



LEGAL MEMORANDUM

Date: July 31, 2020

To: State Legal Officers, Lawmakers, and Policy Advocates

Re: *Disappointment and Opportunity: Americans United for Life Assesses the Supreme Court's Decision in June Medical Services and Surveys the Road Ahead*

In *June Medical Services v. Russo*, Sup. Ct. No. 18-1323 (Slip op., Jun. 29, 2020),¹ the Supreme Court was presented with the opportunity to correct the Court's wayward abortion jurisprudence and affirmatively reject *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which has significantly expanded the abortion industry's angles of attack on legitimate State health and safety measures. While the Court failed to take advantage of the opportunity, the positions of a majority of the Court in *June Medical* provide a clear road map to the States for winning future abortion cases.

June Medical challenged the constitutionality of Louisiana Act 620, an admitting privileges law that was worded similarly to the Texas law struck down in *Hellerstedt* but found to be materially different, and thus constitutionally sound, by the Fifth Circuit Court of Appeals. On June 29, 2020, a plurality of Justices in an opinion joined by Justices Breyer, Ginsburg, Kagan, and Sotomayor, alongside the Chief Justice in concurrence, reversed and struck down Louisiana's law.

Justice Stephen Breyer's plurality opinion, together with the Chief Justice's concurring opinion, applied the Supreme Court's decision in *Hellerstedt* to rule that Louisiana's similar Act 620 was also unconstitutional. The plurality interpreted *Hellerstedt* to control the outcome in *June Medical* because they determined that, like the Texas law struck down in *Hellerstedt*, Act 620's impact on abortion in Louisiana outweighed any medical benefit the law may have conferred. Chief Justice Roberts, in contrast, declined to apply the plurality's balancing-test approach to determine whether an "undue burden" on access to abortion has been shown, instead insisting that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), requires only that a law's purpose be legitimate and that it not impose a "substantial burden" on abortion access within the State. However, the Chief Justice agreed with Justice Breyer's plurality opinion that, based on the fact that

¹ *June Medical Services, L.L.C. et al. v. Russo, Interim Secretary, Louisiana Department of Health and Hospitals*, Sup.Ct. No. 18-1323, was consolidated with the cross-petition filed by Louisiana, No. 18-1460, *Russo, Interim Secretary, Louisiana Department of Health and Hospitals v. June Medical Services L.L.C. et al.*

Act 620 was “virtually identical” to the law struck down in *Hellerstedt* and the evidentiary record before the Court suggesting that abortion doctors were unlikely to obtain privileges, *Hellerstedt* controlled the outcome in *June Medical*.

EXECUTIVE SUMMARY

- **The Chief Justice’s Opinion Controls.** Contrary to public media reports, *June Medical* was *not* a resounding victory for abortion advocates.² It was a 4-1-4 “plurality opinion,” meaning no opinion garnered a majority of the Justices’ votes. Pursuant to the Court’s direction in *Marks v. United States*, 430 U.S. 188, 193 (1977), the opinion that supplied the determining vote on the narrowest grounds is regarded as the controlling opinion; hence, Chief Justice Roberts’ concurrence is considered the controlling opinion on the proper standard of review for abortion cases.
- ***Planned Parenthood v. Casey* Is Once Again the Standard, Not the Abortion-Friendly *Hellerstedt* “Balancing Test.”** The Chief Justice’s stricter interpretation of *Casey*, not Justice Breyer’s balancing test, is the controlling standard for abortion jurisprudence going forward. At the same time, the outcomes

² Witness what a lawyer for the Center for Reproductive Rights, which represented June Medical, wrote in SCOTUSBlog:

Roberts took pains to write an opinion that cabins the plurality. It is a concurrence that goes out of its way to find common ground with the dissenters, including disdain for the Supreme Court’s most recent precedent. It argues for a return to a system that left people seeking abortion without access to the care they need. In his concurrence, Roberts plants a flag to mark the battlegrounds for future abortion fights.

Gretchen Borchelt, *June Medical Services v. Russo: When a “win” is not a win*, SCOTUSBlog (June 30, 2020), <https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/>. And pro-abortion rights lawyer Mark Joseph Stern said this in *Slate*:

[T]he chief justice ... whittled down the holding of *Hellerstedt*, replacing its balancing test with a stingier rule that may give states broader leeway to restrict abortion. Roberts expressly disavowed Breyer’s test, which weighed a law’s benefits to patients against its burdens. “There is no plausible sense in which anyone,” he wrote, “let alone this Court, could objectively assign weight to such imponderable values” as “the potentiality of human life” and a woman’s “own concept of existence.” Rather, he declared, the court must retreat back to *Casey*’s cramped standard, which asks only if an abortion restriction imposes an “undue burden,” and does not permit courts to consider the benefits, or lack thereof, in making that determination.

