Nos. 18-1323, 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., *et al.*,
Petitioners,

v.

DR. REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,
Respondent.

DR. REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,
Cross-Petitioner,

v.

JUNE MEDICAL SERVICES L.L.C., *et al.*,
Cross-Respondents.

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

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DR. REBEKAH GEE

LAWRENCE J. JOSEPH
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Pages

Table of Contents i
Table of Authorities iii
Interest of *Amicus Curiae* 1
Statement of the Case 2
Constitutional Background 2
Statutory Background 5
Factual Background 5
Summary of Argument 8
Argument 10
I. Incanting "*stare decisis*" does not resolve the questions presented. 10
A. *Hellerstedt* was a fact-bound result. 10
B. *Stare decisis* does not trump due process. 12
C. Neither *Hellerstedt* nor *Singleton* – nor any other decision – has decided the *jus tertii* issue presented here. 14
II. Providers lack *jus tertii* standing to assert patients' *Roe-Casey* rights. 16
A. Providers cannot meet this Court's post-*Kowalski* test for *jus tertii* standing. 17
B. Prudential limits on standing are not "waivable" in any way that precludes a court from considering the issue. 22

C. Enforcing limits on *jus tertii* standing would merely be an example of the general rule that *Roe-Casey* litigation must follow the same jurisdictional and prudential rules as other litigation..... 24
III. The *jus tertii* issue should be dispostive in this litigation..... 24
A. The presence or absence of *jus tertii* standing determines what rights Providers can assert. 25
B. Without *jus tertii* standing, Act 620 easily survives the rational-basis test. 26
C. With *jus tertii* standing, Act 620 survives because Louisiana distinguished *Hellerstedt* factually. 28
D. This Court should reverse the *Roe-Casey-Hellerstedt* line of cases. 29
Conclusion 31

TABLE OF AUTHORITIES

Pages

Cases

Am. Immigration Lawyers Ass'n v. Reno,
199 F.3d 1352 (D.C. Cir. 2000) 17

Animal Legal Defense Fund, Inc. v. Espy,
29 F.3d 720 (D.C. Cir. 1994) 22

Baker v. General Motors Corp.,
522 U.S. 222 (1998) 12

Bd. of Miss. Levee Comm'rs v. EPA,
674 F.3d 409 (5th Cir. 2012) 22

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 13

Brushaber v. Union Pac. R. Co.,
240 U.S. 1 (1916) 30

Buford v. U.S.,
532 U.S. 59 (2001) 13

Caplin & Drysdale, Chartered v. U.S.,
491 U.S. 617 (1989) 17

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 19, 26

City of Chicago v. Morales,
527 U.S. 41 (1999) 16

Connecticut v. Menillo,
423 U.S. 9 (1975) 4

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 13

Craig v. Boren,
429 U.S. 190 (1976) 20

Dallas v. Stanglin,
490 U.S. 19 (1989) 28
Doe v. Bolton,
410 U.S. 179 (1973) 19
Eisenstadt v. Baird,
405 U.S. 438 (1972) 20
Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 18, 21, 23
F.C.C. v. Beach Comm., Inc.,
508 U.S. 307 (1993) 27
Gee v. Planned Parenthood of Gulf Coast, Inc.,
139 S.Ct. 408 (2018) 24
Gonzales v. Carhart,
550 U.S. 124 (2007) 3-4, 24, 29
Gonzales v. Oregon,
546 U.S. 243 (2006) 3, 29
Gratz v. Bollinger,
539 U.S. 244 (2003) 14
Griswold v. Connecticut,
381 U.S. 479 (1965) 17
Grutter v. Bollinger,
539 U.S. 306 (2003) 14
In re County Investigating Grand Jury XXIII,
Misc. No. 9901-2008
(Pa. C.P. Phila. filed Jan. 14, 2011) 5-7
K.P. v. LeBlanc,
729 F.3d 427 (5th Cir. 2013) 8
Kowalski v. Tesmer,
543 U.S. 125 (2004) 4, 9, 17-18, 21
Lepelletier v. FDIC,
164 F.3d 37 (D.C. Cir. 1999) 18

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014) 22
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4
Marks v. U.S., 430 U.S. 188 (1977) 15
Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 28
Mazurek v. Armstrong, 520 U.S. 968 (1997) 4
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 3, 29
Miller v. Albright, 523 U.S. 420 (1998) 17
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 27
Murphy v. NCAA, 138 S.Ct. 1461 (2018) 29-30
Nat'l Park Hospitality Ass'n v. DOI, 538 U.S. 803 (2003) 23
Pa. Psychiatric Soc'y v. Green Spring Health Servs., 280 F.3d 278 (3d Cir. 2002) 18
Payne v. Tennessee, 501 U.S. 808 (1991) 13
Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012) (*en banc*) 8
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 19

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F. 3d 583 (5th Cir. 2014) 11-12, 28
Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992) .....*passim*
Plessy v. Ferguson, 163 U.S. 537 (1896) 13
Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974) 23
Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993) 18
Roe v. Wade, 410 U.S. 113 (1974) .....*passim*
S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) 13
Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 21
Sessions v. Morales-Santana, 137 S.Ct. 1678 (2017) 21
Singleton v. Wulff, 428 U.S. 106 (1976) 14-15
Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944) 23
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 14
Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009) 22
U.S. v. Carver, 260 U.S. 482 (1923) 14-15
U.S. v. Morrison, 529 U.S. 598 (2000) 3

