Nos. 18-1323, 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ET AL.,
Petitioners–Cross-Respondents,
v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent–Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* SUSAN B. ANTHONY LIST SUPPORTING RESPONDENT–CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Do abortion providers have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf?

2. Are objections to prudential standing subject to waiver or forfeiture?

3. Does *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), foreclose lower courts from evaluating challenges to States' abortion clinic safety regulations in light of a case's specific factual record?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND REGULATIONS

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS[1]

The 837,000 members of the Susan B. Anthony List reside in all 50 states and Washington, D.C., united by the same belief expressed by Alice Paul, the author of the 1923 Equal Rights Amendment: "Abortion is the ultimate exploitation of women."

Founded in 1992, the Susan B. Anthony List is named to honor the suffragette whose work was essential to the enfranchisement of women. Susan B. Anthony's legacy demonstrates that the right to vote is more than a recognition of women's equality. Access to the democratic process, not judicial rulings, provides the greatest protection of women's freedom. Voters should be allowed to determine abortion policies using this political voice, and the Court should retreat from its intensive regulation of abortion, an area where "the answers to most of the cruel questions posed are political and not juridical." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in judgment).

Amicus Curiae Susan B. Anthony List is a "pro-life advocacy organization," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153 (2014) (internal quotation marks omitted), dedicated to reducing and ultimately eliminating abortion by electing leaders and advocating

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the Amicus's intent to file this brief and granted written consent. No counsel for a party authored this brief, in whole or in part, and no person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission.

for laws that save lives, with a special calling to promote pro-life women leaders. The Susan B. Anthony List invests heavily in voter education to ensure that Americans know where their lawmakers stand on protecting the unborn. The organization is also involved in issue advocacy, working to advance pro-life laws through direct lobbying and grassroots campaigns throughout the States.

The States have long had authority to protect public health, and this Court has held that abstract medical studies are not sufficient to rebut the "health basis" for a State's regulation of abortion. *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam). The opinion for the Court in *Whole Woman's Health v. Hellerstedt* does not even mention *Mazurek*, let alone overrule it. 136 S. Ct. 2292, 2300-20 (2016). The Susan B. Anthony List is, therefore, particularly interested in this Court's resolution of the third question presented: whether States continue to have the ability to impose thoughtful health regulations upon abortion providers to protect women, to further the state's interest in the life of unborn children, and to ensure consistent and competent medical care more generally.

SUMMARY OF ARGUMENT

Petitioners argue that affirmance of the court below would pose "a serious threat" to the "basic operating principles" of the judiciary because the Fifth Circuit ignored the trial court record and "refused to accept the holding" of *Hellerstedt*. Pet.Br.2-3. These concerns about fidelity to stare decisis, however, rest upon the implicit assumption that *Hellerstedt* reflects an intentional decision by this Court to resume a role as "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States." *Hellerstedt*, 136 S. Ct. 2292, 2326 (2016) (Alito, J., dissenting).

Such an interpretation of *Hellerstedt* does not reflect stare decisis. It reflects amnesia about that case's procedural history. *Hellerstedt* was the culmination of not one, but *two* lawsuits filed by abortion providers against the Texas law that required physicians at abortion clinics to obtain admitting privileges at a nearby hospital. In the first case, a facial challenge to the constitutionality of Texas law, the challengers lost.

Hellerstedt was the second case, and its procedural posture alters the boundaries of stare decisis. If the "adverse consequences" in Texas after its law took effect made "all the difference" for the plaintiffs' claims the second time, 136 S. Ct at 2306, then it is those new facts—and only those facts—that implicate stare decisis. *Hellerstedt*'s decision on an as-applied challenge did not hold that any state law requiring abortion providers to obtain admitting privileges at a nearby hospital is unconstitutional. It could not do so

without ignoring the doctrine of res judicata altogether, which the Court's opinion expressly declined to do.

Far from evincing disrespect for the rule of law, the Fifth Circuit's opinion correctly held that lower courts remain available to litigants, like Louisiana, that can demonstrate the value of an admitting privilege requirement and its effect in that State.