Mark Joseph Stern, *John Roberts’ Opinion Preserving Abortion Rights Is Also a Threat to Abortion Rights*, *Slate*, Jun. 29, 2020, at <https://slate.com/news-and-politics/2020/06/john-roberts-abortion-june-medical.html>.

in *Hellerstedt* and *June Medical* offer some definition as to what a narrow majority of the Supreme Court may regard as an “undue burden” on abortion. Thus, in future cases, a State’s abortion law will pass constitutional muster where it is reasonably related to a medical purpose (see *Gonzales v. Carhart*, 550 U.S. 124 (2007)) and does not impose an “undue burden” on abortion access (e.g., *Hellerstedt*, *supra* (regulation blamed for closure of over half of Texas’s abortion facilities deemed an “undue burden”); *June Medical* (regulation expected to close two of three of Louisiana’s abortion facilities deemed an “undue burden”)).

- ***June Medical* Does Not Foreclose Admitting Privileges Laws.** After *Hellerstedt* and *June Medical*, laws that require abortion providers to have “admitting privileges” at a local hospital may still pass the *Casey* “purpose” test; they will stand or fall based on their impact on abortion access in the state. Compare *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014) (admitting privileges law passed “rational basis” test, but imposed undue burden on abortion because it would have closed the only abortion facility in Mississippi); *Planned Parenthood of Ala. v. Strange*, 172 F. Supp. 3d 1275, 1289 (M.D. Ala. 2016) (applying the *Casey* large fraction test without seeking to quantify the figure; undue burden found where the law would result in the closure of abortion clinics in three of Alabama’s five largest metropolitan areas and reduce the availability of abortions in the State by approximately 40 percent); with *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959 n.8 (8th Cir. 2017) (“We are skeptical that [a reduction in abortion of] 4.8 to 6.0 percent is sufficient to qualify as a ‘large fraction’ of women seeking medication abortions in Arkansas.”); *Cincinnati Women’s Servs. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) (a 12% reduction in abortion access was an insufficiently “large fraction” to constitute an undue burden).
- **The Impossible-to-Quantify “Large Fraction Test” Is a Dead Letter.** With respect to the *Casey* standard, it appears that the “large fraction test” is a dead letter, at least as a quantifying test for the amount of impact that makes an abortion law’s burden “undue.” Neither the plurality nor the Chief Justice attempted to quantify Act 620’s impact on abortion access, although the plurality paid lip service to it as a legal shibboleth – a rhetorical synonym for “substantial obstacle.”
- **Abortion Providers Will No Longer Be Assumed to Represent Women.** After *June Medical*, abortion providers will need to plead and prove to the Court that they have standing to assert the third-party interests of their patients. The wholesale embrace of the standing issue by the dissenters decades after many considered it a settled issue, coupled with the Chief Justice’s equivocality on it, are an open invitation to reinvigorate the defense, especially in States in which abortion has proven particularly dangerous and unhealthy to women. Every State should plead lack of standing as an affirmative defense, seek discovery relating to the plaintiff

abortion providers' alignment of interests with their patients, and strenuously brief the defense at the trial and appellate levels.

- **States Should Strengthen Efforts to Prove that a “Special Justification” Exists to Overturn Abortion Precedents.** Chief Justice Roberts' concurring opinion suggests that his conclusion that a precedent is in error will not be sufficient for him to vote to overturn the case; he will require a showing that “special circumstances” or a “special justification” exists that warrants doing so. For Justice Thomas, no such justification is necessary to reconsider wrongly decided precedent, which he contends *Roe* and *Casey* are. For at least three members of the dissent (Justices Alito, Gorsuch, and Kavanaugh), those circumstances do exist with respect to the *Hellerstedt* precedent, if not the *Casey* precedent.