U.S. v. Salerno,
481 U.S. 739 (1987) 24
Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 21
Vance v. Bradley,
440 U.S. 93 (1979) 28
Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977) 25
Warth v. Seldin,
422 U.S. 490 (1975) 13, 22
Washington v. Glucksberg,
521 U.S. 702 (1997) 30-31
Waters v. Churchill,
511 U.S. 661 (1994) 13
Whole Woman's Health v. Hellerstedt,
136 S.Ct. 2292 (2016) .....*passim*
Whole Woman's Health v. Lakey,
769 F.3d 285 (5th Cir. 2014) 11
Williamson v. Lee Optical of Oklahoma, Inc.,
348 U.S. 483 (1955) 26
Woman's Health Ctr. of West Cnty., Inc. v. Webster, 871 F.2d 1377 (8th Cir. 1989) 26
Wood v. GMC,
865 F.2d 395 (1st Cir. 1988) 6

Statutes

U.S. CONST. art. III..... 2, 4, 21-22
U.S. CONST. amend. X..... 10, 30
U.S. CONST. amend. XIV, § 1, cl. 4..... 16, 31
LA. REV. STAT. ANN. § 40:1061.10 .....*passim*

LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) 5
Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws 2, 8, 10, 27-28

Rules, Regulations and Order

S. Ct. Rule 37.6 1
25 Tex. Admin. Code §139.56 27-28
25 Tex. Admin. Code §139.56(a) 10

Other Authorities

Stuart Donnan, M.D., Editor in Chief, *Abortion, Breast Cancer, and Impact Factors – in this Number and the Last,* 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 605 (1996) 7
Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321 (2000) 15-16
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INTEREST OF *AMICUS CURIAE*

Amicus Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally state or local concern. Further, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, EFELDF consistently has argued for judicial restraint under Article III and separation-of-powers principles. For these reasons, EFELDF has direct and vital interests in the questions presented.

STATEMENT OF THE CASE

Several abortion clinics and doctors (collectively, "Providers") have sued the Secretary of Louisiana's Department of Health and Hospitals (hereinafter, "Dr. Gee" or "Louisiana") to enjoin enforcement of Louisiana Revised Statute § 40:1061.10 ("Act 620"); and its implementing regulations. Act 620 resembles the admitting-privilege requirements of the Texas law ("HB2") that *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), found to violate a woman's rights under *Roe v. Wade*, 410 U.S. 113 (1974), and *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). The district court enjoined Act 620 under *Hellerstedt*, but the Fifth Circuit reversed by distinguishing *Hellerstedt* factually. This Court granted not only Providers' petition for a writ of *certiorari* to review the Fifth Circuit's decision but also Louisiana's cross-petition for a writ of *certiorari* on the issue of Providers' *jus tertii* (or third-party) standing to assert their patients' *Roe-Casey* rights.

Constitutional Background

"Throughout our history the several States have exercised their police powers to protect the health and

safety of their citizens," which "are primarily, and historically, ... matters of local concern." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (interior quotations and alterations omitted); *accord Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) (same for regulating the practice of medicine). For their part, the federal Executive and Congress lack a corresponding police power: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000). That leaves the federal courts and the abortion industry itself as the only other potential regulators beyond rules enacted by the states.

Notwithstanding state dominance on public-health issues, this Court has found in the Fourteenth Amendment a woman's right to abort a non-viable fetus, first as an implicit right to privacy under *Roe* and subsequently as a substantive due-process right to liberty under *Casey*. States retain the right to regulate abortions in the interest of maternal health and in the interest of the unborn child, if the states do not impose an undue burden on *Roe-Casey* rights. But the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community," *Gonzales v. Carhart,* 550 U.S. 124, 163 (2007), because federal courts are not "'the country's *ex officio* medical board.'" *Id.* at 164 (*quoting Webster v. Reproductive Health Serv.,* 492 U.S. 490, 518-19 (1989) (plurality opinion)). In particular, "legislatures [have] wide discretion to pass legislation in areas where there is medical …

uncertainty," which "provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Carhart,* 550 U.S. at 164 (emphasis added). With respect to maternal health, States may require "medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut v. Menillo,* 423 U.S. 9, 10-11 (1975); *accord Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997); *Roe,* 410 U.S. at 150.

The merits question presented here involves the contours of *Roe-Casey* abortion rights *vis-à-vis* states' rights under *Casey* to regulate maternal health and safety. Addressing a similar Texas law in *Hellerstedt*, this Court held that the undue-burden test requires a balancing to determine whether abortion regulations comport with *Roe-Casey* rights. *Hellerstedt*, 136 S.Ct. at 2309. As explained in Section I.A, *infra*, however, the factual record in *Hellerstedt* differed substantially from the factual record here.

Standing has both a constitutional element under Article III – *i.e.,* cognizable injury to the plaintiffs, caused by the challenged conduct, and redressable by a court, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992) – and prudential elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). As explained in Section II.A, *infra*, Providers lack *jus tertii* standing to assert future patients' *Roe-Casey* rights.

