No. 18-2463

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, ET AL.,
Plaintiffs-Appellees,

v.

LARRY JEGLEY AND MATT DURRETT,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Arkansas
Case No. 4:15-00784-KGB (Hon. Kristine Baker)

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

STEVEN H. ADEN
Counsel of Record
CATHERINE GLENN FOSTER
RACHEL N. BUSICK
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington, VA 22201
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

/s/ Steven H. Aden
STEVEN H. ADEN
Counsel of Record
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington, VA 22201
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. AUL attorneys are highly-regarded experts on the Constitution and pro-life policy, and are often consulted on various bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including a contract-physician model bill. *See* Ams. United for Life, Defending Life 414–27 (2018 ed.) (state policy guide providing model bills that protect women's health). Arkansas' contract-physician requirement is similar to AUL's contract-physician model bill. *Cf.* Ark. Code Ann. § 20-16-1504(d), *with* Abortion-Inducing Drugs Information and Reporting Act, Section 4(c), *in* Defending Life, at 420.

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* and its counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice and have consented to the filing of this brief.

ARGUMENT

The court below committed factual and legal error by holding that Arkansas' Act will cause an undue burden.

A. The undue burden test requires that Arkansas' Act creates a substantial obstacle to abortion access and that its "numerous burdens substantially outweigh[] its benefits."

For the first time in 1973, the United States Supreme Court recognized a federal constitutional right of a woman "to decide whether or not to terminate her pregnancy" in *Roe v. Wade*, 410 U.S. 113, 170 (1973).[2] In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court created an undue burden test to determine whether

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[2] The Supreme Court has held that abortion providers, such as Plaintiffs in this case, can assert third-party standing to enforce the rights of their patients, but the right they are enforcing is *the woman's* personal right to choose an abortion, not their personal right to provide abortions. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) ("[I]t generally is appropriate to allow a physician to assert *the rights of women patients* as against governmental interference with the abortion decision." (emphasis added)). *But see Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321–23 (2016) (Thomas, J., dissenting) (noting that "the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake" and calling into question the appropriateness of this practice); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 Notre Dame L. Rev. 1369 (2009) (arguing that abortion providers generally fail to meet the prudential requirements for asserting third-party standing on behalf of their patients).

laws regulating abortion procedures violate the Constitution. 505 U.S. 833 (1992); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (the undue burden standard applies "when determining the constitutionality of laws regulating abortion procedures"). "[A]n undue burden is an unconstitutional burden," and there is an undue burden when "a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (opinion of court) (emphasis added).

More recently in 2016, the Supreme Court clarified in *Hellerstedt* that *Casey*'s "undue burden" standard requires "that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309; *see also id.* at 2310 (stating that the district court applied the correct legal standard when it "weighed the asserted benefits against the burdens"). As this Court explained, the Supreme Court, in *Hellerstedt*, struck down two provisions of H. B. 2 (Texas' law regulating abortion) "because its numerous burdens substantially outweighed its benefits." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017), *cert. denied*, No. 17-

935, 2018 U.S. LEXIS 3332 (U.S. May 29, 2018); *see also id.* at 960 n.9 ("The question here, however, is whether the contract-physician requirement's benefits are substantially outweighed by the burdens it imposes on a large fraction of women seeking medication abortion in Arkansas.").

In *Hellerstedt*, after weighing the benefits and burdens, the Court ultimately invalidated two provisions of Texas' H. B. 2 because "[e]ach place[d] a *substantial obstacle* in the path of women seeking a previability abortion." 136 S. Ct. at 2300 (emphasis added). Notably, *Hellerstedt* explicitly relied on *Casey* to invalidate the two provisions. *See, e.g.*, *id.* at 2300 ("We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*."); *id.* at 2309 ("We begin with the standard, as described in *Casey*."); *id.* at 2309 ("The rule announced in *Casey*, however, requires . . . ."). Nowhere did the Court imply that where there is no benefit, *any* demonstrated burden—no matter how minimal—renders the law unconstitutional. Rather, *Casey*'s standard "asks courts to consider whether any burden imposed on abortion access is '*undue*.'" *Id.* at 2310 (emphasis added). A burden is undue when the requirement places a