BACKGROUND

June Medical is an abortion industry challenge to Act 620, a Louisiana law passed in 2014 that required physicians who perform abortions to have active admitting privileges at a hospital within 30 miles of the facilities where they perform abortions. The statute provides that a physician has “active admitting privileges” if he or she “is a member in good standing of the medical staff” of a licensed hospital, “with the ability to admit a patient and to provide diagnostic and surgical services to such patient.” La. Rev. Stat. § 40:1061.10(A)(2)(a). The law is not unusual; in fact, all other outpatient surgeons in Louisiana are required to abide by that rule. Respondent Louisiana’s Brief in Opposition at 4, *June Med. Servs. v. Russo*, Sup. Ct. No. 18-1323 (July 19, 2019) (Slip op., Jun. 29, 2020).

Act 620 was enacted to further three important medical practices:

First, to create a uniform standard for outpatient practice by bringing abortionists under the same requirements that apply to physicians providing similar services (i.e., surgical procedures) at other surgical centers. *Id.* at 4-5.

Second, to provide a credentialing function for abortion practitioners in Louisiana. Hospitals perform more rigorous and intensive background checks than abortion clinics in Louisiana. Requiring a physician to have admitting privileges at a hospital ensures that the physician has the necessary skills to perform relevant procedures—in this case, abortions. *Id.* at 6, 11-12.

Third, to help ensure that women who suffer complications from abortion procedures receive a proper standard of care by enabling the direct and efficient

transfer of both the patient and her medical records to a local hospital. *Id.* at 6, 12-13.

Louisiana abortion business June Medical Services, dba Hope Clinic for Women, joined with two other abortion clinics and two individual abortionists to file a lawsuit against Act 620 in the Middle District of Louisiana (Baton Rouge) on August 22, 2014. Compl., *June Med. Servs., LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. Aug. 22, 2014) (No. 14-CV-00525-JWD-RLB). The abortion providers sought injunctive relief, arguing the law imposed an undue burden on their patients' access to abortion in violation of *Planned Parenthood v. Casey*. *Casey* held that “[A]n undue burden is a shorthand for the conclusion that 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.” 505 U.S. at 877. The district court temporarily enjoined the law, preventing the law from going into effect as court proceedings progressed. After a trial, the court concluded that the Louisiana law was unconstitutional and granted a preliminary injunction enjoining the law. *June Med. Servs.*, 158 F. Supp. 3d 473, at 536.

In 2016, while the Louisiana lawsuit (and several other similar suits) was pending, the Supreme Court issued its decision in *Whole Woman’s Health v. Hellerstedt*, holding 5-3 that two provisions of a Texas law, H.B. 2, were unconstitutional, including a provision that required abortion doctors to have admitting privileges at a local hospital. 136 S. Ct. at 2311. The Court’s rationale rested on the “undue burden” analysis as outlined in *Casey*, but modified *Casey*’s undue burden standard. *Id.* at 2309. The Court held that courts should “consider the burdens a law imposes on abortion access together with the benefits those laws confer.” *Id.* In effect, this adjustment invited federal courts to conduct an intensive fact-finding exercise and examine science, social science, geography, and more in order to determine if a proposed regulation was more of a “burden” or a “benefit” to women.

Rather than trust the state legislative process, *Hellerstedt* greatly expanded the role of federal courts in regulating abortion – despite the Court’s own prescient warning to courts in *Gonzales v. Carhart* about striking down “legitimate abortion regulations . . . if some part of the medical community were disinclined to follow the proscription.” 550 U.S. 124, 166 (2007):

This is too exacting a standard to impose on the legislative power . . . to regulate the medical profession. 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. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable

regulations. The Act is not invalid on its face where there is uncertainty over whether [it] is ever necessary to preserve a woman’s health

Id.

Predictably, the newly-announced balancing test of *Hellerstedt* encouraged the abortion industry to file dozens of new lawsuits seeking to invalidate abortion laws, including many that courts had previously constitutional such as parental involvement provisions and surgical center health and safety requirements. See AUL, [Litigation Quarterly Report](#), July 2020. Some of the wind was taken out of the abortion industry’s sails when the Supreme Court issued its per curiam decision last year in *Box v. Planned Parenthood of Indiana & Kentucky*, 139 S. Ct. 1780 (2019), reversing a Seventh Circuit decision that had relied on *Hellerstedt* to strike down a state law mandating “humane” treatment of aborted fetal remains. But *Box* did not affect the *Hellerstedt* balancing test, and most of the new wave of abortion cases remained on the dockets, including six “omnibus” lawsuits arguing that a state’s abortion control statutes, taken together, impose an “undue burden” on access.