This Court should make clear that *Hellerstedt* does not "elevate" abortion providers "above other physicians in the medical community." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). The importance of state regulation of abortion providers is magnified by the unique place occupied by clinics in the health care marketplace. Abortion clinics, in the main, do not rely upon federal funding to pay for the services they provide. *See*, *e.g.*, *Further Consolidated Appropriations Act,* 2020, Div. A, Title V, § 506, Pub. L. No. 116-94 at 73-74 (Hyde Amendment). Therefore, the oversight of health care quality imposed as a condition of Medicare and Medicaid payment does not cover them. Louisiana requires other physicians who rely primarily upon private payment—such as plastic surgeons who operate ambulatory surgical centers—to have admitting privileges at a nearby hospital. The Court should affirm the constitutionality of Louisiana's decision to apply this requirement to abortion clinics.

The decision of the court below should be affirmed.

ARGUMENT

I. This Court's decision in *Whole Woman's Health v. Hellerstedt* was a fact-based, as-applied ruling to avoid the barrier created by the doctrine of res judicata. Petitioners cannot now broaden that opinion into a sweeping precedent that would have been procedurally improper.

A. The procedural posture of *Hellerstedt* limits the breadth of its holding.

Hellerstedt was the culmination of not one, but *two* lawsuits filed by Whole Woman's Health and other plaintiffs against a Texas law that required abortion providers to obtain admitting privileges at a nearby hospital.

In *Abbott*, Whole Woman's Health and the other plaintiffs "presented four grounds to the district court for invalidating the hospital admitting privileges requirement" in the newly-enacted Texas Law, H.B 2. *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 587 (5th Cir. 2014) (*Abbott II*). As this Court explained, this "group of Texas abortion providers" included most, but not all, of the plaintiffs in *Hellerstedt*, although the first lawsuit sought "facial invalidation of the [Texas] law's admitting-privileges provision" rather than as-applied relief. 136 S. Ct. at 2301.

The *Abbott* plaintiffs lost. The Fifth Circuit held that Texas's admitting privileges requirement would "not affect a significant (much less 'large') fraction" of women seeking abortions, and any burden would be

"less … than the waiting-period provision upheld in *Casey*." *Abbott II*, 748 F.3d at 600.

Unless an exception to res judicata applied, the *Abbott* final judgment ended the plaintiffs' challenge to the Texas law forever. A "fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983).

Res judicata is more than one of the "fundamental rules of the road" created to manage our judicial system. Pet.Br.2. Res judicata is, at is core, a command of the Constitution itself. "Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it," and the ever-present "risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue." *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982). To prevent the repeated litigation that arose under the Articles of Confederation, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, § 1.

"This Court has consistently recognized that, in order to fulfill this constitutional mandate [of the Full Faith and Credit Clause], 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.'" *Underwriters*, 455

U.S. at 704 (quoting *Hampton v. McConnell*, 3 Wheat. 234, 235, (1818) (Marshall, C.J.)). *See also* 28 U.S.C. § 1738 (imposing the same obligation upon the federal courts).

As a corollary, this Court insists that "the determination of a question directly involved in one action is conclusive as to that question in a second suit." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 147 (2015) (quoting *Cromwell v. County of Sac,* 94 U.S. 351, 354 (1877)). Enforcement of the doctrine of res judicata "is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them." *S. Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897). Put succinctly, a "losing litigant deserves no rematch after a defeat fairly suffered." *B & B Hardware*, 575 U.S. at 147.

Before the *Hellerstedt* Court could reach the merits, then, it needed to determine whether the final judgment in *Abbott* barred review. 136 S. Ct. at 2304-07. The Court concluded that the *Abbott* litigation did not create such an obstacle because "development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim." *Id.* at 2305 (quoting Restatement (Second) of Judgments § 24 cmt. f. (1980)). "Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief

at the time of an earlier suit, was in fact indisputable." *Id.*

The *Hellerstedt* court concluded "[t]hose developments matter" and that the *Abbott* lawsuit was "not the same claim" because the effect of the Texas law "has changed dramatically" since it was brought. *Id.* at 2306. The adverse consequences that providers feared "*have in fact occurred*" making res judicata inapplicable. *Id.* (emphasis in original).

