Nos. 18-1323 & 18-1460

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

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, PETITIONER
v.
JUNE MEDICAL SERVICES L.L.C., ET AL.

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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae is the State of Texas.[1] Texas, like other States, has a strong interest in protecting both women's health and unborn life, and regulates abortion in order to further those important state interests. As a target of multiple challenges to state laws regulating abortion, and as the state litigant in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), Texas has a strong interest in the outcome of this case and whether the Court's decisions in *Hellerstedt* and *Singleton v. Wulff*, 428 U.S. 106 (1976), have continuing vitality.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Whether old or new, this Court does not adhere to plainly erroneous decisions. Sometimes, this Court discards longstanding law. *E.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). Other times, it repudiates its own decisions just a few Terms after they were issued. *E.g.*, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (overruling *Sykes v. United States*, 564 U.S. 1 (2011) after four years); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (contradicting *Stenberg v. Carhart*, 530 U.S. 914 (2000) after seven years).

This case presents the opportunity to discard two plainly erroneous decisions—one old, one new. Most importantly, the Court should repudiate *Singleton*, which

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than the amicus contributed monetarily to its preparation or submission.

granted special solicitude to abortion providers by exempting them from the third-party-standing rules that apply to everyone else. The Court should instead hold that abortion providers do not have Article III standing to challenge, supposedly on behalf of their patients, common-sense abortion regulations that protect patients from unsafe practices *by those very same providers*.

If it reaches the merits, the Court should discard *Hellerstedt*, which was wrong the day it was decided. Its reasoning conflicts with related decisions, creating a mess that displaces States from their traditional regulatory role and substitutes federal judges. As a result, "abortion jurisprudence has spiraled out of control." *Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring). There is no better way to start reining in this Court's wayward jurisprudence than to jettison *Hellerstedt*.

To be sure, the Court need not overrule anything to rule for the state defendant. The Fifth Circuit correctly demonstrated that the factual record in this case requires upholding Louisiana's law even under *Hellerstedt*'s faulty reasoning. Nevertheless, Texas submits that the better course is to correct errors when they are apparent—especially those as pernicious as *Singleton* and *Hellerstedt*. Rather than permit these problems to fester any longer, the Court should eliminate their origin.

ARGUMENT

I. Abortion Providers Lack Article III Standing to Challenge Abortion Regulations on Behalf of Their Patients.

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Nor are they "*ex officio* medical board[s] with powers to approve or disapprove medical and operative practices and standards[.]" *Gonzales*, 550 U.S. at 164 (internal citation omitted). Yet *Singleton*'s dramatic expansion of Article III's limits on the federal judiciary has transformed courts into exactly those.

To have standing in a typical lawsuit, a litigant must assert his own rights, not those of a third party. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The Court, however, has created an exception to that rule: litigants may assert the rights of third parties when (1) the litigant has a "close" relationship with the third party; and (2) some "hindrance" affects the third party's ability to protect her own interests. *Id.* at 130; *see also South Carolina v. Regan*, 465 U.S. 367, 380 (1984) (explaining that third-party standing is "the exception rather than the rule").

Properly applied, the Court's third-party-standing doctrine does not permit abortion providers to challenge abortion regulations "on behalf of" hypothetical future patients, especially when women can bring their own lawsuits. But a four-Justice plurality in *Singleton* permitted abortion providers to assert the rights of patients in a suit regarding Medicaid coverage for elective

abortions. 428 U.S. at 113-18 (plurality op.). Although this Court has never subsequently relied on the *Singleton* plurality opinion to hold that abortion providers have third-party standing, lower courts do so routinely and presume that abortion providers are proper parties to raise women's constitutional rights in court. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 nn.7-8 (5th Cir. 2014); *Isaacson v. Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 147 (3d Cir. 2000).

The *Singleton* plurality was poorly reasoned. It has wrought havoc on the Court's abortion precedent. And when paired with the Court's other rules of abortion exceptionalism, *Singleton* has enabled abortion providers to obtain judgments that would be denied to any other litigant. The Court should repudiate the *Singleton* plurality and hold that abortion providers do not have standing to assert the constitutional rights of their patients.

A. Abortion providers and their patients lack the "close relationship" this Court's precedent requires.

This Court's recent decisions set out stringent requirements for third-party standing. *Kowalski* prohibits basing third-party standing on hypothetical future relationships, while *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), underscores that the litigant's and third party's interests cannot conflict. Each demonstrates that abortion providers lack third-party standing.

1. Third-party standing cannot be based on hypothetical future relationships.

Kowalski, the Court's most recent decision on third-party standing, controls the close-relationship analysis here. *Kowalski* held that attorneys lacked third-party standing to bring constitutional claims regarding the denial of appellate counsel on behalf of criminal defendants who would be their future clients. 543 U.S. at 131. The Court contrasted an "*existing* attorney-client relationship," which could support third-party standing, with a "*hypothetical* attorney-client relationship," which could not. *Id.* The Court concluded that the attorneys "d[id] not have a 'close relationship' with their alleged 'clients'; indeed, they ha[d] no relationship at all." *Id.*

There is no material difference between the hypothetical attorney-client relationship that was insufficient in *Kowalski* and the hypothetical provider-patient relationship in abortion litigation. Abortion providers seeking injunctive relief sue on behalf of hypothetical future patients who would allegedly suffer harm by enforcement of the abortion regulation. *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2301 (seeking injunctive relief); *Gonzales*, 550 U.S. at 133 (same). *Kowalski* confirms that this nonexistent relationship cannot permit third-party standing. 543 U.S. at 131.

As the Court stated in *Kowalski*, "it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients." *Id.* at 134 (alteration in original). The same is true for abortion providers. The lack of an

existing relationship with the patients on whose behalf they bring suit prohibits application of the third-party-standing doctrine.