"'substantial obstacle to a woman's choice' in 'a large fraction of the cases in which' it 'is relevant.'" *Id.* at 2313 (quoting *Casey*, 505 U.S. at 895 (opinion of the Court)). Thus, this Court was correct to state that a regulation on abortion is unconstitutional when the law places a substantial obstacle in the path of a woman seeking an abortion *and* its "numerous burdens substantially outweigh[] its benefits." *Jegley*, 864 F.3d at 958.

B. The undue burden test is a fact-intensive inquiry, requiring plaintiffs provide evidence of causation.

The Supreme Court has repeatedly emphasized the factual nature of determining the constitutionality of laws regulating abortion. *See e.g.*, *Hellerstedt*, 136 S. Ct. at 2310 (district court correctly "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony"); *id.* ("In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional." (citing *Casey*, 505 U.S. at 888–94 (opinion of the Court))). As this Court has already recognized in *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, the undue burden standard is "intertwined with underlying facts." No. 17-1996, 2018 U.S.

App. LEXIS 25545, at *9 (8th Cir. Sept. 10, 2018) (likening the constitutional scrutiny required by the undue burden standard to a "cost-benefit analysis" and pointing out that it is "fundamentally an empirical inquiry"); *see also id.* ("'[L]ater, concrete factual developments' can affect whether or not the *same* law violates the undue burden standard." (quoting *Hellerstedt*, 136 S. Ct. at 2305–06) (emphasis in original).

Plaintiffs have the burden of proof to establish that the law regulating abortion causes an undue burden. For example, in *Hellerstedt*, the Supreme Court held that based on the record in that case, "petitioners *satisfied their burden to present evidence of causation* . . . that H. B. 2 in fact led to the clinic closures." 136 S. Ct. at 2313 (emphasis added); *see also id.* ("In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts."); *id.* at 2344 (Alito, J., dissenting) ("[T]here can be no doubt that H. B. 2 caused some clinics to cease operation.").

C. The lower court factually and legally erred by not conducting a fact-intensive inquiry.

1. The Supreme Court's abortion safety conclusions in *Hellerstedt* were based on the evidence presented in that case and specific for Texas, which had an existing working arrangement requirement.

The district court erroneously conflated *Hellerstedt*'s record and Texas-specific factual findings by the Supreme Court with the reality in Arkansas. For instance, in Texas, "[b]efore the enactment of H. B. 2, doctors who provided abortions were required to 'have admitting privileges *or have a working arrangement with a physician(s) who has admitting privileges at a local hospital* in order to ensure the necessary back up for medical complications.'" *Id.* at 2310 (quoting Tex. Admin. Code., tit. 25, § 139.56 (2009)) (emphasis added). Texas' working arrangement requirement is substantially similar to Arkansas' Act requiring a medication abortion provider to contract with a physician who has "active admitting privileges and gynecological/surgical privileges at a hospital" and "agrees to handle complications" and "emergencies associated with" abortion drugs. Ark. Code Ann. § 20-16-1504(d). The significant difference between the two regulations is that

Arkansas' Act applies only to medication abortions, while Texas' law applied to both medication and surgical abortions.

Texas' H. B. 2 changed the working arrangement requirement so that the actual physician performing or inducing the abortion must be the one who has active admitting privileges at a hospital located within 30 miles from where the abortion is performed. *See Hellerstedt*, 136 S. Ct. at 2310 (quoting Tex. Health & Safety Code Ann. § 171.0031(a)). It was this change—requiring abortion providers *themselves* to have admitting privileges within a limited geographic distance—that "imposed an 'undue burden' on a woman's right to have an abortion." *Id.* at 2310–11.

