Nos. 18-1323 & 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., *ET AL.*,
PETITIONERS/CROSS-RESPONDENTS,

v.

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, RESPONDENT/CROSS-PETITIONER.

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

BRIEF OF
INDEPENDENCE LAW CENTER,
AMICUS CURIAE SUPPORTING
RESPONDENT/CROSS-PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Independence Law Center provides pro-bono representation in civil rights cases in Pennsylvania. As a Pennsylvania entity, its team watched closely as the horrors perpetrated by Kermit Gosnell at his clinic in Philadelphia were revealed to the public. Independence Law Center writes to highlight the substandard care that occurs because regulators often turn a blind eye to safety in the field of reproductive healthcare. Paradoxically, this willful ignorance to women's safety is done in an effort to advance reproductive rights. Unfortunately, the kinds of forces that led to Gosnell existed not only in Pennsylvania, but in other states, including Louisiana. In fact, Gosnell himself worked at a clinic owned by Leroy Brinkley, who has operated two of the clinics in Louisiana.

SUMMARY OF ARGUMENT

Petitioners claim that requiring admitting privileges would not improve the quality of reproductive healthcare, and that such a requirement would drive nearly every provider out of the market, resulting in a loss of access to abortion. Both assertions are false.

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[1] Pursuant to Supreme Court rule 37.6, counsel for amicus represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amicus represents that all parties have consented to the filing of this brief.

Louisiana has had a history of substandard providers. Eventually, the Louisiana State Board of Medical Examiners caught up with some of them — but only after hardship to patients. This is not surprising because the clinics themselves do not provide adequate oversight in selecting or overseeing the doctors who come in to perform abortions. Admitting privileges would ensure a level of oversight long before the Board of Medical Examiners would get involved. The rigorous review by hospitals in order to grant admitting privileges would weed out doctors based on their reputations or past practices.

Many argue against greater health protections, claiming such protections will undermine access. However, this results in harm to those seeking access to abortion service. Admitting privileges are already part of the standard of care for other reproductive health services performed outside of a hospital in Louisiana. Midwife services, for example, require overseeing physicians with admitting privileges — and this requirement does not undermine access.

Pennsylvania's experience with Kermit Gosnell should not be repeated here. Access and appropriate standards of safety can be provided simultaneously. Just as building a hospital or school could be accomplished faster and cheaper if OSHA laws did not apply to the builder, it is not a reason to suspend OSHA laws in order to build more hospitals. Safety regulations protect the end user and weed out the

lazy, inept, or change-averse providers from the field.

Granted, most of Louisiana's current abortion providers lack admitting privileges. Assuming that these providers could not get admitting privileges (even though the record suggests that most of the doctors put in a half-hearted attempt), demand will continue to be met in Louisiana. The reason is simple: abortion is a business, and both the physicians and their practices are seeking a profit. New providers don't show up to serve an oversaturated, shrinking market. Indeed, Louisiana's abortion numbers (like those nationally) have been in decline for decades.

However, a market knows how to compensate for retirements, even if those retirements are accelerated due to regulatory changes. The regulatory changes will not change demand. Because of that, if multiple providers decide to retire, a market opportunity will be provided for others to take their place — so that supply will continue to meet demand. From the consumer's standpoint, there will continue to be access — access that is far less risky to the consumer.

ARGUMENT

I. Admitting Privileges Serve the Purpose of Weeding Out Substandard Providers.

A. Louisiana Has a History of Substandard Abortion Providers.

The State of Louisiana has a critical responsibility in ensuring the health of its residents. Louisiana women deserve to know that the state is protecting them through its laws, regulations, and licensure when they seek reproductive healthcare. Medical professionals who provide abortion services are often held to a lower standard by states and their regulators out of fear of any objection or pushback from the providers. However, those seeking reproductive healthcare should never be subjected to incompetent, untrained, or otherwise dangerous providers.

Without requiring abortion providers to have admitting privileges at nearby hospitals, women are subjected to substandard care. Unfortunately, incompetent abortion providers have been allowed to operate within the state. Too often this substandard care has been discovered only after complaints have been filed due to abortion providers harming patients, as demonstrated by the examples below.