2. Abortion providers' interests conflict with their patients' interests.

Abortion providers also lack a "close relationship" with their patients because their interests conflict. The Court recently confirmed this limitation on third-party standing in *Newdow*. *Newdow* held that a father did not have standing to assert an Establishment Clause claim on behalf of his daughter because the evidence showed, among other things, that his religious beliefs were different from hers. 542 U.S. at 15 & n.7. Because their interests were "not parallel" but "potentially in conflict," the father could not assert third-party standing. *Id.*

Newdow's conclusion that a conflict of interest forecloses third-party standing is neither novel nor controversial. As early as 1984, the Court held that third-party standing is available only when the plaintiff's and third party's interests were "completely consistent[.]" *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). And the courts of appeals routinely cite the existence of conflicts of interest as a reason to deny third-party standing. *See, e.g.*, *Harris v. Evans*, 20 F.3d 1118, 1125 (11th Cir. 1994); *Amato v. Wilentz*, 952 F.2d 742, 750 (3d Cir. 1991); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1016 (8th Cir. 1983).

The Court has already recognized that abortion providers' interests do not align with patients' interests in multiple contexts. While abortion providers often sue to enjoin health-and-safety regulations, the Court has

noted the horrifying results that can occur when clinics are unregulated by the States. *Hellerstedt*, 136 S. Ct. at 2313-14 (discussing Kermit Gosnell's "[d]irty," "unsanitary" clinic, which had been uninspected for years). Further, even though failing to provide a patient all relevant information prior to an abortion can lead to "[s]evere depression" and "devastating psychological consequences," the Court recognized that many abortion doctors "prefer not to disclose precise details" regarding abortion to their patients. *Gonzales*, 550 U.S. at 159; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality op.).[2] Yet providers regularly challenge informed-consent laws. And abortion providers frequently oppose parental-notice laws designed to ensure a minor has the support she needs to make a decision regarding abortion, despite the Court's acknowledgment that "[i]t seems unlikely that [a minor] will obtain adequate counsel and support from the attending physician at an abortion clinic[.]" *H.L. v. Matheson*, 450 U.S. 398, 410 (1981).

Simply put, abortion providers' interests do not align with their patients' interests. Women need safe clinics, relevant information, and adequate counsel when considering abortion. Lawsuits brought by abortion providers to weaken those protections conflict with patients' interests. *Newdow* thus forecloses third-party standing.

B. There is no hindrance to patients bringing suit.

The second requirement for third-party standing is that there must be a genuine obstacle or hindrance to the

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[2] Unless otherwise indicated, citations to *Casey* are to the plurality opinion.

third party's ability to protect her own interests. *Kowalski*, 543 U.S. at 130. Notwithstanding the obvious—that women can and do bring suits to challenge abortion regulations[3]—Plaintiffs and their amici assert that women are hindered from bringing suit for three core reasons. Each is wrong.

First, Plaintiffs and their amici assert that women do not want to bring suit due to concerns about privacy and "stigma." June Med. BIO 27-28; Am. Coll. of Obstetricians & Gynecologists (ACOG) Amicus Br. 28; Whole Woman's Health (WWH) Amicus Br. 16-24. But as many women have done in the past, a woman challenging an abortion regulation may proceed pseudonymously. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 120 n.4 (1973).

A second objection is the potential mootness of the lawsuit, either after the woman obtains an abortion or gives birth. June Med. BIO 28. But *Roe* provided the solution to any mootness concerns by applying the capable-of-repetition-yet-evading-review exception. 410 U.S. at 125.

The final objection is one of means—abortion providers assert that they are in a better financial position to bring suit. ACOG Amicus Br. 28-29; WWH Amicus Br. 24-28. But *Kowalski* rejected that reasoning, holding that forcing "indigent," "unsophisticated" criminal defendants to assert their rights *pro se* was not a hindrance that permitted third-party standing. 543 U.S. at 131-33. Unlike the *pro se* criminal defendants in *Kowalski*, a woman challenging an abortion restriction could easily obtain counsel. Large law firms and advocacy

[3] *See, e.g., Doe v. Parson*, 368 F. Supp. 3d 1345 (E.D. Mo. 2019).

organizations routinely represent abortion-provider plaintiffs, often with the hope of millions of dollars in attorneys' fees if victorious. *See, e.g.*, Ord. on Mot. for Attorney's Fees, *Whole Woman's Health v. Hellerstedt*, No. 1:14-cv-00284-LY (W.D. Tex. Aug. 9, 2019) (Doc. 297). Indeed, even a teenaged, unlawfully present alien with no substantial connection to this country can secure sophisticated, specialized counsel and bring a class-action challenge to an abortion regulation. *See J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (per curiam).

There is no genuine obstacle preventing a woman from challenging an abortion regulation. Abortion providers cannot satisfy the hindrance prong of the third-party-standing analysis.

C. The Court's other cases do not establish that abortion providers have third-party standing.

Plaintiffs wrongly assert that *Doe v. Bolton*, 410 U.S. 179, 188 (1973), held that abortion providers are appropriate plaintiffs to bring suit on behalf of their patients. June Med. BIO 17-18. But *Doe* made no reference to third-party standing and did not indicate that the plaintiff-physicians would be asserting their patients' rights. 410 U.S. at 188. Such a holding would have been unnecessary, given that a patient (Mary Doe) was one of the plaintiffs. *Id.* Moreover, several claims concerned the *physicians'* rights, not the *patients'* rights, making the physicians proper plaintiffs on their own. *Id.* at 191, 193 (asserting vagueness claims and a due-process right to practice medicine). *Doe* does not hold that abortion providers have third-party standing.

The Court has wrongly cited *Doe* for the proposition that abortion providers have third-party standing in two other cases, but neither actually applies the third-party standing doctrine. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976). The remainder of the Court's abortion cases fail to address standing at all, which means they have "no precedential effect" with respect to standing. *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (stating that "the existence of unaddressed jurisdictional defects has no precedential effect").