The Supreme Court came to this conclusion based on the evidence and arguments presented in the judicial proceedings in that case. *See id.* at 2310. It compared H. B. 2 to Texas' preexisting law. *See id.* at 2311 ("We have found nothing in Texas' record evidence that shows that, *compared to prior law* (which required a 'working arrangement' with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health." (emphasis added)). Before H. B. 2—and with a requirement (very similar to Arkansas' Act)

that abortion providers have, at a minimum, a working arrangement with a physician who has admitting privileges—the lower court found that "[t]he great weight of evidence demonstrates that . . . abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." *Id.* (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d. 673, 684 (W.D. Tex. 2014)). The Supreme Court agreed. *See id.* (finding nothing in Texas' record evidence that would upset the district court's conclusion). This conclusion tells us at least three things. First, the Supreme Court affirmed the district court's factual finding that abortion "was extremely safe" based on the evidence presented in the record evidence of that case. *Id.* Second, the safety finding was limited to "abortion in Texas." *Id.* Third, the conclusion that abortion was "extremely safe" was a description of abortion in Texas *with* a working arrangement requirement—albeit one that covered both medication and surgical abortions. *Id.*

2. The lower court refused to consider whether there was a different health problem not present in Texas that Arkansas was responding to.

In contrast, the lower court in the instant case held that "[t]o the extent either party wishes to revisit the issue of the dangerousness of first trimester and second trimester abortions, this Court determines that the Supreme Court has now spoken on this subject, and this Court is required to follow." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, No. 15-784, 2018 U.S. Dist. LEXIS 110358, at *82 (E.D. Ark. July 2, 2018); *see also id.* at *139 ("This is especially so given that, as established by the Supreme Court, abortion in the first and second trimester is a safe procedure."). The court used *Hellerstedt* to automatically reject evidence and affidavits that medication abortions have a higher risk of complication than surgical abortions. *See id.* at *127 ("[B]ased on the factual determinations in *Hellerstedt*, it is established that any complications that arise after a medication abortion are exceedingly rare."); *id.* at *129 ("The Court determines that, in the light of the factual underpinning accepted by the majority in *Hellerstedt*, Dr. Harrison's statements regarding the incidence of

complications from medication abortions must be rejected."). This was factual and legal error.

The Supreme Court's determination regarding the safety of abortions, as explained above, was explicitly based on the evidence before it, limited to the state of Texas, and with an existing floor of a working arrangement regulation.[3] In *Hawley*, this Court held that "*Hellerstedt* did not find, as a matter of law, that abortion was inherently safe or that provisions similar to the laws it considered would never be constitutional." 2018 U.S. App. LEXIS 25545, at *12. *See generally* Allison Orr Larsen, *Factual Precedents*, 162 U. Pa. L. Rev. 59 (2013) (explaining why lower courts should give no authoritative

[3] The district court also relied on opinions from neighboring states, but those cases, like *Hellerstedt*, involved an admitting privilege law which required the *abortion provider* to have admitting privileges. *See, e.g.*, *Jegley*, 2018 U.S. Dist. LEXIS 110358, at *85–88 (Wisconsin "required every doctor who performed abortions to have admitting privileges at a hospital within a 30-mile radius of each clinic at which the doctor performed abortions."); *id.* at *88–106 (Alabama required "abortion providers to obtain staff privileges at a local hospital."); *id.* at *106–07 (Louisiana required "every doctor who performed abortions in Louisiana to have 'active admitting privileges' at a hospital within 30 miles of the facility where the abortions were performed."); *id.* at *107–109 (Mississippi required that "[a]ll physicians associated with the abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians.").