In 1995, Dr. David Lee Golden had his license suspended for two years for medical incompetence by the Louisiana State Board of Medical Examiners ("Board"). On two separate occasions while performing abortions, Golden perforated the

patient's uterus, pushed the fetal head through the tear, and sent both patients away without informing them that the abortions were incomplete. Both patients had to undergo hysterectomies. *See In the Matter of: David Lee Golden*, No. 94-A-001 (La. Bd. Med. Exam'rs Aug. 25, 1995).[2] Golden finally had his license revoked completely in 1998, when the Board discovered that he had continued to practice medicine after his temporary suspension in 1995. During his suspension, he performed multiple abortions, including a late-term abortion. *See In the Matter of: David Lee Golden*, No. 97-A-011, at 4 (La. Bd. Med. Exam'rs Mar. 25, 1998).[3]

In 2002, the Board placed Dr. A. James Whitmore, III's medical license on immediate probation after he performed a second trimester abortion at Delta Clinic in Baton Rouge, Inc ("Delta Clinic"). When one patient experienced prolonged bleeding, he prevented his staff from calling an ambulance — and this went on for three hours. Emergency responders were only notified when the patient herself made the call. When she arrived at the hospital, hospital staff discovered that she had a perforated uterus and a lacerated uterine artery. Ultimately, hospital physicians were forced to perform a complete hysterectomy.

Whitmore's grossly substandard medical practice was not limited to this tragic incident. He also failed

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[2] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=70917.

[3] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=70917.

to follow proper sanitary procedures: using single-use instruments on multiple patients, utilizing instruments that were rusty and cracked, and making use of "sterilization" solution that had floating bits of tissue. *See In the Matter of: A. James Whitmore, III*, No. 00-A-021, at 3 (La. Bd. Med. Exam'rs Jan. 22, 2002).[4] The harm caused to these women by Whitmore could have been prevented had the requirement for admitting privileges existed, because no hospital would have extended privileges based on his earlier appearance before the Board due to substandard practices that resulted in the death of one child, brain damage of another, and an improper Caesarean section. *See In the Matter of: A. James Whitmore*, No. 92-A-001, at 1 (La. Bd. Med. Exam'rs May 21, 1992).[5]

In 2007, the Board revoked Dr. Victor Brown's medical license after "flagrant disregard" of the terms of a consent order that prohibited most of his OB/GYN practice (including his abortion practice) and failure to meet the standard of care for his patients. *In the Matter of: Victor Brown*, No. 06-A-021, at 2 (La. Bd. Med. Exam'rs Sept. 17, 2007).[6] His first consent order was all the way back in 1989, and he did not lose his license until 2007. An admitting privileges requirement would have been of profound value in this case because seven years earlier, in 2000, Dr. Brown's privileges with the St. Claude

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[4] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=41680.

[5] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=41680.

[6] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=8428.

Medical Center were suspended after its investigation into his medical practices. *See In the Matter of: Victor Brown*, No. 99-I-035, at 1 (La. Bd. Med. Exam'rs May 24, 2000).[7] Fellow doctors and hospitals are far more aware of a doctor's reputation and practices than a state or its medical examiners ever will be. So if his ability to practice were contingent on those who knew him best, this substandard provider would have been eliminated much sooner.

In 2008 and 2009, Dr. Adrian Coleman, who performed abortions at the Delta Clinic, had his clinical privileges and his operative vaginal delivery privileges suspended at two medical facilities. The first suspended him after an infant died during a delivery. The second listed these deficiencies: "unacceptably high number of absences from obstetrical deliveries, [does] not adequately evaluate and care for his patients in the labor and delivery unit, and fail[s] to document his patient care adequately and accurately." *In the Matter of: Adrian Joseph Coleman*, No. 08-I-775, at 1 (La. Bd. Med. Exam'rs Mar. 15, 2010).[8] In 2010, the Board put a three year probation on Coleman's medical license, prohibiting him from operative vaginal delivery procedures. *Id*. Again, an admitting privileges requirement would have protected the public because two medical facilities restricted his privileges before the Board took action.

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[7] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=8428.

[8] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=41782.

