Nos. 18-1323 and 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ET AL., PETITIONERS

v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

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

v.

JUNE MEDICAL SERVICES L.L.C., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR FOR LACK OF THIRD-PARTY STANDING OR AFFIRMANCE ON THE MERITS

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QUESTIONS PRESENTED

1. Whether abortion providers have third-party standing to invoke the constitutional rights of potential patients in challenging health and safety regulations as to which the interests of the patients and providers potentially diverge.

2. Whether the Court can address Louisiana's objections to third-party standing in this case.

3. Whether it is facially unconstitutional for Louisiana to require abortion providers, like many other providers of outpatient procedures, to hold admitting privileges at a local hospital.

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INTEREST OF THE UNITED STATES

This case presents important questions about the scope of third-party standing and the undue-burden standard for abortion regulation. The United States has previously participated in cases presenting those issues. See, *e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016); *Elk Grove Unified Sch. Dist.* v.

Newdow, 542 U.S. 1 (2004); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992). In addition, Congress has legislated in the field of abortion, see, *e.g.*, 18 U.S.C. 1531, and the government has defended those statutes against constitutional challenges, see, *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124 (2007). The United States accordingly has a substantial interest in this Court's resolution of the questions presented.

STATEMENT

1. In 2014, Louisiana enacted the Unsafe Abortion Protection Act (Act 620 or Act). 18-1323 Pet. App. (Pet. App.) 145a. As relevant here, the Act requires that physicians who perform abortions within the State must have "active admitting privileges at a hospital" within 30 miles of "the location at which the abortion is performed or induced." § 1. The Act also provides that any invalid applications "shall be severed from the remaining applications," which "shall remain in force." § 3.

2. Shortly before Act 620's admitting-privileges requirement was scheduled to take effect, plaintiffs—an abortion clinic and two abortion providers—sued to enjoin its operation. Pet. App. 5a. The district court entered a temporary restraining order allowing additional time for the providers to attempt to obtain privileges. See *ibid.* The court subsequently issued a preliminary injunction, concluding that the admitting-privileges requirement violated "the substantive due process right of Louisiana women to obtain an abortion." 158 F. Supp. 3d 473, 482-483. The court of appeals stayed the preliminary injunction pending appeal, concluding that "[a]t least one of the physicians" has "standing to assert the rights of [his] prospective patients," but that plaintiffs were unlikely to succeed on the merits. 814 F.3d 319, 322, 328. This Court vacated the Fifth Circuit's

stay, 136 S. Ct. 1354, referring to the stay the Court had entered in *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), which remained pending at the time. Once *Hellerstedt* was decided, the court of appeals remanded this case to the district court. See Pet. App. 6a.

3. The district court declared Act 620's admitting-privileges requirement facially unconstitutional and entered a permanent injunction against its enforcement. Pet. App. 132a-279a. The court concluded that "[t]he medical benefits which would flow from Act 620 are minimal and are outweighed by the burdens." *Id.* at 203a. Specifically, the court determined that three abortion providers had made what it considered "good faith efforts to comply with Act 620," and yet had been unable to obtain qualifying privileges. *Id.* at 220a. The court determined that the departure of those providers from practice would cause another provider to leave practice, *id.* at 251a-252a, and that the result would be an undue burden on abortion in Louisiana, *id.* at 276a.

4. The court of appeals reversed. Pet. App. 1a-103a. It held that the district court had misunderstood the sort of "good-faith effort" an abortion provider could be expected to exert to comply with the law, *id.* at 45a-46a, and concluded that any anticipated reduction in access to abortion would be attributable to choices by individual providers rather than to the Act itself, *id.* at 48a-49a & n.60. The court further concluded that even if Act 620 placed an undue burden on some women's access to abortion, it could not be declared facially unconstitutional because it did not do so with respect to a "large fraction" of women. *Id.* at 28a (citation omitted). Judge Higginbotham dissented. *Id.* at 60a-103a.

5. The court of appeals denied rehearing en banc, over dissents by Judge Dennis (joined by Judges Higginbotham, Graves, and Higginson) and Judge Higginson. Pet. App. 105a-131a.

6. This Court stayed the court of appeals' mandate pending consideration of a petition for a writ of certiorari. 139 S. Ct. 663. The Court then granted plaintiffs' petition challenging the decision below and Louisiana's cross-petition contending that plaintiffs lack third-party standing. 140 S. Ct. 35.

SUMMARY OF ARGUMENT

This Court should vacate the decision below for lack of third-party standing or affirm it on the merits.

I. A plaintiff generally must assert his own legal rights and cannot rely on the rights of others. This rule against third-party standing has sometimes been relaxed in cases where a litigant is directly regulated by the law that allegedly violates the constitutional rights of others. But the Court has never applied such relaxed treatment in the face of a potential conflict between the interests of the litigant and of the right-holders. Because the challenge here presents a potential conflict between the interests of the abortion-provider plaintiffs and those of Louisiana women, plaintiffs should be subject to this Court's ordinary approach to third-party standing. Under that approach, plaintiffs are not appropriate parties to assert the rights of Louisiana women, because the women themselves suffer no hindrance in suing and lack a close relationship to plaintiffs. The Court can decide this case by applying that rule because the issue was passed upon expressly below, and even if it had not been, the purposes of the doctrine —to protect the courts and absent parties—make it

generally appropriate to consider questions about third-party standing when raised.

II. If this Court reaches the merits, it should affirm. Under *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), an abortion regulation does not impose an undue burden unless it creates a "substantial obstacle" to obtaining an abortion. *Id.* at 877 (plurality opinion). This Court's decision in *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), did not purport to displace that central holding of *Casey*. The critical inquiry in this case is thus whether plaintiffs have shown that Act 620 will create a substantial obstacle to obtaining an abortion for all or most Louisiana women. After a careful review of the record, the court of appeals correctly held that plaintiffs have not carried that heavy burden. Plaintiffs respond by trying to dilute the test, arguing that *Hellerstedt* replaced *Casey*'s definition of an undue burden with a freestanding benefits-burdens balancing test, and effectively invalidated admitting-privileges requirements nationwide. But *Hellerstedt* and *Casey* should be read to cohere, not to conflict. And if that is not possible, stare-decisis considerations dictate that *Hellerstedt* should be narrowed or overruled to eliminate any conflict with *Casey* and the rest of this Court's abortion precedents.