Other non-abortion cases relied on by Plaintiffs have been undermined by *Kowalski*, which controls the analysis here. June Med. BIO 24. For example, the vendor/customer relationships that supported third-party standing in *Craig v. Boren*, 429 U.S. 190, 193-97 (1976), and *Carey v. Population Services, International*, 431 U.S. 678, 683-84 (1977), would likely no longer withstand scrutiny as they concerned only *potential* customers. Moreover, in neither case did the Court discuss the hindrance prong of the third-party-standing analysis, *Carey*, 431 U.S. at 683-84; *Craig*, 429 U.S. at 193-97, nor can a genuine obstacle to such lawsuits be imagined.

D. The Court should repudiate *Singleton*.

The only remaining basis for finding that abortion providers have third-party standing is the four-Justice plurality in *Singleton*. 428 U.S. at 113-18 (plurality op.). But this Court has never since relied on the *Singleton* plurality to hold that abortion providers have third-party standing. And despite the 4-4 tie in *Singleton* on the

question of third-party standing, this Court has never revisited the issue to resolve it. The Court should do so now and repudiate *Singleton*.

Stare decisis is not an inexorable command, *Janus*, 138 S. Ct. at 2478, and does not require adherence to *Singleton*. The Court has not hesitated in recent years to overrule longstanding decisions that, like *Singleton*, were plainly erroneous. *E.g.*, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (overruling *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Citizens United v. FEC*, 558 U.S. 310 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

Those decisions identify several factors that should be considered when deciding whether to overrule a past decision: "the quality of [the opinion's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus*, 138 S. Ct. at 2478-79. Each factor weighs against *Singleton*.

1. *Singleton* was poorly reasoned.

The *Singleton* plurality's analysis failed to command a majority of the Court for good reason: it was contrary to third-party-standing law. As noted by the dissenting Justices, the mere existence of a physician-patient relationship is insufficient to establish the necessary close relationship for third-party standing. 428 U.S. at 128 (Powell, J., dissenting in part). And with respect to

hindrance, the *Singleton* plurality itself recognized that (1) women could bring their own lawsuits to challenge any abortion regulations, (2) privacy and mootness obstacles were "not insurmountable," and (3) a class could be assembled. *Id.* at 117-18 (plurality op.).

Yet the plurality approved third-party standing, concluding there would be "little loss in terms of effective advocacy." *Id.* at 118. But the "effectiveness" of the advocate is not the test, as standing concerns the limits of the courts' power. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (stating that standing informs the "proper—and properly limited—role of the courts in a democratic society"). Even so, as described above, abortion providers cannot bring these claims under the proper test.

2. *Singleton* is unworkable because it permits abortion providers to police themselves.

"Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question," *Janus*, 138 S. Ct. at 2481, which includes consideration of the "significant consequence[s]" that flow from the rule. *Knick*, 139 S. Ct. at 2179. When combined with the Court's other abortion-related precedent, the consequences that flow from permitting third-party standing to abortion providers are significant, as Texas's experience demonstrates.

a. Relying on *Singleton*, an abortion provider can bring a facial challenge to any abortion regulation "on behalf of" his patients. 428 U.S. at 118 (plurality op.). And because these are hypothetical future patients, they can be imagined as any women, with any number of burdens, from anywhere in the State.

Abortion providers then use the special rule created by the Court for facial challenges to abortion laws: they must show the law is unconstitutional only in a "large fraction" of its applications in order to demonstrate it is facially unconstitutional. *Casey*, 505 U.S. at 895 (opinion of the Court); *see also Hellerstedt*, 136 S. Ct. at 2320 (applying large-fraction test). And given that the Court has defined the denominator of that fraction as the number of women for whom the law is a relevant burden, *Hellerstedt*, 136 S. Ct. at 2320, the provider need only imagine a few hypothetical women for whom the law might be a burden. Using that smaller number as the denominator inevitably produces a large fraction, *see id.* at 2343 n.11 (Alito, J., dissenting), rendering the law facially invalid without proof of its actual impact on any number of real women.

Further complicating matters is that many challenges are brought pre-enforcement, so courts must consider not only hypothetical women, but a hypothetical situation, too. *See, e.g.*, *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018), *appeal pending*, No. 18-50730 (5th Cir.) (pre-enforcement challenge to Texas's fetal-remains-disposition statute); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017), *appeal pending*, No. 17-51060 (5th Cir.) (pre-enforcement challenge to Texas's live dismemberment-abortion ban). Moreover, abortion providers have little incentive to attempt compliance with the law, as a perceived inability to comply will only increase their chances of success in court. *See, e.g.*, *Whole Woman's Health*, 338 F. Supp. 3d at 623, 629-34 (exempting providers from having to attempt to comply with Texas's fetal-remains-

disposition law and then holding that compliance would be a burden).

And while patients have a constitutional right to abortion and may invoke the Court's undue-burden test, abortion providers do not have a constitutional right to perform abortions, meaning their claims are assessed under a less-stringent standard. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc); *see also Casey*, 505 U.S. at 884 (the doctor-patient relationship is "derivative of the woman's position"). With such a favorable test and related precedent, it is no wonder why abortion providers wish to bring these claims "on behalf of" their patients instead of on their own.

b. Texas's experience demonstrates that lower courts reflexively rely on *Singleton* to find standing even when the record shows the opposite. For example, abortion providers challenging Texas's fetal-remains-disposition law—on behalf of their patients—admitted at trial that they had no idea how the law would impact their patients or even what their patients believed about fetal-remains disposition.[4] But the district court ignored that evidence, found that the providers had standing under *Singleton*, and declared the statute unconstitutional. *Whole Woman's Health*, 338 F. Supp. 3d at 622, 637-38.

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[4] 7/16/18 Tr. Trans. at 147, *Whole Woman's Health v. Smith*, No. 1:16-cv-1300-DAE (W.D. Tex.) (Doc. 244) (plaintiff-clinic president "do[es]n't have any idea" how many patients would be offended by the law); 7/17/18 Tr. Trans. at 17-18, *Whole Woman's Health*, No. 1:16-cv-1300-DAE (W.D. Tex.) (Doc. 245) (plaintiff-physician admitting that he has never spoken with a patient about burying or cremating fetal remains).