In 2012, Dr. Ifeanyi Charles Anthony Okpalobi, while permitted to keep his medical license, was reprimanded by the Board because he "repeatedly failed to meet Abortion Facility Licensing Standards and demonstrated continued conduct that is indicative of a practice which fails to satisfy the prevailing and usually accepted standards of medical practice." *In the Matter of: Ifeanyi Charles Okpalobi*, No. 10-I-033, at 1 (La. Bd. Med. Exam'rs May 21, 2012).[9] This was not his first run-in with the Board. In 1999, the Board gave Okpalobi an indefinite prohibition on his obstetrical practice and placed him on a three-year probation because he "demonstrated professional and/or medical incompetency by his inability to provide timely and appropriate care to his patients, including but not limited to risk assessment, pre-natal and post-natal management, determination of uterine size and gestational age, and testing and evaluation related to abortion." *In the Matter of: Ifeanyi Okpalobi*, No. 93-I-051-X, at 1 (La. Bd. Med. Exam'rs Mar. 24, 1999).[10]

While the previous abortion providers have had their medical practice ended, some have been allowed to continue operating even though they are violating standard medical practice. Dr. Kevin Work, who works at Women's Health Care Center, Inc. in New Orleans, has been placed on probation a

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[9] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=86872.

[10] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=86872.

number of times, however, on June 20, 2019, the Board reinstated his medical license without restriction. *See In the Matter of: Kevin Govan Work*, No. 2019-A-11 (La. Bd. Med. Exam'rs June 10, 2019).[11] One of the probationary restrictions was in 2009 when a hospital suspended his clinical privileges due to an inappropriate sexual comment made to a nurse and a peer review finding that he failed to show up to the delivery unit on too many occasions. *See In the Matter of: Kevin Govan Work*, No. 08-I-774 at 1 (La. Bd. Med. Exam'rs Mar. 16, 2009).[12] In 2014, the Board discovered that he was allowing staff to engage in the practice of medicine and to use his name and electronic signature. *See In the Matter of: Kevin Govan Work*, No. 14-I-014 at 1-2 (La. Bd. Med. Exam'rs Oct. 20, 2014).[13] Again in 2016, Work allowed unlicensed staff to perform ultrasounds and provide prenatal care. *See In the Matter of: Kevin Govan Work*, No. 15-A-009 at 2 (La. Bd. Med. Exam'rs Feb. 15, 2016).[14] Work again had his medical license suspended after the Board learned he was practicing at an abortion clinic without prior approval. *See In the Matter of Kevin Govan Work*, No. 19-I-144 (La. Bd. Med. Exam'rs

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[11] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=2461.

[12] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=2461.

[13] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=2461.

[14] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=2461.

Feb. 26, 2019).[15] This occurred just months before the Board reinstated his license without restriction.

Other litigation in Louisiana involving its abortion providers suggests additional abortion doctors may be violating standard medical practice, which has not yet been addressed by the Board. Judge Jennifer Walker Elrod in her concurrence in *In re Gee*, No. 19-30953 (5th Cir. Nov. 27, 2019), stated that it is alleged that there is deposition testimony by Doe 2 that Doe 5 violated the standard of care for second-trimester abortions by not using the dilation and evacuation method, instead performing induction abortions through 19 weeks gestation. *See id.* at 6 (Elrod, J., concurring).

Judge Elrod also noted that it was alleged that there is deposition evidence that Doe 2 failed to report the forcible rape of a fourteen-year-old girl. *See id.* at 6-7 (Elrod, J., concurring); *Cf. La. Stat. Ann. § 14:403* (requiring mandatory reporters to report sexual abuse of a minor). This deposition also allegedly shows that Doe 2 knowingly performed an abortion on a minor without parental consent or a judicial bypass. *See In re Gee*, No. 19-30953, at 6-7 (Elrod, J., concurring); *Cf.* La. Stat. Ann. § 40:106.14.

Likewise, the Fifth Circuit in the present case noted that Doe 3, the Chief Medical Officer at June Medical Services, LLC, trained other doctors to perform abortions and then hired them, but admitted that he has not performed criminal

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[15] Available at http://apps.lsbme.la.gov/disciplinary/DocViewer.aspx?decision=true&fID=2461.

background checks or asked about their previous training. *See June Medical Services LLC v. Gee*, 905 F.3d 787, 799 (5th Cir. 2018). Three of those doctors are not OB/GYNs, but a radiologist, ophthalmologist and a generalized family medical practitioner. *See Id.*

