No. 18-1323

In the Supreme Court of the United States

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

v.

DR. REBEKAH GEE, in her official capacity as secretary of the Louisiana Department of Health and Hospitals,
RESPONDENT

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), forecloses lower courts from evaluating challenges to States' abortion clinic safety regulations in light of a case's specific factual record under the "substantial obstacle" standard derived from *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992).

2. Whether a federal court may adopt an interpretation of State law contrary to the reasonable, sworn interpretation of the State official charged with enforcement.

3. Whether the substantive due process standard applicable to abortion regulations authorizes a federal court to enjoin application of rational, generally applicable health standards.

4. Whether an abortion regulation can be held facially invalid when it only potentially affects a "large fraction" of women, without any proof of the traditional requirement that "no set of circumstances exists under which the [law] would be valid."

5. Whether evidence of material non-compliance with reasonable health and safety regulations destroys a health care provider's third party standing.

PARTIES TO THE PROCEEDING

The Petitioners are June Medical Services L.L.C., d/b/a Hope Medical Group for Women, and two pseudonymous abortion providers proceeding as Dr. John Doe 1 and Dr. John Doe 2. Petitioners are Cross-Respondents in the related Conditional Cross-Petition, No. 18-1460. To avoid confusion, this Brief will refer to Petitioners as "Plaintiffs."

The Respondent is Dr. Rebekah Gee, Secretary of the Louisiana Department of Health ("LDH"), sued in her official capacity. LDH was formerly referred to as the Louisiana Department of Health & Hospitals. Dr. Gee is the Cross-Petitioner in No. 18-1460. To avoid confusion, this Brief will refer to Dr. Gee as "Louisiana."

LIST OF PROCEEDINGS

The following proceedings are directly related to the case in this Court:

June Med. Servs. v. *Gee*, No. 3:14-cv-00525 (M.D. La.), judgment entered on Apr. 26, 2017.

Women's Health Care Ctr. v. *Kliebert*, No. 3:14-cv-597 (M.D. La.), consolidated with No. 3:14-cv-00525 on Sept. 24, 2014, and judgment entered on Dec. 11, 2014.

June Med. Servs. v. *Gee*, No. 16-30116 (5th Cir.), judgments entered on Feb. 24, 2016 and Aug. 24, 2016.

June Med. Servs. v. *Gee*, No. 17-30397 (5th Cir.), judgments entered on Sept. 26, 2018 and Jan. 18, 2018.

June Med. Servs. v. *Gee*, No. 15A880 (S. Ct.), judgment entered on Mar. 4, 2016.

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The opinion of the district court is reported at 250 F. Supp. 3d 27 (M.D. La. 2017) and reprinted in the Appendix to the Petition ("App.") at 132a–279a. The Fifth Circuit panel decision is reported at 905 F.3d 787 (5th Cir. 2018) and reprinted at App. 1a–103a. The Fifth Circuit's denial of Plaintiffs' petition for rehearing *en banc* is reported at 913 F.3d 573 (5th Cir. 2019) and reprinted at App. 104a–131a.

JURISDICTION

Plaintiffs timely filed a petition for certiorari April 17, 2019, No. 18-1323, which was docketed April 20, 2019. *See* 28 U.S.C. § 2101(c); 28 U.S.C. § 1254(1). As explained in Louisiana's Conditional Cross-Petition, No. 18-1460, Louisiana denies this Court or lower courts have jurisdiction to address the merits of Plaintiffs' substantive due process claims because Plaintiffs lack third-party standing to raise those claims.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The underlying Petition, No. 18-1323, involves United States Constitution amendment XIV, § 1, as well as Louisiana Revised Statutes § 40:1061.10 ("Act 620") and its implementing regulations. Relevant portions of these provisions are reproduced at App. 285a–290a.

INTRODUCTION

Plaintiffs' petition is built on the premise that Louisiana's Act 620 burdens abortion in the State in the same (or worse) way as the Texas law at issue in *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292

(2016). But the factual record shows that premise is false.

Louisiana adopted Act 620 based on a lengthy history of abortion clinic safety violations reflecting the clinics' indifference to doctor qualifications and the threat that indifference poses to women. The law does nothing more than extend a longstanding Louisiana requirement that doctors who provide outpatient surgery at surgical centers have admitting privileges at local hospitals. Under Act 620, abortion providers are treated like any other doctor.

As the Fifth Circuit concluded on a detailed examination of the factual record, Act 620 would—at worst—cause up to one hour of delay for abortion procedures at *one* of Louisiana's three clinics. App. 52a–53a. If the "burden" turns out to be any greater than that, it is entirely the fault of Louisiana abortion doctors themselves, who: (1) did not seek privileges in good faith, (2) threatened to leave abortion practice, (3) disputed approval of privileges they were granted, and (4) blamed the State for the potential reduction in abortion services. Given that background, there is little to criticize in the Fifth Circuit's detailed ruling, a fact-bound decision that faithfully applied this Court's precedents to a complex factual record in a facial, pre-enforcement challenge. Nothing in the opinion warrants this Court's review.

Unsurprisingly, Plaintiffs cannot point to a circuit split on any relevant legal question. The purported er-

rors discussed in the Petition all rest on supposed conflicts between the Fifth Circuit decision and *Hellerstedt*. But even there, Plaintiffs' view of *Hellerstedt* bears no resemblance to what this Court actually held. In fact, the supposed "errors" Plaintiffs identify are the same interpretations of *Hellerstedt* that Plaintiffs themselves urged in the lower courts. To the extent the Fifth Circuit may have erred, its missteps *favored* Plaintiffs.

That leaves Plaintiffs with nothing more than a request that this Court review the Fifth Circuit's application of *Hellerstedt* to these facts: specifically, to redo the majority's clear-error review of the district court's factual findings. That is hardly ever a suitable use of this Court's resources. And it is especially unsuitable here, where Plaintiffs' petition fails to cite the evidentiary record even *once*. Perhaps the reason for such a glaring absence is that the record contains ample evidence supporting the Fifth Circuit's conclusions.

In sum, Plaintiffs seek neither resolution of unsettled law, nor enforcement of this Court's precedents. At best, they seek to secure their preferred outcome through an exercise in fact-specific error-correction where there is no error—all for the benefit of actors who themselves caused the supposed burdens and who invited the supposed errors they now raise. At worst, they seek judicial legislation on a question of policy that the Louisiana legislature resolved and the Fifth Circuit upheld. Certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Although the Petition cites the district court and Fifth Circuit opinions (principally the dissents), it is entirely devoid of citations to the evidentiary record. Because the Petition alleges that the Fifth Circuit erred in its application of clear-error review to the district court's factual findings, familiarity with the record is essential.

1. Act 620

Louisiana has long required that doctors who perform surgeries at the State's ambulatory surgical centers have admitting privileges at a local hospital in addition to requiring a hospital transfer agreement. La. Admin. Code § 48:4541(A), (B) (2019); see also La. Admin. Code § 48:4535(E)(1) (2014) (former ambulatory surgical center regulation); ROA.10154–10155. Louisiana has also required that doctors who perform simple office-based surgeries either (1) maintain staff privileges to perform the same procedure at a hospital in "reasonable proximity" (in most cases within 30 miles), or (2) have completed a residency in the field covering the procedure. See La. Admin. Code § 46:7309(A)(2); *id.* § 46:7303.

Yet until 2014, no admitting-privileges requirement applied to one major locus of surgeries performed in Louisiana: abortion clinics. Abortion clinics were subject only to a far more lenient requirement

that there be "one physician present who has admitting privileges or has a written transfer agreement with a physician[] who has admitting privileges at a local hospital to facilitate emergency care." La. Admin. Code § 48:4407(A)(3) (2003).

Louisiana Act 620 corrected that regulatory gap.[1] Act 620 requires that physicians performing abortions "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." Act 620, § 1(A)(2)(a).[2] A physician has "active admitting privileges" if he "is a member in good standing of the medical staff" of a licensed hospital, "with the ability to admit a patient and to provide diagnostic and surgical services to such patient[.]" *Id.*

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[1] Louisiana has "a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade*, 410 U.S. 113, 150 (1973).

[2] The Act amended La. Rev. Stat. § 40:1299.35.2, which has been recodified at La. Rev. Stat. § 40:1061.10. App. 286a–287a. Act 620 is unlike the law at issue in *Hellerstedt* because it aligned Louisiana law with pre-existing regulations governing other venues for outpatient surgery. It also imposes far fewer obligations on abortion clinics and doctors, given that it does not subject abortion clinics to the full panoply of requirements applicable to ambulatory surgical centers. See *Hellerstedt*, 136 S. Ct. at 2300 (citing Tex. Health & Safety Code Ann. § 245.010(a)); Pet. at 4 & n.1.

The Louisiana Legislature passed Act 620 after committee hearings with extensive testimony on both sides. Witnesses for the bill—including two highly credentialed doctors later accepted as Louisiana's experts at trial—testified that (1) Louisiana abortion clinics have a history of serious health and safety problems, among other failures of legal compliance; (2) abortion carries known risks of serious complications that may require intervention in a hospital; (3) the process for obtaining admitting privileges serves to vet physician competency; (4) competent abortion providers would be able to obtain privileges; and (5) the Act would bring abortion practice into conformity with the privileges requirements for doctors performing other outpatient surgeries, ensuring continuity of care for women who experience complications following an abortion. *E.g.*, ROA.11221–11223, ROA.11225–11228, ROA.11256–11260, ROA.11262–11263, ROA.11264–11265, ROA.11266–11269. By linking abortion providers to hospital privileging, Act 620 would also ensure inclusion of Louisiana abortion providers in the National Practitioner Data Bank, which tracks malpractice and other misconduct by doctors. See National Practitioner Data Bank, "About Us" (available at https://tinyurl.com/npdbabout); see also 42 U.S.C. § 11131 *et seq.*; *id.* § 1396r–2; *id.* § 1320a–7e. Although various abortion advocates and clinic staff testified against the law, not a single Louisiana abortion doctor appeared let alone testified that he or she would be unable to obtain privileges. ROA.11248.

2. Louisiana abortion providers

1. The record identifies six Louisiana abortion providers, Drs. John Doe 1–6,[3] and five abortion clinics—the Plaintiff clinic in Shreveport (June Medical Services, d/b/a Hope Medical Group); Bossier City Medical Suite ("Bossier") in Bossier City; Women's Health Care Center ("Women's Health") and Causeway Medical Clinic ("Causeway") in the New Orleans area; and Delta Clinic ("Delta") in Baton Rouge. The following chart illustrates the clinic location of each Louisiana abortion provider at the outset of this case:

Clinic	Doctor(s)	Location
June	Doe 1, Doe 3	Shreveport
Bossier	Doe 2	Bossier City
Causeway	Doe 2, Doe 4	Metairie
Women's Health	Doe 5, Doe 6	New Orleans
Delta	Doe 5	Baton Rouge

Doe 3 has had admitting privileges at two Shreveport hospitals for decades and maintained those privileges throughout this case. ROA.7653–7654. The remaining

[3] The doctors' names are in the record under seal. ROA.13153. Although some of the doctors are women, Louisiana will employ male pronouns. App. 5a n.4.

doctors did not have privileges at the time Act 620 was enacted, although three maintained privileges earlier in their careers *while providing abortions*. ROA.7825–7826; ROA.14137 (18:17–25, 19:1–15); see also ROA.905.

2. The status of the Louisiana abortion providers changed during the pendency of the case. Doe 4—who was in his 80's—retired, ROA.3966; App. 11a, and Causeway and Bossier voluntarily surrendered their licenses while Act 620 was enjoined. Importantly, Plaintiffs concede those clinic closures were wholly unrelated to Act 620. Pet. at 6 n.4. Doe 2 affiliated with the Plaintiff clinic as a backup abortion provider. ROA.4172. Meanwhile, Doe 2 and Doe 5 received hospital privileges in New Orleans. ROA.7835–7837, ROA.14169 (37:22–38:1).

The parties do not dispute that Doe 5's privileges satisfy Act 620, but do dispute the legal adequacy of Doe 2's privileges. Kathy Kliebert, then-Secretary of the Louisiana Department of Health, submitted a sworn declaration stating the Department's position that Doe 2's privileges *would* allow him to continue performing abortions in the New Orleans area after Causeway's closure (should Women's Health in New Orleans wish to hire him). ROA.10800–10802. She also testified to that effect at trial. ROA.8031–8033. Notwithstanding the State's approval, Plaintiffs argued Doe 2's privileges would *not* meet the requirements of Act 620. ROA.7841:5–11. Doe 2's expressed worry was that LDH at some point in the future "may change [its] view" about the meaning of

Act 620. ROA.7868:13–21. Second-guessing Secretary Kliebert's construction of State law, the district court agreed Doe 2's privileges did not qualify, App. 238a, and the Fifth Circuit agreed on that point based on its reading of the statute, App. 43a–44a n.58. Regardless of Doe 2's privileges, two clinics (the Plaintiff clinic and Women's Health) undisputedly would have at least one qualifying doctor.

The record does not reflect changes in the two years since the district court's decision. But Louisiana represents that the locations of the Doe doctors have changed and that other doctors have since entered abortion practice in the State.

3. Evidence on the effects of Act 620

1. The record shows that Act 620's hospital admitting-privileges requirement would address serious safety concerns relating to the lack of any meaningful credentialing review of doctors who provide abortions in Louisiana. Doe 3, the Plaintiff clinic's medical director, admitted he hired a radiologist and an ophthalmologist to perform abortions. ROA.7690–7691. When hiring doctors, he performs *no* background check and makes *no* inquiry into an applicant's previous training. ROA.7692–7694. Such poor hiring and credentialing practices are common among other Louisiana abortion clinics, which, "beyond ensuring that the provider has a current medical license, do not appear to undertake *any* review of a provider's competency." App. 35a–36a (emphasis added); ROA.7692–7694; see also, *e.g.*, ROA.14155 (116:14–25), ROA.14156 (117–

119). The doctors who do perform abortions in Louisiana have a long history of professional discipline.[4]

The poor credentialing of Louisiana abortion doctors, moreover, exists against a backdrop of serious regulatory violations the panel characterized as "horrifying." App. 38a n.56.[5] It was undisputed at trial that the Plaintiff clinic has been cited for improper administration of intravenous medications and gas, ROA.7598:3–8, failure to document patients' physical examinations, ROA.7599:5–12, administration of anesthesia by employees who were not qualified,

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[4] See ROA.15066–15078 (sealed exhibit collecting Louisiana State Board of Medical Examiners disciplinary records for two Louisiana abortion doctors); *In the Matter of: Kevin Govan Work*, No. 2019-A-011 (La. Bd. Med. Exam'rs Apr. 15, 2019) (prohibiting doctor from performing abortions); *In the Matter of: Victor Brown*, No. 06-A-021 (La. Bd. Med. Exam'rs Sept. 17, 2007); *In the Matter of: A. James Whitmore*, No. 00-A-021 (La. Bd. Med. Exam'rs Jan. 22, 2002); see also *Amicus* Br. of Ams. United for Life (No. 18-1460) at 24–30.

[5] The panel considered those violations "unrelated" to the merits. App. 38a n.56. Louisiana submits that the poor safety and compliance records of Louisiana abortion clinics amplifies the importance of ensuring the doctors themselves meet high professional standards. The reported violations cover some of the aspects of professional competence hospitals review in their admitting-privilege decisions. Because the proven public health problems are reasonably related to the State's rational basis for Act 620, they cannot be irrelevant. See *Gonzales* v. *Carhart*, 550 U.S. 124, 158 (2007); *Washington* v. *Glucksberg*, 521 U.S. 702, 728, 735 (1997); *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 487–488 (1955).

ROA.7599–7600, inaccurate reporting of abortion procedures to the State, ROA.7609–7611, and "irregularity" in calculation of medication dosages, ROA.7614:3–6, among other violations. In 2012, LDH revoked the Plaintiff clinic's license for failure to comply with health and safety regulations. ROA.7602–7605, ROA.11474–11477. Other Louisiana abortion clinics and their staff admitted to similar health and safety violations and poor compliance. See ROA.14023–14025 (36:6–41:2), ROA.14049–14056 (161:7–191:1); *Amicus* Br. of Ams. United for Life (No. 18-1460) at 5–24; see also *Amicus* Br. of Am. Ctr. for Law & Justice (No. 18-1460) (discussing dangers faced by women obtaining abortions).

Although Plaintiffs question whether their poor credentialing practices have adverse consequences for patient health, their speculation is self-serving and uninformed because their knowledge of their patients' post-operation health, they concede, is limited at best. Abortion patients are supposed to return to the clinic for a follow-up appointment, but very few do. ROA.7574–7575, ROA.7891–7895. As a result, Plaintiffs and other Louisiana abortion providers repeatedly admitted they actually have no idea how many complications result from the abortions they perform. ROA.7574–7575, ROA.7579–7580, ROA.7891–7895, ROA.14034 (92:7–22), ROA.14177–14179 (80:3–82:12).

Act 620—which makes hospital credentialing a threshold for providing abortions in Louisiana—offers a partial solution. Louisiana's expert on credentialing,

Dr. Robert Marier, testified that hospitals undertake a detailed examination of a doctor's competency before granting privileges. ROA.8330–8331. Doe 3 agreed, based on his own experience on hospital credentialing committees, see ROA.7691:7–25, ROA.7692:1–13, as did Plaintiffs' expert. ROA.8793:17–25, ROA.8796:17–25, ROA.8842:7–21, ROA.10864; see also ROA.14155 (116:14–25), ROA.14156 (117–119). Louisiana anticipated that better-credentialed abortion providers would better serve the health of the State's women who choose abortions and provide a similar local safety-net as that provided in facilities where similarly invasive, high-volume surgical procedures occur.

2. The record also shows that hospital admitting privileges would help women who suffer complications from surgical abortions receive appropriate care. Previously, Louisiana abortion clinics were required to maintain a transfer agreement with a local hospital. La. Admin. Code § 48:4407(A)(3) (2003). But a transfer agreement would not allow the doctor who performed the abortion to treat the patient's complications. It would also allow the doctor to *avoid* responsibility if the patient did need hospitalization. ROA.8336–8337 (discussing risk of patient abandonment). The Plaintiff clinic, furthermore, had been cited for relying only on a *verbal* transfer agreement, ROA.7619:2–13, which even Plaintiffs' expert agreed was inconsistent with the standard of care. ROA.8856–8857.

The need for efficient, direct hospital transfers and continuity of care for injured surgical patients is not theoretical. Abortion patients are no different than other patients. Two of the abortion providers involved in this case (Doe 1 and Doe 3) on separate occasions perforated a woman's uterus during an abortion, requiring immediate hospitalization. Doe 3 recounted at trial that—thanks to his admitting privileges at local hospitals—he accompanied both patients to the hospital and performed the necessary surgeries to repair the damage. ROA.7660:14–23, ROA.7695:11–25, ROA.7696:1–13, ROA.7662:9–20.[6] Even Plaintiffs' own expert agreed that admitting privileges contribute to continuity of care in cases of surgical complications. ROA.7484–7485, ROA.10864–10865.

3. Contrary to the bare allegations in their pleadings, the evidence established that Louisiana abortion providers *can* obtain admitting privileges. Doe 3 had maintained qualifying admitting privileges for decades at two Shreveport-area hospitals, and at least three other providers had maintained privileges as

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[6] The parties disputed the significance of that testimony. The Fifth Circuit agreed with Plaintiffs that Louisiana had not proved "that, had Doe 3 not been available, the women's health would have suffered." App. 38a n.56. But there is no disagreement Doe 3 used his admitting privileges; using them ensured continuity of care; and his presence reduced the *likelihood* of adverse medical outcomes—which provides an ample policy basis for the admitting-privileges requirement. Requiring the State to prove the patient's health would have suffered had he not done so is an impossible standard.

well. ROA.7825–7826, ROA.14137 (18:17–25, 19:1–15), ROA.905. So, *four of the six Does had obtained and maintained admitting privileges before Act 620.*

Plaintiffs claimed that abortion providers do not admit enough patients to qualify for admitting privileges. But the evidence was to the contrary. For example, Louisiana hospitals offer and customarily extend "courtesy" privileges to ensure that doctors who rarely admit patients have access to a hospital. ROA.8323–8325, ROA.8344–8345, ROA.8376:13–20, ROA.8379–8385. Doe 5 obtained qualifying courtesy privileges in New Orleans. ROA.14038 (108:18–25), ROA.14343, ROA.14347–14349. Doe 2's privileges were courtesy privileges as well. ROA.17032–17038.[7]

While some Louisiana abortion providers did not obtain privileges, Plaintiffs presented no competent, non-hearsay evidence about why any hospital had denied or failed to act on any privileges application. The most apparent reason for that failure, as Plaintiffs' own evidence established, was that Doe 2, Doe 5, and Doe 6 did not make good-faith efforts to obtain privileges.

Doe 2 failed to even apply at two Shreveport-area hospitals. Notably, he did not apply to a hospital where he previously held privileges, and where Doe 3 has privileges now. ROA.7849–7850, ROA.7897:6–15;

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[7] Plaintiffs' trial experts are abortion providers who maintain privileges at hospitals in other States. ROA.7725–7726.

App. 42a–43a. At one hospital to which Doe 2 did apply, he refused to follow basic instructions and provided insufficient documentation for the application to be considered, then declined to remedy this defect after the hospital sent a follow-up request. ROA.13061–13064. Doe 5 failed to make good-faith efforts to arrange a doctor to cover for him at a Baton Rouge hospital willing to grant privileges. ROA.9925, ROA.14169–14170 (39:20–41:1). Doe 6, who provides abortions in the New Orleans area, applied to only *one* of *nine* qualifying hospitals and did not apply to the hospital where Doe 5 was granted privileges. App. 24a; ROA.10787, ROA.14057 (247:7–248:5).[8]

The only doctor who might have found it difficult to obtain privileges was Doe 1, who, as far as the record reflects, seems *unqualified* to perform abortions much less obtain admitting privileges.[9] Doe 1, a graduate of Saba University medical school in the Dutch

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[8] Several abortion providers declared or testified that they refused to apply to hospitals affiliated with the Catholic Church. See ROA.7849–7850 (Doe 2), ROA.9925 (Doe 5), ROA.10786 (Doe 6); see also ROA.9948 (administrator of Plaintiff clinic discussing Doe 1's applications), ROA.10174–10175 (Plaintiffs' expert). But Doe 3 conceded he had privileges at Christus, a Catholic hospital, where other doctors are aware he performs abortions. ROA.7716:1–19. Plaintiffs had no good explanation for their systematic bias against Catholic-affiliated institutions.

[9] Doe 1's good faith is also highly questionable. See ROA.8177:5–14 (admitting he originally applied for privileges for his addiction medicine practice); ROA.11800 (sealed exhibit containing communication between Doe 1 and hospital).

Caribbean, ROA.8114:10–15, ROA.8204:11–13, is not an obstetrician or gynecologist. Instead he is a specialist in "Family Medicine and Addiction Medicine"—but has never actually practiced family medicine. ROA.8115:13–20, ROA.8204:20–22. Doe 1 also conceded he had no training in abortion practice during medical school or his residency; he was principally taught on-the-job by Doe 3. ROA.8140:2–14, ROA.8204–8205; see also ROA.7673–7678.

B. Proceedings Below

1. On August 22, 2014—shortly before Act 620 took effect—Plaintiffs filed this lawsuit. Plaintiffs' principal claim is that Act 620 is facially invalid because it imposes an "undue burden" on their patients' substantive due process right to choose an abortion.[10] Although Plaintiffs do not include any past or prospective abortion patients, Plaintiffs claim that they are suing "on behalf of [their] patients." *E.g.*, ROA.351.[11]

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[10] *E.g.*, *Gonzales*, 550 U.S. at 146 (explaining that an "undue burden" arises from regulations whose "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability'") (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 878 (1992) (joint opinion)); *Hellerstedt*, 136 S. Ct. at 2300 (same).

[11] Bossier and Causeway were originally Plaintiffs as well. Delta, Women's Health, Doe 5, and Doe 6 filed a separate challenge that was consolidated with Plaintiffs' lawsuit, but that suit was voluntarily dismissed as well. ROA.674; *June Med. Servs.* v. *Kliebert*, No. 3:14-cv-00525 (M.D. La.), Doc. 77.

After discovery and a six-day bench trial, the district court preliminarily enjoined Act 620. ROA.3748–3859. The Fifth Circuit granted a stay February 24, 2016, allowing Act 620 to go fully into effect "for the first time." ROA.3942–3957; *June Med. Servs.* v. *Gee*, 814 F.3d 319 (5th Cir. 2016). This Court vacated that stay eight days later. *June Med. Servs.* v. *Gee*, 136 S. Ct. 1354 (2016). On June 27, 2016, this Court decided *Hellerstedt*, invalidating a Texas law that encompassed admitting privileges and on August 24, 2016, the Fifth Circuit granted Louisiana's motion to remand for further proceedings. ROA.4081. The district court issued an opinion and judgment permanently enjoining Act 620 April 26, 2017.

2. Louisiana appealed and the Fifth Circuit reversed. The majority held that "the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." App. 39a. The majority then reasoned that (1) it is Plaintiffs' burden to establish that Act 620 *creates* an obstacle to abortion, App. 40a, and (2) that if providers *can* obtain privileges, "no other burdens result" from Act 620, *id.* Applying clear error review, the panel scrutinized Louisiana abortion providers' efforts to obtain privileges and concluded—based on the evidence described above—that Doe 2, Doe 5, and Doe 6 had failed to make good-faith efforts to obtain privileges. App. 42a–46a. If the doctors had all sought privileges in good faith, only Doe 1 possibly would not have obtained

them,[12] all three clinics would have doctors with admitting privileges, and *no* Louisiana clinic would close as a result of Act 620.

The panel next considered the effect on Louisiana abortion patients if Doe 2, Doe 5, and Doe 6 obtained privileges by good-faith compliance efforts. In such a circumstance, 70% of patients (those served by Delta and Women's Health) would not be affected at all. App. 55a–56a. While patients of the Plaintiff clinic *might* be affected if Doe 1 left practice, Doe 2 and Doe 3 could make up the difference with at most an hour-long increase in patient wait times. App. 52a–53a. "Instead of demonstrating an undue burden on a large fraction of women, June Medical at most shows an insubstantial burden on a small fraction of women. That falls far short of a successful facial challenge." App. 58a.

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

SUMMARY OF ARGUMENT

The Fifth Circuit opinion reflects faithful application of this Court's precedents. In the lower courts,

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[12] The Fifth Circuit observed it is "possible" Doe 1 could still obtain privileges if he resolves a "communication problem" with one hospital, but did not find the district court clearly erred in finding a good-faith effort. App. 42a.

Plaintiffs advanced the same interpretations of precedent as those adopted by the Fifth Circuit. Plaintiffs now object to the majority's identification of clear factual error in the district court's decision. But reviewing for clear error is the responsibility of every court of appeals. And Plaintiffs' plea for error correction is made without *any* citations to the record. Insofar as review is warranted, it is only to reject Plaintiffs' newly proffered misinterpretations of *Hellerstedt* that gave rise to the Petition in the first place.

I. Plaintiffs' legal arguments all involve supposed misapplications of *Hellerstedt*. Plaintiffs identify no circuit splits or other conflicts. They instead claim incorrectly that *Hellerstedt*:

A. resolved for all jurisdictions for all time that admitting privileges offer no health benefit, foreclosing State legislatures and lower courts from ever reaching different decisions on different records in different States; Pet. at 21–26,

B. established that foreseeably *possible* burdens of an abortion regulation *must* be attributed to the regulation, even where the evidence does not support causation and even where abortion providers act in bad faith to create those burdens; *id.* at 26–30, and

C. abolished the "substantial obstacle" standard that has governed abortion litigation

> since *Casey*, notwithstanding that *Hellerstedt* reaffirmed that standard in its first sentence and applied it throughout, *id.* at 31–32.

Plaintiffs are not asking this Court to *apply Hellerstedt*, but to *transform* it into something unrecognizable and unworkable. Indeed, Plaintiffs appear to view *Hellerstedt* as a vehicle to wipe out virtually all abortion regulation, untethered to any recognizable precedent.[13] In any event, the interpretations Plaintiffs now call error are the very same interpretations they urged in the lower courts—a fact that precludes Plaintiffs from pressing them now.

That leaves only Plaintiffs' arguments about the Fifth Circuit's identification of clear factual errors by the district court. Those arguments are not worthy of review under this Court's usual criteria. And Plaintiffs ignore the weight of factual evidence supporting the panel majority. There is no reason for this Court to retread the same ground.

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[13] See, for example, abortion providers' recent reliance on *Hellerstedt* to challenge the "cumulative" effects of entire State licensing regimes. *June Med. Servs.* v. *Gee*, No. 3:16-cv-444 (M.D. La.), Doc. 88 at 39; *June Med. Servs.* v. *Gee*, No. 3:17-cv-404 (M.D. La.), Doc. 87 at 53; *Jackson Women's Health Org.* v. *Currier*, No. 3:18-cv-171 (S.D. Miss.), Doc. 23 at 55; *Whole Woman's Health All.* v. *Paxton*, No. 1:18-cv-500 (W.D. Tex.), Doc. 1 at 39; *Whole Woman's Health All.* v. *Hill*, No. 1:18-cv-1904 (S.D. Ind.), Doc. 1 at 39; *Falls Church Med. Ctr.* v. *Oliver*, No. 3:18-cv-428 (E.D. Va.), Doc. 41 at 62; *Planned Parenthood Ariz.* v. *Brnovich*, No. 4:19-cv-207 (D. Ariz.), Doc. 1 at 54.

II. Plaintiffs' petition also runs into procedural obstacles. One is that Plaintiffs never cite the underlying *factual record*. Assuming the case hinges on the Fifth Circuit's treatment of the facts, Plaintiff's failure to analyze the record constitutes (1) a default of Plaintiffs' procedural obligations under this Court's Rules, (2) an implied concession that Plaintiffs cannot win if this Court repeats the Fifth Circuit's factual analysis, and (3) a sign that the case is too fact-bound to warrant review. Plaintiffs also ignore several complex factual and legal issues (including at least one *State*-law issue) that would have to be addressed if the Court granted certiorari and which provide alternative grounds to affirm.

III. To the extent this case raises any issues deserving of review, it illustrates *Hellerstedt*'s susceptibility to radical misinterpretations that threaten reasonable State regulation. Louisiana opposes certiorari, but if this Court believes the case deserves review, it should clarify or overrule *Hellerstedt*.

ARGUMENT

I. PLAINTIFFS PRESENT NO LEGAL ERROR JUSTIFYING FURTHER REVIEW BY THIS COURT.

Plaintiffs present no conflict with any of this Court's cases, including *Hellerstedt*, and no circuit split. All that remains is an argument for correcting the panel's application of clear-error review. But Plaintiffs cannot show factual errors by the Fifth Circuit, and do not even cite the record. In short, Plaintiffs seek fact-bound error correction in a situation

that contains no error: the weakest possible case for review. Granting the Petition would invite use of certiorari review merely to relitigate basic determinations of fact.

A. *Hellerstedt* does not preclude, and affirmatively supports, fact-specific review of the public health benefits of Act 620.

Plaintiffs' lead argument is that *Hellerstedt* determined as a matter of law, for all future State legislatures and cases, that admitting-privileges requirements for abortion providers *never* have public health benefits. Pet. at 21–26. Under that theory, the Fifth Circuit not only erred in finding Act 620 serves Louisiana women through improved credentialing of abortion providers, but also was foreclosed by *Hellerstedt* from even *considering* the issue in light of the State-specific factual record. Plaintiffs say these obviously fact-bound considerations create a conflict in "legal conclusion[s]." *Id.* at 23.

That cannot be right. *Hellerstedt*—which addressed an as-applied challenge to a Texas law, 136 S. Ct. at 2301—establishes that *facts* decide abortion cases, and that unquestioning judicial deference to litigants' factual assertions is forbidden. *Id.* at 2310. On the basis of that reasoning, the *Hellerstedt* Court painstakingly evaluated the record evidence. *Id.* at 2310–2318. Because the analysis *Hellerstedt* requires is tied to case-specific records, failures of proof in *Hellerstedt* cannot foreclose Louisiana from developing a

better record showing it regulated to address Louisiana-specific needs. At least two other circuit courts have interpreted *Hellerstedt* in that way. *Comprehensive Health of Planned Parenthood Great Plains* v. *Hawley*, 903 F.3d 750, 758 (8th Cir. 2018) (reversing injunction against State admitting-privileges law because "*Hellerstedt* did not find, as a matter of law, that abortion was inherently safe or that provisions similar to the laws it considered would never be constitutional"); see also *Planned Parenthood of Ind. & Ky.* v. *Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 817 (7th Cir. 2018), *pet. for cert. filed* (U.S. Feb. 4, 2019) (No. 18-1019) ("An abortion statute valid as to one set of facts and external circumstances can be invalid as to another.") (citing *Hellerstedt*). Plaintiffs cite no case to the contrary.

Plaintiffs also ignore *Hellerstedt*'s procedural history. *Hellerstedt* held that although abortion providers had lost a pre-enforcement facial challenge to the Texas law, post-enforcement factual developments opened the door for an as-applied challenge. 136 S. Ct. at 2304–2307. That shows that an admitting-privileges statute *can* be held facially constitutional if a plaintiff fails to carry its burden of proof. Likewise, if the prior facial challenge did not control the as-applied challenge in *Hellerstedt*, the case-specific facts in *Hellerstedt* can hardly resolve subsequent facial challenges.

Contrary to their new theory, Plaintiffs treated *Hellerstedt* in precisely this fact-sensitive manner in the lower courts. The supplemental proposed findings

of fact and conclusions of law Plaintiffs submitted after *Hellerstedt* insisted the district court "must consider [] *evidence* regarding whether and how the restriction furthers the legislature's purported interest, which in this case, includes the Act's medical reasonableness[.]" ROA.4093 (emphasis added); see also ROA.4133–4134. Plaintiffs continued to argue before the Fifth Circuit that *Hellerstedt* required close review of the record. See Appellee Brief at 20–23, No. 17-30397 (5th Cir.) ("Appellee Br."). Insofar as Plaintiffs object that the panel scrutinized the facts, they invited any error and cannot raise it now. *E.g.*, *United States* v. *Galletti*, 541 U.S. 114, 120 n.2 (2004); *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257, 259 (1987).

Plaintiffs' petition identifies no way in which the Fifth Circuit misapplied *Hellerstedt*. Contrary to the Petition (Pet. at 25), the Fifth Circuit did not "uncritical[ly] defer[]" to Louisiana's asserted interests as *Hellerstedt* forbids. See 136 S. Ct. at 2310 (quotes and alteration omitted). Rather, the majority carefully examined the State's arguments, accepting some and rejecting others. App. 35a–39a & n.56. Plaintiffs accuse the majority of "*assum[ing]* that physician credentialing *necessarily* confers a health or safety benefit." Pet. at 25. But the Fifth Circuit concluded the benefit of additional credentialing was small precisely because specific health outcomes were uncertain. App. 39a. The Fifth Circuit's scrutiny of Louisiana's proffered health benefits based on the factual record, just as *Hellerstedt* commanded.

Plaintiffs want this Court to reconsider whether Act 620 furthers credentialing of abortion doctors in Louisiana. But the record amply supports the Fifth Circuit's view that Act 620 creates at least some health benefit for Louisiana women by means of doctor credentialing. App. 39a. There is no dispute that doctor competency matters, even in abortion practice, and that doctors who perform abortions in Louisiana should be adequately credentialed. Nor is there any dispute that, absent Act 620, Louisiana hospitals credential doctors more thoroughly than Louisiana abortion clinics—which barely credential them at all. At any rate, redoing the panel's work on that question is a fact-bound analysis with little wider application.

Plaintiffs resort instead to supposed "'general fact[s]'" about credentialing mentioned in *Hellerstedt*, which are different from the facts *in Louisiana*. Pet. at 23. Plaintiffs argue that hospitals might deny privileges for reasons other than competency. *Id.* at 24. But those claims are unsupported by evidence[14] and

[14] Plaintiffs claim that hospitals might discriminate against abortion providers. Pet. at 11, 24. Such discrimination would violate federal law. See 42 U.S.C. § 300a–7(c)(1)(B); *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 599 n.13 (5th Cir. 2014); *Planned Parenthood of Wis.* v. *Van Hollen*, 738 F.3d 786, 791–92 (7th Cir. 2013). The record not only lacks evidence of discrimination against any applicant, it flatly contradicts that claim. See ROA.7686:1–10, ROA.7706:7–22, ROA.7715–7716. Hospitals, moreover, are mandatory reporters to the National Practitioner Data Bank, 42 U.S.C. § 11133, which incentivizes due process (with appeal rights) on credentialing decisions. 42 U.S.C. §§ 11111(a), 11112.

are directly contradicted by abortion providers' *success* in obtaining privileges. The Fifth Circuit's identification of a "minimal" benefit as a factual matter does not call for review.

Plaintiffs' final argument hinges upon Act 620's 30-mile radius—similar to the proximity required for admitting privileges necessary for other outpatient surgeries—and the fact that initial medical licensure in Louisiana involves a background check. Pet. at 25–26 & n.13. That shows how far-reaching Plaintiffs' theory really is. Plaintiffs object that Louisiana has aligned credentialing of abortion providers with all doctors performing other outpatient surgeries, which implies either (1) that *no* outpatient surgeries should be subject to an admitting-privileges requirement, or (2) that Louisiana is constitutionally compelled to grant abortion providers less-protective *exceptions* from generally applicable safety regulations. Either way, a decision in Plaintiffs' favor would not apply *Hellerstedt*, but go far beyond it to destabilize *all* medical regulation.

B. *Hellerstedt* affirmatively supports fact-specific review of Act 620's alleged burdens.

Plaintiffs next say *Hellerstedt* precludes case-specific analysis regarding whether Louisiana abortion providers manufactured their alleged harms. Pet. at 26–30. The Fifth Circuit concluded that abortion providers' failure to make good-faith compliance efforts contributed to Plaintiffs' failure to prove causation.

But Plaintiffs argue that because this Court found causation in *Hellerstedt* as a factual matter, causation must exist here too *as a matter of law*.[15]

Hellerstedt did not resolve causation in cases with different records. It simply declined to speculate that "other evidence, not presented at trial or credited by the District Court," might explain clinic closures in Texas. 136 S. Ct. at 2313. *Hellerstedt* rejected Texas' challenge to causation, in other words, because there was no evidence to support it. Because the Louisiana record *does* show "unrelated reasons" why abortion doctors have failed to obtain privileges (or for clinic closures), *id.* at 2313, nothing in *Hellerstedt* forbids a different result. That is not holding Plaintiffs to "a higher standard of causation," Pet. at 29; it is evaluating the burdens of abortion regulations in light of evidence.

Plaintiffs' other novel legal theory is that "*foreseeable*" consequences of an abortion law *must* be attributed to the law, "[e]ven where the injuries are ultimately inflicted by a third party or other intervening cause," or self-inflicted to advance Plaintiffs' litigation cause. Pet. at 30 (emphasis added). Here, according to Plaintiffs, the fact that some abortion providers did

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[15] Plaintiffs point to no case obliging lower courts to find that an admitting-privilege requirement creates burdens for women seeking abortions. At least one circuit has confirmed post-*Hellerstedt* that the inquiry is a case-specific one tied to record evidence. *Planned Parenthood of Ark. & E. Okla.* v. *Jegley*, 864 F.3d 953, 959–60 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018).

not obtain privileges is subject to an irrebuttable presumption of "proximate causation," notwithstanding that the record (1) makes a detailed analysis possible, and (2) shows Plaintiffs' unclean hands. *Id.*

Plaintiffs' new position on the causation standard departs from *any* recognizable standard applied to a constitutional challenge to a State law. Lower courts agree that intervening causes can break the chain of causation in Section 1983 cases. *Bodine* v. *Warwick*, 72 F.3d 393, 400 (3d Cir. 1995); *Wray* v. *City of N.Y.*, 490 F.3d 189, 193 (2d Cir. 2007); *Jones* v. *Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999). Plaintiffs' theory would change that uncontroversial rule and give abortion providers freedom to invalidate regulations for virtually any reason: Whenever a burden on patients *might* result, abortion providers can create or exacerbate such burdens, blame the State, and obtain relief. Plaintiffs cite no legal support for this theory of causation.

Furthermore, the lower courts' examination of causation was, at worst, invited error. Plaintiffs' proposed findings of fact and conclusions of law argued that Louisiana abortion providers made good-faith efforts to obtain privileges. ROA.3800, ROA.3805, ROA.3818, ROA.3820, ROA.3823. The doctors' efforts to obtain privileges were raised in Fifth Circuit briefing, see Appellant Brief at 32–33, No. 17-30397 (5th Cir.), and discussed at oral argument. The panel accordingly addressed the question. Now that the panel has conducted the review Plaintiffs invited, Plaintiffs cannot reverse course because they lost.

Lacking a viable legal issue, all Plaintiffs offer are factual disputes among the lower court opinions about particular doctors' applications to particular hospitals. Pet. at 27. But as discussed above, ample record evidence supports the Fifth Circuit's resolution, which held Plaintiffs to their proper burden in a facial challenge to a State law. Retreading that ground serves no purpose.

C. *Hellerstedt* affirmed and applied the "substantial obstacle" test.

Plaintiffs finally say the Fifth Circuit violated *Hellerstedt* by holding that Act 620 "must be upheld because its burdens do not rise to the level of a substantial obstacle." Pet. at 31. Plaintiffs argue that the sole inquiry should have been to balance the benefits and alleged burdens of Act 620 *without* considering the existence of a substantial obstacle. *Id.*

Plaintiffs have also forfeited this argument. Post-*Hellerstedt*, Plaintiffs argued to the district court that Act 620 was invalid because it created a substantial obstacle to the abortion decision. ROA.4129–4130, ROA.4134–4136, ROA.4137. Plaintiffs appeared to argue on appeal that the *Hellerstedt* standard involved a "balancing" test, but continued to treat the "substantial obstacle" standard as part of the analysis. Appellee Br. at 20. Although the lower court judges interpreted the substantial-obstacle standard in different ways, each one accepted Plaintiffs' invitation: the district court, ROA.4191–4192, ROA.4279, the panel majority, App. 29a–30a, the dissent, App. 60a, and the

principal dissent from rehearing *en banc*, App. 108a. Now, however, Plaintiffs try to move the goal posts.

Even if Plaintiffs had raised the argument appropriately, it conflicts with this Court's abortion precedents. Ever since *Casey* introduced the "undue burden" test, the test was tethered to a substantial-obstacle analysis. As the joint opinion put it, "[a] finding of an undue burden is a *shorthand* for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion[.]" 505 U.S. at 877 (emphasis added). *Casey*'s analysis shows, furthermore, that not all burdens amount to substantial obstacles. *Id.* at 874 ("The fact that a law which serves a valid purpose … has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."). This Court has repeatedly required proof of a substantial obstacle as part of the undue burden test ever since. See *Gonzales*, 550 U.S. at 146, 156, 160, 165; *Stenberg* v. *Carhart*, 530 U.S. 914, 921 (2000); *Mazurek* v. *Armstrong*, 520 U.S. 968, 971–972, 973, 974 n.2 (1997).

Plaintiffs nevertheless argue *Hellerstedt* excised the substantial-obstacle requirement and replaced it with a free-floating balancing of benefits and burdens. Not so. Indeed, *the very first sentence* of the majority opinion reaffirmed that challengers to abortion laws must prove a substantial obstacle. 136 S. Ct. at 2300 (quoting *Casey*). Showing its fidelity to this precedent,

Hellerstedt explicitly examined the record for substantial obstacles. *Id.* at 2309, 2312, 2313, 2316, 2318, 2320.

Although the *Hellerstedt* majority reversed the Fifth Circuit's former formulation of the undue burden test, it left the substantial-obstacle requirement intact. *Id.* at 2309–2310. *Hellerstedt* instead specified that when a State regulates solely in the interest of protecting women's health, courts must independently examine (1) "the existence or nonexistence of medical benefits" resulting from a challenged law, and (2) the benefits and burdens of a law in light of the record evidence. *Id.* That is exactly how the panel majority understood *Hellerstedt*. App. 30a (holding *Hellerstedt* established a balancing test that complements the traditional substantial-obstacle analysis).

Plaintiffs cite no circuit that has abolished a substantial-obstacle requirement after *Hellerstedt* and Louisiana is aware of none. At least five circuits (in addition to the Fifth) have continued to apply it. *Planned Parenthood of Greater Ohio* v. *Hodges*, 917 F.3d 908, 916 (6th Cir. 2019); *Planned Parenthood of Ind. & Ky.*, 896 F.3d at 817; *Planned Parenthood of Ark. & E. Okla.*, 864 F.3d at 958; *W. Ala. Women's Ctr.* v. *Williamson*, 900 F.3d 1310, 1317 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2606 (2019); *J.D.* v. *Azar*, 925 F.3d 1291, 1325 (D.C. Cir. 2019).

The Fifth Circuit restated the test correctly and dutifully followed this Court's direction in applying it. Plaintiffs, by contrast, are not arguing that this Court

should correct a misstatement or misapplication of *Hellerstedt*; they are effectively arguing that *Hellerstedt* should be overruled.

II. THE CASE IS PROCEDURALLY UNSUITED TO FURTHER REVIEW.

Review would not be a sound use of this Court's resources for several additional reasons.

A. Plaintiffs have failed to carry their burden of citing "whatever is essential to ready and adequate understanding of the points requiring consideration."

It is Plaintiffs' burden to direct this Court to "whatever is essential to ready and adequate understanding of the points requiring consideration." S. Ct. R. 14.4. That rule helps this Court determine whether factual or legal issues are really at stake and whether fact-specific aspects of the record might prevent the Court from reaching legal questions. But Plaintiffs have not included a *single* citation to the evidentiary record. This is a curious omission, because *Hellerstedt* calls for detailed review considering the correct standards. Plaintiffs' failure to cite to or properly challenge any particular factual conclusion, at a minimum, is an implied concession that the facts do not support them.

Plaintiffs' unwillingness to cite facts also increases the likelihood the Court would dismiss the writ as improvidently granted once it reviews the record, one of the very results Rule 14.4 is intended to prevent. Only by considering the relevant factual context, which

Plaintiffs should not just leave to the Court to identify, could the Court determine the propriety of reviewing the legal issues the Petition raises. The legal standard the Court ultimately endorses may not even have any impact on the outcome of the case. The fact that the abortion providers were the very *architects* of any purported burdens would justify the panel's conclusion that Plaintiffs failed to prove an undue burden. App. 41a ("…the vast majority sat on their hands…"). There is no point in the Court devoting resources to a case in which Plaintiffs have not proven factual suitability for review.

B. Multiple complex issues of fact and law would hamper review of the issues Plaintiffs raise.

The case's complex issues also render it a poor vehicle for resolving legal questions.[16]

1. If the Court undertook plenary review, complete analysis would cover not just the grounds of the opinion, but alternative grounds that the Fifth Circuit did not reach or decided against Louisiana. One example is the panel's holding that Doe 3's undisputed use of admitting privileges to care for abortion patients who experienced complications—a decision he presumably considered better for the women's health than simply sending them to the emergency room—did not bear on

[16] Plaintiffs' lack of third-party standing, as shown in Defendants' Conditional Cross-Petition, No. 18-1460, also illustrates why the Petition is a poor vehicle.

Act 620's medical benefits. App. 38a n.56. This Court would have to reconsider whether those instances corroborate Act 620's health benefits.

Another is the panel's decision not to defer to former Secretary Kliebert's position that Doe 2 obtained legally qualifying admitting privileges in New Orleans. That legal conclusion by the Fifth Circuit amplified the alleged burdens of Act 620 and conflicts with *Pennhurst State School & Hospital* v. *Halderman*, which held that a federal court may not "instruct [a] state official[] on how to conform [her] conduct to state law." 465 U.S. 89, 106 (1984); see *June Med. Servs.*, 814 F.3d at 327, *vacated on other grounds*, 136 S. Ct. 1354. The adequacy of Doe 2's privileges is one of *State* law that only a Louisiana court can resolve definitively. Resources the Court spends analyzing the burdens of Act 620 would thus be wasted on an *Erie* guess that has significant consequences for important State sovereign interests.[17]

Then there is the extensive lower court record on clinic capacity and patients' travel distances. Because of the small number of Louisiana abortion providers, that record is far more clinic- and doctor-specific than

[17] In another example of Plaintiffs "s[itting] on their hands," App. 41a, Plaintiffs *have* a legal avenue they elected not to pursue, which would allow them to obtain a definitive interpretation of State law and the Secretary's application of Act 620 to Doe 2's privileges. They could have asked the Secretary for a declaratory order, which under Louisiana law "shall have the same status as agency decisions or orders in adjudicated cases." La. Rev. Stat. § 49:962.

the record in *Hellerstedt*. App. 40a. The panel did not need to reach that subject in detail, and Plaintiffs leave it unaddressed. But if Act 620 might lead to clinic closures, that evidence would be crucial to analyzing any resulting burdens.

In short, the error-correction Plaintiffs request would require a massive commitment of resources to a case-specific record with little clear significance beyond the facts.

2. As Justice Kavanaugh noted in his dissent from this Court's order granting a stay, this is a *pre-enforcement facial* challenge based on suspect *predictions* about how Act 620 will work in effect. App. 282a. Louisiana abortion providers' ability to obtain privileges can only be answered after the law goes into effect and the providers make *actual* good-faith efforts. Plaintiffs' efforts to obtain privileges since trial are not even in the record. And Plaintiffs' assumption that the facts have not changed since the district court's decision is at best speculative. Given Plaintiffs' failure to provide competent evidence about how any hospital handled any privileges application, Plaintiffs' concerns about what hospitals would do if abortion doctors *did* apply in good faith are unsubstantiated.

Unlike in *Hellerstedt*, review would be of unsupported, hypothetical burdens. The better course is to deny certiorari, which would force Louisiana abortion providers to attempt good-faith compliance before rushing to court again.

III. INSOFAR AS THE CASE MERITS REVIEW, IT IS ONLY TO CLARIFY OR LIMIT *HELLERSTEDT*.

The weakness of Plaintiffs' petition justifies denying certiorari, and that is what Louisiana asks this Court to do. Nonetheless, if this Court considers review, it should be to clarify or narrow *Hellerstedt* and clarify the *Casey* test. At a minimum, as explained above, the Court should hold that *Hellerstedt* authorizes State-specific proof of factual issues and continues to require that the Plaintiff carry a heavy burden of proof to facially invalidate a State law. It should reaffirm the *Casey* substantial-obstacle test. And it should clarify *Hellerstedt* in several other ways as well.

1. One way to clarify *Hellerstedt* is by holding that a State establishes the "benefits" of a challenged abortion regulation by proving the law rationally serves its intended purpose. That clarity would solve two problems with *Hellerstedt* illustrated by Plaintiffs' petition.

Plaintiffs argue *Hellerstedt* categorically disables Louisiana from extending a pre-existing admitting-privileges requirement from ambulatory surgical centers to abortion clinics. Public safety regulations are generally subject to rational basis review. *Casey*, 505 U.S at 884; see also *Glucksberg*, 521 U.S. at 728; *Williamson*, 348 U.S. at 488. Plaintiffs' rule thus gives abortion clinics special exemptions from health standards—an entirely backwards view, considering that abortion clinics serve vulnerable populations that

may need special protections from incompetent and unscrupulous medical providers. *E.g.*, *Planned Parenthood Ass'n of Kan. City, Mo.* v. *Ashcroft*, 462 U.S. 476, 488 & n.12 (1983).

Plaintiffs also seem to argue *Hellerstedt* requires States to establish *sufficient* benefits to overcome an abortion regulation's alleged burdens. Pet. at 31–32. That flips the burden of proof to facially invalidate a State law on its head. It is also a blatant invitation for judicial policymaking; at a minimum, it will be difficult to avoid that *impression* if abortion cases were decided under Plaintiffs' analysis. In the long run, such an interpretation of *Hellerstedt (*and *Casey* to the extent *Hellerstedt* applied it) increases the likelihood of litigation and threatens the perception of federal courts' institutional legitimacy.

The solution to both problems is to clarify that a rational basis establishes a regulation's benefits—especially when a State extends a generally applicable health and safety regulation to abortion clinics. Rational laws should be upheld, provided they do not impose a substantial obstacle.

2. Another way to clarify *Hellerstedt* would be to establish that abortion regulations must burden *all* affected women to be deemed facially invalid.

The general rule in constitutional litigation is that a law is facially invalid only when it has *no* constitutional application. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); *City of L.A., Calif.* v. *Patel*, 135 S. Ct. 2443, 2451 (2015) (Fourth Amendment); *Wash. State*

Grange v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (First Amendment); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (Due Process). But this Court's abortion cases have not been consistent and have even been recently characterized as having "spiraled out of control." *Harris* v. *W. Ala. Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring in denial of certiorari). Lack of clarity on the facial invalidity standard is one of the reasons why. Sometimes courts apply the *Salerno* standard, and sometimes they state an abortion regulation is facially invalid when it burdens a "large fraction" of the women "for whom it is relevant." *Gonzales*, 550 U.S. at 167–168 (declining to resolve the open question) (citing *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990), and *Casey*, 505 U.S. at 895 (opinion of the Court)).[18]

Although the Fifth Circuit understood *Hellerstedt* to establish the large-fraction formulation, App. 27a–28a, the question remains open. *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J. dissenting). Because the Court's conclusions in *Hellerstedt* implied that *all* Texas women would be affected by clinic overcrowding, 136

[18] Further complicating the ambiguity of the test and subjecting it to judicial manipulation is the lack of standards regarding the denominator and numerator for determining what constitutes a large fraction, assuming that test applies. Courts use the same number for both. By most math standards "that fraction is always '1,' which is pretty large as fractions go." *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

S. Ct. at 2313, *Hellerstedt* would not have been a suitable case to resolve the question.

Here, the choice could be dispositive. Because Doe 5 obtained privileges sufficient to continue providing abortions at Women's Health in New Orleans (and, upon a good-faith effort, could likely obtain privileges sufficient to provide abortions at Delta in Baton Rouge), the only patients whom Act 620 might affect are the Plaintiff clinic's patients, where the panel concluded Doe 1 may be unable to obtain privileges. App. 55a–56a. But the Plaintiff clinic only serves 30% of the State's abortion patients. Under *Salerno*, that would be insufficient to justify Plaintiffs' facial challenge. Adopting *Salerno* for facial challenges to abortion statutes could therefore be the simplest way to resolve the case as a matter of law.

3. Finally, insofar as *Hellerstedt* is thought to preclude States from bringing their own proof on disputed factual issues or to allow courts to invalidate State laws that do not pose a substantial obstacle to the abortion decision, *Hellerstedt* should be overruled. The better course, though, is simply to reject Plaintiffs' misinterpretations of *Hellerstedt* on these and the other points discussed above.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted.

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