Nos. 18-1323, 18-1460

IN THE

Supreme Court of the United States

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

v.

DR. REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE STATES OF ARKANSAS, INDIANA, ALABAMA, ARIZONA, FLORIDA, GEORGIA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT DR. REBEKAH GEE

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[For Continuation of Caption, See Inside Cover]

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INTERESTS OF AMICI CURIAE

Amici are the States of Arkansas, Indiana, Alabama, Arizona, Florida, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.

Amici States routinely face preenforcement challenges to their abortion laws brought by abortion providers. *See, e.g., Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Preterm-Cleveland v. Himes*, 940 F.3d 318 (6th Cir. 2019); *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018), *cert. docketed*, No. 18-1019 (Feb. 4, 2019); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018); *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017).

In such cases, abortion practitioners regularly assert the rights of hypothetical future patients without presenting direct evidence of how the challenged law will actually impact women seeking abortion. This case provides an opportunity to clarify this Court's doctrine on the availability of third-party standing to challenge state health-and-safety regulations, the proper standard for preenforcement challenges in the abortion context, and how lower courts should conduct the balancing analysis set forth in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Amici States urge the Court to preclude abortion providers from invoking the rights of hypothetical future patients in challenging health-and-safety regulations (such as admitting-privileges requirements) designed to protect those patients. The Court should

also hold that a preenforcement facial challenge to an abortion regulation cannot succeed without evidence of the challenged regulation's actual impact on women. And should the Court reach the merits of Petitioners' challenge, the Court should clarify that health-and-safety regulations impose an undue burden only if the burdens they impose—by causing women to forgo an abortion or materially delay and face significantly greater risks—*substantially outweigh* those regulations' benefits.

SUMMARY OF THE ARGUMENT

This Court should either remand with instructions to dismiss, or it should affirm. Because Petitioners, as abortion practitioners, do not have third-party standing to challenge health-and-safety regulations on behalf of pregnant women, this Court should require the complaint to be dismissed. Third-party standing requires a unity of interests, which practitioners lack when challenging regulations that protect women from practitioners themselves. Countless abortion practitioners, such as Kermit Gosnell and Ulrich Klopfer, have a macabre history of disregarding basic clinical competence and sanitation. That history underscores why courts and the States cannot trust practitioners to safeguard women's interests.

Alternatively, this Court should affirm the decision below. In rejecting Petitioners' claims, the Fifth Circuit properly applied *Hellerstedt*'s weighing analysis. Unlike the Fifth Circuit, some lower courts have wrongly suggested that *Hellerstedt* requires invalidating a health-and-safety regulation any time its burdens marginally outweigh its benefits. But a regulation only imposes an undue burden where it is *substantially* more burdensome than beneficial, as was

found in *Hellerstedt*. Moreover, only truly significant burdens—those that require a woman to entirely forgo or materially delay and face significantly greater risks—are relevant to that analysis. And to determine whether such burdens actually exist, the Court should discourage preenforcement facial challenges where abortion practitioners have a history of conjuring phantom obstacles to justify invalidating health-and-safety regulations. And finally, facial relief is not appropriate, as the Fifth Circuit concluded, absent evidence that a challenged regulation would unduly burden *practically all*—and not just some—women. Indeed, only that standard is consistent with general principles governing facial relief.

ARGUMENT

I. Under the Court's *jus tertii* precedents (including *Singleton*), abortion practitioners cannot challenge health-and-safety regulations on behalf of pregnant women.

Historically, individual women, often using pseudonyms, have challenged abortion laws that they believed interfered with their putative rights to choose abortion. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137 (1996); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Mitchell v. D.R.*, 449 U.S. 808 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).[1]

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[1] This is equally true in the lower federal courts. *See, e.g.*, *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004); *Coe v. Melahn*, 958 F.2d 223 (8th Cir. 1992); *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991); *Doe v. Kenley*, 584 F.2d 1362 (4th Cir. 1978); *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Roe v. Norton*, 522 F.2d 928 (2d Cir. 1975); *Poe v. Gerstein*, 517 F.2d 787

But since the Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), where the Court permitted an abortion practitioner to challenge a State's refusal to subsidize abortion by invoking the rights of women recognized in *Roe*, women have less frequently brought abortion cases. Instead, abortion-law cases have become vehicles by which abortion practitioners and facilities attack health-and-safety regulations designed to protect women—the same women whose rights the practitioners claim to invoke—from the practitioners themselves. Lower courts, unfortunately, have not taken seriously this Court's third-party-standing precedents (including *Singleton* itself) and have permitted third-party challenges to abortion laws as a matter of course. The result is an abortion doctrine that protects abortion practitioners' bottom lines—not the right recognized in *Roe*.

A. *Jus tertii* doctrine requires a unity of interests that is inherently lacking when providers challenge health-and-safety regulations that protect their patients.

1. A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted). That has been the case for most of our Nation's history. *Id*. at 135-36 (Thomas, J., concurring).

The exception to that general rule is *jus tertii*—the third-party-standing doctrine. That limited exception

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(5th Cir. 1975); *Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974); *Doe v. Israel*, 482 F.2d 156 (1st Cir. 1973); *Coe v. Hooker*, 406 F. Supp. 1072 (D.N.H. 1976); *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975).

permits litigants to assert the rights of third parties *only* when: (1) the litigant has a "close relationship" to the third party; and (2) some "hindrance" affects the third party's ability to protect his or her own interests. *See id.* at 130 (citations and internal quotations omitted); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring in the judgment).

Despite this limited exception, the Court has long precluded litigants from asserting the constitutional rights of third parties. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 99 (1968) ("The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) ("[T]he general rule is that 'a litigant may only assert his own constitutional rights or immunities.'" (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)); *accord Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

In *Singleton*, a plurality of the Court distilled the justification for barriers to third-party standing to matters of agency and pragmatism. 428 U.S. at 113-14. Principally, "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* In addition, "third parties themselves usually will be the best proponents of their own rights." *Id.* at 114.

There, the Court permitted abortion practitioners to assert hypothetical patients' rights in challenging a prohibition against using Medicaid to pay for nontherapeutic abortions. *Id.* at 108. Critically, the Court found a unity of interests between the practi-

tioners' injury (lack of payment) and the patients' injury: "A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State." *Id.* at 117. That unity of interests was enough to override deference to the agency of women to assert their own rights and concerns about effective advocacy. *Id.* at 118.

Shortly after *Singleton*, lower courts began affording abortion practitioners unchecked authority to challenge essentially any abortion regulation. *See, e.g.*, *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984) (practitioner organization challenge to informed consent and reporting statute); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) (facility challenge to zoning ordinance); *Mahoning Women's Ctr. v. Hunter*, 610 F.2d 456 (6th Cir. 1979) (facility challenge to city ordinance requiring license), *vacated on other grounds*, 447 U.S. 918 (1980).

And more recently, some circuits have held that abortion practitioners categorically enjoy third-party standing to challenge regulations with which they disagree. *See June Med. Servs. v. Gee*, 814 F.3d 319, 322 (5th Cir. 2016) ("The Supreme Court has held that physicians who perform abortions satisfy the test for third-party standing even when they are not threatened with immediate prosecution under state abortion regulations."), *stay vacated*, 136 S. Ct. 1354 (2016); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 910 (7th Cir. 2015) ("The cases are legion that allow an abortion provider . . . to sue to enjoin as violations of federal law . . . state laws that restrict abortion."); *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 56 n.2 (1st Cir. 2004) ("[P]roviders

routinely have jus tertii standing to assert the rights of women whose access to abortion is restricted."); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 147 (3d Cir. 2000) (citing *Singleton* and *Casey* to confer standing without additional analysis).

2. These more recent cases demonstrate a troubling erosion of basic third-party standing principles and an expansion of *Singleton* beyond anything the Court there envisioned. Indeed, while *Singleton* at least involved a physician who took an oath to act in the patient's best medical interests, more recent cases have involved facilities, which, as corporate entities, do not share that characteristic. Moreover, while *Singleton* involved payments for abortions, more recent cases have featured challenges to health-and-safety regulations where patients and facilities do not necessarily share the same interests.

Those differences are particularly important here. A ruling requiring a State to fund abortions would financially benefit both practitioner and patient, and the Court could plausibly conclude that their interests were unified. By contrast, invalidating a health-and-safety regulation (as here) would benefit providers who have an interest in minimizing compliance costs, not patients who have an interest in ensuring abortions occur in the least dangerous conditions possible. These interests are plainly in tension, and the Court has emphasized that the "close relationship" inquiry is not satisfied where a conflict of interest may arise between the party asserting the claim and the party whose rights are at stake. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 & n.7 (2004) (distinguishing *Singleton* on the basis that, in *Newdow*, the father and child's interests were "potentially in conflict").

As many Justices and lower-court judges have observed, abortion cases have yielded rules and outcomes that are aberrant in constitutional law. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (referring to "the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion"); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1314 & n.1 (11th Cir. 2018) (collecting citations and observing that "[s]ome Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion. If so, what we must apply here is the aberration.").

Nothing about the right recognized in *Roe* suggests a need to make a special exception to the usual third-party standing doctrine at all, let alone where tension exists between the interests of the litigant and the third party whose rights are at stake.

3. Several recent examples of physician malfeasance—including the cases of Kermit Gosnell and Ulrich Klopfer—also underscore problems inherent in relying on practitioners to advance patients' interests.

Gosnell's now-infamous abortion-shop-of-horrors sadly illustrates the practitioner-patient conflict over health-and-safety regulations. Investigators raiding Gosnell's abortion facility found "[s]emi-conscious women," sedated by unlicensed staff, "moaning in the waiting room or the recovery room, where they sat on dirty recliners covered with blood-stained blankets." Grand Jury Report at 20, *In re County Investigation Grand Jury XXIII*, No. 0009901-2008 (Pa. Ct. of Common Pleas Jan. 14, 2011). Gosnell used rusty, outdated, and unsterilized surgical tools, and had no functioning resuscitation equipment. *Id.* At least one woman died

in Gosnell's facility after receiving too much anesthetic by untrained employees. *Id.*

Gosnell clearly did not share his patients' interests in undertaking abortions in the least dangerous conditions possible. Yet even after his conviction, Gosnell maintained that his "deeds were in a war against discrimination . . . disenfranchisement, undereducation and poverty." Alexander Nazaryan, *The Many Sins of Kermit Gosnell*, The Atlantic (Sept. 27, 2013), https://www.theatlantic.com/national/archive/2013/09/kermit-gosnell-book-review/310537/.

Ulrich Klopfer was similarly known for championing abortion rights, including by invoking the rights of hypothetical patients in a lawsuit demanding that Indiana subsidize abortions. *See Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *see also* Michael Tarm, *Ulrich Klopfer, abortion doctor who kept fetal remains in home and car, was a villain to many—both in life and death*, Chicago Tribune (Oct. 25, 2019), https://www.chicagotribune.com/suburbs/post-tribune/ct-abortion-doctor-fetuses-ulrich-klopfer-20191025-2nm5vfyapnhldlxi3xafepjpia-story.html.

Doing right by his actual abortion patients, however, was another matter. Klopfer's state-mandated back-up physician routinely treated patients Klopfer had injured by "being sloppy." Grant Morgan, *Concerns over Indiana abortion doctor's clinics led to at least one county law, state law: 'He had injured them by being sloppy'*, The Post-Tribune (Sept. 29, 2019), https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-klopfer-concerning-medical-practices-st-0928-20190927-ygh3yebzrbdvlndptkmekmhv6e-story.html. In 2014, Klopfer was criminally charged for failing to file Termination of Pregnancy Reports regarding two 13-year-old patients—charges that resulted in deferred-

prosecution agreements. Office of the Indiana Attorney General, *A Preliminary Report on the Investigation of Dr. Ulrich Klopfer* 6-7 (2019), https://www.in.gov/attorneygeneral/files/Klopfer%20Preliminary%20OAG%20Report%2012.19.19.pdf. In 2015, Indiana's Department of Health took action against Klopfer's facility for failing to exercise reasonable care with patients; follow proper sedation practices; keep a log of cleaning procedure rooms; and dispose of expired medications. *Id.* at 7. Indiana's Medical Licensing Board finally suspended Klopfer's license in 2016 for failing to administer medications using qualified staff; document informed consent; report abortions for two 13-year-old patients; and otherwise exercise reasonable care. *Id.* at 8-9.

But that was only the beginning. More disturbing news about Klopfer came to light after his death in September 2019, when his family discovered fetal remains in the family garage. *Id.* at 10. A search of the property revealed 2,246 medically preserved fetal remains among boxes of personal items, rusting cars, soda cans, and other random garbage stacked high to the ceiling. *Id.* The remains—found inside molding boxes and old polystyrene coolers—were in various states of decay. *Id.* Someone (presumably Klopfer or his associates) had attempted to preserve the remains by sealing them individually in clear plastic bags of formalin variously bearing, in black marker, patient chart numbers, patient initials, and dates. *Id.* Over time, many bags had begun to leak, soaking the storage boxes and coolers. *Id.* Police later discovered another 165 medically preserved fetal remains, along with additional health records, intermingled with garbage and rodent droppings, in the trunk of Klopfer's Mercedes Benz. *Id.* at 20.

After these revelations, the Indiana Attorney General partnered with local law enforcement agencies to

search three abandoned properties in Indiana that had once housed Klopfer's abortion clinics. *Id.* at 13. Expecting perhaps to find more preserved fetal remains, investigators instead discovered abandoned medical equipment, instruments and patient records, all swimming in a stew of standing water and desiccating garbage. *Id.* at 15-18. At one site, authorities found a locked, narcotics-filled filing cabinet, the keys to which were in the front desk in the clinic waiting area, accessible to anyone who entered the abandoned building. *Id.* at 16. Dr. Klopfer had apparently closed his clinics simply by turning out the lights and locking the doors without making arrangements to transfer (or destroy) his patients' medical records, narcotics, instruments and equipment he left behind. Like Gosnell, Klopfer did not have his patients' interests top-of-mind.

Unfortunately, even less-notorious abortion practitioners all too frequently injure patients through careless practices. Examples abound:

- In 2016, a Washington, DC, abortion facility was cited for "dirty equipment, expired medication in unlocked cabinets, lax storage of medical records and a failure of staff to sterilize and maintain medical equipment and follow hand-washing protocols," including an employee who had held a patient's hand during a procedure after using a plunger to unstop a toilet. David Mastio, *Abortionist Ulrich Klopfer Kept Thousands of Dead Babies But Inspires Little Curiosity*, USA Today (Sept. 18, 2019), https://www.usatoday.com/story/opinion/2019/09/18/ulrich-klopfer-abortion-gosnell-buttigieg-fetal-remains-illinois-indiana-column/2355359001/.

- In Chicago, a woman died after a practitioner perforated her uterus. *Documents Shed Light on Woman's Death After Abortion*, CBS Chicago (July 24, 2012), https://chicago.cbslocal.com/2012/07/24/documents-shed-light-on-womans-death-after-abortion/.
- In Maryland, a woman died of massive internal bleeding four days after Leroy Carhart—the same practitioner that asserted the rights of patients in *Gonzales v. Carhart* and *Stenberg v. Carhart*—performed a 33-week late-term abortion due to fetal anomaly. Chelsea Kiene, *Jennifer McKenna-Morbelli Death: Pro-Life Group demands Justice After Abortion-Related Passing*, Huff Post (Feb. 12, 2013), https://www.huffpost.com/entry/jennifer-mckenna-morbelli_n_2671375.
- In Mississippi, Thomas Tucker had his medical license suspended for charges of allowing non-physicians to perform abortions, administer anesthesia, insert birth-control devices, and perform pap smears. Adam Nossiter, *Doctor Loses his License in Abortions*, New York Times (Apr. 23, 1994), https://www.nytimes.com/1994/04/23/us/doctor-loses-his-license-in-abortions.html.
- A court recently ordered Planned Parenthood of Arizona to pay $3 million to an employee it fired for reporting frequent medical mistakes. Mastio, *supra*.
- And particularly relevant here, in 2015, a former manager of an affiliate of Planned Parenthood of the Heartland testified that entity would routinely "tell women who experienced complications at home to report to their local ER" and "say they were experiencing a miscarriage, not that

> they had undergone a chemical abortion." *Planned Parenthood Exposed: Examining Abortion Procedures and Medical Ethics at the Nation's Largest Abortion Provider*, Hearing Before H. Comm. on the Judiciary, 114th Cong. 18 (2015) (testimony of Susan Thayer, Former Planned Parenthood Manager). That deceptive policy enabled Planned Parenthood to continue "outsourcing complications to others." *Id.* at 20.

Ultimately, as these incidents underscore, the unity of interests presumed in *Singleton* does not apply when practitioners challenge health-and-safety regulations. Indeed, left unchecked, practitioners can—and *do*—harm women. They cannot adequately represent the interests of patients and should not be allowed to do so as a means of protecting their business practices.

4. Women seeking abortion need not rely on practitioners to assert their rights; women can effectively assert their own rights, and courts generally allow them to do so anonymously.

Singleton itself acknowledged this point. A woman wishing to protect her privacy may bring suit "under a pseudonym, as so frequently has been done." 428 U.S. at 117. Moreover, "[a] woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.'" *Id.* (quoting *Roe*, 410 U.S. at 124-25).

Singleton overrode those normal considerations against third-party standing only because "little loss in terms of effective advocacy from allowing its assertion by a physician" would occur. *Id.* at 118. Nothing remotely similar can be said for practitioner lawsuits seeking to enjoin health-and-safety regulations, and

the Court should accordingly preclude third-party standing in such cases.

B. Precluding practitioners from asserting the rights of hypothetical patients will address many anomalies that arise in challenges to abortion health-and-safety regulations.

Many of the maladies that plague abortion litigation have arisen precisely because courts have permitted abortion practitioners and facilities to challenge health-and-safety regulations by asserting the rights of hypothetical abortion patients. By holding abortion practitioners and facilities to the same standards that apply elsewhere, the Court can begin to redress abortion-doctrine exceptionalism.

1. Third-party standing facilitates unnecessary facial challenges using the poorly understood "large fraction" test and discourages limited as-applied relief for women seeking abortion.

In general, "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). "[F]acial challenges are best when infrequent" because they "carr[y] too much promise of 'premature interpretation of statutes' on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 608-09 (2004) (alterations omitted) (quoting *Raines*, 362 U.S. at 22). They "run contrary to the fundamental principle of judicial restraint that courts should neither '"anticipate a question of constitutional law in advance of the necessity of deciding it'" nor '"formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."'" *Wash. State Grange*, 552 U.S. at 450 (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). They also

"threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451. Thus, where a statute impinges constitutional rights, "the 'normal rule' is that partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985))

In most contexts outside of free-speech overbreadth doctrine, a plaintiff seeking facial invalidation of a statute has an extraordinarily high bar and must establish that "no set of circumstances exists under which [it] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But the Court has permitted facial invalidation of an abortion regulation if it "will operate as a substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [it] is relevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992); *cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 n.11 (2016) (Alito, J., dissenting) (noting conflict between the large-fraction and "no set of circumstances" tests and arguing that "[t]he proper standard for facial challenges is unsettled in the abortion context").

Courts considering facial challenges to abortion laws are therefore required to determine "which group of women is properly considered the numerator and which group of women is properly considered the denominator"—and then determine "whether the resulting fraction is large." *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 377-78 (6th Cir. 2006) (Rogers, J., concurring) (citation and internal quotation marks

omitted). As explained in greater detail below, courts have often struggled to apply that test correctly. *See infra* Part II.B.

Applying that test is particularly difficult when a practitioner brings a preenforcement challenge seeking to vindicate the rights of hypothetical patients in response to burdens that may never materialize. A woman who brings her own as-applied challenge to an abortion health-and-safety regulation puts her own concrete circumstances at issue. By contrast, practitioners that invoke the abstract rights of women to challenge abortion regulations before any meaningful period of enforcement require courts to predict the impact on aggregate abortion access, typically from out-of-state data or mere anecdotes. *See A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (out-of-state data); *Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 821-22 (7th Cir. 2018), *cert. docketed*, No. 18-1019 (Feb. 4, 2019) (a handful of unverified anecdotes). And a court that predicts a "substantial burden" on a "large fraction" of women will enjoin the law and prevent the State from ever gathering evidence about the actual impact of the law. *See, e.g.*, *id.*

Widespread third-party standing by abortion facilities thus produces exactly the negative consequences the Court generally fears—unnecessary and uninformed constitutional litigation yielding broad holdings rather than narrow redress of individual rights. Curtailing such standing would promote the use of as-applied challenges by individual women seeking narrower holdings having a more concrete impact. And doing so would not keep practitioners from challenging health-and-safety regulations altogether; it would

merely limit them to asserting their own due-process rights rather than those of women generally—just as in other areas of the law.

2. The ability of practitioners and facilities to invoke patients' rights also enables federal courts to intervene in state licensing and regulatory matters.

Typically, federal courts may neither "instruct[] state officials on how to conform their conduct to state law," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), nor entertain collateral attacks on state judicial (and administrative quasi-judicial) determinations, *see D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923). When courts permit abortion practitioners to bring suits based on the rights of their patients, however, they create avenues by which abortion practitioners circumvent normal limits on federal judicial interference with state regulatory functions.

For instance, in Indiana, the Seventh Circuit has extended a bespoke provisional license for a new abortion clinic to operate, even though the clinic was denied an actual license by the State and failed to pursue state judicial remedies. *Whole Woman's Health Alliance v. Hill*, 937 F.3d 864 (7th Cir. 2019), *cert. docketed,* No. 19-743 (Dec. 11, 2019). And in this case, the district court declared invalid Louisiana's hospital-admitting-privileges requirement only after overriding a state agency's understanding of what sort of privileges sufficed under state law. Pet. App. 239a. In both cases, because federal courts were not limited to the rights of litigants before them, they apparently did not feel constrained by ordinary jurisdictional limits. The presence of abstract third-party rights somehow empowered federal courts to direct state officials how to comply with state law precisely

because the courts would be safeguarding the undue-burden rights of hypothetical future patients.

If left to develop unabated, third-party standing threatens the fundamental rules of comity and respect that define the boundaries of federal jurisdiction vis-à-vis states. With abortion doctrine, unfortunately, such erosion of the usual rules in favor of more abortion-friendly outcomes has been par for the course. But by putting limits on third-party standing, the Court can begin to rectify the unjustified havoc that abortion doctrine has been wreaking throughout American law.

II. This Court should clarify the *Hellerstedt* standard by affirming the decision below.

Setting aside Petitioners' lack of standing, the decision below correctly applied the nebulous undue-burden standard to uphold Louisiana's health-and-safety regulation on the merits. As the Fifth Circuit held—and other courts of appeals have agreed—a regulation does not impose an undue burden unless its benefits are substantially outweighed by the burdens it imposes. Pet. App. 30a-31a & n.50. And only actual burdens—*i.e.*, being required to forgo an abortion or materially delay and face significantly increased risks from a later abortion—are even relevant to that analysis. Thus, even a law that provides few benefits is constitutional absent truly substantial burdens.

Moreover, even assuming Louisiana's law imposed an undue burden on some women, the Fifth Circuit correctly held that Petitioners' challenge must fail because that hypothetical burden would not fall on a large fraction of affected women. *See* Pet. App. 53a-59a.

A. An abortion regulation imposes an undue burden only if its burdens substantially outweigh its benefits.

To the extent the undue-burden standard is even workable, lower courts have struggled to apply it, and some have wrongly suggested that any law that makes an abortion more costly or difficult to obtain imposes an undue burden absent a compelling health benefit. This case presents an opportunity to clarify that few burdens are undue and that absent extraordinary circumstances state health-and-safety regulations are generally constitutional.

Since *Casey*, this Court has held that a "State may enact regulations to further the health or safety of a woman seeking an abortion," although it may not "impose an undue burden on [her] right[s]." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion). But *Casey* unhelpfully defined an "undue burden" as whenever a health-and-safety regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Id.* Even prominent abortion-rights advocates agree that *Casey* "offer[ed] no guidance as to which laws are an undue burden and which are not." Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 Tex. L. Rev. 1189, 1220 (2017).

Hellerstedt made things no better. There the Court "considered the evidence in the record" and "weighed the asserted benefits against the burdens." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). But it did not explain how lower courts should measure a challenged regulation's supposed burdens, nor how to compare those burdens to the regulation's benefits. Consequently, even after *Hellerstedt* (perhaps

especially after) the undue-burden test remains "confusing to apply." Chemerinsky & Goodwin, *supra*, 95 Tex. L. Rev. at 1219.

Affirming the decision below would provide much needed clarity. It would clarify, first, how to estimate a regulation's alleged burdens; and second, the proper analysis for weighing burdens and benefits.

1. Only burdens that require women to forgo or materially postpone an abortion are constitutionally cognizable.

Every marginal decrease in the convenience of obtaining an abortion does not amount to a constitutionally relevant burden. *See Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), *vacated as moot sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2017) ("The Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes."). The question is whether a challenged regulation will "*prevent* a significant number of *women from obtaining an abortion*." *Casey*, 505 U.S. at 893 (plurality opinion) (emphasis added).

Hellerstedt, for example, "recognize[d] that increased driving distances do not always constitute an 'undue burden.'" 136 S. Ct. at 2313. Instead, the problem in *Hellerstedt* was "fewer doctors, longer waiting times, and increased crowding" at the remaining abortion facilities. *Id.* Those facilities would "not be able to meet" the increased "demand without" operating in a way that "would be harmful to, not supportive of, women's health." *Id.* at 2317-18; *see id.* at 2316. Thus, *Hellerstedt* counted as relevant only burdens imposed by state law that would prevent a significant number

of patients from obtaining an abortion or that would require a significant number of women to materially delay their abortions (*i.e.*, delays that would lead to significantly increased health risks from the abortion). *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018) (framing the relevant burdens in terms of abortions forgone or materially delayed).

Thus, a regulation that merely increases an abortion's cost, requires more travel, or leads women to seek abortions out-of-state, but *does not itself* require a significant number of women to forgo or materially delay their abortions, does not impose a constitutionally cognizable burden. Nor for that matter are circumstantial factors—such as socioeconomic status and stigma—cognizable burdens since they exist independent of state law. Indeed, any lesser standard ignores *Casey*'s express command that only items that "will operate as a *substantial obstacle* to a woman's choice to undergo an abortion" are potentially problematic. 505 U.S. at 895 (emphasis added).

Not only the Eighth Circuit in *Jegley*, but other courts of appeals as well, have reached such conclusions. The Sixth Circuit, for instance, rejected the argument that mere price increases from regulations are cognizable burdens, holding that, to be burdensome, a regulation must amount to "a substantial obstacle *to the ultimate abortion decision*." *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 516 (6th Cir. 2012) (emphasis added); *see id.* ("[A]ll of the affected women who gave statements proceeded to obtain a surgical abortion regardless of their preference for a medical procedure.").

The decision below likewise correctly estimated the challenged regulation's burdensomeness by consider-

ing only the extent to which it allegedly required women to forgo or materially postpone their abortions. *See, e.g.*, Pet. App. 52a (concluding law would cause an "extra 54 minutes of procedure time" per day, which "is unlikely to result in an undue burden on women"). Beyond that, the Fifth Circuit correctly held that Petitioners had "failed to establish a causal connection" between the regulation and any supposed burden. *Id.* 40a. Critically, "courts cannot consider" circumstantial burdens—such as the purported stigma of being an abortion practitioner—because they are "not attributable to the state generally" nor to a challenged health-and-safety regulation "in particular." *Id.* 48a n.60. And even more fundamentally, most of the abortion practitioners "largely sat on their hands, assuming that they would not qualify" for admitting privileges, which "sever[ed] the chain of causation." *Id.* 41a; *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) ("[S]elf-inflicted injuries are not fairly traceable to the Government's purported activities."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (requiring "injury to persons *caused by* private or official violation of law" (emphasis added)); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998) ("[T]here must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.").

The Court did not suggest in *Hellerstedt* that any regulatory impact on abortion whatever—let alone an infinite variety of circumstantial factors—is constitutionally cognizable. It should use this opportunity to embrace the standard that the Fifth, Sixth, and Eighth Circuits have established—that a burden is relevant only if it requires women to forgo or materially delay their abortions.

2. An abortion regulation becomes unduly burdensome only if its burdens substantially outweigh its benefits compared to prior law.

Determining whether a health-and-safety regulation imposes a constitutionally cognizable burden is only one piece of the puzzle. *Hellerstedt* also requires a court to analyze a law's benefits "compared to prior law." 136 S. Ct. at 2311. A court must then "weigh[] the asserted benefits against the burdens." *Id.* at 2310.

The result of that weighing was clear in *Hellerstedt*. According to this Court, the Texas law at issue there had literally zero benefits. It would not "help[] even one woman obtain better treatment" than preexisting health-and-safety regulations. *Hellerstedt*, 136 S. Ct. at 2311. Yet Texas's law had caused so many abortion facilities to close that the remaining facilities would face the impossible task of accommodating a five-fold patient increase. *Id.* at 2316. Those closures were so significant that the district court found Texas's law "would operate for a significant number of women . . . just as drastically as a complete ban on abortion." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014); *see Hellerstedt*, 136 S. Ct. at 2316 (remaining providers "could not 'meet' that 'demand'").

Hence, as the Eighth Circuit has explained, *Hellerstedt* "struck down [Texas's law] because its numerous burdens *substantially outweighed* its benefits." *Jegley*, 864 F.3d at 958, 960 n.9 (emphasis added). And even before *Hellerstedt*, other circuits had employed a similar approach, defining an "undue" burden as "a burden [that] *significantly* exceeds what is necessary to advance the state's interests." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919-

20 (7th Cir. 2015) (emphasis added) (quoting *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014)).

The decision below correctly followed that approach. *See* Pet. App. 31a (refusing to invalidate a regulation that does not "present a substantial obstacle to abortion"—regardless of its benefits). Indeed, as the Fifth Circuit explained, the undue-burden test "is not a 'pure' balancing test under which *any* burden, no matter how slight, invalidates the law." *Id.* 30a.

In *Hellerstedt*, even the U.S. Solicitor General rejected pure balancing. *See* Pet. Br. 49 (arguing that any regulation with "a burden that outweighs its benefits" fails undue-burden test). Instead, "even a law that confers little or no benefit may still be warranted if it imposes little or no burden." Br. of United States as Amicus Curiae at 24, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 67681.

Any other approach conflicts with the principle that legislatures enjoy discretion to address problems "even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature." *Stenberg v. Carhart*, 530 U.S. 914, 970 (2000) (Kennedy, J., dissenting); *accord Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting) (States are not required to adopt or "revise [their] standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area"). Indeed, Petitioners' proposed rule reverses the normal practice of reviewing a state law "with a heavy presumption favoring the law's constitutional application." *A*

Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 688 (7th Cir. 2002). If a regulation's burdens only marginally exceed its benefits, no "judge [could] feel[] a clear and strong conviction of" the regulation and the Constitution's "incompatibility with each other." *Fletcher v. Peck*, 10 U.S. 87, 128 (1810).

Thus, in affirming the decision below, this Court should clarify that a health-and-safety regulation imposes an undue burden only if it causes burdens that substantially outweigh its benefits. Only that rule is consistent with this Court's conclusion that "the State has a significant role to play in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

B. The large-fraction test requires lower courts to find an undue burden on practically all affected women.

Finding that a law's burdens substantially outweigh its benefits does not end the analysis. An abortion regulation is still valid unless it "operate[s] as a substantial obstacle" "in a large fraction of the cases in which [it] is relevant." *Casey*, 505 U.S. at 895 (plurality opinion). This Court has never suggested that a lower court *can*—let alone *must*—weigh benefits and burdens without determining whether a challenged provision poses a substantial obstacle to a large fraction of relevant would-be abortion patients. *See Hellerstedt*, 136 S. Ct. at 2313 (weighing benefits against burdens but also applying large-fraction test).

Following that rule, the Fifth Circuit "additionally h[e]ld that the law d[id] not burden a large fraction of women." Pet. App. 53a. Petitioners relegate the large-fraction test to a single footnote, treating it as mori-

bund, subsumed within *Hellerstedt* balancing. Pet. Br. 45 n.9. This Court should reaffirm that the large-fraction test retains independent analytical significance, namely that, per the decision below, a fraction is not "large" unless it amounts to *practically all* affected women. *See* Pet. App. 55a-58a.

1. Courts must properly calculate the denominator and the numerator to apply the large-fraction test.

Since *Casey*, this Court has required lower courts to calculate the fraction of women that a challenged regulation unduly burdens. A court does not perform the required calculation by finding that a challenged regulation will unduly burden—or even *entirely prevent*—"some women" from obtaining an abortion. *See Casey*, 505 U.S. at 885-87 (plurality opinion) (upholding waiting period despite its "'particularly burdensome' effects . . . on *some women*"); *id.* (upholding parental-consent provision that would likely prevent some women from obtaining an abortion); *see also Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) ("The *Casey* Court itself was not persuaded to invalidate Pennsylvania's parental-consent requirement by record evidence showing that the requirement would altogether prevent some women from obtaining an abortion.").

Yet this Court has offered little guidance on how to calculate the relevant fraction, *see* Pet. App. 53a, with the consequence that lower courts do little more than "focus[] on amorphous groups of women to reach [the] conclusion that" a challenged regulation is "facially unconstitutional," *Jegley*, 864 F.3d at 959 (rejecting district court's reliance on burdens on "some women" to enjoin law). And given the tendency of abortion practitioners to bring all-out facial challenges to abor-

tion laws, this is yet another area of doctrinal confusion exacerbated by liberal third-party standing rules.

The Seventh Circuit's large-fraction precedents, in particular, demonstrate the need for Supreme Court guidance. In *Planned Parenthood of Wisconsin, Inc. v. Schimel*, it struck down an admitting-privileges requirement without properly determining how many women would actually be unduly burdened. 806 F.3d 908, 917 (7th Cir. 2015). It instead treated as the denominator the patients of a facility that might have closed owing to the law (as if this was a static group of women repeatedly coming to the same clinic for abortion after abortion) and then assumed (for the numerator) that *all* such women would be completely denied abortion access, *see id.* at 917-18, despite the existence of another facility "a mere 1.3 miles" away that could accommodate virtually all of the demand, *id.* at 932 & n.7 (Manion, J., dissenting).

Even after *Hellerstedt*, the Seventh Circuit has preliminarily enjoined two Indiana laws based on excessively narrow denominators. In *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, it became the first circuit to affirm an injunction against an abortion informed-consent law when it declared that an 18-hour ultrasound law would be an undue burden on "low income women who do not live near one of PPINK's six health centers where ultrasounds are available." 896 F.3d 809, 819 (7th Cir. 2018). And even more recently, it affirmed an injunction against Indiana's parental-notice requirement by declaring the denominator to include all "young women *who are likely to be deterred* from even attempting a judicial bypass because of the possibility of parental notice." *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 982-83 (7th

Cir. 2019) (emphasis added), *cert. docketed*, No. 19-816 (Dec. 27, 2019).

In each of those cases, by "us[ing] the same figure (women actually burdened) as both the numerator and the denominator," the Seventh Circuit prejudged the outcome of the large-fraction analysis. *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting). Those cases, therefore, underscore how confusion over the large-fraction test leads lower courts to invalidate health-and-safety regulations that impede very few women in the real world. *See Schimel*, 806 F.3d at 932 n.7 (Manion, J., dissenting) (pointing out that "98% of women seeking abortions in Milwaukee will not be impacted"—even "if [the facility] closes").

To resolve that confusion, in affirming the decision below, this Court should hold that the large-fraction test properly calculated has as its denominator the entire group of women for whom the law has any regulatory effect, while the numerator is the portion of that broader group for whom the regulatory effect is a substantial obstacle, *i.e.*, those the law requires to forgo or materially delay an abortion.

2. A fraction is "large" only if it amounts to practically all affected women.

That holding raises another question addressed below and ignored by Petitioners: How large must the fraction be? See Pet. App. 56a-58a (explaining why 30% is not a "large fraction"). As the Fifth Circuit noted, in every other context, a statute is not facially invalid unless a plaintiff "demonstrat[es] that there is *no possible* constitutional application of a law." *Id.* 58a; see *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challengers must "establish that no set of circumstances exists under which the Act would be

valid"). And to find 30% is a large fraction would be grossly inconsistent with that precedent and effectively "eviscerate[] the restrictions on a successful facial challenge." Pet. App. 58a.

This Court should clarify that a health-and-safety regulation is not facially invalid unless it unduly burdens "practically all" of the women that it could potentially affect. *Taft*, 468 F.3d at 373. Indeed, while the large-fraction test, "in a way, is more conceptual than mathematical," *id*. at 374, the test "is not entirely freewheeling," *Jegley*, 864 F.3d at 960, and courts must "define its outer boundaries," *id*. The need for well-defined (and high) boundaries for facial challenges is even more critical if the fraction of women burdened may fluctuate over time. If "large fraction" is insufficiently great, state abortion regulations may vacillate between validity and invalidity with some frequency. Proof that an extraordinarily high percentage of affected women will be substantially burdened by a regulation would indicate a more predictable and stable result.

The Sixth and Eighth Circuits have agreed that "a large fraction exists [only] when a statute renders it *nearly impossible* for the women actually affected by an abortion restriction to obtain an abortion." *Taft*, 468 F.3d at 373 (emphasis added) (invalidating one law as an undue burden in every instance where it applied but upholding another law that imposed an undue burden only 10-12% of the time); *Jegley*, 864 F.3d at 960 (expressly following *Taft*); *see also Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 605-06 (6th Cir. 2006) (no undue burden absent "evidence in the record showing that closing the [affected] clinic would operate as a substantial obstacle in choosing to have an abortion *for a majority of* [*affected*] *women*"

(emphasis added)); *see also Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013) (holding that a "one hundred percent correlation" amounted to a large fraction).

This Court should follow suit, and in so doing maintain the analytical integrity of the "large fraction" concept, the stability of constitutional evaluation of abortion laws, and the high threshold for facial challenges more generally.

C. Even correctly applied, *Hellerstedt*'s fact-intensive test is ill-suited for preenforcement challenges.

As the above discussion illustrates, *Hellerstedt* "placed considerable weight upon evidence," relying for example on "factual findings and the research-based submissions of *amici*." 136 S. Ct. at 2310. In other words, *Hellerstedt* requires a fact-bound analysis. And a fact-bound analysis requires *facts*. But with *preenforcement* facial challenges, such as here, facts are in short supply. Thus, as is true in other contexts, health-and-safety regulations should generally be allowed to go into effect to "provide the courts with a better record on which to judge their constitutionality." *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring).

By contrast, freely authorizing abortion practitioners to bring preenforcement facial challenges to health-and-safety regulations in effect gives practitioners license to seek constitutional protection for their own business models. Because they cannot, in advance of enforcement, present meaningful data on a law's *actual* aggregate impact on abortion access, abortion practitioners instead resort to evidence that compliance costs will interfere with current practices

and limit their ability to meet demand. In this way, providers' current business models become proxies for women's rights, where to burden a clinic's status quo is to burden women. Such a rule has the practical effect of constitutionalizing the static business models of current abortion practitioners and negates any need to take account of how both women and the market will react to a newly enacted law.

The constitutionalization of abortion clinics' business models explains the results of recent cases at the circuit level. In *Planned Parenthood of Indiana & Kentucky v. Commissioner, Indiana State Department of Health*, 896 F.3d 809 (7th Cir. 2018), *cert. docketed*, No. 18-1019 (Feb. 4, 2019), the Seventh Circuit enjoined Indiana's 18-hour ultrasound law based on Planned Parenthood's current supply of ultrasound machines, rather than wait to see whether Planned Parenthood or some other abortion provider would adapt to the new law to provide the required ultrasound. In *Little Rock Family Planning Services v. Rutledge*, the court invalidated prior to enforcement (as an undue burden on women) a requirement that abortion providers be board-certified OB/GYNs merely because some of the practitioners at the plaintiff facility were not currently so certified. 397 F. Supp. 3d 1213, 1308 (E.D. Ark. 2019), *appeal filed*, No. 19-2690 (8th Cir. Aug. 9, 2019). Enjoining an abortion law preenforcement based on the current practices of an abortion provider protects practitioners' business models—not women.

To be sure, the decision below in this case is a refreshing exception to this trend to the extent that the Fifth Circuit would at least require the abortion practitioners to demonstrate a good-faith effort to obtain admitting privileges. Pet. App. 40a-41a. But

even that requirement does not illustrate whether, if these practitioners fail to obtain admitting privileges, *other* providers *with* privileges would fill the market void. The case becomes all about the plaintiff providers' current practices rather than about the interests of the women whose rights are at stake.

It is also far from fanciful that abortion providers will adapt to new abortion laws if required. Two particularly egregious examples from Indiana and Arkansas underscore the point. In the Indiana example, practitioners challenged an in-person informed-consent law on the grounds that they did not have enough facilities, spread evenly enough across the State, to handle the required face-to-face meetings. After the Seventh Circuit permitted that law to go into effect, however—*see Newman*, 305 F.3d at 693—Planned Parenthood managed to open more health centers around the State to meet that need. Appellant's App. 78-79, *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, No. 17-1883 (7th Cir. Sept. 14, 2018).

Similarly, in the Arkansas example, Planned Parenthood obtained a preenforcement injunction against Arkansas's requirement that abortion practitioners contract with a physician who has admitting privileges based entirely on self-serving representations that they could not locate a contract physician. *Jegley*, 864 F.3d at 956-57. "Planned Parenthood's efforts to recruit a contract physician," however, did not even "include any offer of financial compensation." *Id.* at 956 n.4. And unsurprisingly, after the Eighth Circuit vacated the preenforcement injunction and Arkansas's law took effect, Planned Parenthood—and another Arkansas abortion provider that likewise claimed it could not comply—managed to hire a (presumably com-

pensated) contract physician and comply. Joint Mot. to Vacate Prelim. Inj. at 2-3, *Planned Parenthood of Ark. & E. Okla. v. Jegley*, No. 18-2463 (8th Cir. Nov. 5, 2018) (after years of litigation, abortion practitioners announce sudden ability to comply with law they had previously said was impossible to comply with).

Those examples underscore that preenforcement challenges (such as this one) are often based on phantom obstacles that would not exist if state laws were allowed to take effect.

Further, the circuits have recognized the difficulty of applying *Hellerstedt* in preenforcement facial challenges. In one recent order, a majority of the Seventh Circuit's judges agreed that the standard for considering preenforcement abortion challenges needs clarification. *See* Order Denying Rehearing En Banc, *Planned Parenthood Ind. & Ky., Inc. v. Box*, No. 17-2428 (7th Cir. Oct. 30, 2019). That court nevertheless denied rehearing en banc, because two judges concluded that *Hellerstedt* created an unworkably fluid standard, impossible to apply to preenforcement challenges. *See id.* (slip op. at 2-4) (Easterbrook, J., joined by Sykes, J., concurring in the denial of rehearing en banc). Assessing a plaintiff's undue-burden claim "depends on what the burden would be," which a preenforcement "injunction prevents [a reviewing court] from knowing." *Id.* (slip op. at 4); *see Newman*, 305 F.3d at 687 ("Because Indiana has been disabled from implementing its law and gathering information about actual effects, any uncertainty . . . must be resolved in Indiana's favor.").

The Eighth Circuit, meanwhile, rejected a preenforcement facial injunction "[b]ecause the record [wa]s practically devoid of any information" about the burdens imposed by Missouri's laws, such that the court

"lack[ed] sufficient information to make a constitutional determination" under *Hellerstedt*. *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 756-57 (8th Cir. 2018). The court emphasized the particular need for judicial restraint when faced with preenforcement challenges to abortion regulations: "[P]erhaps the decisive factor pointing towards restraint is *the fact-intensive nature of* the constitutional test here: the undue burden standard." *Id.* at 755-56 (emphasis added).

Such an approach is consistent with this Court's caution against granting preenforcement facial relief in nonabortion contexts. Where a "State has had no opportunity to implement" a challenged statute, "its courts have had no occasion to construe the law in the context of actual disputes arising from [a given] context, or to accord the law a limiting construction to avoid constitutional questions." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). States should have the same opportunities when faced with challenges to abortion regulations. Indeed, "[t]alk of the states as laboratories is hollow if federal courts enjoin experiments before the results are in." Order Denying Rehearing En Banc, *Box* (slip op. at 2-3) (Easterbrook, J., joined by Sykes, J., concurring in the denial of rehearing en banc).

CONCLUSION

This Court should remand with instructions to dismiss the complaint for lack of standing; alternatively, this Court should affirm the Fifth Circuit's judgment.

Respectfully submitted,

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