The Court's decision on res judicata means something else, however. These new facts in the second case, *Hellerstedt*, were the legally necessary underpinning for the Court's grant of relief. *Hellerstedt* rested "in significant part upon later, concrete factual developments," *id.* at 2306, and had these new facts not developed, the second challenge would have been "successive litigation of the very same claim" and barred, *id.* at 2305.

Respect for *Hellerstedt* and stare decisis implicates only these new facts and legal conclusions arising from them. As Chief Justice Marshall explained, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). To the extent that statements "go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id.*

B. Hellerstedt's narrow factual basis is clear in the text of the opinion.

Abbott decided a "facial challenge." 136 S. Ct. at 2304. The as-applied claim in *Hellerstedt* rested "in significant part upon later, concrete factual developments" that "a large number of clinics have in fact closed" as a result of the Texas law and "physicians have been unable to obtain admitting privileges after diligent effort." *Id.* at 2306.

In contrast, *Hellerstedt*'s discussion about the health benefits of the Texas admitting privilege requirement did not rely on information that had developed since *Abbott*. Just the opposite. *Hellerstedt* noted Texas had not presented any "health-related benefit" for admitting privileges because "*before the act's passage*, abortion in Texas was extremely safe." 136 S. Ct. at 2311 (emphasis added). Evidence that predates the Texas law is, by definition, knowable at the time of the *Abbott* facial challenge to the Texas statute. *See id.* at 2306 (exception from res judicata because of "unknowable" evidence that arose after the Texas law took effect).

The *Abbott* findings on health benefits matter because "the doctrine of res judicata applies to disputed facts as well as to disputed mixed questions of fact and law." Bryan A. Garner, et al., *The Law of Judicial Precedent* 374 (2016). If the "adverse consequences" in Texas after the pre-enforcement stay ended made "all the difference" for the application of res judicata to the plaintiffs' claims, *id.* at 2306, then it is these facts—and only these facts—that "control the judgment," *Cohens*, 19 U.S. at 399, and implicate stare decisis.

Under res judicata, new "material operative facts" can be considered "in conjunction" with "the antecedent facts" established in the earlier litigation, but this does not broaden the *Hellerstedt* holding. *See* Restatement (Second) of Judgments § 24, cmt. f. The *Abbott* facial challenge considered the health benefits of an admitting privileges requirement, and the plaintiffs lost on these 'antecedent facts' as well. When the Fifth Circuit considered Texas's request for a stay pending appeal, it reviewed the trial court evidence on the admitting privileges requirement. *See Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013) (trial court's consideration of evidence). The Fifth Circuit held that Texas had presented evidence that its requirement "fosters a woman's ability to seek consultation and treatment for complications directly from her physician, not from an emergency room provider." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 411 (5th Cir. 2013) (*Abbott I*). The panel concluded that the trial court's injunction should be reversed not only out of deference to the facts before the Texas Legislature, but also because the trial court's injunction was "not supported by the evidence" adduced at trial about the benefits to women's health. *Id.*[2]

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[2] *Abbott II* is more ambiguous about the trial court evidence, noting that "evidence placed before the state legislature" had "easily supplied a connection between the admitting-privileges rule and the desirable protection of abortion patients' health." *Abbott II*, 748 F.3d at 594. This does not alter the effect of *Abbott I*'s holding that the trial court's factual findings on this point were not supported by the evidence (*i.e.* clearly erroneous), as the first decision would

Hellerstedt did not, therefore, either hold or "suggest[]," Pet.Br.25, that any state law that requires abortion providers to obtain admitting privileges from a nearby hospital is similarly unconstitutional. It could not do so. Such a broad opinion would have jettisoned the "universal inexorable command" of res judicata. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) ("Stare decisis is not, like the rule of res judicata, universal inexorable command.").