That some abortion providers administer substandard care with little oversight should not come as a shock after Dr. Kermit Gosnell's misdeeds were finally discovered in Pennsylvania. What many overlook is that Gosnell is alleged to have engaged in many of the same practices in a Delaware clinic[16] owned by Leroy Brinkley, *see* Grand Jury Rpt. 1, *In re Cnty. Investigating Grand Jury XXIII*, No. 0009901-2008, 2011 WL 711902, at 41 (1st Jud. Dist. Pa. Jan. 14, 2011), the same Leroy Brinkley that controls two of the three clinics in Louisiana (where three of the above-mentioned doctors, Dr. A. James Whitmore, III, Dr. Adrian Coleman, and Dr. Kevin Work have been employed), *see* Mem. ISO Mot. To Modify Judgment, *United States v. Brinkley*, No. 90-4364, at 2 (E.D. La. Aug. 8, 2006); Louisiana Secretary of State, Delta Clinic of Baton Rouge, Inc. business filing.[17] Indeed, the Gosnell Grand Jury Report stated that Brinkley "did not properly supervise the doctors he hired as 'independent

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[16] *See* Sean O'Sullivan, *Why Del. didn't charge 'house of horrors' abortion doctor*, The (Wilmington, Del.) News Journal, June 4, 2013, available at https://www.usatoday.com/story/news/nation/2013/06/04/why-delaware-never-charged-convicted-abortion-doctor/2387495/.

[17] Available at https://coraweb.sos.la.gov/commercialsearch/CommercialSearchDetails.aspx?CharterID=568414_FBE9852ADC.

contractors' to assure that they followed the law." Grand Jury Rpt. 1 at 259. If that was the case in Delaware, there's no reason to believe his practice differs in Louisiana.

Louisiana has a duty to provide oversight in the field of reproductive healthcare, ensuring that patients are receiving appropriate care. Unfortunately, Louisiana has had numerous substandard and unsafe abortion providers and the oversight provided by the clinics themselves is wholly inadequate.

B. The Investigation and Oversight Afforded by Admitting Privileges Could Have Prevented Substandard Care.

In contrast to the qualifications June Medical places on those practicing medicine (or the oversight provided by Brinkley, for that matter), hospitals' investigative process prior to granting admitting privileges is rigorous.[18] Doctors must undergo intense background checks. "Hospitals verify an applicant's surgical ability, training, education, experience, practice record, and criminal history. These factors are reviewed by a board of multiple physicians." *June Medical Services,* 905 F.3d at 805 n.53. Meanwhile, many abortion clinics do not even ask if new hires are credentialed OB/GYNs. Doe 4

[18] Hospitals are rigorous in who they grant privileges to because they open themselves up to both financial and reputational liability when associating with substandard providers.

said he was only asked if his medical license was active. *Id*.

Credentialing is part of the process of applying for admitting privileges and this can require providing "documentation of education, training, experience, current competence, board certification, state licensure, and malpractice liability certificate."[19] Competence is measured by several areas of general competency: "Patient care, Medical clinical knowledge, Practice-based learning and improvement, Interpersonal and communication skills, Professionalism, and System-based practice." *Id*. The doctors mentioned previously would not have passed these competency tests and the substandard and even tragic "care" could have been prevented.

The American College of Obstetricians and Gynecologists (ACOG) and American Academy of Family Physicians (AAFP) recommend that physicians and obstetricians work together in a cooperative and collaborative manner to ensure high-quality and consistent care for the patient.[20] While these recommendations arise in the context of perinatal care, the logic applies equally in these settings, especially since similar procedures are often used. Women deserve the highest standard of

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[19] American Academy of Family Physicians, *Hospital Credentialing and Privileging FAQs*, available at https://www.aafp.org/practice-management/administration/privileging/credentialing-privileging-faqs.html.

[20] AAFP — ACOG Joint Statement on Cooperative Practice and Hospital Privileges (revised Dec. 2018), available at https://www.acog.org/-/media/Statements-of-Policy/Public/73AAFPACOGStmtCollege2018.pdf.

care, which should not be compromised in this setting.

> The assignment of hospital privileges is a local responsibility and privileges should be granted on the basis of training, experience and demonstrated current competence. All physicians should be held to the same standards for granting of privileges, regardless of specialty, in order to assure the provision of high-quality patient care.

Id.

The goal of laws related to medicine is to create a safe environment for healthcare. A woman should be able to trust that the doctor she is choosing is being held to the highest medical standards.

C. The Experience in Pennsylvania With Kermit Gosnell Demonstrates Why Reproductive Care Should Not Be Denied Appropriate Oversight.

The world watched with alarm as the sickening acts of Dr. Kermit Gosnell and his "House of Horrors" in Philadelphia were discovered after a federal drug raid in 2011. He operated under unsanitary and filthy conditions, allowed unlicensed staff to administer drugs and perform medical procedures, and violated Pennsylvania's Abortion Control Act for decades without any oversight or investigation by the state. Gosnell was convicted of

first degree murder in May of 2013 for the deaths of three infants (by severing their spinal cords with scissors after they were born alive during attempted abortions) and involuntary manslaughter in the death of Karnamaya Mongar (a 41-year-old refugee from Nepal).[21]

In 1993, the Pennsylvania Department of Health stopped inspecting all abortion clinics because "officials concluded that inspections would 'put[] a barrier up to women' seeking abortions." Grand Jury Rpt. 1, *supra*, at 9. In 1999, high-level government officials met and made the decision to not regularly inspect abortion clinics. "[T]here was a concern that if they did routine inspections, that they may find a lot of these facilities didn't meet [the standards for getting patients out by stretcher or wheelchair in an emergency], and then there would be less abortion facilities, less access to women to have an abortion." *Id.* at 147. Women do not deserve substandard care simply because the doctor involved performs abortions. When state officials choose to turn a blind eye to an industry, people suffer. In this case, women, especially poor women of color, suffered the most.

The Pennsylvania Department of State could have shut Gosnell down at any time if they had chosen to respond to complaints against him, but instead they closed their eyes because it involved the

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[21] *See* Vince Lattanzio, *Abortion Doctor Gosnell Found Guilty of Killing 3 Babies Born Alive,* NBC Philadelphia, May 13, 2013, available at https://www.nbcphiladelphia.com/local/gosnell-murder-deliberations-stretch-into-10th-day/2143888/.

subject of abortion. The Philadelphia District Attorney's office stated, "[w]e think the reason no one acted is because the women in question were poor and of color, because the victims were infants without identities, and because the subject was the political football of abortion." *Id.* at 13.

Pennsylvania has learned from these mistakes and is providing equal oversight to abortion clinics as it does to other healthcare facilities. Regulation or licensure of an industry should not be prohibited simply because that area of medicine is sensitive. As this Court has stated before, "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992). Poor women of color, immigrants and refugees, and all other women deserve to be protected.

II. Like Most Regulations, the Admitting Privileges Requirement May Accelerate the Retirement of Change-Averse Providers, but the Industry Has Long Compensated for Retirements.

Petitioners argue that the common-sense health requirement of Louisiana's admitting privileges law is unconstitutional because most current providers do not now have admitting privileges. They make the logical leap that if these particular doctors do not have admitting privileges, abortions will be scarce, resulting, in the words of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016), "an 'undue burden' on a woman's right to have an abortion."

However, the "fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1633 (2007) (quoting *Casey*, 505 U.S. at 874). "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 505 U.S. at 874.

Petitioners assume a static supply and reason that if many of the current abortion providers do not obtain admitting privileges, there will be a gross shortage of abortions in the state. But the truth is that as long as there has been legal abortion in our nation, providers have both entered and exited the market.

Granted, there are fewer market entries than exits, but that is because the abortion market — particularly the surgical abortion market — has been in steady decline in Louisiana, as described below. Likewise, the number of abortions has shrunk nationally, even in states with few laws impacting abortion, evidencing a nationwide decrease in demand. Declining markets hardly signal an inviting environment for new providers. But as all businesses know, new regulations create both hurdles and opportunities. If most existing providers cannot (or simply, for whatever reason, do not) get admitting privileges, an environment will be created that is inviting for others to enter. Indeed, retirements are

no new phenomena — and when there is adequate demand, new doctors always provide the supply.

Louisiana's experience should be understood in the context of a national trend. Increasingly, small clinics are pushed out by very large urban clinics — often owned by the industry leader in the abortion business, Planned Parenthood. These consolidations require women to travel further, but this is because of economics. Not only may certain existing physicians be reasoning that it is easier to move on than get admitting privileges, but the clinics themselves may be recognizing the larger trends and not soliciting new physicians because they know they cannot compete with the changes coming to the larger marketplace. Existing providers have a hard time competing with Planned Parenthood, which can be described as the Walmart or Amazon of the abortion industry. From the standpoint of a marginal provider that recognizes it will eventually have to close due to market forces, it is easier to throw in the towel than to find the quality of physician able to get admitting privileges. But one thing is certain, any clinic that wishes to remain viable is already doing what every large clinic has done nationwide — soliciting physicians.

A. Demand for Abortion Services Has Been Declining Significantly and Steadily for Decades, Resulting In an Unattractive Environment for New Providers.

Petitioners' entire argument assumes that the number of providers is solely the result of government forces, and that demand for abortions

will not result in new physicians entering the market. On the contrary, the present market conditions must be understood in the context of very significant trends: a long-term reduction in demand in regulated and non-regulated states alike. In short, *the decrease in demand resulted in a small number of providers. But should most of those providers retire, others will step in to meet demand.*

The number of abortions, abortion rates, and even the number of clinics have been in decline for decades in nearly every state. Total abortions nationwide in 1988 was 1,580,710 but steadily fell to 862,320 in 2017.[22] Louisiana's numbers mirror those nationally, with 23,730 abortions in 1982 falling to 9,920 in 2017.[23] These trends are consistent with the fact that a smaller percentage of women facing unintended pregnancies have obtained an abortion. This number fell from 54 percent nationally in 1994 to 42 percent in 2008.[24] Likewise, the U.S. abortion

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[22] *Guttmacher Institute, Number of Abortions - U.S. Total*, available at https://data.guttmacher.org/states/trend?state=US&topics=69&dataset=data; Guttmacher Institute, *Abortion Rate and Number of Abortions - U.S. Total and Louisiana*, available at https://data.guttmacher.org/states/table?state=US+LA&topics=66+65&dataset=data.

[23] Guttmacher Institute, *Number of Abortions - Louisiana,* available at https://data.guttmacher.org/states/trend?state=LA&topics=69&dataset=data; *Abortion Rate and Number of Abortions - U.S. Total and Louisiana, supra.*

[24] Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008-2011,* 374 N ENGL. J. MED. 843-852 (2016); Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001–2008*, 104 AM. J. PUB. HEALTH S43, S45–S46 (2014); Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, 28 (1998).

rate and the Louisiana abortion rate have steadily fallen from 28.6 and 22.6 respectfully in 1982 to 13.5 and 10.6 in 2017.[25]

As a natural result of the decrease in demand, the supply of abortion providers has gone down. A record number of abortion providers (all providers, not just clinics) existed in the 1980s. There were 2,908 nationally and 19 in Louisiana. Those numbers dropped to 1,587 nationally and four in Louisiana according to the latest readily available data.[26]

The effect of the admitting privileges law can best be understood after recognizing the economics specific to this industry. Physicians have been slow to enter this market because it has been in decline. In fact, in just the nine years between 2008 and 2017, abortions in Louisiana dropped from 14,110 to 9,920.[27]

In contrast, if the new regulatory environment does what Petitioners claim — pushing various doctors out of the market — new providers will

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[25] *Abortion Rate and Number of Abortions - U.S. Total and Louisiana, supra*; Guttmacher Institute, *Abortion Rate - U.S. Total and Louisiana*, available at https://data.guttmacher.org/states/trend?state=US+LA&topics=68&dataset=data.

[26] Guttmacher Institute, *Number of Abortion Providers - U.S. Total and Louisiana*, available at https://data.guttmacher.org/states/trend?state=US+LA&topics=71&dataset=data.

[27] *Abortion Rate and Number of Abortions - U.S. Total and Louisiana, supra*; Guttmacher Institute, *Number of Abortions - U.S. Total and Louisiana*, available at https://data.guttmacher.org/states/trend?state=US+LA&topics=69%&dataset=data.

certainly come. This law is not directed at demand — it prohibits not even one single abortion. It simply provides added safety to consumers — a basic requirement that other physicians will be able to meet even if the current providers cannot or choose not to do so.

Ultimately, retirements are normal in any industry, including the abortion industry. Many times existing abortion providers pick up the additional work when a physician retires since the total number of abortions is dropping.[28] But if there are multiple simultaneous retirements, there are physicians able to do this work within Louisiana, others can move to Louisiana to perform this work, and still others can travel to the state for such work.[29]

The reduction in both abortion demand and total abortion providers nationally are not the result of governmental health standards. The Guttmacher Institute observed that laws passed prior to 2011 "were far from sufficient to explain the significant drop that spanned almost all states and every major

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[28] Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 U. ST. THOMAS J.L. & PUB. POL'Y, at 18-19 (2014).

[29] *See*, *e.g.*, Andrea Grimes, *An Abortion Provider Speaks Out: 'I'll Do Whatever My Conscience Tells Me I Must,'* Rolling Stone (Nov. 24, 2015), available at https://www.rollingstone.com/politics/politics-news/an-abortion-provider-speaks-out-ill-do-whatever-my-conscience-tells-me-i-must-51616/ (stating that she travels to various locations by plane to provide abortion services due to retirements or other reasons).

region of the country."[30] Between 2008 and 2017 (the most recent data available), abortions have dropped another 28 percent nationally, seven percent in just the past three reported years.[31] Interestingly, some of the biggest declines over the past three reported years occurred in states with few restrictions, such as Delaware with a 37 percent decrease, California with a 16 percent decrease, and Nevada with a twelve percent decrease.[32]

Based on the market and continuing trends, the current five providers more than meet the demand in Louisiana. Due to cultural trends, we can expect demand to lag further. Americans are increasingly pro-life. A 2013 study revealed that 49 percent of Americans believe abortion is morally wrong in contrast to 15 percent who believe it is morally acceptable.[33] Naturally someone who believes the procedure is immoral will be less likely to have an abortion even if she believes it should be legal for others.

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30 Joerg Dreweke, *U.S. Abortion Rate Continues to Decline While Debate over Means to the End Escalates*, 17 GUTTMACHER POL'Y REV. at 3 (No. 2, 2014).

31 *Number of Abortions - U.S. Total*, *supra*; *Abortion Rate and Number of Abortions - U.S. Total and Louisiana*, *supra*; Rachel K. Jones, Elizabeth Witwer, & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017,* Guttmacher Institute, at 14, available at https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf.

32 *Id.* at 14-15.

33 Pew Research Center, *Abortion Viewed in Moral Terms: Fewer See Stem Cell Research and IVF as Moral Issues* at 2 (August 15, 2013).

It is far from surprising that only 36 percent of 18 to 29 year-olds believe abortion should be legal in all circumstances.[34] They have grown up seeing ultrasound photos and videos of their unborn siblings and friends' siblings showing them yawning, blinking and sucking their thumbs inside their mothers' wombs. As they get older and find themselves with an unexpected pregnancy, they are more likely to want to keep the baby. Additionally, women ages 18 to 29 are much more likely than previous generations to view three to four children as an ideal family size, and thus unexpected pregnancies are seen as an opportunity rather than a constraint.[35] This generation of women is also less likely to see motherhood as an impediment to working outside the home. *See id.* Likewise, those growing up in an environment where single motherhood is common are less likely to believe that single motherhood is a reason to have an abortion. *See id.* at 141.

One of the most significant factors in the reduction of abortions is a decrease in the teen abortion rate from 44 abortions per thousand 15 to

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[34] Gallup, *Abortion Trends by Age*, available at https://news.gallup.com/poll/246206/abortion-trends-age.aspx.

[35] Clyde Wilcox and Patrick Carr, *The Puzzling Case of the Abortion Attitudes of the Millennial Generation*, UNDERSTANDING PUB. OPINION 128-29 (Barbara Norrander and Clyde Wilcox eds., 3d ed., Wash., DC: Cong. Q. Press 2009), available at https://books.google.com/books?id=r_jd0nzKTvMC&lpg=PT192&dq=The%20Puzzling%20Case%20of%20the%20Abortion%20Attitudes%20of%20the%20Millennial%20Generation&pg=PT192#v=onepage&q=The%20Puzzling%20Case%20of%20the%20Abortion%20Attitudes%20of%20the%20Millennial%20Generation&f=false.

19 year-old females in 1988 to eleven abortions per thousand in 2013.[36] This trend does not result from an inability of teens to get an abortion. Instead, the pregnancy rate is down from 118 per thousand 15 to 19 year-old females in 1990 to 43 per thousand in 2013.[37] This, in turn, is explained by, among other things, a significantly lower rate of sexual activity among teens. 41 percent of high school students reported having had sex in 2015, down from 53 percent in 1995.[38]

With lower rates of sexual activity among teens, and with pregnancy rates of those who are sexually active declining as well, perhaps due to more effective contraception use, abortions are declining. Even among those teens and young women who get pregnant, the scientific advances allowing us to peer into the womb, the social acceptance of single parenting, desires for larger families, and changed attitudes protecting working parents have all contributed to a decreased desire for abortion. With abortions on the decline, especially among the

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[36] *See* Guttmacher Institute, *Rate by age - U.S. Total*, available at https://data.guttmacher.org/states/trend?state=US&topics=88&dataset=data.