Statutory Background

Act 620 requires abortion doctors to have "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." LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a). In addition, the hospital must be one that "provides obstetrical or gynecological health care services." *Id.* Having "active admitting privileges" includes having the "ability to admit a patient and to provide diagnostic and surgical services to [the patient]" at the hospital. *Id.*

Factual Background

Amicus EFELDF adopts the facts as stated by Dr. Gee. *See* Louisiana Br. at 4-23. As Providers acknowledge, Act 620 does not prevent all abortion doctors from practicing: even some of the doctors at Providers' own clinics have admitting privileges at local hospitals. Pets.' Br. at 11. In addition to those facts stated by the parties' briefs, EFELDF also relies on the Gosnell Grand Jury Report cited by *Hellerstedt*, 136 S.Ct. at 2313, and other legislative facts on which Louisiana's legislature plausibly may have relied to enact Act 620.

Under the heading "Who Could Have Prevented All this Death and Damage?," the Gosnell grand jury found that Pennsylvania's failure to regulate abortion providers as ambulatory surgical centers contributed to the death of at least one patient:

> Had [the Pennsylvania Department of Health ("DOH")] treated the clinic as the ambulatory surgical facility it was, DOH inspectors would have assured that the staff were all licensed, that the facility was clean and sanitary, that

> anesthesia protocols were followed, and that the building was properly equipped and could, at least, accommodate stretchers. Failure to comply with these standards would have given cause for DOH to revoke the facility's license to operate.

In re County Investigating Grand Jury XXIII, Misc. No. 9901-2008, at 215 (Pa. C.P. Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report"); *see also id.* at 21, 45, 77-78, 129, 139-41, 155.

Further, a variant of "agency capture"[2] and "political correctness" infects the administrative regulation of the abortion industry, so that – for example – "[e]ven nail salons in Pennsylvania are monitored more closely for client safety" than abortion clinics. Gosnell Grand Jury Report, at 137. In order to avoid restricting abortion rights, regulators do not adequately enforce public-health rules:

> [Pennsylvania Department of Health Senior Counsel Kenneth] Brody confirmed some of what [Janice] Staloski [the Director of the Pennsylvania Department of Health unit responsible for overseeing abortion clinics] told the Grand Jury. He described a meeting

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[2] "'Agency capture' … is the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." *Wood v. GMC,* 865 F.2d 395, 418 (1st Cir. 1988) (*citing* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism,* 99 HARV. L. REV. 713, 724-26 (1986); Richard B. Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975)).

> of high-level government officials in 1999 at which a decision was made not to accept a recommendation to reinstitute regular inspections of abortion clinics. The reasoning, as Brody recalled, was: "there was a concern that if they did routine inspections, that they may find a lot of these facilities didn't meet [the standards for getting patients out by stretcher or wheelchair in an emergency], and then there would be less abortion facilities, less access to women to have an abortion."

Gosnell Grand Jury Report, at 147 (fourth alteration in original).

The same phenomenon also appears in the medical literature:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3, p. 74 (Wolters Kluwer, 5th ed. 2018) (citations omitted); Stuart Donnan, M.D., Editor in Chief, *Abortion, Breast Cancer, and Impact Factors – in this Number and the Last,* 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 605 (1996) ("pro-choice" doctor decrying the "excessive paternalistic censorship … of the data" "vital" to "open discussion of risks" associated with abortion); *see also* Gosnell Grand Jury Report, at 137-207 (citing non-enforcement by state and local regulators).

In short, a legislature could rationally conclude that the abortion industry is an unsuitable candidate either for self-regulation or for weak and discretionary regulatory oversight. Indeed, quite to the contrary, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (abortion industry opposed South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. LeBlanc,* 729 F.3d 427 (5th Cir. 2013) (abortion industry opposed Louisiana's linking limitation on liability to only those medical risks disclosed in an informed-consent waiver). For all these reasons, legislators had a plausible factual basis to conclude that the public health requires that the abortion industry face more stringent regulation, including the oversight provided by hospitals' credentialing authorities.

SUMMARY OF ARGUMENT

Hellerstedt is a fact-bound decision, based largely on Texas's failure to submit any evidence in support of HB2 (Section I.A), and – as such – very little in *Hellerstedt* commands that lower courts or this Court follow the *Hellerstedt* result in cases with different factual records: due process requires each party to have its own day in court, as *Hellerstedt* itself held (Section I.B). Similarly, this Court has never found *jus tertii* standing in an abortion case like this one – where a state regulates to support maternal health, as distinct from unborn life and where some doctors

can and do comply with the new regulation – which makes Providers' demand for *stare decisis* inapposite to the *jus tertii* issue (Section I.C).

Under *Kowalski*, Providers lack both the close relationship with their *future* patients required for *jus tertii* standing to assert patients' *Roe-Casey* rights and an identity of interest with patients, given the conflict of interests inherent in seeking to enjoin public-health standards that protect patients from Providers (Section II.A). On whether *jus tertii* standing is waivable, federal courts have the discretion to raise prudential limits on their jurisdiction *sua sponte*, especially when the parties ask the court to reach a constitutional issue that *jus tertii* could avoid (Section II.B). This Court should apply neutral principles – including not only *jus tertii* limits but also limits on facial-versus-as-applied challenges – to all abortion litigation (Section II.C).