After the *Hellerstedt* decision, the Louisiana case was sent back to the district court, with instructions to “engage in additional fact finding required by” *Hellerstedt*. *June Med. Servs., L.L.C. v. Gee*, No. 16-30116, 2016 WL 11494731, at *1 (5th Cir. Aug. 24, 2016). On April 25, 2017, the district court entered final judgment and permanently enjoined the law. *June Med. Servs.*, 250 F. Supp. 3d at 89. The district court determined that the Louisiana law’s benefits were minimal, but its burdens were many. *Id.* at 86. Ultimately, it ruled that Act 620 was unconstitutional under the “undue burden” standard of *Casey*, as modified by *Hellerstedt*. On appeal, however, the Fifth Circuit reversed, ruling 2-1 in favor of Louisiana’s law. *June Med. Servs. v. Gee*, 905 F.3d 787, 815 (5th Cir. 2018). The Fifth Circuit found there were “stark differences” between the facts and evidence in the Texas case and the facts and evidence in Louisiana’s case. *Id.* at 791. Unlike in Texas, there was no evidence that any Louisiana abortion business would close as a result of the law. *Id.* The Fifth Circuit concluded that Act 620 would—at worst—cause up to one hour of delay for abortion procedures at one of Louisiana’s three clinics. *Id.* at 813. Consequently, it concluded that Act 620 did not create an undue burden for women seeking abortions.

June Medical appealed to the en banc Fifth Circuit, which denied review. *June Med. Servs., L.L.C. v. Gee*, 913 F.3d 573 (5th Cir. 2019). It filed for an emergency stay of the circuit court’s decision, and on February 7, 2019, the Supreme Court granted the stay, over the dissents of Justices Thomas, Alito, Gorsuch, and Kavanaugh. Order Granting Appl. of Stay, *June Med. Servs. v. Russo*, 591 U.S. ____ (U.S. Feb. 7, 2020) (No. 18-1323). In April 2019, June Medical filed its petition for certiorari. Louisiana opposed the petition and asked the Court to take up an additional question: whether an abortion provider has third-party standing to challenge a health and safety regulation, like the admitting privileges

requirement at issue in *June Medical*. Conditional Cross-Pet. at i, *Russo v. June Med. Servs.*, 591 U.S. ____ (U.S. May 20, 2019) (No. 18-1460). Usually a party must bring a lawsuit on its own behalf to have standing, but occasionally third parties can bring a lawsuit on behalf of another party that can demonstrate injury.

Traditionally, third-party standing doctrine requires 1) a “close” relationship between the third party and the person who possesses the right, and 2) a “hindrance” to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). A plurality of the Supreme Court suggested over forty years ago in *Singleton v. Wulff*, 428 U.S. 106 (1976) (Blackmun, J., for the plurality), that “it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.” *Id.* at 118. Since then, the federal courts have generally assumed that abortion businesses have third-party standing on behalf of women seeking abortions. This assumption has gone largely unexamined, and is not predicated on any of the meaningful, particularized analysis that is required in other contexts when determining third-party standing.

The Supreme Court granted certiorari on both petitions to examine the following questions:

1. Whether abortion providers can be presumed to 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. Whether objections to prudential standing are waivable; and
3. Whether the U.S. Court of Appeals for the 5th Circuit’s decision upholding Louisiana’s law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court’s binding precedent in *Whole Woman’s Health v. Hellerstedt*.

Pet. for a Writ of Cert., *June Med. Servs. v. Russo*, 591 U.S. ____ (U.S. Apr. 17, 2019) (No. 18-1323); Conditional Cross-Pet. at i, *Russo v. June Med. Servs.*, 591 U.S. ____ (U.S. May 20, 2019) (No. 18-1460).³

³ In hindsight, in light of the Court’s grant of an emergency stay pending the filing of the petition, it seems likely that the four Justices in the plurality voted to grant certiorari on June Medical’s petition, in the (realized) expectation that Roberts would hew to the *Hellerstedt* precedent. It also seems likely that the four Justices in dissent voted to grant certiorari on Louisiana’s cross-petition, hoping (unsuccessfully) to pull the Chief Justice over on the standing issue, or at least hoping to raise the issue forcefully, which they have certainly done.