Hellerstedt's comments that the Court found "nothing in Texas' record evidence" that demonstrated the "new law advanced Texas' legitimate interest in protecting women's health" must be taken in the context of an as-applied challenge only. 136 S. Ct. at 2311. The broader interpretation that Petitioners advance here, Pet.Br.25, applying *Hellerstedt*'s discussion of health benefits to the entire United States, is foreclosed by the *Abbott* litigation. The same is true of *Hellerstedt*'s statement about a low rate of complications for women who use medication to cause an abortion. 136 S. Ct. at 2311. The *Abbott* trial court had considered this evidence as well. *Planned Parenthood of Greater Texas Surgical Health Servs. v.*

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be the "law of the case" in subsequent proceedings. *Chapman v. NASA*, 736 F.2d 238, 242 n.2 (5th Cir. 1984). In any event, *Abbott II* agreed with the conclusion in *Abbott I* that "rational speculation, if not empirical data," *Abbott II*, 748 F.3d at 594-95, supported the view that admitting privileges "'would assist in preventing patient abandonment by the physician who performed the abortion and then left the patient to her own devices to obtain care if complications developed," *id.* at 595 (quoting *Abbott I*, 734 F.3d at 411).

Abbott, 769 F.3d 330, 350 (5th Cir. 2014) (denial of rehearing en banc) (J. Dennis, dissenting) (describing evidence before the district court).

Consequently, lower courts remain a forum for litigants like Louisiana who can demonstrate the Texas law reflected "one state of facts" but the requirement for admitting privileges remains valid elsewhere. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another.").[3]

C. The Fifth Circuit properly found that Louisiana's admitting privileges have not caused closures like those identified in Texas by *Hellerstedt*.

The court below carefully examined whether Louisiana's admitting privileges requirement caused "a large number of clinics" to close, as the *Hellerstedt* Court found in Texas. 136 S. Ct. at 2306. The Fifth Circuit held that Texas is not Louisiana, which has "a

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[3] Some of the information in *Hellerstedt* was supplied by amicus briefs to this Court. It was not "evidence … presented in judicial proceedings," 136 S. Ct. at 2310, through the traditional process that allows litigants an opportunity to test these facts for accuracy. For example, the Court inferred El Paso abortion providers had difficulty in obtaining admitting privileges because, as one amicus brief suggested, hospitals "often" required a minimum number of referrals per year before granting privileges. *Id.* at 2312. The Court inferred that one experienced physician had difficulty obtaining admitting privileges because, as suggested by an amicus brief, hospitals commonly consider prerequisites "that have nothing to do with ability to perform medical procedures." *Id.*

substantially similar statute but greatly dissimilar facts and geography." Pet.App.31a. The facts that made such a difference in *Hellerstedt* cannot be found here.

While two abortion clinics in Louisiana have closed since the law was enacted, nothing in the record indicates—and no party has asserted—that either clinic closed as a result of Louisiana's law. Pet.App. at 7a n.13 & 12a n.21.[4] The court of appeals examined "each abortion doctor's efforts" to seek admitting privileges as well as "the specific by-laws of the hospitals to which each applied." Pet.App.40a. "On the entire evidence," only one abortion provider made a

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[4] On November 30, 2015, the Louisiana Department of Health completed a relicensing survey of the Causeway Medical Clinic, and that report indicates the facility had performed, in 2015, at least one abortion on a minor without any documentation the young woman had parental consent or judicial bypass as required by law. *See* Public Record #00137 at 11-15, located in Louisiana Attorney General, Public Record Request R000222-111219, *available at* https://bit.ly/37mRPES. The Causeway Medical Clinic closed approximately two months after that survey. Jessica Williams, "One of two abortion clinics in New Orleans area shuts down abruptly; unclear if it will reopen," *available at* https://bit.ly/2rIHmoo.

The Louisiana Department of Health completed a relicensing survey of the Bossier City Medical Suite on February 1, 2017. Public Record #00022, *available at* https://bit.ly/37mRPES. That clinic also closed approximately two months after the licensing review, on April 1, 2017. Public Record #00039, *available at* https://bit.ly/37mRPES. *Amicus* does not assert it knows why these clinics closed, only that significant factual investigation is needed before a court could conclude Louisiana's law on admitting privileges influenced either closure. *But see* Resp.Br. at 46 n.20 (records from Bossier clinic, which would presumably be needed for such an investigation, destroyed by owner in May 2017).

good faith attempt to seek admitting privileges from a nearby hospital. Pet.App.46a.

Petitioners state that their challenge is "[d]ifferent from resolving a purely-fact based dispute," Pet.Br.21 (initial capital letters removed), but they also, paradoxically, argue that the Fifth Circuit overstepped its appellate role by failing to adopt the district court's "detailed factual findings" about the Louisiana law. Pet.Br.26.

This misunderstands appellate review. The Fifth Circuit did nothing improper.

Legal questions receive *de novo* review. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). An appellate court reviews the determination of historic facts with deference, reversing only when the factual findings by the trial court are "clearly erroneous." Fed. R. Civ. P. 52(a)(6). These are findings about "basic" or "historical" fact "addressing questions of who did what, when or where, how or why." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018).

Some issues on appeal have both factual and legal aspects, and the Court distinguishes between review of historic facts and review of the legal effect of such facts. These "mixed questions of fact and law" involve situations where the historical facts are admitted or established, and the rule of law is undisputed, but the court must determine whether the facts satisfy the legal standard.

When the "issue falls somewhere between a pristine legal standard and a simple historical fact, the standard of review reflects which "judicial actor is better positioned" to make the decision. *U.S. Bank*, 138 S. Ct. at 967 (quoting *Miller v. Fenton,* 474 U.S. 104, 114 (1985)). When the decision requires a court to "expound on the law, particularly by amplifying or elaborating on a broad legal standard" such that "applying the law involves developing auxiliary legal principles of use in other cases," then review is typically *de novo*. *Id.* In contrast, clear error review is appropriate when the trial court has been forced to address the "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.*

The specific efforts by the abortion providers to seek admitting privileges are described within the record, and the Fifth Circuit did not dispute those facts. Rather, the Fifth Circuit concluded that the *legal effect* of those historic facts does not demonstrate that Louisiana's law is an unconstitutional obstacle to the availability of abortion services in that State. *Hellerstedt* itself makes clear that such an analysis is primarily legal, not factual. As the Court noted in that case, the question for a court is whether "the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)" with the admitting privileges requirement. 136 S. Ct. at 2310. While this analysis has a factual component, considering "expert evidence, presented in stipulations, depositions, and testimony," the ultimate decision can be reached only after the court has

"weighed the asserted benefits against the burdens." *Id.*[5]

The court below did not disagree with the determinations of historic fact by the trial court. Rather, it reached a different conclusion about whether these facts demonstrate that the admitting privileges requirement is unconstitutional. The Fifth Circuit concluded that Louisiana's law is intended to "further the health or safety of a woman seeking an abortion," not an "unnecessary" restriction with the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992). Such an assessment is a legal analysis and reflects appropriate appellate review.

II. The Constitution and this Court's precedents permit States to legislate to protect the quality of medical care in abortion clinics, and the Fifth Circuit's decision properly upheld Louisiana's statute.

The States have protected public health since their inception. Chief Justice Marshall noted "the public health" is a "great object of public interest, within the acknowledged scope of State legislation." *Gibbons v. Ogden*, 22 U.S. 1, 72 (1824). "The protection and promotion of the public health has long been recognized as the responsibility of the sovereign power. Government is, in fact, organized for the express purpose, among others, of conserving the public health

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[5] As noted above, *Hellerstedt*'s legal conclusions on these mixed questions were limited by its procedural posture as an as-applied challenge.

and cannot divest itself of this important duty." Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 Hastings Const. L.Q. 267, 281 (1992) (quoting James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126 (1927)).

To this end, the States have licensed and regulated medical professionals since colonial times. David A. Johnson & Humayun J. Chaudhry, *Medical Licensing and Discipline in America* 3-6 (2012). New Jersey was the first to impose an examination requirement for physicians in 1772. *Id.* at 5. Regulation of the medical profession necessarily involves balancing competing risks, often in the presence of scientific uncertainty and differences of opinion about what is best for patients.

The need for state oversight is particularly great for abortion providers, who occupy a unique place in the health care marketplace. The federal government does not fund elective abortions, so abortion clinics do not, in the main, rely upon federal funding as a significant source of payment. *See*, *e.g.*, *Further Consolidated Appropriations Act,* 2020, Div. A, Title V, § 506, Pub. L. No. 116-94 at 73-74 (Hyde Amendment). "Although abortion clinics currently are subject to regulatory oversight outside the realm of state-specific statutes, the [federal] requirements currently in place govern the privacy of patients' health records, laboratory testing practices, and workplace health and safety, but do not address directly the regulation of surgical procedures." Jessica Arden Ettinger, *Seeking Common Ground in the Abortion Regulation Debate*, 90 Notre Dame L. Rev. 875, 876-77 (2014).

For example, Medicaid requires all ambulatory surgical centers that serve Medicaid patients to comply with its facility requirements. *See generally* 42 C.F.R. Part 416. These include protocols and plans for improving the quality of health care, 42 C.F.R. § 416.43, as well as standards for building construction, hygiene, and safety, 42 C.F.R. § 416.44. This extensive oversight of health care quality is not a required cost of operation for abortion clinics. Ettinger, 90 Notre Dame L. Rev. at 881 (Since the Hyde Amendment prohibits the use of federal funds to obtain an abortion, "abortion clinics would not be required to meet the facility design requirements specified by the Center for Medicare & Medicaid Services if they provide no other services for which Medicare or Medicaid funds might be used in reimbursement.").

"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." *Gonzales*, 550 U.S. at 163. Petitioners, not Louisiana, must provide sufficient evidence that admitting privileges create a "substantial obstacle to a woman seeking an abortion." *Mazurek*, 520 U.S. at 972. Although plaintiffs may overcome this burden, this Court has not previously held that generalized medical evidence is enough to rebut a State's "health basis" for regulation. *Id.* at 973.

For more than forty years, Louisiana has regulated ambulatory surgical centers, and its current regulations require physicians at these centers to have admitting privileges at a nearby hospital. Resp.Br. at

6-7.[6] By extending its admitting privileges requirement to abortion providers, Louisiana has done what the Federal government has long encouraged for practitioners nationally: mandatory review of a physician's credentials and competency through a peer review process.

The hospital admitting privilege process has an important, federally-approved advantage in the evaluation of a physician's competency. Hospital admitting privilege reviews must consider information from the National Practitioner Data Bank. 45 C.F.R. § 60.17. The National Practitioner Data Bank was created in 1986 after reports by the Office of the Inspector General for the U.S. Department of Health and Human Services noted a "festering" "disconnect between public expectations for improvement [in provider quality] and state boards' capacity to perform their role at that level given their available resources." Johnson, *Medical Licensing* at 211. Congress created the Data Bank to "protect the public by restricting the ability of unethical or incompetent practitioners to move from state to state without disclosure or discovery of previously damaging or incompetent performance." Bhagwan Satiani, *The National Practitioner Data Bank: Structure and Function*, J Am. Coll Surg. 2004 Dec;199(6):981. The Data Bank includes records of hospital discipline against physicians, reports on malpractice payments (including settlements) made on behalf of physicians, and the

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[6] These regulations address the need for oversight of another significant category of medical treatment excluded from Medicaid and Medicare payment: elective plastic surgery.

names of providers who have been excluded from the Medicaid or Medicare programs for fraud or other reasons. *Id.* at 982.

Federal law requires a hospital to review information in the Data Bank every time a practitioner applies for medical privileges and every two years thereafter. 45 C.F.R. § 60.17. The majority of queries elicit no negative information (more than 85% of queries in 2002 had "no match"). Satiani, *The National Practitioner Data Bank* at 982. Nevertheless, for practitioners who have reports in the Data Bank, there is a general "correlation between physicians with high numbers of medical malpractice payment reports and at least some adverse action/reports and Medicaid/ Medicare exclusion reports." *Id.* at 984.