On the merits, the *jus tertii* issue determines the level of scrutiny that applies to the challenged law: the rational-basis test under Providers' own rights or the undue-burden test under patients' *Roe-Casey* rights (Section III.A). If Providers lack *jus tertii* standing, they cannot prevail because Providers have failed to negate the *theoretical* premise for admitting-privilege requirements and because rational-basis cases are not decided on courtroom factfinding (Section III.B). Even if Providers have *jus tertii* standing to assert *Roe-Casey* rights, Louisiana has successfully rebutted Texas's evidentiary failure in *Hellerstedt* and so deserves to prevail – consistent with due process – on the record that Louisiana established (Section III.C). Finally, if Providers would prevail on both the *jus*

tertii issue and the merits, this Court should revisit the entire *Roe-Casey* framework, at least as applied to maternal-health regulations. Under those circumstances, the under-burden analysis would entangle and intrude this Court and lower federal courts into commandeering the states' regulation of medical practice under a dubious substantive due-process analysis in an area that the Tenth Amendment reserves to the states (Section III.D).

ARGUMENT

I. INCANTING "*STARE DECISIS*" DOES NOT RESOLVE THE QUESTIONS PRESENTED.

Although Providers and their *amici* repeatedly bid this Court to respect principles of *stare decisis*, the issues here are not as "*decisis*" as claimed. That holds true for both *jus tertii* standing and the merits.

A. *Hellerstedt* was a fact-bound result.

Hellerstedt repeatedly found that Texas failed to submit evidence on key issues under the undue-burden test as modified by *Hellerstedt*. 136 S.Ct. at 2311-12 ("We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a 'working arrangement' with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health,"[3] and "when directly asked at oral

[3] This "working arrangement" language comes from 25 Tex. Admin. Code §139.56(a), which – prior to HB2's enactment – required that abortion facilities "shall ensure that the physicians who practice at the facility have admitting privileges or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." *Id.*

argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case"); *id.* at 2313 ("dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue"); *id.* at 2316 (the "upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion").

Before considering Louisiana's plight here, it is worth considering how fate conspired against Texas. In *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F. 3d 583 (5th Cir. 2014), the Fifth Circuit rejected the very balancing that *Hellerstedt* later required: "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Whole Woman's Health v. Lakey*, 769 F.3d 285, 297 (5th Cir. 2014) (*citing Abbott*, 748 F.3d at 593-94, 597). Indeed, in *Abbott*, it was Texas that submitted evidence "that the admitting-privileges requirement will reduce the delay in treatment and decrease health risk for abortion patients with critical complications" and the abortion industry that "had not provided sufficient evidence that abortion practitioners will likely be unable to comply with the privileges requirement." *Hellerstedt*, 136 S.Ct. at 2301 (interior quotations omitted). In the follow-on *Hellerstedt* litigation over the same Texas law, however, it was Texas that failed

to submit undue-burden evidence that *Abbott* had already found irrelevant under circuit law.

B. *Stare decisis* does not trump due process.

In demanding that *stare decisis*, due process, and the very "rule of law" require this Court to impose the *Hellerstedt* result, Providers and their *amici* ask this Court to deviate from permissible judicial practice. It is one thing to apply the *Hellerstedt* holding (*i.e.*, *stare decisis*). It would be something else entirely to impose the *Hellerstedt* result (*i.e.*, *res judicata*) against Louisiana when Louisiana was not a party in *Hellerstedt*. There, this Court simply held that the undue-burden test requires a balancing to determine whether abortion regulations comport with *Roe-Casey* rights. *Hellerstedt*, 136 S.Ct. at 2309. Texas's failure to submit any relevant evidence to support *Texas* law cannot estop Louisiana from submitting relevant evidence to support *Louisiana* law.

While Texas's evidentiary position in *Hellerstedt* is perhaps understandable, see Section I.A, *supra*, it is by no means preclusive on Louisiana in separate litigation. The failure by Texas to submit evidence in *Hellerstedt* – for whatever reason – cannot possibly have a preclusive effect on Louisiana in this separate litigation. Indeed, in extricating the abortion industry from the preclusive effects of *Abbott*, the *Hellerstedt* majority issued a paean to due process. *See* 136 S.Ct. at 2304-09. Under due process, "[i]n no event … can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998). *Hellerstedt* itself acknowledged the weakness

of *stare decisis* for holdings reached by a party's waiver of an issue. 136 S.Ct. at 2320. Moreover, even *stare decisis* can be applied so conclusively as to violate due process. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999).[4] Quite simply, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality). The courts here must contend with the evidence that Louisiana proffers to support its laws. Under these various strands of due-process authority, prior parties' litigation *mistakes* do not bind future litigants.