ARGUMENT

I. ABORTION PROVIDERS ARE NOT APPROPRIATE PARTIES TO REPRESENT THE INTERESTS OF WOMEN IN ASSESSING ACT 620

Plaintiffs are abortion providers and an abortion clinic that wish to perform abortions in Louisiana without complying with Act 620's admitting-privileges re-

quirement. Medical providers, however, have no fundamental right of their own to perform abortions, let alone to be free from health and safety regulations when doing so. See *Planned Parenthood of Se. Pa.* v. *Casey,* 505 U.S. 833, 884 (1992) (plurality opinion); accord *Planned Parenthood of Greater Ohio* v. *Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) (opinion of Sutton, J.). Plaintiffs have therefore rested their claims—and the district court rested its decision—on a "substantive due process right of Louisiana women to obtain an abortion." Pet. App. 143a; see 18-1323 Pet. Br. (Pet. Br.) 47. But plaintiffs cannot rely on the constitutional rights of others in these circumstances.

A. Litigants Can Rely On The Constitutional Rights Of Non-Parties Only In Narrow Circumstances

1. A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of [other] parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (citing *Tileston* v. *Ullman*, 318 U.S. 44 (1943) (per curiam)). In *Tileston*, for example, a doctor challenged a Connecticut law regulating the use of drugs or instruments to prevent conception, but this Court held there was "no basis" for allowing the doctor "standing to secure an adjudication of his patients' constitutional right[s,] * * * which they do not assert in their own behalf." 318 U.S. at 46.

Although this "general prohibition on a litigant's raising another person's legal rights" is distinct from Article III's requirement that the plaintiff suffer a concrete and particularized injury, it serves many of the same important purposes. *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (citation omitted). In general, only the party afforded a given constitutional

right "has the appropriate incentive to challenge (or not challenge) governmental action" in a way that genuinely furthers the right-holder's interests, "and to do so with the necessary zeal and appropriate presentation." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004). Moreover, adjudicating rights at the request of third parties could force courts to consider "questions of wide public significance" in an "abstract" setting removed from the concrete circumstances of the right-holders. *Ibid.* (citation omitted).

This Court therefore "ha[s] not looked favorably upon third-party standing," but it has recognized a "limited * * * exception" to the general rule when the third party can "make two additional showings" beyond an Article III injury of its own: that it has "a 'close' relationship with the person who possesses the right," and that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski*, 543 U.S. at 129-130 (citation omitted). Those showings typically are (and should be) difficult to make; it is not common both that right-holders are unable to sue and that another can be trusted to press their interests.

To be sure, enforcement of those requirements has sometimes been relaxed when the challenged law applies directly to third parties who wish to engage in transactions with the right-holders. *Kowalski*, 543 U.S. at 130. In that circumstance, allowing the third parties to "act[] as advocates" for the right-holders may be appropriate: the regulated third parties are "obvious claimant[s]" as they are more directly and materially harmed than any individual right-holder, and conversely "the threatened imposition of governmental sanctions might deter" the third parties from transact-

ing with the right-holders at all, which could "'result indirectly in the violation'" of the right in question. *Craig* v. *Boren*, 429 U.S. 190, 195-197 (1976) (citation omitted).

Critically, however, the Court has never relaxed enforcement of the ordinary third-party-standing requirements where the regulated third party's interests potentially diverge from the interests of the right-holders. To the contrary, where the interests may not truly be "parallel," the Court has held that the fact that their interests are "potentially in conflict" is a reason for denying third-party standing. *Newdow*, 542 U.S. at 15. Indeed, in *Newdow* this Court found the potential conflict of interest between a noncustodial parent and his minor child made it inappropriate to allow the father to assert the constitutional rights of his daughter—even though the parent-child relationship is much closer than other relationships this Court has treated as "close" for purposes of third-party standing. *Ibid.*

2. Plaintiffs and their amici argue that the conflict-of-interest issue should not be considered in the third-party standing inquiry, because doing so would collapse into a merits inquiry of whether Act 620's burdens on abortion providers ultimately benefit women. See 18-1460 Br. in Opp. (Opp.) 25; Federal Courts Scholars Amici Br. (Scholars Br.) 3. But the question for standing purposes is not whether there is an *actual* conflict of interest. Rather, the question is whether there is a *potential* conflict. *Newdow*, 542 U.S. at 15. If there is, courts should apply the closeness and hindrance requirements with their ordinary full force. Indeed, if anything, a potential conflict should make courts *more* cautious in applying those requirements for at least two reasons.

First, judicial determinations of the merits in a case are based in significant measure on the litigants' presentation. Allowing a litigant with potentially conflicting interests to assert the constitutional rights of an absent party risks skewing the arguments and thereby causing the court to misevaluate the merits. Cf. 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1909, at 440 (3d ed. 2007) (noting that because parties "tailor their own presentation to the interest that each of them has," a conflict creates "a risk that the party will not provide adequate representation of the interest of the absentee"). Under principles of "judicial self-governance," *Warth*, 422 U.S. at 500, courts should not reach the merits when such potential conflicts exist. And courts cannot simply assume at the outset that the litigant invoking third-party rights is doing so correctly.

Second, this Court has emphasized that the absent right-holder may have "incentive[s] to * * * *not* challenge" the particular "governmental action" at issue, *Kowalski*, 543 U.S. at 129 (emphasis added), even if she might be able to persuade a court that it violates her rights, see *Newdow*, 542 U.S. at 15 n.7. When the litigant invoking the right has interests that are "parallel" to those of the absent right-holder, that possibility is diminished. *Id.* at 15. Conversely, when the interests are "potentially in conflict," *ibid.*, the fact that the third party "might [be] deter[red]" by the challenged law is less probative of whether the right-holder herself will be harmed and whether the third party can be trusted to act as a faithful "advocate[]" for the right-holder, *Craig*, 429 U.S. at 195.