OVERVIEW

Justice Stephen Breyer wrote for a four-Justice plurality (Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor). Chief Justice John Roberts concurred in the judgment, but offered his own interpretation of the controlling standard of *Planned Parenthood v. Casey*, *supra*. *June Med. Servs.*, No. 18-1323, slip op. at 4-11, 16 (U.S. June 29, 2020) (Roberts, C.J., concurring in the judgment). Dissents were filed by Justice Clarence Thomas (for himself only), Justice Samuel Alito (joined fully by Justice Neil Gorsuch and in large part by Justices Thomas and Brett Kavanaugh), by Justice Gorsuch (for himself), and by Justice Kavanaugh (for himself).

Justice Breyer, the author of the Court's opinion in *Hellerstedt*, penned a workmanlike "paint by numbers" opinion that said comparatively little this time on the relative safety of abortion. Gone is any substantive treatment of the "large fraction test" penned by some erstwhile members of the Court (see *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., joined by Souter, J., concurring)). At the least, the plurality did no math to justify the asserted "undue burden" on access to abortion in Louisiana. *June Med. Servs.*, slip op. at 39. Justice Breyer's principal point, and perhaps his only necessary one, was that the Louisiana record was "similar to, nearly identical with, *Hellerstedt*." *Id.* at 40.

Chief Justice Roberts opined that the question before the Court was whether to adhere to *Hellerstedt*, not whether it was right or wrong. *Id.* at 2 (concurring). Stare decisis requires the Court to "treat like cases alike" absent "special circumstances," he stated. *Id.* Invoking the late Justice Antonin Scalia, the Chief Justice rejected *Hellerstedt*'s "balancing test" approach. *Id.* at 5.⁴ Roberts asserted that *Casey* did not establish a standard that balances the benefits and burdens of an abortion law; *Casey* simply asked if the law's purpose was legitimate and the law reasonably related to its purpose. *Id.* at 9. With respect to the standing question, the Chief Justice only stated in a footnote that he "agreed with" the reasons set forth by the plurality to conclude that June Medical had standing to assert the rights of its patients. *Id.* at 12 n.4.

In a strenuous dissent, Justice Samuel Alito (joined in full by Justice Gorsuch and for the most part by Justices Thomas and Kavanaugh), agreed that *Casey* rules out

⁴ The Chief Justice might better have kept in mind Justice Antonin Scalia's observations on stare decisis in his dissent in *Planned Parenthood v. Casey*:

The Court's reliance upon stare decisis can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that stare decisis ought to be applied even to the doctrine of stare decisis, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.

505 U.S. at 993 (Scalia, J., dissenting).

Hellerstedt's balancing test, but asserted that "there is ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice." *Id.* at 4-5 (Alito, J., dissenting). *June Medical* differed from *Hellerstedt* in that *Hellerstedt* dealt with a statute's post-enforcement effect, while *June Medical* regards Act 620's pre-enforcement language. Justice Alito argued that the district court erroneously predicted the statute would leave Louisiana with very few abortion providers, and it ignored the incentives of the doctors, *i.e.*, the statute had been preliminarily enjoined, and enforcement would be permanently barred if the lawsuit was successful. *Id.* at slip op. at 11-14. Therefore, the doctors made only perfunctory efforts to obtain admitting privileges. *Id.* at 15. In a part of the opinion that Justice Thomas did not join (presumably because he felt the *Casey* standard itself should be overturned and the case reversed on that basis), Justice Alito urged that the Supreme Court should have remanded the case for a new trial under *Casey*'s substantial obstacle test, not *Hellerstedt*'s balancing test. *Id.* at 24.

Justice Thomas wrote separately to reiterate his well-established view that *Roe* and *Casey* are illegitimate precedents that should not be followed. *Id.* at 14-20 (Thomas, J., dissenting). In light of this position, Thomas maintained that Act 620 was a valid exercise of Louisiana's police power to protect citizens from health risks. *Id.* at 14. He also contended that third-party standing is an Article III jurisdictional requirement in every case, and consequently abortion businesses lack standing to plead the interests of their patients. *Id.* at 3-4.

Justice Gorsuch wrote separately to offer "eight reasons" why the Court's judgment was incorrect (discussed in depth below): (1) the Court did not accord proper deference to the factual record; (2) the plaintiffs do not have proper standing; (3) Louisiana did not waive the right to raise standing; (4) this was an improper ruling on a facial challenge; (5) injunctive relief was improperly issued; (6) the court did not engage in *de novo* review of the lower court's application of the law; (7) the Supreme Court did not provide a clear and predictable legal standard; and (8) adherence to *stare decisis* was not required, and was not properly followed in this case in any event. *Id.* at 2-20 (Gorsuch, J., dissenting).