force to Supreme Court statements of fact). The findings in *Hellerstedt* are relevant to Texas and have no bearing on another state's law because that state might be responding to a unique problem under its inherent police power, which "may require a different response than what was needed in Texas." *Hawley,* 2018 U.S. App. LEXIS 25545, at *14–15 (citing *Hellerstedt*, 136 S. Ct. at 2309; *Roe*, 410 U.S. at 150); *see id.* at *10 (vacating a preliminary injunction because the court lacked sufficient information to make a constitutional determination where the record was "practically devoid of any information" necessary for the court's judgment).[4] Thus, the lower court's conclusion that "there is 'no significant health-related problem' [Arkansas' Act] is intended to address" is factual and legal error. *See Jegley,* 2018 U.S. Dist. LEXIS 110358, at *83 (quoting *Hellerstedt*, 136 S. Ct. at 2311). As a result of these numerous factual and legal errors, the district court cannot accurately conclude that Arkansas' Act unduly burdens abortion access.

[4] This Court further explained that the reliance on out-of-state sources in *Hellerstedt* does not change this. *See Hawley*, 2018 U.S. App. LEXIS 25545, at *14 n.8.

3. Arkansas has a legitimate interest in addressing the unique risks associated with medication abortion.

As a valid exercise of its police power, a state may regulate abortion provided it has a rational basis to act and does not impose an undue burden. *See Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); *Casey*, 505 U.S. at 877–78. More specifically, states have a "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Hawley*, 2018 U.S. App. LEXIS 25545, at *14–15 (citing *Hellerstedt*, 136 S. Ct. at 2309; *Roe*, 410 U.S. at 150). This includes a "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163.

Here, Arkansas was responding to the unique risks associated with medication abortion. Defs.-Appellants Larry Jegley & Matt Durrett's Opening Br. (Jegley Br.) at 6–10 (discussing benefits of having a contract-physician requirement). For example, a study published by the American College of Obstetricians and Gynecologists found that "medical abortion results in an increased incidence of adverse events" compared to surgical abortion. Maarit Niinimäki, et al., *Immediate*

Complications After Medical Compared with Surgical Termination of Pregnancy, 114 Obstetrics & Gynecology 795, 803 (2009). Specifically, the rate of adverse effects after medication abortion was *four times higher* than that of surgical abortion, with the incidence of the two most common adverse events—hemorrhage and incomplete abortion—"notably higher" after medication abortions. *Id.* at 798; *see also id.* at 799–800 ("The rate of consultation related to a diagnosis of hemorrhage was high and *eight times* more common after medical termination of pregnancy" than surgical termination, which is not surprising considering that "medical abortion is associated with uterine bleeding lasting approximately 2 weeks." (emphasis added)). Arkansas' contract-physician requirement is a rational exercise of its police power, benefits women who choose medication abortion, and, as discussed below, does not impose an undue burden.

D. Plaintiffs failed to present sufficient evidence that Arkansas' Act *caused* an undue burden.

"In order to sustain a facial challenge and grant a preliminary injunction, the district court was required to make a finding that the Act's contract-physician requirement is an undue burden for a large fraction of women seeking medication abortions in Arkansas." *Jegley*,

864 F.3d at 959. Plaintiffs have the burden of proof and failed to present sufficient evidence that the Act *caused* an undue burden on a woman's right to choose abortion. *See Hellerstedt*, 136 S. Ct. at 2313 ("[P]etitioners satisfied their burden to present evidence of causation . . . that H. B. 2 in fact led to the clinic closures."). To prove that the Act causes an undue burden, Plaintiffs must prove each link in the causation chain:

- The Act caused clinics to close because Plaintiffs are unable to comply with the Act;
- The closed clinics result in less access because the remaining open clinic lacks the requisite overall capacity to meet the increased demand; and
- Based on the remaining open clinic's capacity and location, a large fraction of the women for whom the restriction is relevant are unable to attain abortion.

Mere correlation is not enough; the effect must be attributed to the Act itself. To the extent that clinics closed for any reason unrelated to the Act, the corresponding burden on abortion access may not be factored into the access analysis. *See Harris v. McRae*, 448 U.S. 297, 316 (1980) (While the government "may not place obstacles in the path" of abortion, "it need not remove those not of [the government's] own creation."); *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989) (upholding a state law because it "place[d] no governmental

obstacle in the path of a woman who chooses to terminate her pregnancy"). As explained below, the lower court erred by failing to address the complexities of causation and attributing the effects of actions by third parties and factual findings by other courts (based on the records in other cases concerning other states) to Arkansas' Act.