Texas is also defending a lawsuit brought not just by abortion providers, but by organizations who provide money to women seeking abortions. Compl., *Whole Woman's Health All. v. Paxton*, No. 1:18-cv-00500-LY (W.D. Tex., filed June 14, 2018) (Doc. 1). In response to Texas's still-pending motion to dismiss for lack of standing, the funding organizations rely on *Singleton*. Pls.' Resp. to Mot. to Dismiss at 13, *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex., filed Sept. 21, 2018) (Doc. 41).

Moreover, many abortion plaintiffs in Texas are not even physicians, but clinics. *See, e.g.*, *Whole Woman's Health*, 338 F. Supp. 3d at 612 n.1; *Paxton*, 280 F. Supp. 3d at 940 n.1. *Doe* recognized that such clinics are not directly injured by abortion regulations. 410 U.S. at 189. And nothing in *Singleton* supports finding a "close relationship" between a patient and a business entity.

3. *Singleton* is inconsistent with related decisions and subsequent developments.

a. As demonstrated above, the *Singleton* plurality is contrary to *Kowalski*, 543 U.S at 131, because it allows abortion providers to represent hypothetical future patients, and *Newdow*, 542 U.S. at 15 & n.7, because it permits abortion providers to assert claims at odds with their patients' interests. It also stands in tension with *Roe*, which applied the capable-of-repetition-yet-evading-review exception to mootness to allow patients to bring lawsuits challenging abortion regulations. 410 U.S. at 125.

The *Singleton* plurality is also part of a larger pattern of applying unique rules to abortion cases. *Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting); *id.* at 2330-31 (Alito, J., dissenting); *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting); *Margaret S. v. Edwards*, 794 F.2d 994, 997 (5th Cir. 1986) (noting that "the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases"). Abortion litigants should be held to the same requirements as everyone else—especially when it comes to Article III's limits on federal jurisdiction. The special solicitude it granted to abortion providers only confirms that *Singleton* is an anomaly ripe for repudiation.

b. The dissent in *Singleton* predicted that the plurality's expansive holding "will prove difficult to cabin." 428 U.S. at 129 (Powell, J., dissenting in part). Time has proven the dissent correct. The recent tactics of abortion plaintiffs have made the flaws in the plurality's assumption of common interests even more apparent.

To begin, despite taking advantage of *Singleton* to bring suit on behalf of future patients, abortion providers are now trying to altogether eliminate the doctor-patient relationship. They have filed multiple suits across the country—on behalf of their patients—to enjoin laws requiring abortions to be performed by doctors.[5] Thus,

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[5] *See, e.g.*, Compl., *Planned Parenthood Ariz., Inc. v. Brnovich*, No. 4:19-cv-00207-JGZ (D. Ariz., filed Apr. 11, 2019) (Doc. 1); Compl., *Whole Woman's Health All. v. Hill*, No. 1:18-cv-1904 (S.D. Ind., filed June 21, 2018) (Doc. 1); Compl., *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex., filed June 14, 2018) (Doc. 1). A complete list of challenges to physician-only rules can be found in the amicus brief filed by Idaho.

despite describing their doctors as providing "compassionate abortion care," "emotional support," "empathy," and "respect" to their patients, Planned Parenthood Fed. of Am. (PPFA) Amicus Br. 5; WWH Amicus Br. 29, 31, these providers are actively trying to ensure that doctors never have to speak with, or even be in the same clinic with, the women they purport to represent.[6]

Next, abortion providers have gone beyond simply bringing claims that are inconsistent with their patients' interests. Aided by *Singleton* (and *Hellerstedt*, *see infra* Part II.B), they are now asserting claims blatantly opposed to their patients' interests. Abortion providers and funding organizations challenged—purportedly on behalf of their patients and clients—nearly every abortion-related law in Texas, including all health-and-safety regulations, informed-consent provisions, and parental-notice laws. Compl., *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex., filed June 14, 2018) (Doc. 1). Enjoining laws that require sterilized instruments, a working toilet, caps on ultrasound fees, and a private opportunity to ask questions, to name a few, is not in a woman's best interest. *Id.* ¶¶ 78(b), 116(a), (e).[7]

Similarly, despite evidence that women overwhelmingly prefer that their doctors induce fetal demise before

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[6] As it is, abortion doctors rarely spend more than a few minutes with their patients. *See* Gee Merits Br. 15 n.8.

[7] Similar suits have been filed in other States. *See infra* p.31. The Fifth Circuit has already called the providers' standing into question in the similar suit filed by June Medical in Louisiana. *In re Gee*, 941 F.3d 153, 159-65 (5th Cir. 2019) (per curiam).

dismembering the child during a second-trimester abortion, providers obtained an injunction of Texas's live dismemberment-abortion ban so they would not have to do so. *Paxton*, 280 F. Supp. 3d at 953-54; 11/7/17 Tr. Trans. at 51, *Whole Woman's Health v. Paxton*, No. 1:17-cv-00690-LY (W.D. Tex.) (Doc. 164) (study finding 92% of patients preferred fetal demise prior to the abortion).

Finally, abortion providers make inconsistent arguments regarding their patients' desires, demonstrating that their real interest is in eliminating abortion laws, not furthering their patients' interests. For example, abortion providers previously argued that States could not require women to choose how to dispose of fetal remains following an abortion. *Margaret S.*, 794 F.2d at 997-98; *see also id.* at 1003-04 (Williams, J. concurring). Now, they claim that it is unconstitutional not to provide women with those choices. *Whole Woman's Health*, 338 F. Supp. 3d at 634-36. In *Hellerstedt*, the plaintiffs assured the Court that the ambulatory-surgical-center requirement was unnecessary because abortion clinics were already regulated. 136 S. Ct. at 2314 (finding preexisting regulations sufficient). Now, providers argue that even those underlying regulations are unconstitutional burdens. *See supra* p.17.[8] And the plaintiffs in the suit to enjoin nearly all of Texas's abortion laws readily admit

[8] The National Abortion Federation previously recommended that abortion-minded women look for physicians with admitting privileges at nearby hospitals. *Planned Parenthood of Greater Tex.*, 748 F.3d at 595. It now joins Planned Parenthood's amicus brief arguing that admitting privileges provide no benefit to the patient. PPFA Amicus Br. 4.

their goal is obtaining "more diverse revenue streams" and being "economically sustainable," which has more to do with their bottom line than their patients' health. Compl. ¶¶ 188-96, *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex., filed June 14, 2018) (Doc. 1).

In short, abortion providers are using future patients as proxies to eliminate abortion regulations the providers dislike, disregarding what real patients think. And they are doing so on the authority of *Singleton*.

4. *Singleton* does not implicate any reliance interests.

Although reliance interests should not be a significant factor when the Court is addressing issues of jurisdiction and the Court's power, repudiating *Singleton* would not harm such interests. At most, abortion providers will have to recruit real women to be plaintiffs in their lawsuits. Discarding *Singleton* will not impact substantive rights; it will merely require abortion proponents to pursue litigation strategies that comply with the Constitution.

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Abortion providers lack third-party standing to bring suits on behalf of their patients. It is time to formally discard the patently erroneous *Singleton* plurality. The Court should hold that Plaintiffs lack standing and order this case dismissed for lack of subject-matter jurisdiction.

II. *Hellerstedt* Is an Unworkable "Anomaly" and Should Be Discarded.

Plaintiffs lack standing. *See supra* Part I. But if the Court reaches the merits, it should repudiate its erroneous decision in *Hellerstedt* and affirm.

Hellerstedt was wrongly decided. It misapplied the undue-burden standard and allowed the plaintiffs to skirt the requirements of a facial challenge. It cannot be squared with the Court's other abortion jurisprudence. And it has sowed confusion among the courts of appeals, hindering States' core ability to regulate abortion providers to further important state interests, such as patient health and the protection of unborn life.

This Court does not hesitate to overrule recent decisions that are demonstrably erroneous. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent."). Indeed, the Court has repeatedly discarded recent decisions—even in the abortion context—when only a few years' experience confirms their error. *See Gonzales*, 550 U.S. 124 (contradicting *Stenberg*, 530 U.S. 914 after seven years); *Casey*, 505 U.S. 833 (overruling *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron*, 462 U.S. 416).[9] The Court does so with such frequency that it is

[9] The Court has overruled its own recent decisions in myriad contexts. *E.g., Johnson*, 135 S. Ct. 2551 (overruling *Sykes*, 564 U.S. 1 and *James v. United States*, 550 U.S. 192 (2007)); *Citizens United*, 558 U.S. 310 (overruling in part *McConnell v. FEC*, 540 U.S. 93 (2003)); *Pearson v. Callahan*, 555 U.S. 223 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194 (2001)); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (overruling

doubtful whether recent decisions enjoy *stare decisis* protection at all. Regardless, the *Janus* factors readily confirm that nothing stands in the way of discarding *Hellerstedt* as an erroneous anomaly.

A. *Hellerstedt*'s application of the undue-burden standard was poorly reasoned and inconsistent with the Court's abortion jurisprudence.

The quality of a decision's reasoning is an important factor in determining whether it should be overruled. *Janus*, 138 S. Ct. at 2479 (citing *Citizens United*, 558 U.S. at 363-64; *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003)). *Hellerstedt* misapplied the undue-burden

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Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)); *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)); *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)); *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989) and *Booth v. Maryland*, 482 U.S. 496 (1987)); *Daniels v. Williams*, 474 U.S. 327 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527 (1981)); *United States v. Ross*, 456 U.S. 798 (1982) (overruling *Robbins v. California*, 453 U.S. 420 (1981)); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)); *Gregg v. Georgia*, 428 U.S. 153 (1976) (overruling *McGautha v. California*, 402 U.S. 183 (1971)); *Dove v. United States*, 423 U.S. 325 (1976) (overruling *Durham v. United States*, 401 U.S. 481 (1971)); *Edelman v. Jordan*, 415 U.S. 651 (1974) (overruling *Shapiro v. Thompson*, 394 U.S. 618 (1969)); *Spevack v. Klein*, 385 U.S. 511 (1967) (overruling *Cohen v. Hurley*, 366 U.S. 117 (1961)); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

standard, contradicted *Casey* and related cases, and failed to hold the plaintiffs to the correct standard for bringing a facial challenge. That "exceptionally ill founded" reasoning, *Knick*, 139 S. Ct. at 2178, justifies overruling *Hellerstedt*.

1. *Hellerstedt* conflicts with *Casey*.

The crux of *Hellerstedt*'s poor reasoning is its departure from *Casey*'s undue-burden standard: a law imposes an "undue burden" when it places "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878. *Hellerstedt* confused that formulation by using a balancing test that weighs a law's benefits against its burdens. That new formulation conflicts with *Casey* and its progeny.

The *Casey* plurality opinion rejected *Roe*'s strict-scrutiny regime and acknowledged that States have significant, legitimate reasons for regulating abortion. Recognizing that its precedent made it too difficult for States to regulate abortion, the Court corrected its error with the undue-burden standard, which asks whether a law presents a "substantial obstacle." *Hellerstedt* ignores this context. It (1) conflates burdens with "substantial obstacles," transforming any burden into an undue burden; (2) wrongly requires a balancing of benefits and burdens; and (3) erroneously requires proof of "sufficient" medical benefit as part of its balancing analysis, pushing the test back towards the previously rejected strict-scrutiny regime. *Hellerstedt*, 136 S. Ct. at 2300.

a. First, "substantial obstacle" does not mean "any burden" or "any burden not countered by sufficient actual benefit," as *Hellerstedt* suggests and Plaintiffs

argue. Pet. Br. 45-50. *Casey* made clear that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue." 505 U.S. at 876. Even if state regulation "increas[es] the cost or decreas[es] the availability of medical care," or makes it "more difficult or more expensive to procure an abortion,"—things that would surely qualify as "burdens"—that "cannot be enough to invalidate it" if the law serves a "valid purpose . . . not designed to strike at the right itself." *Id.* at 874. Thus, if state regulations result in burdens on women seeking abortions, even a reduction in clinics or increased costs, that is not enough. State abortion regulations are not unconstitutional unless the burdens they create are "undue" because they present a "substantial obstacle" to the exercise of the right itself. *Id.* at 878. By suggesting that any burden can be "undue," *Hellerstedt* is inconsistent with *Casey*.

b. Second, *Casey* provides no support for *Hellerstedt*'s balancing test which asks whether the benefits of a law outweigh its burdens. *Casey* did not balance benefits and burdens—it invalidated or upheld the laws at issue depending on whether they posed a substantial obstacle to abortion access. 505 U.S. at 893-94 (opinion of the Court). That is plainly not what *Hellerstedt* did. *See, e.g.,* 136 S. Ct. at 2313 (holding that "increased driving distances . . . are but one additional burden, which, when taken together with others that the [clinic] closings brought about, *and when viewed in light of the virtual absence of any health benefit*, lead us to conclude that the record adequately supports the District Court's 'undue burden' conclusion." (citation omitted) (emphasis added)); *see also id.* at 2314 ("The record contains

nothing to suggest that H.B. 2 would be *more effective than pre-existing Texas law* at deterring wrongdoers like Gosnell from criminal behavior." (emphasis added)).

c. Finally, *Casey* never required the State to prove the law's benefit. Indeed, *Casey* was willing to assume that the State's laws "[i]n theory" provided the hoped-for benefit. 505 U.S. at 883; *see also Gonzales*, 550 U.S. at 159 (stating it was "unexceptionable to conclude" that some women regret their abortions even though there was "no reliable data to measure the phenomenon").

Further, *Casey* did not hold, like *Hellerstedt*, that if the regulation does not carry "enough" benefit, it is facially unconstitutional regardless of whether the burdens actually amount to a "substantial obstacle." *Casey* looked only to whether the law had a "valid purpose," not to actual benefits. *See Casey*, 505 U.S. at 874; *see also id.* at 878 ("Regulations *designed to foster* the health of a woman seeking an abortion are valid if they do not constitute an undue burden." (emphasis added)), 885 (holding that a state abortion regulation is valid even if "an objective assessment might suggest" it is not necessary). In fact, *Hellerstedt* acknowledged but then ignored that *Casey* required even "unnecessary health regulations" to pose a "substantial obstacle" before they could be declared unconstitutional. 136 S. Ct. at 2300 (quoting *Casey*, 505 U.S. at 878).[10] That leaves no room for *Hellerstedt*'s balancing approach. *Hellerstedt* contradicts *Casey*.

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[10] This is certainly not to suggest that Louisiana's law is unnecessary or carries no benefit. The evidence in the record shows the opposite. Gee Merits Br. 81-89.

2. *Hellerstedt* is inconsistent with *Mazurek* and *Gonzales*.

By recharacterizing *Casey*'s undue-burden framework, *Hellerstedt* contradicted cases that themselves rely on *Casey*. In particular, *Hellerstedt* cannot be squared with *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), and *Gonzales*. Both *Mazurek* and *Gonzales* read *Casey* to proscribe only those laws that present a substantial obstacle to abortion access (and therefore constitute an undue burden). *Hellerstedt* did not account for those cases, further confirming that it should be scuttled. *See Janus*, 138 S. Ct. 2478.

a. *Hellerstedt* ignored *Mazurek*. There, the Court summarily reversed the Ninth Circuit's decision invalidating a state law requiring that abortions be performed only by licensed physicians. 520 U.S. at 971-72. The Court did so because there was insufficient evidence that the requirement had the effect of posing a substantial obstacle. *Id. Mazurek* thus reaffirmed that there must be proof of a *substantial obstacle* to access before a law may be invalidated. And if there were any doubt whether *Casey* required the State to produce evidence of benefits in order to keep its law, *Mazurek* definitively resolved it:

> In the course of upholding the physician-only requirement at issue in [*Casey*], we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective

> assessment might suggest that those same tasks could be performed by others."

Id. at 973 (quoting *Casey*, 505 U.S. at 885). Thus, *Mazurek* and *Casey* both affirmed that even if "an objective assessment" shows that a regulation has no benefit, the law may stand. That is at odds with *Hellerstedt*, which required evidence of the law's benefits. *See* 136 S. Ct. at 2311 (finding no evidence of a "significant health-related problem that the new law helped to cure.")

b. *Hellerstedt* also cannot be squared with *Gonzales*. *Gonzales* upheld a restriction on the barbaric partial-birth abortion procedure. 550 U.S. at 168. Unlike *Hellerstedt*, the Court did not require proof of any measurable medical benefits, even though the law might pose a burden in some cases. Rather, it upheld the law because it served a valid government purpose—respecting unborn life. *Id.* at 157-58. And it did so despite (disputed) evidence that for some women, the partial-birth abortion procedure was safer and that the ban might prevent those women from obtaining an abortion. *Id.* 161-64, 168. Instead, the Court explained that "the proper means" to consider those facts "is by as-applied challenge." *Id.* at 167.

Hellerstedt is also inconsistent with *Gonzales*'s guidance on evaluating abortion-related laws that regulate the medical profession. *Gonzales* rejected giving abortion doctors a special pass. *Id.* at 163 ("The law need 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* reaffirmed that "[u]nder [the Court's]

precedents it is clear the State has a significant role to play in regulating the medical profession," and "the State has 'legitimate concern for maintaining high standards of professional conduct' in the practice of medicine." *Id.* at 157 (quoting *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954)). *Gonzales* also made clear that state regulations concerning abortion should be evaluated like other regulations of the medical profession, where the State is not required to prove medical necessity or even actual benefit. *See id.* at 163-66.