Former judges and Department of Justice officials make the histrionic analogy – and borderline *ad hominem* attack – that questioning *Roe-Casey* rights is as extreme as seeking to undo *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and – presumably – to revert instead to separate-but-equal under *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Amicus* Br. of Former Judges *et al.*, at 6. Again, that confuses the holding with the result. *Brown* does not guarantee that all future equal-protection cases will resolve as *Brown* did. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 503-05 (1975) (dismissal for lack of standing);

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[4] *See also Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise") (interior quotation omitted); *Buford v. U.S.*, 532 U.S. 59, 65-66 (2001) ("the fact-bound nature of [a] decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances").

compare, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003) *with Grutter v. Bollinger*, 539 U.S. 306 (2003) (University of Michigan's undergraduate-admission process violated equal protection, but its law-school admission process did not). As the divergent results in the two Michigan cases demonstrate, facts matter. Even under the same holding as to the law, different facts can yield different results.

C. Neither *Hellerstedt* nor *Singleton* – nor any other decision – has decided the *jus tertii* issue presented here.

While *Hellerstedt* resolved some issues relevant here, *jus tertii* standing is not one of those issues. Indeed, no abortion decision of this Court has decided the standing issue relevant here.

Hellerstedt did not address *jus tertii* standing: "the Court does not question whether doctors and clinics should be allowed to sue on behalf of Texas women seeking abortions as a matter of course." 136 S.Ct. at 2323 (Thomas, J., dissenting). While the other justices were thus aware of the issue, they chose not to *decide* it. To extent prior decisions assumed jurisdiction without addressing it, "drive-by jurisdictional rulings" that reach merits issues without considering a particular jurisdictional issue "have no precedential effect" on that jurisdictional issue. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998). As such, *Hellerstedt* offers no help on *jus tertii*.[5]

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[5] On the lack of meaningful inferences from "drive-by … rulings," Providers' invocation (Pets.' Br. at 7-8) of post-*Hellerstedt* denials of petitions for writs of *certiorari* and voluntary dismissals of appeals is meaningless. *U.S. v. Carver*, 260 U.S. 482, 490 (1923) ("denial of a writ of certiorari imports

The abortion industry often cites *Singleton v. Wulff,* 428 U.S. 106, 118 (1976) (plurality) for *jus tertii* standing, *see*, *e.g.*, Cross-Pets.' Br. in Opp'n at i, 7, 12, 18-20, 23-25, 27-28;[6] Am. Coll. of Obstetricians & Gynecologists *Amicus* Br. 26-27 & n.69, but the fifth *Singleton* vote for standing did not join the plurality decision on *jus tertii* standing:

> In this case (1) the plaintiff-physicians have a financial stake in the outcome of the litigation, and (2) they claim that the statute impairs their own constitutional rights. They therefore clearly have standing to bring this action. … Because I am not sure whether the analysis in Part II-B would, or should, sustain the doctors' standing, apart from those two facts, I join only Parts I, II-A, and III of the Court's opinion.

Singleton, 428 U.S. at 121-22 (Stevens, J., concurring in part). Unfortunately for Providers, the fifth vote sets a holding. *Marks v. U.S.*, 430 U.S. 188, 193 (1977). As such, *Singleton* is no use to Providers on *jus tertii* standing.

The abortion industry sometimes cites Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321 (2000) to support *jus tertii* standing. *See* Fed. Courts

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no expression of opinion upon the merits of the case") (Holmes, J.); *Hellerstedt*, 136 S.Ct. at 2320 (*stare decisis* inapposite for holdings reached by a party's waiver).

[6] Under the Court's briefing order dated October 22, 2019, Providers will not address *jus tertii* standing until after *amicus* EFELDF files this brief. From their brief in opposition, however, Providers appear to rely heavily on *Singleton*.

Scholars *Amicus* Br. at 17. To the contrary, Prof. Fallon's article discusses exceptions to *jus tertii* standing that arise in "overbreadth" or "valid-rule" cases and instances when *state-court appeals* reach this Court. *Id.* at 1359-60 & n.196; *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Those circumstances should have no application here, particularly if this Court confines the abortion industry to as-applied challenges unless the plaintiff meets the criteria for facial challenges that non-abortion litigants must meet. *See* Section II.C, *infra*. In other words, Act 620 is not a facially "invalid rule" in the sense that Prof. Fallon's article discusses the "valid-rule requirement" under the Due Process Clause.

In sum, this Court has never held that abortion providers have standing to assert their third-party patients' *Roe-Casey* rights under the circumstances here. Instead, as explained in Section II.A, *infra*, the instances where abortion providers have had standing to assert their third-party patients' rights are simply a special case of "vendor-vendee" standing where a seller or service provider can assert its customers' rights because the challenged law proscribed the two-party transaction (*e.g.*, criminalizes or limits sellers' and buyers' right to engage in the transaction). Since Act 620 is not that type of law, those vendor-vendee cases do not apply here.

II. PROVIDERS LACK *JUS TERTII* STANDING TO ASSERT PATIENTS' *ROE-CASEY* RIGHTS.

In Dr. Gee's cross-petition, this Court should find that Providers lack *jus tertii* standing to assert the *Roe-Casey* rights of future patients.

A. Providers cannot meet this Court's post-*Kowalski* test for *jus tertii* standing.

While EFELDF does not dispute that physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Providers and *future* patients who may seek abortions at Providers' clinics. An *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski*, 543 U.S. at 131 (emphasis in original).[7] Women simply do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support *jus tertii* standing. As such, Providers lack *jus tertii* standing to assert *Roe-Casey* rights.

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[7] This Court has found *actual* doctor-patient and attorney-client relationships close, *compare Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) *with Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 623 n.3 (1989), but that simply does not apply to *future* relationships. *Kowalski*, 543 U.S. at 131. *Amicus* Whole Woman's Health ("WWH") relates that one of its abortion doctors is very personable and "that his patients share 'deeply personal stories' with him," WWH Br. at 30-31, but the same is true about countless strangers on buses and bartenders across the country. Future bartenders, doctors, lawyers, and fellow travelers do not count under *Kowalski*.

Providers' invocation of *jus tertii* standing also fails for two reasons beyond the limits that *Kowalski* put on using hypothetical future relationships to prove *jus tertii* standing.

First, Providers' lawsuit seeks to enjoin legislation that Louisiana enacted to protect women from abortion-industry practices, thus presenting a conflict of interest that strains the closeness of the relationship. *Jus tertii* standing is even less appropriate when – far from the required "identity of interests"[8] – the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (rejecting *jus tertii* standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow*, 542 U.S. at 15 n.7. Under *Newdow*, abortion providers cannot ground their standing on the third-party rights of their hypothetical future patients, when the goal of Providers' lawsuit is to enjoin Louisiana from

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[8] *See*, *e.g.*, *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

protecting those very same women from abortion providers' substandard care.

Second, the instances where federal courts have found standing for abortion doctors involve laws that apply equally to *all abortions* and to *all abortion doctors*, so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Louisiana regulates in the interest of pregnant women who contemplate abortions and does not restrict abortion doctors who have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating *all abortions*, doctors and patients potentially may have sufficiently aligned interests.[9] Here, by contrast, all abortion doctors do not share the same interests as future abortion patients. Indeed, Providers do not share the same interests as all abortion doctors. Without an identity of interests between Providers and future abortion patients, the doctor-patient relationship is not close enough for *jus tertii* standing.

At bottom, the abortion and non-abortion cases in which this Court has found *jus tertii* standing almost uniformly involve types of vendor-vendee relationships and challenged regulations that prohibited the transaction that the vendor wanted to have with the

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[9] *See*, *e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 440 n.30 (1983), *abrogated on other grounds.*, *Casey,* 505 U.S. at 882-83; *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 62 (1976).

vendee: "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 (1976). It does not particularly matter whether a law prohibits the use or distribution of a product or service. Either way, the vendor's and vendee's interests mirror each other. *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *see also Craig*, 429 U.S. at 195 n.4 (vendor's interests are "mutually interdependent" with third party's rights). By contrast, Act 620 imposes minimum standards for doctors to practice, and some doctors meet those standards. Thus, patients can receive the service in compliance with the law, even if not all Providers can comply with the law. Unlike Act 620, the statutes in this Court's vendor-vendee cases on *jus tertii* standing do not involve state regulations designed *to protect* the vendees from unregulated or unsafe subsets of potential vendors.

Providers' *amici* cite privacy, stigma, finances, and the relative gestation periods of pregnancies and litigation as hindrances that might prevent patients' brining suit.[10] *See*, *e.g.*, Am. Coll. of Obstetricians & Gynecologists *Amicus* Br. 28-29; Fed. Courts Scholars *Amicus* Br. at 19. Even if women patients would not –

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[10] *Amicus* EFELDF respectfully submits that *Roe* rebuts most of these concerns (*i.e.*, the plaintiff sued pseudonymously with public-interest counsel, continuing after her abortion under the "capable of repetition" exception to mootness). Although *amicus* WWH argues that only a few patient-initiated abortion suits have occurred (and all before 1982), WWH also acknowledges that abortion providers can – and have since – sued with patients as co-plaintiffs. WWH *Amicus* Br. at 22-23 & nn.15-16.

for whatever reasons – bring suit to enforce *Roe-Casey* rights, those reasons could constitute – *at most* – a hindrance under the *Kowalski* three-part test. *See Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017) (distinguishing the *Kowalski* "closeness" and "hindrance" analyses). Patients' inability or unwillingness to sue would do nothing to provide the required closeness or identity of interests between Providers and their patients under *Kowalski* and *Newdow*. Even a given plaintiff's lack of standing does not affect *someone else's* standing: "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). The notion that *someone* must have standing assumes incorrectly "that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 489 (1982). It may be that legislatures – not courts – have the only institutional power that can be brought to bear here. *See* Section III.D, *infra*.

Providers' *amici* also question whether states can challenge the potential conflict between patients and abortion providers when, as here, states regulate to protect maternal health. Fed. Courts Scholars *Amicus* Br. at 20-21 ("the argument improperly collapses the standing question with the merits question"); WWH *Amicus* Br. at 28-29 n.18. While Article III standing

analysis assumes the plaintiff's merits views, *Warth*, 422 U.S. at 500, the plaintiff bears the burden of showing its entitlement to raise a third party's rights.

Several scholars of the federal-court system raise the prospect that denying Providers *jus tertii* standing would – somehow – overturn landmark civil-rights decisions. *See* Fed. Courts Scholars *Amicus* Br. at 26. Because neither Article III jurisdiction nor prudential limits on standing are open to collateral attack, *see Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 (2009) (collecting cases), that simply will not happen.

B. Prudential limits on standing are not "waivable" in any way that precludes a court from considering the issue.

Louisiana did not question Providers' standing to assert future patients' *Roe-Casey* rights in the lower courts. The circuits are split on whether prudential limits on justiciability – such as *jus tertii* standing – are waivable. *Compare Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) *with Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994). It is not clear that *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386-88 (2014), resolved that split. *Lexmark* concerned the jurisdictional versus prudential status of the zone-of-interest test applied to whether a party had a statutory cause of action, *id.*, but that does not answer the question whether *jus tertii* standing is non-waivable.

Several former judges and Department of Justice officials argue that this Court's considering *jus tertii* standing "has implications for the rule of law" because Louisiana did not raise the issue below. *See Amicus*

Br. of Former Judges *et al.*, at 28. This argument is simply absurd. Even if waiver applied to *the parties*, that would not limit *this Court's* authority to raise prudential limits *sua sponte*: "even in a case raising only prudential concerns, the question … may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003). On questions of *judicial* restraint, the parties obviously cannot bind the judiciary: "To the extent that questions … involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Indeed, simple logic dictates that judges can enforce *judge-made* prudential limits on justiciability, regardless of the parties' positions. Otherwise, judges could never adopt a new prudential limit without simultaneously rejecting it as having been waived.

Moreover, numerous canons compel federal courts to consider non-constitutional means to avoid deciding a constitutional question or invalidating legislative enactments: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Newdow*, 542 U.S. at 11. Far from deviating from the rule of law here, this Court was completely correct to consider *jus tertii* standing antecedent to considering the merits. As explained in Section III.A, *infra*, moreover, the

standing analysis helps this Court determine *which merits* to consider.

C. Enforcing limits on *jus tertii* standing would merely be an example of the general rule that *Roe-Casey* litigation must follow the same jurisdictional and prudential rules as other litigation.

This Court – appropriately – has acknowledged that the Constitution should not be read to "elevate" the abortion industry "above other physicians in the medical community." *Carhart,* 550 U.S. at 163. And yet, the laxness with which this Court has applied *jus tertii* standing to the abortion industry is just one example of rules that appear to apply only to the abortion industry. *See Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S.Ct. 408, 410 (2018) (Thomas, J., dissenting from the denial of *certiorari*) (discussing the Court's reticence to apply neutral principles to the abortion industry). Another example is this Court's allowing facial abortion challenges in cases where a different plaintiff would be relegated to an as-applied challenge. *Compare U.S. v. Salerno,* 481 U.S. 739, 745 (1987) *with Casey,* 505 U.S. at 895; *see also Carhart,* 550 U.S. at 168 ("as-applied challenges are the basic building blocks of constitutional adjudication") (interior and alterations omitted). If the Court decides the *jus tertii* issue, the Court should decide it by committing to apply neutral, generally applicable principles to *all* aspects of abortion litigation.

III. THE *JUS TERTII* ISSUE SHOULD BE DISPOSTIVE IN THIS LITIGATION.

As shown in the following subsections, this Court's resolution of the *jus tertii* issue should be

dispositive of the merits: if Providers cannot assert their future patients' *Roe-Casey* rights, Providers will necessarily fail under the rational-basis test in their independent assertion of Providers' own rights.

A. The presence or absence of *jus tertii* standing determines what rights Providers can assert.

When a party – like Providers here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted). As relevant here, if left to their own – lesser – "right to be free of arbitrary or irrational [government] actions,"

id., Providers would need to show that Act 620 violates the rational-basis test. *Akron Ctr. for Reprod. Health,* 462 U.S. at 438 ("lines drawn … must be reasonable"). As shown in Section III.B, *infra,* Providers cannot prevail under that standard.

B. Without *jus tertii* standing, Act 620 easily survives the rational-basis test.

To the extent that they have standing to challenge Act 620 *without* relying on future patients' rights under *Casey,* Providers must proceed under the rational basis test. *See* Section III.A, *supra.* Under that test. "[i]t is enough … that it *might be* thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488 (1955) (emphasis added). As the Eighth Circuit recognized, a similar Missouri law "furthers important state health objectives" by "ensur[ing] both that a physician will have the authority to admit his patient into a hospital whose resources and facilities are familiar to him and that the patient will gain immediate access to secondary or tertiary care." *Women's Health Ctr. of West Cnty., Inc. v. Webster,* 871 F.2d 1377, 1381 (8th Cir. 1989). The theoretical connection of admitting privileges to patient safety is obvious. Moreover, while *Hellerstedt* relied on Texas's lack of any evidence to discount the cautionary Gosnell example under the undue-burden test's balancing approach, 136 S.Ct. 2313-14, that insouciance in no way negates the link between admitting privileges and safety under the rational-basis test.

Instead, to overturn a legislative response under the rational-basis test, Providers must do more than

marshal "impressive supporting evidence … [on] the probable consequences of the [statute]" *vis-à-vis* the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original); *F.C.C. v. Beach Comm., Inc.,* 508 U.S. 307, 315 (1993) ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").[11] Even if it were possible to "negate" that "*theoretical* connection" between admitting privileges and safety – and *amicus* EFELDF doubts that it is – Providers certainly have not made the required showing, not here and not in *Hellerstedt*.