1. Plaintiffs failed to provide sufficient evidence that they are unable to comply with the Act's contract-physician requirement.

Plaintiffs claim that the Act caused clinics to close because they are unable to comply with the Act's contract-physician requirement. But they made little effort to show why it is reasonably impossible for them to find a contract-physician. Presumably, if Planned Parenthood made no attempt to comply with the contract-physician requirement, any burden imposed on abortion access as a result could not be attributed to the Act. Instead, the resulting burden would be the effect of Planned Parenthood's inaction. To hold otherwise would mean that Planned Parenthood could flout any law or regulation that would require them to close, so long as their closure would impose an "undue burden" on abortion access.

Here, Planned Parenthood has made only minimal and half-hearted attempts to recruit a contract physician. It is unclear why they find it so difficult when they have been able to comply with Texas' more extensive requirement since 2009. *See* Complaint ¶ 36, *Lakey*, 46 F. Supp. 3d. 673 (No. 14-284) (W.D. Tex. Apr. 2, 2014). This Court pointed out earlier in litigation that "Planned Parenthood's efforts to recruit a contract physician did not include any offer of financial compensation," yet it is still unclear what, if any, compensation Planned Parenthood has offered or would offer a physician who is interested in the position. *Jegley*, 864 F.3d at 956 n.4. Planned Parenthood's second mass-email merely asks the physician to contact them if the physician is "interested in learning more about . . . compensation." Pl.'s First Report Regarding Efforts to Comply with Section 1504(D) at Ex. B, *Jegley,* 2018 U.S. Dist. LEXIS 110358 (E.D. Ark. Aug. 1, 2018), ECF No. 160. Unless and until Plaintiffs offer reasonable compensation to a contract physician, the court cannot know whether a contract physician can be found.

The court opines about "protestors, harassment, potential violence, and professional isolation" that *abortion providers* have faced, assuming that "this same hostility is *likely* to befall any physician

willing to act as contracted physicians to abortion providers." *Jegley*, 2018 U.S. Dist. LEXIS 110358, at *115, *148 (emphasis added). Despite the existence of contract physicians in Texas and existing abortion providers in Arkansas, the court was "skeptical that the compensation offered by plaintiffs or that any compensation to be offered would be enough to overcome these obstacles." *Id.* at *150. Assumptions and speculation that the same hostility "is *likely*" going to exist and no compensation "would be enough to overcome these obstacles" falls far short of evidence that the Act *causes* an undue burden. It is legal error to attribute actions (especially hypothetical)—including both criminal activity and protected First Amendment activity—by private parties to the State. *See Harris*, 448 U.S. at 316 (While the government "may not place obstacles in the path" of abortion, "it need not remove those not of [the government's] own creation."). In sum, plaintiffs failed to provide sufficient evidence that they are unable to comply with the contract-physician requirement such that the Act caused clinics to close.

2. Plaintiffs failed to provide sufficient evidence that clinic closures will create a substantial obstacle to abortion access in Arkansas.

Next, provided that the Act did in fact cause the closure of two Arkansas medication abortion clinics, the key issue is not the number or percentage of clinics closed, but the effect of the closures on women seeking abortion. The court assumes—again, without citing any evidence—that the one remaining clinic, Little Rock Family Planning Services (LRFP), will be unable to accommodate the increased demand for surgical abortions. It assumes that an increase in surgical abortions at LRFP's facility would result in decreased quality of care, overcrowding, and women "less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered." *Jegley,* 2018 U.S. Dist. LEXIS 110358, at *215 (quoting *Hellerstedt*, 136 S. Ct. at 2318). The court, however, did not discuss whether the facility in fact could not accommodate additional patients, would be unable to hire additional abortion providers or staff, and could not operate longer hours to see more patients. And Plaintiffs failed to provide evidence of the actual capacity of LRPF. Currently, LRFP's website indicates that they only

"do abortion procedures by appointment Wednesday through Saturday most weeks."[5] Presumably, the clinic is not anywhere close to its physical capacity and could easily almost double the amount of abortion procedures provided merely by scheduling procedures the additional three days a week. *See also* Jegley Br. at 20 (discussing how, with the same number of providers, LRFP provided 3,273 surgical abortions in 2011, which is more than the 3,249 total abortions (medication and surgical) performed in Arkansas in 2017).

In addition to an assumed lack of capacity, the lower court focuses on driving distances. *See Jegley*, 2018 U.S. Dist. LEXIS 110358, at *205–13. But "additional driving distances alone [are] not dispositive." *Jegley*, 864 F.3d at 958. Increased driving distances do not per se "constitute an 'undue burden.'" *Hellerstedt*, 136 S. Ct. at 2313 (citing *Casey*, 505 U.S. at 885–87 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)). Because of the discrepancies in the number and location of women seeking abortion in Arkansas, as well as the court's mathematical errors, *see* Jegley Br. at 15–29, it is unclear how much, if

[5] *Frequently Asked Questions*, Little Rock Family Planning Servs., https://lrfps.com/frequently-asked-questions/ (last visited Sept. 20, 2018).

any, increased driving distances create a substantial obstacle, and thus, the court cannot legally find an undue burden.

3. Plaintiffs failed to provide sufficient evidence that there will be an undue burden on a large fraction of women.

Finally, even assuming that (1) the Act caused the closure of two Arkansas abortion clinics, (2) the remaining clinic is unable to accommodate the increased demand, and (3) women now have increased driving distances, the court still must find that these burdens cause a substantial obstacle for a large fraction of women for whom it is relevant. The "relevant denominator here is women seeking medication abortions in Arkansas." *Jegley*, 864 F.3d at 958 (internal quotation marks omitted).

Ignoring the lower court's glaring mathematical errors, it found that on average approximately 20% of women currently seeking medication abortion in Arkansas would forgo the procedure. *Jegley*, 2018 U.S. Dist. LEXIS 110358, at *201 (discussing a potential range of 11% to a more than doubled 28%). Twenty percent is only 20 cents on the dollar or 12 minutes on the hour. Twenty percent is not a *large* fraction. *See Hellerstedt*, 136 S. Ct. at 2312, 2316 (finding a large

fraction where the law caused about 20/40 clinics to close and the remaining clinics now had to accommodate an increase of the number of abortions they provide by a factor of about 5); *Casey*, 505 U.S. at 897 (finding a large fraction where the law prevented practically all women for whom the law is relevant from obtaining an abortion); *Cincinnati Women's Servs. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) (collecting cases of courts finding a large fraction only when "practically all of the affected women would face a substantial obstacle in obtaining an abortion"). In sum, as Arkansas' brief explains, the district court's large fraction calculations are "contrary to law, fact, and mathematics." Jegley Br. at 45. The uncontested record evidence strongly indicates that, in contrast with Texas' H. B. 2 in *Hellerstedt*, Arkansas' Act does not create an undue burden.

CONCLUSION

The Court should vacate the district court's order.

Respectfully submitted,

STEVEN H. ADEN
Counsel of Record
CATHERINE GLENN FOSTER
RACHEL N. BUSICK
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington, VA 22201
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae

September 20, 2018

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(g), that this brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because it contains 4,380 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. I also certify that this brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

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/s/ Steven H. Aden
STEVEN H. ADEN
Counsel of Record
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington VA 22201
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae

September 20, 2018

CERTIFICATE OF SERVICE

I certify that on September 20, 2018, I electronically filed the foregoing brief with the Clerk of the Court through the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Steven H. Aden
STEVEN H. ADEN
Counsel of Record
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington, VA 22201
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae