Nos. 18-1323 & 18-1460

In The Supreme Court of the United States

JUNE MEDICAL SERVICES, LLC *et al.*,

Petitioners,

v.

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

Respondent.

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

Cross-Petitioner,

v.

JUNE MEDICAL SERVICES, LLC *et al.*,

Cross-Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY, CATHOLIC BAR ASSOCIATION, HUMAN COALITION ACTION & NATIONAL PRO-LIFE ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT-CROSS-PETITIONER

REED N. SMITH
Counsel of Record
KIMBERLEE WOOD COLBY
CENTER FOR LAW AND RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Suite 302
Springfield, VA 22151
(703) 894-1081
rsmith@clsnet.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF *AMICI CURIAE*[1]

Amici are legal societies and advocacy groups whose members are pro-life and support the conscience rights of others. *Amici* also support sound jurisprudence that allows for consistent results in abortion cases.

The **Christian Legal Society (CLS)** is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors with members in every state and chapters on 90 law school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, works to protect all citizens' right to be free to exercise their religious beliefs. CLS supports the right to life for all persons and the equal administration of justice. Cases involving the unborn should not be subject to unique jurisprudence that extends the meaning of state action to include the private decisions of individuals or cannot be applied consistently across cases.

The **Catholic Bar Association (CBA)** is a community of legal professionals that educates, organizes and inspires its members to faithfully uphold and bear witness to the Catholic Faith in the study and practice of the law. As part of its mission, the CBA seeks to

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Blanket consent letters are on file with the Clerk.

protect the rights of Catholic physicians and health care workers who choose not to perform abortions.

Human Coalition Action is the advocacy arm of a national network of grassroots organizations that provide meaningful support and resources for women at high risk to abort their preborn children. Human Coalition Action supports the rights of women to be fully informed about the risks of abortion as well as resources and alternatives available to them. Human Coalition Action advocates through grassroots mobilization and the government to enact pro-life policies and seeks reasonable certainty as to how courts will scrutinize such policies.

The **National Pro-Life Alliance (NPLA)** is a grass-roots alliance with more than 600,000 members whose primary focus is passing pro-life legislation that will comprehensively protect the unborn. NPLA's top priority is to lobby both incumbents and aspiring candidates for office to come out clearly for pro-life initiatives. NPLA counts numerous physicians who morally object to performing abortions among its membership.

SUMMARY OF ARGUMENT

I. As Justice Alito noted in dissent in *Whole Woman's Health v. Hellerstedt*, abortion clinics and providers may close for many reasons completely separate from state action. 136 S. Ct. 2292, 2344-45 (2016). For example, if an abortion provider retires or otherwise

stops performing abortions, "the closure of the clinic or the reduction in capacity cannot be attributed to [a challenged law] unless it is shown" that the law, "as opposed to some other factor[,]" was the reason the provider stopped performing abortions. *Id*. at 2345. To prevail, Petitioners must show that the claimed undue burden to women's access to abortion is caused by state action and not these other factors.

Under Act 620 (the "Act") and applicable Louisiana law, any person wishing to perform an abortion must: (1) be a licensed physician; (2) be enrolled in or have completed a residency in obstetrics and gynecology or family medicine; and (3) have active admitting privileges. Hundreds of physicians in Louisiana already meet or could readily meet these requirements though many choose not to perform abortions for moral, religious, economic or other reasons unrelated to the law. Before the Act, six abortion providers performed all abortions in the state. Given that the number of potential abortion providers under the Act greatly exceeds the number required to fully meet demand, no reasonable analysis of the Act can conclude that it serves as a substantial obstacle to women seeking abortions in Louisiana.

The circumstances of Doe 5's practice in this suit are illustrative. Doe 5 testified that he does not perform abortions beyond 18 weeks' gestation because after that time, "the baby is formed to a certain degree that it is beyond what he 'feel[s] comfortable with.'" Pet. App. 17a. No reasonable court would hold that Doe 5's personal discomfort with performing

abortions beyond 18 weeks is attributable to Act 620 or that his refusal to perform such abortions should be attributed to state action. There is no basis to distinguish between Doe 5 limiting his abortion practice due to discomfort with certain abortions and the hundreds of Louisiana physicians abstaining completely from providing abortions for personal reasons despite meeting Act 620's requirements. The personal choice of eligible physicians not to perform abortions cannot properly be attributed to state action, as is required for constitutional torts.

Furthermore, Petitioners themselves have no more than a generalized liberty interest in performing abortions. In such circumstances, a challenged statute needs only be rationally related to its objective. Here, the Fifth Circuit noted that the hospital admitting privileges requirement has actual benefits to women's health because hospitals are more likely to run background checks on their physicians than abortion clinics. This benefit, even if "not huge," more than suffices to survive rational basis scrutiny. Pet. App. 39a.

II. As shown above, the Court need not reconsider its large fraction test in order to find Act 620 constitutional on this record. Nonetheless, as a matter of good jurisprudence the Court should abandon the large fraction test, for the same reasons the Court reconsidered the *Lemon* test[2] in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019).

---

[2] See *Lemon v. Kurtzman*, 403 U.S. 672 (1971).

In *American Legion*, the Court noted that the *Lemon* test was widely maligned for its inconsistency and malleability. 139 S. Ct. at 2081 & nn.13-15; see also *id.* at 2101 (Gorsuch, J., concurring) ("Our 'doctrine [is] in such chaos' that lower courts have been 'free to reach almost any result in almost any case.'" (quoting Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 119 (1992))). The large fraction test is similarly incapable of consistent application. Courts have found little guidance or agreement as to how to formulate the fraction, how to populate the fraction once a formulation is chosen, and the "largeness" of the fraction required to facially invalidate a regulation. Indeed, the dissent below argues that any attempt to calculate the fraction of women affected is an improper application of the test. Pet. App. 98a ("Such a calculation is not required.").

Rather than allowing the large fraction test to linger like "some ghoul in a late-night horror movie," the Court should reconsider the large fraction test as it did the *Lemon* test.

ARGUMENT

I. Act 620 does not impose an undue burden on women seeking an abortion because the number of legally eligible abortion providers greatly exceeds the number needed to meet demand.

Under the Court's undue burden test, a statute which has "'the purpose or effect of presenting a

substantial obstacle to a woman seeking an abortion impose[s] an undue burden on the right.'" *Hellerstedt*, 136 S. Ct. at 2309. Louisiana's Act 620, at issue here, requires physicians who perform abortions (1) to be enrolled in or have completed a residency in obstetrics and gynecology or family medicine and (2) have active admitting privileges. As shown below, the Act leaves hundreds of Louisiana physicians eligible to perform abortions; no more than six are required to fully meet the State's abortion demand.

The Fifth Circuit examined the effects of Act 620 on six physicians who perform the entirety of abortions in Louisiana. Pet. App. 7a. Noting that the prerequisites for hospital admitting privileges in Louisiana are much less burdensome than the Texas admitting privileges that the Court examined in *Hellerstedt*, the panel majority held that of the five physicians who did not have the necessary admitting privileges to fully maintain their pre-Act abortion practice, four did not show a good faith effort to get such privileges. Therefore, Petitioners failed to show that Act 620 caused them to limit or abandon their abortion practice and the law was upheld. Pet. App. 49a.

Amici do not quarrel with the Fifth Circuit's determination that four of the five affected abortion providers in this suit failed to make a good faith effort to obtain admitting privileges; however, *amici* suggest that Petitioners' argument has a more fundamental causation problem—the Act does not serve as a substantial obstacle to women seeking an abortion because the Act legally permits hundreds of Louisiana physicians to perform abortions.

A. Hundreds of Louisiana physicians already meet or could readily meet the requirements of Act 620.

As explained below, more than 400 Louisiana physicians fully meet or could readily meet Act 620's requirements and may legally perform abortions. Although many of these physicians choose not to perform abortions, their private decision is not attributable to the Act. Rather, they choose not to perform abortions for moral, religious, economic, or other personal reasons. If just 2% of these eligible physicians chose to perform abortions, the number of providers in Louisiana under the Act would exceed pre-Act levels.

Act 620 and applicable Louisiana law permit any licensed physician who (1) "is currently enrolled in or has completed a residency in obstetrics and gynecology or family medicine"[3] and (2) has qualifying hospital admitting privileges to perform an abortion. La. Stat. Ann. § 40:1061.10.

There are more than 800 board-certified family medicine physicians throughout Louisiana.[4]

---

[3] La. Rev. Stat. § 40:1299.35.2(A)(1) (2015) (later amended and recodified at La. Rev. Stat. § 40:1061.10). See also Pet. App. 237a-38a (finding of fact 304).

[4] American Board of Family Medicine, Find a Physician Directory, available at https://portfolio.theabfm.org/diplomate/find.aspx (last visited December 16, 2019) (identifying 826 currently board-certified family medicine physicians in Louisiana); see also American Board of Family Medicine, Am I Board Eligible?, available at https://www.theabfm.org/become-certified/am-i-board-eligible (last visited December 20, 2019) (indicating that a residency in family medicine is required for board eligibility).

Additionally, there are approximately 500 board-certified OB/GYNs in Louisiana, including practicing residents.[5] Consequently, approximately 1300 physicians meet the Act's residency requirements.[6]

As to the admitting privileges requirement, the Fifth Circuit noted that, unlike Texas, "the majority of hospitals [in Louisiana] do not have a minimum number of required admissions." Pet. App. 41a. Based on this record, many of those physicians who meet the Act's first requirement could secure admitting privileges in compliance with the Act. Two of the six petitioners who perform abortions in Louisiana, Does 3

---

[5] See William F. Rayburn, *Distribution of American Congress of Obstetricians and Gynecologists Fellows and Junior Fellows in Practice in the United States*, 119 Obstetrics & Gynecology 1017, 1019 (2012), available at https://journals.lww.com/greenjournal/Fulltext/2012/05000/Distribution_of_American_Congress_of_Obstetricians.19.aspx (last visited December 20, 2019) (identifying 507 Fellows and Junior Fellows of the American Congress of Obstetricians and Gynecologists ("ACOG") in Louisiana). See also William F. Rayburn, *The Obstetrician-Gynecologist Workforce in the United States: Facts, Figures, and Implications* 54 (2011), available at https://m.acog.org/~/media/BB3A7629943642ADA47058D0BDCD1521.pdf (last visited December 16, 2019) (identifying 476 ACOG Fellows and Junior Fellows of the American Congress of Obstetricians in Louisiana). See also *id*. at 46 (identifying board certification as a requirement to become a Fellow).

[6] Because this number only includes board-certified physicians and residents, it is likely under inclusive. For example, a similar study found approximately 600 OB-GYNs practice in Louisiana. See Imam M. Xierali, *Relocation of Obstetrician–Gynecologists in the United States, 2005–2015*, 129 Obstetrics & Gynecology 543, 548 (2017), available at https://journals.lww.com/greenjournal/Fulltext/2017/03000/Relocation_of_Obstetrician_Gynecologists_in_the.22.aspx (last visited December 20, 2019).

and 5, obtained qualifying admitting privileges in at least one hospital. Doe 5 likely could receive admitting privileges in at least one more hospital.[7] Thus, even if, contrary to the Fifth Circuit's analysis, none of the remaining four abortion providers could receive admitting privileges, one-third of the pre-Act providers in this case were able to secure admitting privileges in compliance with the Act.

Applying that percentage uniformly to the physicians in Louisiana who meet the first criterion, well over 400 physicians in Louisiana meet or could readily meet all requirements for performing abortions in Louisiana. Before Act 620, the demand for abortion in Louisiana was fully met by six abortion providers. The potential workforce for abortion providers under the Act exceeds the pre-Act workforce by over 6500%. Consequently, the effect of Act 620 does not create a substantial obstacle to women's access to abortion.

---

[7] Doe 5 indicated he had received qualifying hospital admitting privileges pending his identification of a covering physician. The majority, noting that the record showed that Doe 5 had only asked one doctor to be his covering physician, found that he did not satisfy the burden of showing that the Act stood as an obstacle to his performing abortions. Pet. App. 17a-18a.

B. Act 620's admitting privileges requirement does not substantially interfere with women's access to abortion.

1. The choice of hundreds of private physicians to abstain from performing abortions they are legally entitled to perform is not attributable to state action.

The facial constitutionality of a statute or regulation must be judged according to the effects it compels without considering the decisions of private actors. See *Martinez v. State of Cal.*, 444 U.S. 277, 285 (1980) (holding that private actors rendered plaintiffs' injury "too remote a consequence" to attribute to state actors). Plaintiffs bear the burden of establishing that their injury was caused by state action. *Hellerstedt*, 136 S. Ct. at 2313 (noting that "petitioners satisfied their burden to present evidence of causation").

As shown above, hundreds of physicians in Louisiana may legally perform abortions in Louisiana. There is no argument that, absent the private decisions of hundreds of Louisiana physicians to abstain from this practice, the Act imposes no substantial obstacle to abortion access in Louisiana. Where someone alleges a deprivation of a liberty interest that is attributable to private actors, any causal chain between state action and the deprivation is broken unless the private entity "performs a traditional, exclusive public function," "the government compels the private entity to take a particular action," or "the government acts jointly with the

private entity." *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

Louisiana physicians choose not to perform abortions, not because of any compulsion by the State or legal obstacles, but rather because they have moral, religious, economic, or other personal reasons not to offer abortions. One recent study shows that although 97% of practicing OB-GYNs have encountered patients seeking abortions, only 14% have performed them.[8] The study concludes that "access to abortion is limited *by the willingness of physicians to provide abortion services*" and notes that OB-GYNs that indicate a high level of religious motivation are particularly unlikely to provide abortions.[9] Nearly 90% of OB-GYNs reporting high religious motivation stated they do not provide abortions. Similarly, a survey of nearly 2300 members of faith-based medical organizations found that 82% of respondents reported they are very or somewhat likely to limit the scope of their practice if required to perform abortions or other procedures to which they have moral or religious objections.[10]

---

[8] Debra V. Stulburg, *Abortion Provision Among Practicing Obstetrician-Gynecologists*, 118 Obstetrics & Gynecology 609 (2011).

[9] *Id*. (emphasis added).

[10] Kellyanne Conway, *Report and Analysis of Findings: Online Survey of Faith-Based Medical Organization Members* (Apr. 8, 2009), available at https://24168d49-d5cc-4260-ae1a-a97a91740a06.filesusr.com/ugd/7d505d_d8cf3baefba04b4ca49c0f0dd411c3da.pdf (last visited December 23, 2019).

Where a private actor allegedly deprives a person of a constitutionally recognized liberty interest, the person is only "considered a state actor when [he or she] exercises a function 'traditionally exclusively reserved to the State.'" *Halleck*, 139 S. Ct. at 1926. Abortion is not a traditional, exclusive public function. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). Similarly, although their medical practice is highly regulated by the State, "being regulated by the State does not make one a state actor." *Halleck*, 139 S. Ct. at 1932. Nor is it enough "that the function serves the public good or public interest in some way." *Id*. at 1928-29.

Justice Alito's dissent in *Hellerstedt* highlights this division between private choice and state action. For example, when an abortion clinic closes due to a physician's retirement, "the closure of the clinic or the reduction in capacity cannot be attributed to [the law] unless it is shown that the retirement was caused by the admitting privileges or surgical center requirements as opposed to age or some other factor." *Hellerstedt*, 136 S. Ct. at 2345 (Alito, J., dissenting). The clinic's closure and the subsequent reduction in abortion capacity in such instance is not attributable to the State, but rather a consequence of the physician's personal decisions.

The break in the causal chain between state action and the claimed lack of access to abortion is further illustrated by facts in this suit. At least two of the abortion providers in this case limit their practice for moral or personal reasons. For example, although Louisiana

law permits abortions up until 21 weeks and six days' gestation, Doe 5 indicated he only performs abortions up to 18 weeks' gestation. After that point, "the baby is formed to a certain degree that is beyond what he 'feel[s] comfortable looking at and dealing with.'" Pet. App. 17a. Similarly, Doe 4, who was 82 years old at the time of the Fifth Circuit's opinion, indicated that he had no intention to expand his abortion practice because "he was already 'working more than enough for [his] age' and 'do[es]n't want to work more.'" Pet. App. 12a.[11] Doe 4's decision to limit his abortion practice due to his age cannot be attributed to Act 620.

If all six abortion providers in this suit shared Doe 5's discomfort with abortions after 18 weeks' gestation, pregnant women in Louisiana would effectively be denied abortions after 18 weeks' gestation though no reasonable jurist would attribute such denial to the Act. Yet no legitimate basis exists to distinguish between physicians like Doe 5, who limits his abortion practice due to personal convictions, or Justice Alito's retired abortion provider, who stops performing abortions for personal reasons, and any one of the hundreds of Louisiana physicians who are or could readily become legally eligible to perform abortions but have opted for personal reasons to abstain altogether from performing abortions. In each case Act 620 permits the physician to perform abortions, and in each case the physician does not perform certain abortions due to

[11] Doe 4 has stopped seeking admitting privileges but thought he had a "very good chance" of getting admitting privileges while actively seeking them. Pet. App. 11a.

personal choice. The difference is merely in degree, not in kind.

Act 620 does not "impose a substantial burden on a large fraction of women" because its effect is to keep several hundred physicians eligible to perform abortions in the state, vastly more than would be needed to perform every abortion sought by pregnant mothers in Louisiana. If legally eligible physicians are unwilling to perform abortions due to moral, religious, or other reasons, the Court should not attribute their decisions to state action for the purpose of invalidating Act 620.

2. Examining the direct effect of Act 620 is consistent with the Court's applicable precedents.

a. The Court's undue burden cases have focused on the legal barriers imposed by abortion regulations.

As the Court held when examining a federal abortion regulation in *Gonzales v. Carhart*, "[a] review of the statutory text discloses the limits of its reach." 550 U.S. 124, 150 (2007). An abortion regulation is invalid if the law itself "strike[s] at the right itself," but not if it has the "incidental effect of making it more difficult or more expensive to procure an abortion." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion). Thus, courts should confine their analyses to the legal barriers a regulation imposes.

Applying the undue burden test accordingly, the Court affirmed the constitutionality of a Pennsylvania statute requiring a 24-hour waiting period between receiving information about abortion and having an abortion. The Court agreed that the waiting period requirement "has the effect of 'increasing the cost and risk of delay of abortions,' " but held these incidental effects on some women "is a distinct inquiry from whether [the law] is a substantial obstacle." *Id*. at 886-87. See also *Casey*, 505 U.S. at 887 ("A particular burden is not of necessity a substantial obstacle.").

In contrast, the Court invalidated a spousal notification requirement because its legal effect was "likely to prevent a significant number of women from obtaining an abortion. 505 U.S. at 893. Under that requirement, physicians were legally prohibited from performing an abortion on a married woman without a signed statement "that she had notified her spouse that she is about to undergo an abortion." *Id*. at 887. For women affected by the spousal notification provision, the Court reasoned that the law imposed a direct barrier to abortion access "as surely as if the Commonwealth had outlawed abortion in all cases." *Id*. at 894. Thus, the undue burden analysis in *Casey* examines the legal barrier imposed by the law and not its "incidental effect[s]."

Stenberg v. Carhart follows the same reasoning. 536 U.S. 914 (2000). In *Stenberg*, the Court held that under the statute, all abortion providers "who perform abortion procedures using [D & E] must fear prosecution, conviction, and imprisonment." *Id*. at 945.

Because the law was held to outlaw "a broad[ ] category of procedures," including D & E, "the most commonly used method for performing previability second trimester abortions," the law imposed a direct barrier to many women seeking abortions. *Id.* at 939, 945. Under the Court's reasoning, the regulation acted to make practically all second trimester abortions illegal.

Justices O'Connor and Kennedy, who formed two-thirds of the Court's joint opinion in *Casey*, were more express in requiring some form of direct effect under the undue burden test. Justice O'Connor noted that under her reading of the statute, which extended to the prohibition to D & E procedures, the law created a substantial obstacle because it "proscrib[ed] the most commonly used method for previability second trimester abortions." *Id*. at 949 (O'Connor, J., concurring). However, if the law "only proscribed the D & X method of abortion," therefore forming an impediment, but not a direct barrier to abortion, the law "would be constitutional in [her] view." *Id*. at 951. Under the same reasoning, Justice Kennedy, who interpreted the law "only to ban the D & X [procedure]," *id.* at 960, would have affirmed the law's constitutionality because it "deprived no woman of a safe abortion and therefore did not present a substantial obstacle on the rights of any woman." *Id*. at 965. The other justices in dissent similarly opined that Nebraska's law was constitutional because "the Court cannot identify any real, much less substantial barrier to any woman's ability to obtain an abortion." *Id*. at 1013 (Thomas, J., dissenting).

In *Gonzales*, Justice Kennedy, writing for the Court, affirmed the constitutionality of a law prohibiting intact D & E procedures. The Court noted "a straightforward reading of the text" of the statute was sufficient to determine "the Act's operation and effect" for purposes of the Court's undue burden test. *Gonzales*, 550 U.S. at 146. The Court reemphasized that an incidental burden is not sufficient to invalidate an abortion regulation on its face. *Id*. at 157-58. The Court acknowledged that the law created an impediment to abortion, finding that "a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term." *Id.* at 160. The Court emphasized that these incidental burdens may often be raised on as-applied challenges, rather than facial challenges, noting it would "be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 168.

Similarly, in *Hellerstedt*, the Court invalidated Texas's admitting privileges requirement due largely to it erecting a *per se* prohibition on physicians performing abortions. In Texas, hospitals frequently conditioned admitting privileges upon admitting a minimum number of patients annually. *Hellerstedt*, 136 S. Ct. at 2312. The Court determined that abortion providers would be unable to satisfy the minimum admissions requirements in Texas hospitals. *Id*. Consequently, the direct legal effect of the admitting privileges requirement in Texas was that abortion providers "would be unable to maintain admitting

privileges or obtain those privileges in the future." *Id*. Lower courts performing an undue burden analysis have likewise focused on legal eligibility. See *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013) (noting that "[p]atients will be subjected to weeks of delay because of the sudden shortage of eligible doctors.").