Thus, "medical uncertainty" over the benefits of a law "does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164. *Gonzales* explicitly rejected the idea (suggested by *Stenberg* just a few years earlier) that there is "no margin of error for legislatures to act in the face of medical uncertainty," finding that standard "too exacting . . . to impose on the legislative power . . . to regulate the medical profession." *Id.* at 166. Instead, "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Id.*

Hellerstedt contradicted that straightforward analysis. Despite *Gonzales*, *Hellerstedt* claimed that "the statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with this Court's case law." 136 S. Ct. at 2310. *Hellerstedt* completely ignored the *Gonzales* analysis cited above, as well as this crystal-clear statement: "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and

scientific uncertainty." *Gonzales*, 550 U.S. at 163. Instead, *Hellerstedt* selectively quoted *Gonzales*'s statement that courts do not place "'dispositive weight'" on legislative fact findings and glossed over the rest. 136 S. Ct. at 2310 (quoting *Gonzales*, 550 U.S. at 165).

Hellerstedt's statement that courts, not legislatures, are the ultimate arbiters of the medical benefits or necessity of state abortion regulations turns courts into "the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Gonzales*, 550 U.S. at 164 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality op.)). Determining appropriate regulation when there is medical evidence on both sides of an issue is a *policy* choice that should be made by the legislature, not by a court relying on inadmissible, extra-record evidence like *Hellerstedt* did. *See* 136 S. Ct. at 2312-13.

Further, *Hellerstedt* rejected the Fifth Circuit's articulation of the undue-burden standard even though it tracked *Gonzales*. *Compare* 136 S. Ct. at 2309 ("The Court of Appeals wrote that a state law is 'constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion . . . and (2) it is reasonably related to (or designed to further) a legitimate state interest.'") *with Gonzales*, 550 U.S. at 158 ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power . . . in furtherance of its legitimate interests.") In sum, *Hellerstedt* and the balancing test it created are incompatible with *Gonzales*.

3. *Hellerstedt* is inconsistent with the Court's large-fraction test for facial challenges to abortion-related laws.

Hellerstedt's reasoning also falters by allowing the plaintiffs to prevail on a facial challenge without holding them to the exacting burden that a facial challenge requires. For any other litigant, that burden is set out in *United States v. Salerno*: "[T]he challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." 481 U.S. 739, 745 (1987).

This Court's pre-*Hellerstedt* decisions do not explain whether the standard applies in abortion cases. *Casey* does not mention *Salerno*, but held that Pennsylvania's spousal notification law was facially unconstitutional because "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." 505 U.S. at 895 (opinion of the Court). *Gonzales* acknowledged the discrepancy between the two tests but declined to resolve it because the plaintiffs failed to meet even the less-stringent large-fraction test. 550 U.S. at 167-68.

Then came *Hellerstedt*, which applied an entirely novel large-fraction test. 136 S. Ct. at 2320. *Casey* and *Gonzales* compared the number of women actually burdened with the number of women potentially burdened. *See Gonzales*, 550 U.S. at 168 (contrasting between all abortions involving the partial-birth procedure and those in which the woman would suffer complications); *Casey*,

505 U.S. at 895 (opinion of the Court) (explaining the fraction as the comparison between the number of women who do not wish to notify their husbands and do not qualify for an exception with the number of women who could not then obtain abortions). In contrast, *Hellerstedt* defined each part of the fraction identically—the number of women actually burdened. *See* 136 S. Ct. at 2320. That is not a fraction at all. *See id.* at 2343 n.11 (Alito, J., dissenting).

If taken seriously, that formulation stacks the deck against the States in a way that makes almost any abortion restriction invalid so long as a plaintiff shows evidence of a burden for *any women*—even if that number is merely a handful—for whom the Court believes the restriction is "relevant." That turns *Gonzales*'s facial analysis on its head by handing the State a loss in every case unless it can affirmatively prove—often before the law goes into effect—that not one hypothetical patient will be burdened. This is yet another problem with *Hellerstedt* that justifies reversal.

* * *

Hellerstedt's balancing test undervalues the State's interest in regulating abortion, incorrectly heightens the State's burden to defend its regulations, and erroneously reduces abortion plaintiffs' burden to prove a law creates a substantial obstacle on abortion access. It is irreconcilable with *Casey*, *Mazurek*, and *Gonzales*, despite the majority's pretense that it was applying established law. It therefore stands as an "anomaly" among the Court's abortion cases and should be overruled. *Janus*, 138 S. Ct. at 2483-84.

B. *Hellerstedt*'s unworkable rule has created confusion in the lower courts.

Beyond incoherent abortion jurisprudence, *Hellerstedt*'s poor reasoning has left another pernicious effect in its wake: it has confounded litigants and lower courts. No one knows how to correctly apply it. This is yet another reason to overrule it. *See Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring) ("[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished.").

1. Though *Hellerstedt* claimed not to change the law, abortion plaintiffs swiftly declared *Hellerstedt* a license to challenge all sorts of state laws—even those this Court had previously approved. For example, citing *Hellerstedt*, abortion plaintiffs have challenged physician-only laws in twelve states, including Texas. They did so even though this Court endorsed such laws in *Mazurek*. *See supra* p.16 n.5. Abortion plaintiffs have further invoked *Hellerstedt* to challenge clinic licensing requirements, even though *Roe* explicitly affirmed the States' rights to license and regulate clinics, 410 U.S. at 163. *See, e.g.*, Am. Compl., *June Med. Servs., LLC v. Gee*, No. 3:17-cv-00404-BAJ-RLB (M.D. La., filed June 11, 2018) (Doc. 87); Am. Compl., *Jackson Women's Health Org. v. Currier*, No. 3:18-cv-00171-CWR-FKB (S.D. Miss., filed Apr. 9, 2018) (Doc. 23); Am. Compl., *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-00428-HEH (E.D. Va., filed Sept., 4, 2018) (Doc. 41).

In fact, abortion activists in Texas have recently claimed that *Hellerstedt* invalidates nearly every

abortion regulation in Texas, including physician-only laws, parental-consent laws, informed-consent requirements, and licensing and facility requirements. Compl., *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex., filed June 14, 2018) (Doc. 1). These activists insist that *Hellerstedt* overrides what this Court previously said about such regulations. *See* Pls.' Resp. to Mot. to Dismiss 20, *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex. filed Sept. 21, 2018) (Doc. 41) (arguing *Hellerstedt* abrogates all previous abortion cases applying the undue-burden standard).