Just as important, hospital admitting privilege committees are one of the few entities permitted access to Data Bank information, which must "be used solely with respect to the purpose for which it was provided." 45 C.F.R. § 60.20(a). As the Data Bank is a creation of federal law, neither Louisiana nor any other State can authorize broader dissemination of its reports. While state licensing boards also have access to the reports, 45 C.F.R. § 60.18(a)(iii), the creation of the Data Bank itself reflects, in part, the judgment that state licensing boards were not as effective as they could otherwise be. Johnson, *Medical Licensing* at 211 (noting resource constraints).

This Court should not assume that hospital admitting privileges will be granted or denied for any reason other than medical competency. The implication in *Hellerstedt* that there are "other common

prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures" does not reflect Louisiana's experience. 136 S. Ct. at 2312.

In particular, Federal law prohibits any hospital that receives funding under the Public Health Act, 42 U.S.C. § 201 *et seq.*, from discriminating against a provider "because he performed or assisted in the performance of a lawful sterilization procedure or abortion." 42 U.S.C. § 300a-7. Inexplicably, the trial court below declined to consider this federal statute, concluding that it did not know whether any Louisiana hospitals were covered by it. Pet.App.168a n.23 & 184a n.33.

The trial court's evasiveness about this federal anti-discrimination requirement affected its conclusions. The federal anti-discrimination provision applies to, among others, a provider that receives any of the $2.3 billion dollars appropriated for the Ryan White HIV/AIDS Program. Pub.L.No. 116-94, Div. A, Title II, at 23 (signed by the President on Dec. 20, 2019). Provider Doe 2 suggested that the "political nature" of abortion could preclude a grant of admitting privileges by the Louisiana State University Health Center in Baton Rouge. Pet.App.13a. That hospital is a provider of Ryan White services, however. *See* Find a Ryan White HIV/AIDS Program Medical Provider (HHS website) at https://bit.ly/2srLucH. It cannot deny privileges to Doe 2 for that reason. If the hospital did so, its decision would be wrong. If there are other reasons to deny Doe 2 admitting privileges, however,

such as concerns about the quality of care, then this is *exactly* why the Louisiana law should be in effect.

Moreover, while hospitals have statutory protection for admitting privileges decisions, 42 U.S.C. § 11111(a), this protection exists only when an admitting privilege committee acts with "the reasonable belief that the action was in the furtherance of quality health care," makes "a reasonable effort to obtain the facts of the matter," and provides "adequate notice and hearing procedures" to the physician involved, 42 U.S.C. § 11112(a). *Cf. Patrick v. Burget*, 486 U.S. 94 (1988) (affirming $2 million antitrust verdict for use of peer review committee for anti-competitive behavior in case brought prior to enactment of the statutory protections).

Finally, many hospitals in Louisiana and elsewhere are public hospitals. As government entities, they must afford procedural due process. "Possession of medical staff privileges" can constitute a property interest under certain circumstances. *Daly v. Sprague*, 675 F.2d 716, 727 (5th Cir. 1982). *See also*, *e.g.*, *Shahawy v. Harrison*, 875 F.2d 1529, 1532 (11th Cir. 1989) (constitutionally-protected property interest in medical staff privileges). The bylaws in the Joint Appendix, therefore, are not meaningless exhortations. *See*, *e.g.*, J.A. Vol VII. at 1259-1303 (Bylaws for East Jefferson General Hospital where Provider Doe 6 applied for privileges but has not yet received a response). The plaintiff physicians, and others, must be treated with respect and will have appeal rights should any of the hospitals act improperly. *See also* 42 U.S.C. § 11111(a)

(peer review protections do not affect suits under 42 U.S.C. § 1983).

CONCLUSION

At one time, this Court's abortion jurisprudence required the States to "continuously and conscientiously study contemporary medical and scientific literature." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting). The *Hellerstedt* interpretation offered by the Petitioners is even more restrictive. Petitioners would impose the medical findings of one federal district court, when affirmed by this Court, upon the entire nation.

Hellerstedt neither offered nor accepted this invitation to resume evaluation of whether "abortion regulations … depart from accepted medical practice." *Akron*, 462 U.S. at 431. The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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