B. Plaintiffs Do Not Fall Within The Narrow Circumstances Where Third-Party Standing Is Appropriate

1. The interests of abortion providers and the interests of Louisiana women do not run in "parallel" with respect to Act 620, but instead are "potentially in conflict." *Newdow*, 542 U.S. at 15. The Act requires abortion providers to have admitting privileges in part as a prophylactic measure for the safety of women who obtain abortions. Because the law creates compliance costs without any personal benefits for abortion providers, such providers have every incentive to see the law invalidated. For women, however, the calculus is different. The law imposes no direct costs on them, and they may see its benefits as quite significant (while viewing any indirect costs as speculative). Because plaintiff abortion providers have different and potentially conflicting interests, their suit does not provide assurances that Louisiana women themselves would have chosen to sue and to frame their suit in the same way if the providers had not sued. Accordingly, the prudential principles of judicial restraint that have long undergirded the third-party-standing doctrine apply here with undiminished force.

2. Plaintiffs cannot satisfy the ordinary closeness and hindrance requirements of this Court's third-party standing doctrine.

a. Plaintiffs' interactions with the women to whom they wish to provide abortions have not created a "'close' relationship" that would make them appropriate legal advocates for those women's interests. *Kowalski*, 543 U.S. at 130 (citation omitted). As Louisiana explains (Br. 41-47), the potential conflict between plaintiffs' interests and those of the women whose rights they seek to assert precludes a finding of closeness as a

matter of law. That by itself is sufficient to resolve this case. Indeed, even when the Court has relaxed its application of the third-party-standing doctrine, see *Kowalski*, 543 U.S. at 130, it has never relaxed the doctrine so far as to encompass a relationship in which the Court recognized a potential conflict of interests. The potential conflict here would thus preclude plaintiffs from establishing third-party standing even under a more forgiving application of the closeness requirement.

Beyond the potential conflict, there is also no evidence that plaintiffs have any ongoing interactions with the women for whom they provide abortions; to the contrary, the evidence indicates that abortion doctors often see women only once, and that frequently their interactions are quite limited because the women are already sedated by the time the doctor arrives. See Louisiana Br. 47-48 (collecting record citations). Moreover, as one plaintiff put it, many of the women have "their own doctors," J.A. 448—and it is with those doctors, not the abortion provider they visit for a single procedure and may never see again, that any meaningful doctor-patient relationship exists. Plaintiffs are thus akin to the attorneys in *Kowalski* who sought (unsuccessfully) to assert the rights of potential clients with whom they had no ongoing representative relationship. 543 U.S. at 131.

b. Plaintiffs have likewise failed to show that "there is a 'hindrance' to the" ability of Louisiana women to challenge Act 620 if they believe that doing so is in their interests. *Kowalski*, 543 U.S. at 130 (citation omitted). Experience in recent decades has shown that women do not need to rely on their doctors to vindicate their constitutional rights. See *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2323 n.1 (2016) (Thomas, J., dissenting) (collecting cases). And while the window for

an abortion is time-limited, this Court's cases concerning mootness exceptions and class-action proceedings confirm women's ability to seek and obtain effective relief. See Louisiana Br. 37-38.

3. Plaintiffs rely on three cases in which abortion providers invoked women's substantive due process rights to challenge "purported health and safety regulations." Opp. 21 (citing *City of Akron* v. *Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (*Akron I*), overruled on other grounds by *Casey*, *supra*; *Planned Parenthood of Cent. Missouri* v. *Danforth*, 428 U.S. 52 (1976); and *Doe* v. *Bolton*, 410 U.S. 179 (1973)). None of those cases, however, confronted the sort of potential conflict inherent in the challenge here.

In *Doe*, any concerns about a potential conflict of interest were eliminated by the fact that the lead plaintiff was a woman who had been prevented from obtaining an abortion, suing "on behalf of all others similarly situated." 410 U.S. at 186. Indeed, the Court noted that "[i]nasmuch as Doe and her class are recognized, the question whether the other appellants * * * have standing is perhaps a matter of no great consequence." *Id.* at 188.

Danforth is likewise inapposite. Plaintiffs note that the case involved a "ban on a certain method of abortion that the state asserted was 'deleterious to maternal health.'" Opp. 21 (citation omitted). But no one suggested a potential conflict, because the law at issue there did not (as here) require abortion providers to take steps that could increase the safety of the procedure for a woman who had requested it; instead, the law prohibited providers from performing that procedure

even when requested by women. The interests of abortion providers and women thus ran more closely in parallel. See *Danforth*, 428 U.S. at 75-79.

Finally, *Akron I* did not even address third-party standing to challenge the health and safety regulation at issue there. See 462 U.S. at 431-439. Instead, the Court's discussion of third-party standing pertained only to the challenge to a parental-consent requirement, as to which abortion providers' interests were largely parallel with the interests of their "minor patients" who wished to obtain an abortion without involving their parents in the decision. *Id.* at 440 n.30.[1]

C. This Court Can And Should Reach The Third-Party Standing Issue

1. This Court's "traditional rule" precludes review "only when 'the question presented was not pressed *or passed upon* below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis added; citation omitted). The "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.* Here, the court of appeals passed upon the third-party-standing question in addressing the State's request for a stay of the preliminary injunction, holding that "the physician plaintiffs have standing to assert the rights of their prospective patients." 814 F.3d 319, 322. That interlocutory determination was in no way tentative, and could not have been revisited at the permanent-injunction stage in the district court or before the panel because it

[1] Plaintiffs' amici similarly rely on cases entertaining abortion providers' challenges without questioning third-party standing (see Scholars Br. 14), but this Court has "repeatedly held" that the lurking existence of unaddressed standing defects has "no precedential effect." *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996).

was dictated by binding circuit precedent. *Id.* at 322-323 (citing *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 589 (5th Cir. 2014)). This Court can thus address the correctness of the court of appeals' holding on third-party standing under its "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. a. In any event, "in exceptional cases," this Court can review "questions not pressed or passed upon" in the federal courts below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) (citation omitted). Review is warranted here because restrictions on third-party standing are "judicially self-imposed limits on the exercise of federal jurisdiction," *Newdow*, 542 U.S. at 11-12 (citation omitted), that are "essentially matters of judicial self-governance," *Warth*, 422 U.S. at 500. The very purpose of limiting third-party standing is to prevent courts from "'decid[ing] abstract questions of wide public significance'" in cases where "'judicial intervention may be unnecessary'"—and to ensure that when courts do decide such questions, their decisions are based on "appropriate presentation" of the right-holders' interests. *Kowalski*, 543 U.S. at 129 (citation omitted). Those purposes are squarely implicated here, where plaintiffs seek to have this Court decide a constitutional question of broad public significance, without first asking whether Louisiana abortion providers and Louisiana women have the same interests with respect to Act 620.

To be sure, because third-party-standing limits go beyond Article III's "constitutional minimum of standing," *Kowalski*, 543 U.S. at 129, courts are not *obligated* to raise third-party-standing objections themselves. But neither are they *precluded* from doing so or considering belatedly raised objections. Third-party-standing limits exist to protect absent parties and courts, so the decision whether to invoke them should not rest entirely within the control of litigants, especially in constitutional cases where the ruling will govern the fundamental rights of other individuals and the authority of the political branches. Cf. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-542 (1986) ("[The] obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented."). Accordingly, although a court need not raise third-party standing *sua sponte*, it should typically address the issue when raised by the parties or when the court concludes that raising the issue on its own would be prudent in light of the important values at stake. Cf. *American Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1357-1358 (D.C. Cir. 2000) ("[W]e treat prudential standing as akin to jurisdiction, an issue we may raise on our own, in part because the doctrine serves the 'institutional obligations of the federal courts.'") (citation omitted).

b. In arguing otherwise, plaintiffs rely heavily (Opp. 8-12) on *Craig*, in which the Court held that any objection to third-party standing had been forfeited, 429 U.S. at 193-194. *Craig* differs from this case in two important respects, however, and those differences underscore why it would be appropriate and prudent for the Court to resolve this case by holding that plaintiffs lack third-party standing.

First, *Craig* was brought and litigated below by a man between the ages of 18 and 21 (Craig) who argued that the statute at issue violated his own equal-protection rights because it prohibited beer vendors from selling low-alcohol beer to men but not women within that age range. 429 U.S. at 192. Only "after [this Court] noted probable jurisdiction" did Craig "attain[] the age of 21," rendering his personal claim moot and leaving his co-plaintiff—a beer vendor—as the only remaining plaintiff with Article III standing. *Ibid.* Given that a litigant asserting his own constitutional rights had been directly involved in creating the record and bringing the case to this Court for review, the ordinary concerns about assertion of third-party rights were substantially diminished. That explains the Court's observation that "denial of *jus tertii* standing * * * [would] serve no functional purpose." *Id.* at 194. Here, by contrast, the women whose rights are being adjudicated were never parties to the case with a role in the development of the record and arguments.

Second, there was no apparent or asserted conflict of interest in *Craig* that would have warranted denying third-party standing absent the forfeiture. Indeed, counsel for the State expressly disclaimed any challenge to third-party standing. See Tr. of Oral Argument at 41, *Craig*, *supra* (No. 75-628); see also *Craig*, 429 U.S. at 193 (noting the State's "concession"). And this Court "independently" held that third-party standing existed. 429 U.S. at 194-197. Here, however, a third-party standing objection was raised (and granted as a separate question) at the certiorari stage, meaning the Court will have the benefit of full briefing and argument on the issue.

II. ACT 620 IS FACIALLY CONSTITUTIONAL

If the Court reaches the merits, it should affirm. Under the framework adopted in *Casey* and reiterated in *Hellerstedt*, an abortion regulation does not impose an unconstitutional "undue burden" unless it creates a "substantial obstacle" to a woman's ability to obtain an abortion. *Hellerstedt*, 136 S. Ct. at 2300 (quoting *Casey*, 505 U.S. at 878 (plurality opinion)). The court of appeals correctly concluded that, on the evidence presented, Act 620 would not create a substantial obstacle to obtaining an abortion for a large fraction of Louisiana women seeking one—let alone all such women—and therefore is not facially unconstitutional. Plaintiffs fail to refute that conclusion; indeed, their brief never even mentions the "substantial obstacle" standard. Plaintiffs instead overread *Hellerstedt*, which neither silently upended existing abortion jurisprudence by abandoning *Casey*'s substantial-obstacle requirement, nor invalidated all admitting-privileges requirements nationwide. But if *Hellerstedt* must be read to work such a fundamental change, it should be narrowed or overruled to conform with *Casey* and this Court's other abortion precedents.

A. Under This Court's Precedents, A Law Does Not Impose An Undue Burden Unless It Creates A Substantial Obstacle To A Woman's Ability To Obtain An Abortion

1. From the start, this Court's abortion decisions have emphasized States' "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade*, 410 U.S. 113, 150 (1973). In *Casey*, a controlling opinion by three Justices held that States may regulate abortion before viability, including through "[r]egulations designed to foster the health of a woman," if the regulations do not "impose an

undue burden on the [abortion] right." 505 U.S. at 878 (plurality opinion). *Casey* defined an "undue burden" as "the conclusion that a * * * regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The plurality accordingly concluded that, because the informed-consent requirement at issue there "[could not] be considered a substantial obstacle to obtaining an abortion, * * * it follows [that] there is no undue burden." *Id.* at 883.

Six Justices in *Casey* opposed the undue-burden framework. Of particular relevance here, Justice Stevens would have applied a balancing test "[w]eighing the State's interest" against "the woman's liberty interest." 505 U.S. at 916. But the plurality rejected that proposal in favor of a threshold substantial-obstacle requirement. *Id.* at 877. *Casey* therefore upheld a requirement that a physician, rather than a medical assistant, provide patients with abortion-related information, because it did not "amount * * * to a substantial obstacle," even though "an objective assessment might suggest" the assistant could deliver the information equally well. *Id.* at 884-885.

Following *Casey*, this Court similarly upheld a law that only physicians could perform abortions because there was "insufficient evidence" the law posed a "substantial obstacle," notwithstanding the argument that "'all health evidence contradicts the claim that there is any health basis' for the law." *Mazurek* v. *Armstrong*, 520 U.S. 968, 972-973 (1997) (per curiam) (citation omitted). A six-Justice majority rejected that "line of argument" as "squarely foreclosed by *Casey*." *Id.* at 973.

2. Although most Justices in *Casey* disagreed with the undue-burden standard, they all agreed that it

requires a fact-intensive, record-specific analysis. See 505 U.S. at 887 (plurality opinion); *id.* at 920 (opinion of Stevens, J.); *id.* at 926 (opinion of Blackmun, J.); *id.* at 990 (opinion of Scalia, J.). This Court's decision in *Hellerstedt* applied both *Casey*'s undue-burden standard and its fact-intensive, record-specific approach.

Hellerstedt involved two Texas regulations: a requirement, like Act 620, that abortion providers obtain hospital admitting privileges, and a requirement that abortion facilities meet the same health standards as ambulatory surgical centers (ASCs). 136 S. Ct. at 2300. This Court analyzed whether those requirements "violate the Federal Constitution as interpreted in *Casey*." *Ibid.* Citing the record at least 17 times, *id.* at 2310-2317, the Court held that "[e]ach [requirement] places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution," *id.* at 2300 (citation omitted).

The district court here read *Hellerstedt* to mean that a regulation affecting abortion "is constitutional only if its benefits outweigh its burdens." Pet. App. 137a. Plaintiffs similarly contend (Br. 20) that, after *Hellerstedt*, the "undue burden test requires courts to balance a woman's liberty interest in determining whether to carry her pregnancy to full term against the state's legitimate regulatory interests." But those interpretations contradict *Hellerstedt* itself. Although *Hellerstedt* addressed the intended benefits of Texas's law, see 136 S. Ct. at 2311-2312, it did not abandon *Casey*'s central holding that a law imposes an undue burden only if it creates a substantial obstacle to obtaining an abortion. To the contrary, *Hellerstedt* not only said that it was ap-

plying *Casey*, but repeatedly referred to *Casey*'s substantial-obstacle requirement, including in its key holdings. *Id.* at 2300, 2309, 2312, 2316, 2318.

Plaintiffs' interpretation also conflicts with *Casey*, which *declined* to adopt the balancing approach proposed by Justice Stevens, and *upheld* the physician-information requirement because it did not constitute a substantial obstacle while expressly disregarding whether it had an "objective" benefit. 505 U.S. at 885 (plurality opinion); see p. 18, *supra*. Moreover, plaintiffs' contention (Br. 20) that "any burden imposed by" a law that "serves *no* health or safety benefit * * * is by definition undue" is irreconcilable with *Mazurek*'s holding that a physician-only requirement was valid regardless of whether it had any health benefit. 520 U.S. at 973. Plaintiffs thus advocate a fundamental transformation of the undue-burden framework, replacing *Casey*'s threshold requirement of a substantial obstacle with a pure balancing test. See Pet. Br. 49 ("[T]he plain meaning of an 'undue burden' is a burden that outweighs its benefits.").

Given that *Hellerstedt* applied *Casey*, the decisions can and should be read to cohere, not conflict. *Casey* holds that a substantial obstacle is a necessary condition for the existence of an undue burden. Nothing in *Hellerstedt* is to the contrary. Instead, *Hellerstedt* recognizes that if a regulation presents a "substantial obstacle," its benefits must be "sufficient to justify the burdens." 136 S. Ct. at 2300. As before *Hellerstedt*, however, a regulation that does not create a substantial obstacle does "not impose an undue burden," without regard to its asserted benefits (or lack thereof). 139 S. Ct. 663, 663 (Kavanaugh, J., dissenting from grant of application for stay).

Even if that interpretation is not the only available reading of *Hellerstedt*, this Court should adopt it over plaintiffs' approach, which reads *Hellerstedt* to silently overrule *Casey*'s definition of an undue burden and thereby jeopardizes numerous abortion regulations upheld in the nearly 30 years since *Casey*. The "doctrine of stare decisis" does not "require[] adherence to a broad reading" of a previous decision when a narrower reading is consistent with the decision and relevant precedent. *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009) (emphasis omitted). This Court has previously declined to interpret prior abortion decisions to have revived an argument that "*Casey* put * * * to rest." *Gonzales* v. *Carhart*, 550 U.S. 124, 154 (2007) (discussing *Stenberg* v. *Carhart*, 530 U.S. 914 (2000)). This Court should similarly decline to read *Hellerstedt* to conflict with *Casey*.

If, however, the Court concludes that *Hellerstedt* must be read to conflict with *Casey*, then *Hellerstedt* should be narrowed or overruled to eliminate the conflict. Cf. U.S. Br. at 43-44, *Gonzales*, *supra* (No. 05-380) (making the same argument about *Stenberg*). When a recent decision contradicts earlier precedents, it "better serves the values of stare decisis" to repudiate the "recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995) (emphasis omitted); see, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 712 (1993) (overruling a three-year-old precedent that "contradicted an 'unbroken line of'" prior decisions) (citation omitted). Here, plaintiffs' reading of *Hellerstedt* should be rejected because it would contradict numerous decisions of this Court upholding abortion regulations under *Casey*'s framework.

B. Plaintiffs Failed To Show That Act 620 Creates A Substantial Obstacle To Obtaining An Abortion

A plaintiff asserting a facial challenge to an abortion regulation faces "a heavy burden." *Gonzales*, 550 U.S. at 167 (citation omitted); see *Hellerstedt*, 136 S. Ct. at 2309, 2313 (noting challengers' burden and quoting *Casey*, 505 U.S. at 877 (plurality opinion)). The plaintiff must "present evidence" that *the regulation*—as opposed to other causes—would create a substantial obstacle to obtaining an abortion for at least a "'large fraction'" of affected women. *Hellerstedt*, 136 S. Ct. at 2313, 2320 (citation omitted). In a pre-enforcement facial challenge like this one, the plaintiff must make that "intensely factual" showing using only "predictions" about the law's likely effects. 139 S. Ct. at 664 (Kavanaugh, J., dissenting from grant of application for stay).

As the court of appeals explained, see Pet. App. 39a-59a, the district court incorrectly held that plaintiffs had met their burden based on two distinct errors. First, the district court took far too lax an approach to several providers' supposedly good-faith efforts to comply with Act 620, thereby attributing potential obstacles to Act 620 rather than to the providers' own inaction. Second, the district court wrongly attributed one abortion provider's putative decision to quit his practice to Act 620 rather than to his own personal choices. *Id.* at 42a-49a. The court of appeals treated those errors as factual, but they are better understood as applying an overly lenient legal standard to largely undisputed facts. Cf. *id.* at 143a (district court stating that "findings of fact * * * more appropriately considered conclusions of law are to be so deemed"). Under any standard of review, the district court's errors failed to hold plaintiffs to their burden to show that Act 620—rather

than separate private decisions—would create a substantial obstacle.

1. When this litigation began, Louisiana had five abortion clinics staffed by six providers. Pet. App. 156a, 160a-161a. Two clinics later closed for reasons that plaintiffs do not assert are related to Act 620, and one provider (Doe 4) retired. *Id.* at 7a, 146a. That left three clinics staffed by five providers: Hope in Shreveport, staffed by Does 1-3; Delta in Baton Rouge, staffed by Doe 5; and Women's Health in New Orleans, staffed by Does 5-6. *Id.* at 7a-25a, 155a-166a.

It is undisputed that Doe 3 has admitting privileges at a hospital near Hope, and that Doe 5 obtained privileges near Women's Health during the litigation. Pet. App. 241a, 244a. The district court found, and the court of appeals upheld, that Doe 1 likely cannot obtain admitting privileges near Hope. *Id.* at 19a-21a, 42a, 220a-225a. Doe 1's exit from practice alone, however, would not require closure of any clinic and would lead at most to a modest increase in waiting time (about 54 minutes), which plaintiffs do not suggest would be a substantial obstacle to obtaining an abortion. *Id.* at 52a-53a; see *Casey*, 505 U.S. at 886 (concluding that a several-day delay is not a substantial obstacle).

The parties' dispute thus centers on whether plaintiffs have met their burden of showing that Act 620 will create a substantial obstacle to obtaining an abortion for a large fraction of Louisiana women by (a) causing Does 2, 5, and 6 to cease practice because they cannot obtain admitting privileges at hospitals near the clinics where they lack them, and (b) causing Doe 3 to leave practice at Hope because he refuses to serve as the only abortion provider in northern Louisiana. See Pet. App.

42a-49a, 252a-254a. The court of appeals correctly held that plaintiffs failed to make either showing.

a. The district court concluded that Does 2, 5, and 6 had "attempted in good faith" to obtain admitting privileges at hospitals near the clinics where they now lack them, but had failed to obtain privileges and would cease practice if Act 620 takes effect, thereby creating an obstacle to abortion access. Pet. App. 249a. But as the court of appeals correctly recognized, the district court's approach was not nearly rigorous enough. Because plaintiffs challenging an abortion regulation bear the "burden to present evidence of causation"—that is, evidence that the regulation itself, rather than other causes, had "'the effect'" of creating a substantial obstacle to obtaining an abortion—any assertion that abortion providers are unable to comply with a regulation must be subject to searching review. *Hellerstedt*, 136 S. Ct. at 2309, 2313 (quoting *Casey*, 505 U.S. at 877 (plurality opinion)).

Otherwise, abortion providers could effectively veto disfavored legislation by asserting that compliance is too difficult or objectionable and threatening to leave practice if forced to follow the law. But see *Gonzales*, 550 U.S. at 163 ("Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."); accord *id.* at 166 (declining to "strike down legitimate abortion regulations" simply because "some part of the medical community were disinclined to follow" them). That risk is particularly pronounced in pre-enforcement litigation, when providers are not faced with the real-world choice between doing

what it takes to comply and abandoning their practices, and instead have every incentive to overstate the burdens of compliance and the likelihood that they will leave practice if the law takes effect.

The court of appeals properly applied rigorous review to the abortion providers' assertions of inability to comply with Act 620. It was plainly correct, for instance, to reverse the district court's conclusion that Doe 5 had made a good-faith effort to obtain privileges near Delta. Pet. App. 45a-46a. As the court of appeals explained, Doe 5 successfully obtained privileges at a hospital near Women's Health during this litigation, and, according to Doe 5 himself, a hospital near Delta "will grant him privileges once he finds a covering doctor." *Id.* at 45a. Yet Doe 5 neither made meaningful attempts to locate such a doctor—an undertaking even Doe 4 agreed was not "overburdensome"—nor applied to other nearby hospitals. *Id.* at 11a.

Under an appropriate standard, those undisputed facts fail to show that Doe 5 would actually be unable to practice at Delta for any reasons fairly attributable to Act 620. See Pet. App. 18a, 45a (explaining that Doe 5 has "contrived a situation in which it is impossible for him to obtain privileges," and the "most logical explanation for" his behavior "is that he is awaiting the result of this litigation"). Indeed, plaintiffs do not even attempt to defend Doe 5's lack of diligence, but instead suggest (Br. 42) that he "could never meet" the hospitals' requirements to obtain admitting privileges. That assertion, however, contradicts Doe 5 himself, who "explained that Woman's Hospital cannot deny him privileges once he" finds a covering doctor. Pet. App. 17a.

The court of appeals was also correct in rejecting as inadequate Doe 6's decision to apply to only one of nine

hospitals near Women's Health. Pet. App. 46a. Common sense dictates that a provider who actually wanted to obtain privileges would apply to more than one out of nine hospitals, especially when the other doctor at Women's Health (Doe 5) had already obtained privileges at one of the eight hospitals to which Doe 6 did not apply. See *ibid.* The same is true for Doe 2, who failed to apply to a hospital near Hope where he previously held privileges and another Hope physician (Doe 3) currently holds privileges. *Id.* at 43a. This Court has refused to "strike down legitimate abortion regulations" where reasonable alternatives would allow women to obtain abortions without confronting a substantial obstacle. *Gonzales*, 550 U.S. at 166; see *id.* at 163-164. The court of appeals correctly held that, by failing to diligently pursue such alternatives, Does 2, 5, and 6 themselves are responsible for any resulting obstacles to a woman's ability to obtain an abortion. Pet. App. 49a.

b. The district court likewise erred in attributing to Act 620 Doe 3's assertion that he would quit practicing if he is the only remaining abortion provider in northern Louisiana. Pet. App. 251a-252a. The Court need not reach this error if it agrees with the court of appeals that Doe 2's potential departure from Hope cannot properly be attributed to Act 620, see *id.* at 42a-43a, because then Act 620 would not be responsible for rendering Doe 3 the only provider in northern Louisiana. Regardless, the court of appeals was correct that Doe 3's "personal choice to stop practicing" if he becomes the only abortion provider in "*northern* Louisiana" cannot be "legally attributed to Act 620." *Id.* at 48a. Although Doe 3 purportedly based his choice on an increased risk of violence, he offered no evidence that he would face

such an increased risk if he were the only provider in "*northern* Louisiana." *Ibid.* Indeed, his own account of the purported risks shifted during the litigation, as he initially professed to be at risk only if he were the last remaining provider in all of Louisiana, then changed position after Doe 5 obtained privileges in New Orleans. *Id.* at 47a. Doe 3's self-imposed limitation should be attributed to Doe 3 himself (or, at most, to outside factors separate from Act 620), not to Louisiana.

Relatedly, the district court failed to make more than a cursory inquiry into whether clinics could recruit new abortion providers who could comply with Act 620. See Pet. App. 258a-259a. The record here shows that the abortion-provider market is fluid, with two clinics closing for reasons unrelated to the Act and new providers recently arriving. See *id.* at 146a; Louisiana Br. 20. Given those changes, it is not at all evident why, if plaintiffs are correct about the demand for abortions in Louisiana, additional new providers cannot be found. The arrival of other providers could mean that Doe 3 will not be the only provider in northern Louisiana, and could also allow clinics to compensate if any of Does 2, 5, or 6 is actually unable to obtain admitting privileges near a clinic where he currently lacks them. The fact that Louisiana abortion providers were able to compensate for the recent closing of two clinics and the retirement of Doe 4 for reasons unrelated to Act 620 certainly suggests that such adaptation is possible.

c. Plaintiffs respond that *Hellerstedt* makes the district court's errors irrelevant. In their view (Br. 17), *Hellerstedt* requires invalidating Act 620 because this "Court gave no indication that the result" of a challenge to a similar admitting-privileges requirement "would be

different in other jurisdictions." Under that view, *Hellerstedt* resolved the constitutionality of all admitting-privileges requirements in all States for all time, such that no need exists to analyze the record in this or any other case. Indeed, plaintiffs' logic suggests that an admitting-privileges requirement would be invalid even if every abortion provider in the State could readily obtain privileges. That cannot be correct.

Plaintiffs' sweeping reading contradicts *Hellerstedt* itself. As noted above, *Hellerstedt* focused intensely on the facts and record before it. See p. 19, *supra*. Plaintiffs observe (Br. 17, 24-25) that the Court cited extra-record amicus briefs for some general propositions, but the Court nevertheless repeatedly "return[ed]" to the record in formulating its holding, including its key conclusion that "the record evidence indicates that the [Texas] admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice.'" 136 S. Ct. at 2312 (citation omitted). The Court emphasized, moreover, that even with respect to the Texas law, a "statute valid as to one set of facts may be invalid as to another." *Id.* at 2306 (citation omitted). Nothing in the Court's decision suggests that in a future case with a different record showing different potential effects, the result must be the same.

Plaintiffs also observe (Br. 39) that *Hellerstedt* "did not require proof of each individual abortion provider's efforts to obtain privileges." But Texas did not introduce such evidence, so the Court had no reason to address the issue. The Court instead found that the Texas abortion providers had "satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures," and the Texas district

court had permissibly "credited that evidence and concluded from it that" the Texas law—rather than any other cause, such as provider inaction or self-obstruction—"in fact led to the clinic closures." *Hellerstedt*, 136 S. Ct. at 2313. The Court added that, if Texas had introduced evidence that "might have shown that some clinics closed for unrelated reasons," that evidence could have been considered. *Ibid.* Here, the court of appeals properly relied on such evidence to conclude that Act 620 would not create a substantial obstacle to obtaining an abortion for any Louisiana women, let alone the large fraction required to sustain a facial challenge under the standard most favorable to plaintiffs. Pet. App. 53a.

2. Alternatively, this Court could affirm on the ground that Act 620 is not facially invalid under the rule—generally applicable outside the First Amendment context—that a statute is facially unconstitutional only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

a. The standard governing a facial challenge "in the specific context of abortion statutes has been a subject of some question." *Gonzales*, 550 U.S. at 167. In *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (*Akron II*), the Court applied the *Salerno* standard and held that plaintiffs "making a facial challenge to a statute" regulating abortion "must show that 'no set of circumstances exists under which the Act would be valid.'" *Id.* at 514 (citation omitted). In *Casey*'s discussion facially invalidating a spousal-notification provision, however, the Court stated that, "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895. Yet *Casey* did

not apply the large-fraction formulation to any other provision at issue there, nor did the Court use the formulation in striking down a state partial-birth abortion ban in *Stenberg*, see 530 U.S. at 1019 (Thomas, J., dissenting), and the Court expressly reserved the question in *Gonzales*, 550 U.S. at 167. *Hellerstedt* briefly invoked the large-fraction formulation, but only while noting that "Texas reads *Casey* to have required" that approach. 136 S. Ct. at 2320. The proper standard thus remains an "open question." *Id.* at 2343 n.11 (Alito, J., dissenting).

As the United States explained in its amicus brief in *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the *Salerno* standard for facial invalidity should apply in the abortion context. U.S. Amicus Br. at 9-18, *Ayotte*, *supra* (No. 04-1144). No sound basis exists to carve out an abortion exception to that general rule, which provides a readily administrable standard that preserves proper respect for federalism and the separation of powers. See *Ayotte*, 546 U.S. at 329. Nor is there any basis in precedent to employ *Casey*'s large-fraction formulation, as *Casey* did not expressly depart from *Salerno* or *Akron II*, and this Court has never issued a holding to the contrary. Finally, as a practical matter, the large-fraction formulation has little to recommend it, as indicated by confusion about what the numerator and denominator in the fraction are even supposed to be. Pet. App. 53a-59a; see *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

b. Under *Salerno*, plaintiffs' facial challenge fails because Act 620 is constitutional in numerous applications. Even if the Court were not to agree with all of the government's arguments regarding individual abortion providers, the Court should hold that at least some

of the district court's conclusions were incorrect; that plaintiffs have failed to establish the unconstitutionality of *those* applications; and that the Act is therefore not facially invalid. The Court could thus resolve this case while leaving Act 620 "open to a proper as-applied challenge in a discrete case." *Gonzales*, 550 U.S. at 168. And unless Act 620 is invalid in all its applications, facial invalidation would be particularly inappropriate here because Act 620 expressly directs severance of any statutory "application * * * found to impose an impermissible undue burden." § 3. Although *Hellerstedt* declined to enforce the severability clause at issue there, 136 S. Ct. at 2318-2320, much of its analysis focused on the difficulties of parsing through the detailed requirements of Texas's ASC provision. No such complexity exists here.

C. Act 620's Benefits Are Sufficient To Justify Its Burdens

Because Act 620 does not create a substantial obstacle to obtaining an abortion, the Court need not review its benefits. See pp. 17-21, *supra*. But if the Court were to do so, it should conclude the Act's benefits are more than sufficient to justify the burdens that it imposes on women seeking abortions in Louisiana.

1. Act 620 provides at least three meaningful benefits. *First*, as the district court recognized, the Act's purpose is "to improve the health and safety of women undergoing an abortion" by ensuring that their provider can qualify for hospital-admitting privileges. Pet. App. 202a. Even if there is "a dispute medically and scientifically as to whether" such a requirement "serves a legitimate medical need and is medically reasonable," *id.* at 203a, this Court has held that legislatures should have "wide discretion" to resolve such uncertainty, *Gonzales*, 550 U.S. at 163.

Plaintiffs observe (Br. 26-28) that some of Act 620's health and safety benefits are parallel to those rejected in *Hellerstedt*. But others are distinct. Of particular relevance, Louisiana—unlike Texas—provided "testimony from abortion providers themselves, explaining that the hospitals perform more rigorous and intense background checks than do the clinics." Pet. App. 35a. Plaintiffs respond (Br. 29) that the state medical board will ensure physician competency. But nothing requires the state legislature to rely on the medical board alone. See *Gonzales*, 550 U.S. at 166 ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."). And there is no dispute that "competency is a factor," even if not the only one, in assessing applicants for admitting privileges in Louisiana. Pet. App. 171a. Thus, even if Texas's admitting-privileges requirement did "not serve any relevant credentialing function," *Hellerstedt*, 136 S. Ct. at 2313, Louisiana's does.[2]

Second, Act 620 provides an independent benefit not addressed in *Hellerstedt*: conforming the State's admitting-privileges requirements for abortion providers with those for other providers of outpatient surgery. Pet. App. 36a-37a. The law should not "elevate the[]

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[2] The Department of Health and Human Services (HHS) recently noted that admitting privileges are generally not necessary for "maintaining minimum standards for patient safety and care" at ASCs, and removed the requirement that physicians at Medicare-participating ASCs maintain such privileges. 84 Fed. Reg. 51,732, 51,790 (Sept. 30, 2019); see, *e.g.*, 42 C.F.R. 4165.40. HHS thus recognized that admitting-privileges requirements set a floor, not a ceiling, on the standard of care. That recognition does not undermine Louisiana's conclusion that the admitting-privileges requirement at issue here produces a medical benefit.

status" of abortion providers "above other physicians in the medical community," *Gonzales*, 550 U.S. at 163, and Act 620 advances that interest in evenhanded regulation by closing the regulatory gap that previously required physicians at ASCs—but not at abortion facilities—to obtain admitting privileges. See Louisiana Br. 7; Pet. App. 36a-37a, 199a.

Plaintiffs observe (Br. 35-36) that Louisiana has not achieved total conformance between abortion providers and all outpatient-surgery providers, because some outpatient procedures governed by a different provision of the Louisiana regulatory code are not subject to an admitting-privileges requirement. But perfect tailoring is not the standard. As the court of appeals explained, Act 620 achieves a benefit by bringing admitting-privileges requirements for abortion providers into line with those for ASCs, even if it stops short of doing so for all outpatient surgeries. Pet. App. 36a.

Third, Act 620 addresses "the effects on the medical community and on its reputation" caused by insufficient regulation of abortion practices. *Gonzales*, 550 U.S. at 157. Given the profound ethical concerns presented by atrocities at abortion clinics like those run by Kermit Gosnell, see *Hellerstedt*, 136 S. Ct. at 2313, Louisiana has a strong interest in assuring the public that abortion providers are subject to adequate health and safety regulation, see *Gonzales*, 550 U.S. at 157. Act 620 advances that objective, which *Hellerstedt* did not consider.

2. In light of the foregoing, Act 620 should be upheld even if the Court were to adopt the pure balancing approach advocated by plaintiffs. The burdens of Act 620 are minimal—principally, a modest increase in the waiting time (less than an hour) to obtain an abortion. The

benefits described above are more than sufficient to justify that burden.

CONCLUSION

This Court should remand with instructions for the case to be dismissed for lack of third-party standing. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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