Contrary to the position of Providers and their *amici*, one cannot sensibly read *Hellerstedt* to negate the theoretical connection between hospital admitting privileges and the safety of abortion patients. In fact, the abortion-industry petitioners and the majority in *Hellerstedt* both *relied on* the admitting-privilege protections that Texas regulations already provided, *see* note 3, *supra* (discussing 25 Tex. Admin. Code §139.56), *before* Texas enacted HB2. Specifically, the *Hellerstedt* petitioners and majority relied on §139.56 **to** argue that any *marginal benefits* from the new law did not justify (or out-weigh) the new law's *marginal burdens*. If HB2 had no rational relationship to – indeed, no "*theoretical* connection" with – patient safety, then the same would have been true of §139.56.

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[11] Because Louisiana's legislative judgment is not "subject to courtroom fact-finding" under the rational-basis test, *id.*, the claim that appellate courts should defer to a district court's fact-finding, Pets.' Br. at 18, is obviously wrong.

Given its express reliance on §139.56's baseline protections, however, *Hellerstedt* clearly did not find admitting privileges wholly *unrelated* to safety.

Unlike with strict scrutiny, the availability of less-restrictive alternatives like §139.56 does not undermine admitting-privilege measures like HB2 or Act 620: with the rational-basis test, it is "irrelevant … that other alternatives might achieve approximately the same results." *Vance v. Bradley,* 440 U.S. 93, 103 n.20 (1979); *Dallas v. Stanglin,* 490 U.S. 19, 26-28 (1989); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316-17 (1976). Far from proving the lack of a *rational basis* between safety and admitting privileges, *Hellerstedt* relied on the connection between safety and admitting privileges by analyzing only HB2's marginal benefit over Texas's pre-existing protections in §139.56. As such, *Hellerstedt* does not support Providers' claims against an admitting-privilege requirement under the rational-basis test.

C. With *jus tertii* standing, Act 620 survives because Louisiana distinguished *Hellerstedt* factually.

As *Hellerstedt* explained, due process can prevent a prior decision (there, *Abbott*) from controlling a new case (there, *Hellerstedt* itself). *Hellerstedt*, 136 S.Ct. at 2304-09. Of course, Louisiana's due-process claim is considerably stronger because – unlike Texas in *Abbott* and *Hellerstedt* – Louisiana was not a party to the prior litigation. Accordingly, even if this Court holds that Providers have *jus tertii* standing to press the *Roe-Casey* rights of future patients, the Fifth Circuit was correct to allow Louisiana an opportunity to distinguish the *Hellerstedt* result in this litigation.

If Providers were to prevail under the circumstances, they would prevail because they made the better case under the holdings of *Roe*, *Casey*, and *Hellerstedt*, not merely because of the outcome in *Hellerstedt*.

D. This Court should reverse the *Roe-Casey-Hellerstedt* line of cases.

Finally, if this Court finds not only that Providers may assert their patients' *Roe-Casey* rights but also that Louisiana failed to distinguish the *Hellerstedt* outcome, even with Louisiana's superior factual record, this Court should call for supplemental briefing on whether the *Roe-Casey* framework is constitutionally viable for state laws protecting maternal health.

Although the Court disclaims the status of an "*ex officio* medical board," *Carhart,* 550 U.S. at 163 (internal quotations omitted), this Court would be commandeering how states regulate the practice of medicine. *But see Medtronic*, 518 U.S. at 475; *Oregon*, 546 U.S. at 271. This Court's commandeering states' regulation of the practice of medicine would be no different in kind from what this Court recently prohibited Congress from doing to sports betting:

> [N]o Member of the Court has ever suggested that even a particularly strong federal interest would enable [the federal government] to command a state government to enact *state* regulation. We have always understood that even where [the federal government] has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. [The federal

> government] may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

Murphy v. NCAA, 138 S.Ct. 1461, 1476-77 (2018) (interior quotations and original alterations omitted, alterations added, emphasis in original). While *Murphy* concerned *congressional* commandeering, the Tenth Amendment applies equally to all three federal branches: "The powers not delegated to *the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X (emphasis added). Of course, "the Constitution does not conflict with itself by conferring, upon the one hand, a … power, and taking the same power away, on the other, by the limitations of [another] clause." *Brushaber v. Union Pac. R. Co.,* 240 U.S. 1, 24 (1916). As such, having something as potentially subjective as substantive due process, *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997), prevail over the Tenth Amendment would signal the need for this Court to reassess its *Roe-Casey* holdings.

Specifically, if Providers would prevail under *Roe-Casey*, this Court should revisit and reaffirm its own occasional reluctance to premise unenumerated rights on substantive due process:

> [W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended. … We must … exercise the utmost care whenever we are asked to break

> new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court,

Id. (internal quotations and citations omitted). If a judicially invented substantive due-process right conflicts with a textually based analysis of the Constitution, it would be time for the Court to reassess the substantive due-process right.

CONCLUSION

For the foregoing reasons and those argued by Dr. Gee, *amicus* EFEDLF respectfully submits that this Court should remand with instructions to dismiss the complaint for lack of standing. Alternatively, the Court of Appeals' decision should be affirmed.

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Respectfully submitted,

LAWRENCE J. JOSEPH
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae