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,
Respondent.

&

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

v.

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

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

Amicus Brief of Senator Josh Hawley in Support of Rebekah Gee

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

As a member of the U.S. Senate, Josh Hawley has a strong interest in safeguarding the vital distinction between courts and legislatures. Senator Hawley urges the Court to affirm the judgment of the Court of Appeals because Plaintiffs' claims, if accepted, would violate the separation of powers by transferring legislative authority to courts.

Plaintiffs lack standing for two reasons related to the separation of powers. For one thing, third-party standing improperly shifts policymaking authority to courts. Plaintiffs are abortion providers. The statute regulates them, not women seeking abortions. So Plaintiffs, if suing as first parties, would have to overcome rational-basis review. They instead sue as third parties only to elevate the standard of scrutiny, hindering the right of the people to enact policy through their legislatures. Even if Plaintiffs could sue as third parties, they still would lack standing because the remedy they request is legislative in nature.

Plaintiffs' claims also fail on the merits. When plaintiffs seek facial relief against a statute, they ordinarily must prove that the statute is unlawful in 100 percent of possible cases. That 100-percent rule preserves the constitutional separation between legislative and judicial authority. It ensures that courts enjoin only unlawful enforcement actions, not nullify

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[1] All parties have consented to the filing of this brief. No counsel for a party authored any portion of this brief. No person or entity other than the *amicus* signing this brief contributed money to preparing or submitting this brief.

entire statutes that can be enforced lawfully. The rule thus safeguards legislative authority by prohibiting courts from prescribing rules of general application—a function reserved exclusively for legislatures.

Plaintiffs seek an unprecedented departure from this 100-percent standard. This Court has at times allowed plaintiffs in abortion cases to meet a lesser, "large fraction" standard. But Plaintiffs ask for far more. They assert that if they could prove the statute imposes an undue burden even 30 percent of the time, then this Court should prohibit Louisiana from *ever* enforcing the statute. But that order would be "quintessentially legislative" because it would alter the rights of thousands of people who have no legal claim. Only a legislature can change the legal rights for thousands of people who have no legal claim.

SUMMARY OF ARGUMENT

For two different reasons, Plaintiffs lack standing to sue. They also have not met their burden on the merits to obtain facial relief.

I. Plaintiffs lack third-party standing to sue. If Plaintiffs sued on their own behalf, their claims would be subject to rational-basis review. They try to avoid that more deferential review by suing instead on behalf of women seeking abortions—even though the statute they challenge regulates Plaintiffs, not those women. Here, third-party standing does nothing other than enable a regulated party to avoid the standard of review used to safeguard the separation of powers and prevent courts from assuming policy-making authority.

II. Plaintiffs have not proven that the statute imposes an undue burden 30 percent of the time. But

even if they could, 30 percent is not a "large fraction" under the relevant case law. Holding otherwise would require seizing legislative authority.

A. Because facial challenges are viewed with extreme disfavor, facial challenges ordinarily fail unless a plaintiff proves that the statute would be unlawful in 100 percent of possible cases. Sometimes this Court allows plaintiffs in abortion cases to meet a lesser, "large fraction" standard. But that allowance has been inconsistent, and the correct standard remains unsettled.

Even assuming that the large fraction test governs, 30 percent is not the appropriate threshold. As several courts have held, the 100-percent rule is the baseline standard, so a fraction cannot be "large" for purposes of obtaining facial relief unless it comes very near that baseline.

B. Departing so drastically from the 100-percent rule would violate the separation of powers. Legislatures, not courts, are policymakers, so legislatures have exclusive authority to "prescribe general rules." The 100-percent rule safeguards this authority by limiting injunctions to unlawful enforcement actions. In contrast, when a court enjoins all enforcements, including indisputably lawful enforcements, that court performs "quintessentially legislative work" by altering the rights for people who have no legal claim. The more a facial challenge departs from the 100-percent rule, the more courts seize legislative power.

III. Plaintiffs also lack standing to request facial relief. Under *Gill* v. *Whitford*, plaintiffs cannot request remedies that are legislative in nature. But

Plaintiffs ask this Court to enjoin a statute—and thus change the rights—for thousands of people who indisputably have no individual legal claim. Only the legislature can redress generalized grievances.

ARGUMENT

Plaintiffs lack third-party standing. Their decision to litigate this suit as third parties instead of more conventionally as first parties is nothing more than a backdoor attempt to shift the standard of scrutiny. That decision infringes the right of the people to enact their policies through legislatures.