The admitting requirements in *Hellerstedt* and *Van Hollen* arguably created a near-insurmountable obstacle for any physician to perform abortions, which in turn prevented the supply of abortion providers from reasonably meeting demand. In contrast, the record here establishes that the number of physicians eligible to perform abortions under Act 620 vastly exceeds the number required to fully meet the demand for abortion in Louisiana. Under the undue burden test set forth in *Casey* and applied by more recent decisions, Act 620 is not a substantial obstacle to pregnant mothers' access to abortion.

b. Examining Act 620's direct effect on the number of legally eligible abortion providers is consistent with facial challenges

Furthermore, analyzing the legal effects of Act 620 with respect to physician eligibility is consistent with the Court's jurisprudence with respect to facial challenges. Even if the "no set of circumstances" standard traditionally used in facial challenges does not apply

in the abortion context,[12] it provides useful guidance regarding the necessary showing to facially invalidate a law. See Pet. App. 57a ("In every other area of the law, a facial challenge requires plaintiffs to establish a provision's unconstitutionality in every conceivable application."); see also *Gonzales*, 550 U.S. at 167 ("[T]hese facial attacks should not have been entertained in the first instance.").

The effect of Act 620 does not approach a level of burden justifying facial invalidation. One possible scenario under Act 620 is that all physicians legally qualified to perform abortions choose to provide abortions. Under that scenario, women in Louisiana would have access to more than 400 different abortion providers, when six (and potentially fewer) can meet the entire demand for abortion within the state. In a scenario in which just 1% of abortion-eligible physicians choose to perform abortions, they, in combination with Does 3 and 5, would match the pre-Act number of abortion providers in Louisiana. Given that nearly all scenarios within the legal scope of Act 620 result in the number of abortion providers meeting or exceeding pre-Act levels, there is no basis for finding Act 620 unconstitutional on its face.

---

[12] But see *Hellerstedt*, 136 S. Ct. 2343 n.11 (Alito, J., dissenting) ("The proper standard for facial challenges is unsettled in the abortion context.").

C. Petitioners do not have an independent right under the large fraction test.

1. Petitioners have only a generic liberty interest in performing abortions.

The number of physicians eligible to perform abortions under Act 620, rather than the number of practicing abortionists eligible under the Act, is the proper scope of analysis for a second fundamental reason—those physicians practicing abortions have at most a generic due process interest in their right to perform abortions.

To the extent that Petitioners assert their own "constitutional right to conduct a business or to practice a profession without unnecessary state regulation," the Court applies a rational basis test. *Hellerstedt*, 136 S. Ct. at 2342 (Alito, J., dissenting) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)). This is consistent with the Court's abortion jurisprudence post-*Casey*. In *Casey*, which clarified the "undue burden" test, the joint opinion holds that a physician's interest in performing abortions is at most derivative of the woman's right and "does not underlie . . . the two more general rights under which the abortion right is justified." 505 U.S. at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Thus, seven justices held that a physician's right to perform an abortion is examined under the "rational relationship" standard. See *id*. at 885 ("[T]he Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks

could be performed by others." (citing *Williamson*, 348 U.S. 483)); see also *id*. at 966 (Rehnquist, C.J., dissenting in part and concurring in part) ("States may regulate abortion procedures in ways rationally related to a legitimate state interest.").

Likewise, in *Hellerstedt*, the Court invalidated the Texas regulations at issue because "[e]ach places a substantial obstacle in the path *of women seeking a previability abortion*." 136 S. Ct. at 2300 (emphasis added). The three justices in dissent also noted that the physicians were asserting "the right of the abortion patients they serve" and not their own rights. See *id.* at 2342 (Alito, J., dissenting).

Given the Court's prior holdings, it is clear that Petitioners' right to perform abortions is subject to rational basis scrutiny, not undue burden scrutiny.

2. Petitioners cannot succeed under the rational basis test.

Given the record before the Court, Petitioners cannot prevail to the extent they rely solely on their own rights and not those of their patients. As the Fifth Circuit noted, Act 620 has recognizable benefits to women's health. Pet. App. 35a (noting that "hospitals perform more rigorous and intense background checks than do the clinics"). This recognizable benefit, even if "not huge," establishes a sufficient basis to find Act 620 constitutional as to the Petitioners.

Mazurek v. Armstrong is illustrative. 520 U.S. 968 (1997). In *Mazurek*, the Court refused to enjoin a Montana law limiting abortion providers to licensed physicians. The Court rejected Petitioners' argument that the law "had an invalid purpose because 'all health evidence contradicts the claim that there is any health basis' for the law." *Id*. at 973. Given that the record supports that Act 620 conveys some actual health benefits to women seeking abortions, Petitioners cannot prevail on the basis of their own rights to perform abortions.

Because Act 620 does not present a substantial obstacle to women seeking an abortion in Louisiana and does not unconstitutionally infringe on Petitioners' rights to perform abortions, the Court should affirm the Fifth Circuit's judgment.

II. The Large Fraction Test Suffers from Many of the Same Defects as the *Lemon* Test and Should Be Similarly Reconsidered.

In *American Legion v. American Humanist Association*, the Court greatly limited the application of the *Lemon* test, noting that the test "has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars." 139 S. Ct. 2067, 2081 & nn.13-15 (2019). A number of Justices went even further, indicating that the *Lemon* test is no longer good law. See *id*. at 2092 (Kavanaugh, J., concurring) ("[T]his Court no longer applies the old test articulated in *Lemon*."); *id*. at 2101

(Gorsuch, J., concurring) ("*Lemon* was a misadventure.").

Among the most prevalent criticisms of *Lemon* was that it provided no guidance to courts or government officials and "allow[ed] the Court to 'reach almost any result in almost any case.'" *Id*. at 2081 n.15 (quoting McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118–120 (1992)); see also *e.g.*, *Cooper v. United States Postal Service*, 577 F.3d 479, 494 (2d Cir. 2009) ("*Lemon* is difficult to apply and not a particularly useful test."); *Separation of Church and State Comm. v. Eugene*, 93 F.3d 617, 627 (9th Cir. 1996) (O'Scannlain, J., concurring in result) ("The standards announced by this Court 'are not always clear, consistent or coherent.'").

The "large fraction" test suffers from the same lack of clarity that plagued *Lemon*. Numerous courts and scholars have noted that the application of the large fraction test is difficult, and the Court's guidance is opaque. This case provides an illustrative example. The panel majority, uncertain of how to formulate the fraction, chose two different formulations and found neither constituted a large fraction. Pet. App. 53a-54a. The dissent, however, criticized the majority's approach, arguing that the large fraction test does not "require precise mathematical calculations." Pet. App. 97a. The three distinguished jurists below are hardly unique in expressing confusion and disagreement about the most basic aspects of the large fraction test.

A. The large fraction test is ill-defined and incapable of consistent application.

A commonly accepted formulation of the large fraction test is that in facial challenges to abortion regulations, "the plaintiff can prevail by demonstrating that 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice.'" Pet. App. 28a (quoting *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017)). Although the language is relatively simple, courts and scholars have found that it provides no real guidance or constraint to judges or officials.

When determining whether a "large fraction" of women affected are substantially burdened, courts often disagree on how to define the numerator and denominator, how many women belong in the numerator and denominator once defined, and just how "large" of a fraction is necessary to facially invalidate an abortion law. Indeed, one district court bemoaned that the large fraction test "devolves to which group of women is properly considered the numerator and which group of women is properly considered the denominator. Even if a court properly identifies the numerator and denominator, it still must decide whether the resulting fraction is 'large.'" *Cincinnati Women's Servs., Inc. v. Taft*, 466 F. Supp. 2d 934, 939 (S.D. Ohio 2005).

1. There is no consensus as to the proper formulation for the numerator and denominator for the large fraction test.

To start, courts and jurists often disagree as to what constitutes the numerator and denominator for any given regulation. See Pet. App. 53a ("[A]s an initial matter, [*Hellerstedt*] is less than clear on how to delimit the numerator and denominator to define the relevant fraction"). The Fifth Circuit proposed two options below. In one formulation, the numerator is the number of women actually burdened and the denominator is the number of women potentially burdened. *Id.* at 53a-54a. In a second formulation, the numerator is the number of women substantially burdened and the denominator is the number of women actually burdened. *Id*. As Justice Alito has commented, the Court's formulation in *Hellerstedt* appears to use the number of women actually burdened as both the numerator and denominator. Accordingly, "that fraction is always '1,' which is pretty large as fractions go." *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting). Justice Alito's critique of the Court's formulation in *Hellerstedt* is supported by other formulations of the large fraction test recited by members of the Court. See *Gonzales*, 550 U.S. at 188 (Ginsburg, J., dissenting) ("The absence of a health exception burdens *all* women for whom it is relevant."); *Casey*, 505 U.S. at 895 ("[The regulation's] real target . . . is married women . . . who do not qualify for one of the statutory exceptions to the notice requirement.").

2. After the formulation for the numerator and denominator is settled, courts must rely on assumptions to populate the fraction.

Second, assuming arguendo that the Court provides clear guidance on how to formulate the large fraction, there can be no reliable or consistent means of populating the numerator and denominator. Because the large fraction test is used in facial challenges to abortion regulations, a court must determine the impact of a regulation on hypothetical future women seeking abortions. Such numbers are often "ultimately unknowable." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 686 (W.D. Tex. 2014).

Because these numbers are typically unknowable, courts are generally required to rely on assumptions to determine whether a large fraction of women are substantially burdened by an abortion regulation. But these assumptions are so malleable as to defy consistent application. As Justice Scalia noted in *Casey*, "[w]ere it helpful in an attempt to reach a desired result, one could just as easily assume that battered women situations form 100 percent of the cases where women desire not to notify or that they constitute only 20 percent of those cases." *Casey*, 505 U.S. at 973 n.2 (Scalia, J., dissenting).

Judge Higginbotham's dissent illustrates this difficulty. Criticizing the majority's attempt to formulate and populate the large fraction, Judge Higginbotham

argues that courts should not require mathematical precision in the "large fraction" test, noting that "[n]either *Casey* nor [*Hellerstedt*] calculated a numerical fraction of women who would be burdened before invalidating statutory provisions." Pet. App. 97a-98a. It is difficult to imagine how the large fraction test can facilitate any consistency among cases where even the *mere attempt* to populate the fraction with corresponding data is considered an improper application of the test.

B. There is no guidance as to how "large" a fraction is required under the test.

Even in the unlikely event that the courts agree on how to formulate the large fraction's numerator and denominator and the number of women that should populate both parts of the fraction, "[t]he Supreme Court has not defined what constitutes a 'large fraction,' and the circuit courts have shed little light." Pet. App. 56a. As the Fifth Circuit noted, determining whether a fraction is "large" inherently incorporates value judgments. App. 57a ("[W]hat constitutes a large fraction requires identifying the starting point."); see also David S. Cohen, *Abortion Rights and the Largeness of the Fraction 1/6*, 164 U. Pa. L. Rev. Online 115, 116 (2016) (surveying individuals as to whether one-sixth is a "large fraction" and concluding both that "[a] large majority of people can sometimes consider fractions larger than 1/6 to be small, and fractions smaller than 1/6 to be large" and that "political

orientation can affect whether a person perceives 1/6 as a large fraction.").

In this case, the Fifth Circuit held that 30% is not a large fraction because "[i]n every other area of the law, a facial challenge requires plaintiffs to establish a provision's unconstitutionality in every conceivable application." Pet. App. at 57a. The Sixth Circuit held that 12% is not a large fraction under similar reasoning. See *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) ("[A] large fraction exists when a statute renders it nearly impossible for the women actually affected by an abortion restriction to obtain an abortion."). However, the Eighth Circuit has held that 18% is a large fraction for purposes of establishing an undue burden. See *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1462 & n.10 (8th Cir. 1995) (finding parental notification law unconstitutional because "[r]oughly eighteen percent of South Dakota's minors live in single-parent homes . . . [and] have only one parent to notify."). Thus, even where courts agree as to the number of women affected, jurists may disagree whether such a fraction is sufficiently "large" to facially invalidate an abortion regulation.

C. The large fraction test, like *Lemon*, should be reconsidered.

The Court wisely reconsidered *Lemon* after it became clear that the *Lemon* test was incapable of consistent application. See *American Legion*, 139 S. Ct.

2067 (2019). Like *Lemon*, the large fraction test not only is unclear, but necessarily incorporates assumptions and subjective value judgments in both populating the fraction's numerator and denominator and determining whether the resulting fraction is "large." Rather than allow the large fraction test to linger "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave,"[13] the Court should correct its mistake and reject the large fraction test.

CONCLUSION

For the reasons stated above, the Court should hold that Act 620 does not create a substantial obstacle to a large fraction of women seeking an abortion and is therefore constitutional. Furthermore, because the large fraction test has shown that it is no more capable of consistent results than the frequently maligned *Lemon* test that the Court recently reconsidered, the

[13] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J. dissenting).

Court should likewise reconsider its use of the unreliable large fraction test.

Respectfully submitted,

REED N. SMITH
Counsel of Record
KIMBERLEE WOOD COLBY
CENTER FOR LAW AND
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Suite 302
Springfield, VA 22151
(703) 894-1081
rsmith@clsnet.org

Counsel for Amici Curiae

December 31, 2019