[37] *See* U.S. Department of Health & Human Services, *Trends in Teen Pregnancy and Childbearing*, available at https://www.hhs.gov/ash/oah/adolescent-development/reproductive-health-and-teen-pregnancy/teen-pregnancy-and-childbearing/trends/index.html.

[38] *See* Kathleen A. Ethier, PhD, Laura Kann, & Timothy McManus, *Sexual Intercourse Among High School Students - 29 States and United States Overall, 2005-2015,* Weekly at Table, available at https://www.cdc.gov/mmwr/volumes/66/wr/mm665152a1.htm#T1_down.

young,[39] one can only expect that the abortion rate will continue to decline. These trends not only have had but will continue to have an effect on the number of physicians needed to meet abortion demand and the economics of the industry.

B. Louisiana Women Will Have Adequate Access to Abortion Even If It Requires Physicians to Have Admitting Privileges.

The ongoing demographic and market forces discussed above require fewer physicians to perform abortions. Because there are no insurmountable barriers to entry for abortion providers, there will be an adequate number of physicians to meet demand even if none of the physicians that currently do abortions continues to do so. Demand is always a driver of supply, so there is a market opportunity for physicians with an adequate track record and reputation within the community to join the existing clinics or for the national market leader to solicit such physicians to start a new clinic in the state.

Insofar as petitioners complain about the geographical distribution of providers, this concern is speculative and ultimately determined by market forces. There are plenty of doctors who would qualify for admitting privileges if hired by a clinic. The State of Louisiana cannot ensure that clinics will be distributed evenly since the economics of the industry has resulted in fewer, larger clinics in the

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[39] *See Rate by age - U.S. Total, supra* (revealing a 75 percent decrease in the abortion rates of teenagers from 1988 to 2013).

largest urban areas.[40] These market trends are consistent with the consolidation occurring in multiple industries, including healthcare itself.[41]

Additionally, admission privilege requirements have not left women without access to other reproductive care services. To use the services of a midwife in Louisiana, for example, women must first be evaluated by a physician. *See* La. Adm. Code tit. 46, Part XLV, §5315.A (2016). Additionally, once referred, midwives are still required to consult with a physician at any time that a pregnancy or delivery deviates from normal. *See* §5301. And, in both instances, that physician must have "hospital privileges in obstetrics."[42] §2303.

Certainly the State of Louisiana should not be faulted for choices the industry will make in balancing their desire to increase profit margins and the public's desire to raise the quality of care to that

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[40] Americans United for Life, *The New Leviathan: The Mega-Center Report - How Planned Parenthood Has Become Abortion, Inc.* at 9 (2015), available at https://aul.org/wp-content/uploads/2018/11/AUL-Mega-Center-Report-06-24-2015.pdf (pointing to the gain in market share at Planned Parenthood through the opening of mega centers in urban areas).

[41] Deloitte, *The great consolidation: The potential for rapid consolidation of health systems* (2014), available at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/life-sciences-health-care/us-lshc-great-consolidation-111214.pdf (stating that the healthcare industry is beginning a consolidation not unlike what we see in the banking, retail, and airline industries).

[42] This requirement also demonstrates that admission privileges are consistent with the standard of care for reproductive services performed outside of a hospital.

which customers expect and deserve outside of the abortion context. The number of providers might change because five may be too many for the number of abortions performed in Louisiana — and the geographic distribution may change due to market forces that are at work quite apart from the law at issue. What is certain is that supply always adjusts to meet demand, no matter the regulatory environment or market forces. In a context where the regulation is as simple as admitting privileges for medical care, something that exists for many other medical services, this is especially true.

CONCLUSION

Louisiana women have experienced abortion services through substandard providers. They deserve better. Requiring admitting privileges is a practical way to ensure safer care so that those who best know doctors' practices and reputation can weed out substandard providers before harm is done. This basic requirement is not too much to ask of those who provide any kind of medical care. While the requirement may hasten the departure of some doctors, Louisiana has long had excess capacity — discouraging new doctors from entering this saturated market. Ironically, adequate healthcare protection is the very force that will create the market opportunity for more professional and safety-conscious providers.

Respectfully submitted,

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