On the merits, Plaintiffs' claims should be denied because they ask this Court to drain legislatures of their constitutionally exclusive authority. Plaintiffs request facial relief to enjoin *all* applications of the statute even though nobody disputes that the statute is lawful in thousands of cases. That order would alter the legal rights of people who have no legal claim. Legislatures alone have that authority.

For similar reasons, Plaintiffs also lack standing to seek facial relief because the remedy they request is legislative in nature.

I. Invoking third-party standing here improperly shifts legislative authority to courts.

The Constitution crafts a strict wall separating legislatures from federal courts. Legislatures, not courts, are the "forum for generalized grievances." *See Gill* v. *Whitford*, 138 S. Ct. 1916, 1929 (2018). They have exclusive authority "to prescribe general rules for the government of society." *Patchak* v. *Zinke*, 138 S. Ct. 897, 915 (2018) (Roberts, C.J., dissent-

ing) (quoting *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810)). A court, in contrast, "has no jurisdiction" to prescribe general rules and can only "adjudge the legal rights of litigants in actual controversies." *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (citation omitted).

Rational-basis review is critical to this separation of powers. It protects the exclusive policymaking authority of legislatures by prohibiting courts from weighing various policy values. Except when fundamental rights are implicated, rational-basis review applies so that legislatures are not saddled with a "constitutional straitjacket." *See, e.g.*, *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). Courts cannot second-guess statutes that meet that minimal standard because doing so would transfer policymaking authority from legislatures to courts. *See, e.g.*, *Preseault* v. *I.C.C.*, 494 U.S. 1, 17 (1990) (stating that rational-basis review requires deferring to Congress).

Plaintiffs invoke third-party standing to impose that straitjacket. The statute regulates Plaintiffs, not women. If Plaintiffs sued as first parties, Louisiana would have to satisfy only rational-basis review because its statute does not implicate any fundamental right held by Plaintiffs. But by invoking third-party standing, Plaintiffs elevate the standard of scrutiny.

Invoking third-party standing undermines legislative authority because the only reason Plaintiffs sue as third parties instead of first parties is to elevate the standard of scrutiny. Women seeking abortions ordinarily can bring their own as-applied suits. *Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007); *Roe* v. *Wade*, 410 U.S. 113, 120 (1973). Plaintiffs never proved—or even tried to prove—that individual

women are unable to sue here. What's more, Plaintiffs have a conflict of interest with the women they purport to represent. The statute imposes burdens on Plaintiffs for the benefit of women, yet Plaintiffs are suing to try to remove those benefits from women so that Plaintiffs will no longer have to comply with the statute. In fact, as the Court of Appeals determined, Plaintiffs themselves are responsible for any burdens faced by women seeking abortion because Plaintiffs voluntarily declined to seek admitting privileges. *June Med. Servs.*, *L.L.C.* v. *Gee*, 905 F.3d 787, 795–800, 810 (5th Cir. 2018). Plaintiffs sue as third parties only because they know they cannot overcome rational-basis review. In doing so, they sidestep the standard of scrutiny designed to preserve legislative authority.

Third-party standing is not meant for enabling regulated parties to use pleadings strategies to shift policymaking power from legislatures to courts. It is designed for rare situations where the represented party cannot bring suit. *Kowalski* v. *Tesmer*, 543 U.S. 125, 131 (2004). This Court should reject Plaintiffs' attempt to violate the separation of powers. It should conclude that Plaintiffs lack standing to sue as third parties because their only reason for doing so is to evade the standard of scrutiny that is critical to maintaining the separation of powers.

II. This Court would have to seize legislative power to grant facial relief because it is indisputable that the challenged statute has thousands of lawful applications.

To obtain facial relief under the test Plaintiffs advocate, they must prove that the statute poses an "undue burden" to women seeking abortions "in a

large fraction of the cases in which [the statute] is relevant." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 895 (1992). Plaintiffs request facial relief even though the statute imposes *no* undue burden the vast majority—if not all—of the time. Their argument ignores precedent and improperly asks this Court to conduct an "invasion of the legislative domain." *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (citation omitted).

A. Under the large fraction test, Plaintiffs must prove that the statute is unlawful nearly all of the time.

The challenged provision burdens "at most, only 30% of women, and even then not substantially." *June Med.*, 905 F.3d at 791. Even if Plaintiffs could prove that 30 percent of women seeking abortions were unduly burdened, that would not satisfy the large fraction test for facial invalidation.

In contending that they met their burden, Plaintiffs ignore the 100-percent baseline from which the "large fraction" was created. Indeed, even though the conclusion by the Court of Appeals that Plaintiffs failed to satisfy the large fraction test provides an independent basis to affirm, Plaintiffs ignore this issue almost entirely, addressing it with just one footnote. Pet. Br. 45 n.9. Plaintiffs' suit fails because, as several courts of appeals have held, a fraction is not "large" unless it includes nearly all relevant persons seeking abortions, perhaps 90 or 95 percent.

"Facial challenges are disfavored," so requesting facial relief ordinarily requires meeting a demanding standard. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008).

Because successful facial challenges essentially "nullify" statutes, *Ayotte*, 546 U.S. at 329, "the challenger must establish that *no* set of circumstances exists under which the Act would be valid," *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added) (quoted in *Washington State Grange*, 552 U.S. at 449). In other words, a plaintiff must prove that a statute would be unlawful in 100 percent of possible cases. *Id.*

Application of this rule in abortion cases has been inconsistent. At times, this Court has departed from the 100-percent rule, granting facial relief upon proof that a statute is unlawful a "large fraction" of the time. *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2320 (2016); *Casey*, 505 U.S. at 895. But just as often, this Court has held plaintiffs to the 100-percent rule. *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'" (citation omitted)); *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991) (similar); *see also Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 523–524 (1989) (O'Connor, J., concurring in part and concurring in judgment) (similar).

Plaintiffs assume that the large fraction test applies, but this Court has expressly held that the question remains unsettled. *Carhart*, 550 U.S. at 167. *Hellerstedt* did not settle the issue because it was not argued. The respondents in that case merely "assume[d] arguendo that the 'large fraction' test applies." Brief for Respondents at 30 n.10, *Hellerstedt*, 136 S. Ct. 2292 (2016), 2016 WL 344496. So even after *Hellerstedt*, "[t]he proper standard for facial chal-

lenges is unsettled in the abortion context." *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting) (joined by Roberts, C.J., and Thomas, J.).

Even if the large fraction test governs, 30 percent is too small when compared to the 100-percent baseline from which the large fraction test was created. Because facial challenges "impose 'a heavy burden'" on states, the large fraction test deviates from that baseline only modestly. *Carhart*, 550 U.S. at 167 (citation omitted). For example, Plaintiffs must establish a larger fraction than required for First Amendment overbreadth challenges. *Id.* ("The latitude given facial challenges in the First Amendment context is inapplicable here.").

A fraction is not "large" unless it comes very near that 100-percent baseline. The federal "circuits that have applied the large fraction test to facial challenges to abortion regulations have . . . only found a large fraction when *practically all* of the affected women would face a substantial obstacle." *Cincinnati Women's Servs., Inc.* v. *Taft*, 468 F.3d 361, 373–74 (6th Cir. 2006) (citing cases) (emphasis added). Courts routinely reject facial claims when litigants assert figures similar to what is asserted in this case. *E.g.*, *id.* (12%); *Planned Parenthood of Ark. & E. Okla.* v. *Jegley*, 864 F.3d 953, 960 (8th Cir. 2017) (12%) (cert. denied); *A Woman's Choice-E. Side Women's Clinic* v. *Newman*, 305 F.3d 684, 698–700 (7th Cir. 2002) (Coffey, J., concurring) (13%).

This Court should affirm the judgment of the Court of Appeals because the Fifth Circuit correctly determined that "[b]earing a burden of 30% compared to the typical burden of 100% is not large." *June Med.*, 905 F.3d at 815.

Plaintiffs briefly suggest that the percentage might be higher than 30, but they decline to identify a percentage and simply cite part of the record where the district court analyzed the hypothetical "effect of Act 620" on abortion access. Pet. Br. 45 n.9 (citing Pet. App. 255a–58a).[2] That may be because Plaintiffs incorrectly believe that even *one* percent is a "large fraction."[3]

In any event, the district court's discussion about the alleged "effect of Act 620" on abortion access is inapposite, not just for the reasons identified by the Court of Appeals, but also because the district court based its discussion on factors independent of the statute. For example, the district court stated that clinic closures would decrease abortion access if the

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[2] Plaintiffs do contend that, under the statute, "all women in Louisiana would be burdened." Pet. Br. 45 n.9. But the relevant legal question is the percentage whose burden is so substantial as to be legally "undue." *Casey*, 505 U.S. at 895.

[3] In their stay motion, Plaintiffs cited *Casey* for this assertion. Stay Mot. 23 n.15. But *Casey* says no such thing. *Casey* remarked that the "the group for whom the law is a restriction" was about one percent of women seeking abortions, but of that relevant group, the statute substantially burdened practically all women. *Casey*, 505 U.S. at 894–95. The same is not true here.

Plaintiffs also cannot evade the large-fraction issue by asserting that percentages are irrelevant because this Court in *Hellerstedt* "did not engage in elaborate calculations." Stay Mot. 23. That argument misses the point. This Court did not address the question of how large a fraction must be because the issue was not argued. *Cf. Ayotte*, 546 U.S. at 331 (reversing grant of facial relief even though this Court previously affirmed facial relief in a different appeal because the parties in the first case "did not ask for, and we did not contemplate, relief more finely drawn").

statute went into effect. But then it acknowledged that Plaintiffs did not prove that clinic closures were, or would be, all caused by the statute. Even still, it held the State responsible for the effect of those closures, "regardless of the reason" for the closures. Pet. App. 254a, 258a. Similarly, the district court penalized the State for the general and nationwide unwillingness of physicians to perform abortions. *Id.* at 259a. It also penalized the State for a physician's "personal" decision not to seek admitting privileges, because he "doesn't want to work more," and for another physician's refusal to apply for privileges at eight of the nine local hospitals. *June Med.*, 905 F.3d at 795, 810 (brackets adopted); *see also* Pet. App. 254a.

The district court's decision to hold the State responsible for independent causes violates this Court's established precedent. "[T]he right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference *by the State*," not any other entity. *Casey*, 505 U.S. at 887 (emphasis added). So "[a]lthough government may not place [undue] obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris* v. *McRae*, 448 U.S. 297, 316 (1980); *cf. Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (holding that "respondents cannot manufacture standing merely by inflicting harm on themselves").

It was legal error for the district court to describe alleged reductions in abortion access as "the effect of Act 620" when the district court itself admitted that the alleged reduction was due to many independent causes. To ignore the role of independent causes

would be to give private parties veto power over legislation they dislike: "the independent choice of a single physician could determine the constitutionality of a law." *June Med.*, 905 F.3d at 807.

Because Plaintiffs have not and cannot meet their burden under the large-fraction test to obtain facial relief, the proper vehicle to address their concerns is the as-applied challenge. "[A]s-applied challenges are the basic building blocks of constitutional adjudication." *Carhart*, 550 U.S. at 168 (citation omitted). Choosing instead to request an injunction against lawful application of the statute is improper. "[T]hese facial attacks should not have been entertained in the first instance." *Id.* at 167.

B. Legislatures alone have authority to change the statutory rights for people who have no legal claim.

By suggesting that this Court depart drastically from the 100-percent rule, Plaintiffs misunderstand the separation of powers principles on which that rule is founded.

Specifically, they misunderstand that legislatures, not courts, have exclusive authority to "to prescribe general rules for the government of society." *Patchak*, 138 S. Ct. at 915 ((Roberts, C.J., dissenting) (quoting *Fletcher*, 6 Cranch at 136). Legislatures, not courts, are the "forum for generalized grievances." *See Whitford*, 138 S. Ct. at 1929. A court, in contrast, is the forum to determine legal rights and duties for specific parties in concrete circumstances. Its "remedy must be tailored to redress the plaintiff's particular injury," *id.* at 1934, so it is "never to formulate a rule of constitutional law broader than is required by

the precise facts," *Raines*, 362 U.S. at 21 (citation omitted).

Facial challenges are disfavored because they threaten this fundamental separation. Courts can enjoin "not the execution of the statute, but the [unlawful] acts of the official." *Commonwealth of Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). Courts lack authority to enjoin other enforcement actions—those that are lawful—because altering general legal rights is "quintessentially legislative work" that, if exercised by courts, is a "serious invasion of the legislative domain." *See Ayotte*, 546 U.S. at 329–30 (citation omitted). But facial challenges ask courts to enjoin all possible enforcement actions, creating the risk that courts will act like legislatures by enjoining enforcement actions that are lawful.

The traditional 100-percent rule protects against that threat. By denying relief if even a single lawful enforcement action could occur, it constrains courts from altering the legal rights of persons who have no legal claim and thus preserves "the peculiar province of the legislature to prescribe general rules." *Fletcher*, 10 U.S. at 136; *cf.* Alexis de Tocqueville, DEMOCRACY IN AMERICA 75–76 (R. Heffner ed. 1956) (stating that, because suits are limited to specific parties, judges may only "censure[]" but "not abolish[]" a statute).

In requesting a stark departure from the 100-percent rule, Plaintiffs would have this Court wield legislative power. The farther a fraction departs from 100 percent, the more legislative power a court must seize to grant facial relief.

If the large fraction test governs, it merely relaxes the 100-percent rule; it does not cast aside the entire separation-of-powers foundation on which that rule is built. The Fifth Circuit and other courts of appeals have correctly held that the large fraction test requires plaintiffs to prove that a statute is unlawful in practically all possible cases. *E.g.*, *June Med.*, 905 F.3d at 815; *Jegley*, 864 F.3d at 960; *Cincinnati Women's Servs.*, 468 F.3d at 373–74; *Newman*, 305 F.3d at 698–700 (Coffey, J., concurring).

Nothing about the relaxed standard for facial relief under the First Amendment justifies the freewheeling standard Plaintiffs advance. The 100-percent rule is relaxed in the "limited context of the First Amendment," *Salerno*, 481 U.S. at 745, when a statute targets substantially more lawful conduct than necessary, *Bd. of Trustees of State Univ. of New York* v. *Fox*, 492 U.S. 469, 485 (1989). But that context is unique. Overbroad statutes targeting speech impose more than individual harm; they tear the structure of democracy itself. Those statutes "harm[] . . . society as a whole" by depriving society of "an uninhibited marketplace of ideas," *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003), a marketplace that "is essential to free government," *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

But abortion claims are individual, not structural. Indeed, this Court has stressed that the structural concerns underlying free speech claims do not apply to abortion. *Carhart*, 550 U.S. at 167 ("The latitude given facial challenges in the First Amendment context is inapplicable here."). And this Court has not hesitated to reverse courts that granted facial relief in the abortion context. *Id.* ("[T]hese facial at-

tacks should not have been entertained in the first instance."); *Ayotte*, 546 U.S. at 328–32 (reversing a judgment granting facial relief because as-applied relief was possible).

When courts act like a legislature, people treat them like one. Nullifying abortion-related regulations in their entirety "undermine[s] public confidence in the Court as a fair and neutral arbiter" and encourages people to view courts as legislatures. *See Hellerstedt*, 136 S. Ct. at 2331 (Alito, J., dissenting) (joined by Roberts, C.J., and Thomas, J.). Courts become the "object of the sort of organized public pressure that political institutions in a democracy ought to receive." *Webster*, 492 U.S. at 532 (Scalia, concurring in part and concurring in the judgment). And "when you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it would be viewed in those terms." *Remarks by Chief Justice John Roberts*, New England Law School, Feb. 3, 2016.

This Court should affirm the judgment of the Court of Appeals because that court correctly rejected Plaintiffs' request for a drastic departure from the 100-percent rule.

III. After *Gill* v. *Whitford*, Plaintiffs lack standing to seek facial relief under the large fraction test.

As this Court recently reiterated, plaintiffs lack standing to request any remedy other than one that requires "exercis[ing] power that is judicial in nature." *Whitford*, 138 S. Ct. at 1929 (citation omitted). The remedy requested "must be tailored to redress the plaintiff's particular injury." *Id.* at 1934. It can-

not seek relief for a "collective political interest" because legislatures alone have authority to redress those concerns. *Id.* at 1932.

Plaintiffs lack standing because they seek relief for people who have no cognizable "individual legal interest." *Id*. They sue as third-party representatives for all Louisiana women seeking abortion. *See Singleton* v. *Wulff*, 428 U.S. 106, 118 (1976). But it is indisputable that many members of that group never will experience an undue burden. Even under the district court decision, on which Plaintiffs heavily rely, up to 45 percent of women seeking abortions never will experience an undue burden. *See June Med. Servs. L.L.C.* v. *Kliebert*, 250 F. Supp. 3d 27, 80–81 (M.D. La. 2017). Those individuals lack any "individual legal interest." *Whitford*, 138 S. Ct. at 1932. Their interest instead is a "collective political interest" that legislatures alone can address. *Id.* Because Plaintiffs seek a group-wide remedy that only legislatures can provide, they lack standing.

Critically, Plaintiffs ask for far more than an injunction that would benefit others incidentally. In the one-person-one-vote cases, "the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale 'restructuring of the geographical distribution of seats in a state legislature.'" *Id.* at 1930 (citation omitted). As with a nuisance injunction, granting individual relief sometimes affects non-parties incidentally. But Plaintiffs ask this Court to rearrange the legal rights for *all* women seeking abortions in Louisiana, even those who indisputably have sustained no undue burden. That request for relief is inappropriate. Cognizable harms caused by abortion-related statutes can be

rectified on an individual basis through "as-applied challenge in a discrete case." *Carhart*, 550 U.S. at 168.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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