Of course, this is a serious misreading of *Hellerstedt* given its insistence that it was following *Casey*, but that is not the point. The fact that *Hellerstedt* has been so widely and pervasively misunderstood—and misapplied—only confirms that it should be overruled.

2. Lower courts have struggled to harmonize *Casey*'s substantial-obstacle requirement and *Hellerstedt*'s benefits-and-burdens test. The Fifth Circuit attempted it here. Other courts have instead set aside *Casey* and applied *Hellerstedt* as a pure benefits-and-burdens balancing test without requiring plaintiffs to show a substantial obstacle. The conflicting approaches *Hellerstedt* has spawned weigh in favor of its abolition. *See Janus*, 138 S. Ct. at 2484.

Examples of the lower courts' struggles abound. For instance, in the pending challenge to Texas's law prohibiting live dismemberment abortions, the district court enjoined the law, citing *Hellerstedt*. *Paxton*, 280 F. Supp. 3d at 944. It read *Hellerstedt* to redefine "substantial obstacle" as a burden "no more and no less than 'of substance.'" *Id.* The court then framed the dispositive

question under *Hellerstedt* as whether "the benefit [of the law] bring[s] with it an obstacle of substance." *Id.* On appeal, the plaintiffs argued that "[a]s clarified by [*Hellerstedt*], any material, not *de minimus* burden may constitute a 'substantial' obstacle if it outweighs the benefits the law actually furthers." Appellees' Br. 26, *Whole Woman's Health v. Paxton*, No. 17-51060 (5th Cir. Apr. 11, 2018). None of that analysis comports with *Casey* or *Gonzales*, which required plaintiffs to demonstrate a substantial obstacle regardless of offsetting benefits. *See Casey*, 505 U.S. at 883, 885.

The district court in that same case also cited *Hellerstedt* when requiring Texas to prove that the law carried a medical benefit, even though the regulation at issue did not address health concerns, but rather advanced the State's legitimate interest in protecting developed unborn life from live dismemberment. *Paxton*, 280 F. Supp. 3d at 948, 951, 953. This is also inconsistent with *Casey* and *Gonzales*.

The confusion *Hellerstedt* created is pervasive in the courts of appeals, and some have thrown up their hands in frustration. Even before the petition in this case was filed, the Fifth Circuit delayed decision in Texas's appeal in the aforementioned challenge to the State's ban on live dismemberment abortion, placing Texas's appeal in abeyance until it receives further clarification from this Court in this case. Order, *Paxton*, No. 17-51060 (5th Cir. Mar. 13, 2019) (per curiam). A few months later, it did the same thing in Texas's appeal regarding the State's fetal-remains-disposition law. *See* Order, *Whole Woman's Health v. Smith*, No. 18-50730 (5th Cir. Oct. 7, 2019). The Fifth Circuit, in other words, is repeatedly

delaying deciding cases that could require it to harmonize *Hellerstedt* with other abortion cases.

The Seventh Circuit is similarly exasperated. Purporting to apply *Hellerstedt*, a panel of that court invalidated Indiana's parental-notification law before it went into effect, even though it contained a judicial-bypass provision. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019). The Indiana law comports with *Bellotti v. Baird*, 443 U.S. 622 (1979), and *Casey*, 505 U.S. at 895 (opinion of the Court). But the panel enjoined the law, citing *Hellerstedt*, because "the State has offered no evidence that any actual benefit" from informing a parent of their child's abortion "is likely or that there is a real problem that the notice requirement would reasonably be expected to solve." *Adams*, 937 F.3d at 984. Despite this Court's decisions affirming the obviously important state interest in parental notice, *Adams* was led by *Hellerstedt* to dismiss them as reciting "myths, speculation, and conventional wisdom," which, according to *Hellerstedt*, are "not enough to justify restrictions on the right to abortion." *Id.* at 984.

Yet the Seventh Circuit declined to take the case en banc, apparently because the undue-burden standard is too confusing. Judges Easterbrook and Sykes issued a concurrence in the denial lamenting that the standard is unworkable:

> [A] court of appeals cannot decide whether requiring a mature minor to notify her parents of an impending abortion, when she cannot persuade a court that avoiding notification is in her best interests, is an "undue burden" on abortion. The "undue burden" approach announced in [*Casey*]

> does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court's opinions. How much burden is "undue" is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute, such as the one Indiana has enacted. Three circuit judges already have guessed how that inquiry would come out; they did not agree. The quality of our work cannot be improved by having eight more circuit judges try the same exercise. It is better to send this dispute on its way to the only institution that can give an authoritative answer.

Slip Op. at 3-4, *Planned Parenthood of Ind. & Ky. v. Box*, No. 17-2428 (7th Cir. Oct. 30, 2019) (Easterbrook, J., concurring in denial of rehearing en banc).

When exasperated circuit judges insist that they are unable to do their jobs because of this Court's muddled jurisprudence, it is past time for this Court to correct course. Discarding *Hellerstedt* is the right start.

C. No reliance interests justify retaining *Hellerstedt*.

There is no serious argument that reliance on *Hellerstedt* justifies adhering to it. *Hellerstedt* was decided

barely three-and-a-half years ago, and it has confounded lower courts ever since. *Hellerstedt* "does not provide a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *Janus*, 138 S. Ct. at 2484 (internal quotation marks omitted).

* * *

Plaintiffs assert that this case is simply about adhering to the rule of law. Pet. Br. 2. But adherence to the rule of law is not accomplished through blind fidelity to a poorly reasoned recent precedent that itself violates the rule of law and principles of federalism. *See Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring). *Hellerstedt* is inconsistent with the rest of the Court's abortion jurisprudence and has led to chaos and frustration in the lower courts. It should be overruled.

CONCLUSION

Because Plaintiffs lack standing, this case should be dismissed for lack of subject-matter jurisdiction. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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