Justice Kavanaugh's brief separate dissent offered his view that the factual record was insufficient with respect to the impact of the admitting privileges requirement, and the case should be remanded for further development. *Id.* at 1-2 (Kavanaugh, J., dissenting).

THE OPINIONS

The Plurality.

Justice Breyer wrote an opinion for the plurality that was similar in many ways to his opinion for the Court in *Hellerstedt*. This time, Breyer largely camped on the impact of the law – the difficulty in getting privileges – and spent less time on the medical benefits of the admitting privileges rule. Breyer concluded that “Act 620 would place substantial obstacles in the path of women seeking an abortion in Louisiana.” *June Med. Servs.*, slip op. at 35 (plurality). As to the Act’s medical benefits, Justice Breyer did not find clear error in the district court’s findings “that the admitting privileges requirement “[d]oes [n]ot [p]rotect [w]omen’s [h]ealth,” provides “no significant health benefits,” and makes no improvement to women’s health “compared to prior law.” *Id.* at 36 (quoting *June Med. Servs. v. Gee*, 250 F. Supp. 3d at 86 (boldface deleted)). Thus, he concluded that Act 620 was unconstitutional. *June Med. Servs.*, slip op. at 38 (plurality).

As to third-party standing, Justice Breyer concluded for the plurality, “We think that the State has waived that argument.” *Id.* at 12. He asserted that the third-party standing rule is only a judicially created prudential consideration, not an issue involving Article III’s “case or controversy requirement,” and thus it “can be forfeited or waived.” *Id.* Breyer argued that because Louisiana had urged the District Court to decide the case on the merits and had conceded standing in the original proceeding before the district court, it had waived its right to challenge the standing of abortion providers under the third-party standing rule. *Id.* at 12-13. But Breyer also maintained, “We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.” *Id.* at 14 (internal citations omitted). He also noted that third-party standing has been held appropriate in cases where the “enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” *Id.* Thus, he concluded, “the obvious claimant” and “the least awkward challenger” is the party upon whom the challenged statute imposes “legal duties and disabilities.” *Id.* In this case, that party is the abortion provider. *Id.* at 14-16.

Justice Breyer began his consideration of the constitutionality of Act 620 by explicitly affirming *Casey* and *Hellerstedt*. *Id.* at 16. He reiterated the *Casey* rule that “a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” *Id.* Breyer restated *Hellerstedt*’s gloss on *Casey* that “[u]nnecessary health regulations” impose an unconstitutional “undue burden” if they have “the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion,” and further that “courts must ‘consider the burdens a law imposes on abortion access together with the benefits those laws confer.’” *Id.* at 16.

Justice Breyer argued that a clear error standard was appropriate in reviewing the district court's findings. *Id.* at 16-18. The plurality reviewed the district court's findings and agreed with the lower court that "[e]ven if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden." *Id.* at 19 (citing *June Med. Servs. v. Gee*, *supra*, 250 F. Supp. 3d at 88). Considering the burdens imposed on abortion providers by the law, Justice Breyer maintained that anti-abortion sentiment would make it impossible for abortionists to gain admitting privileges and argued that the result would be the closure of clinics, making it harder for women to get abortions. *Id.* at 19-35. In turn, the closure of clinics would increase burdens on women by forcing them to drive further and wait longer for an abortion, and this in turn would preclude some women from abortion access and increase the risk that a woman will experience complications. *Id.* at 34.⁵

The plurality by and large ignored the Chief Justice's concurrence, and it did not address Roberts' view of precedent or of stare decisis.

Chief Justice Roberts' Concurrence.

The Chief Justice concurred in the judgment only, *June Med. Servs.*, slip op. at 16, meaning that he did not necessarily agree with the reasoning employed by the plurality. Although acknowledging his dissent in *Hellerstedt* and his continued belief that *Hellerstedt* was "wrongly decided," Roberts said, "The question today . . . is not whether [*Hellerstedt*] was right or wrong, but whether to adhere to it in deciding the present case." Slip op. at 2. Stare decisis, absent special circumstances, requires the Court to treat like cases alike, Roberts urged. *Id.* Stare decisis ensures humility in recognizing that "today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them." *Id.* at 3. It prevents arbitrary discretion; promotes "evenhanded, predictable, and consistent development of legal principles[;] fosters reliance on judicial decisions[;] and contributes to the actual and perceived integrity of the judicial process." *Id.* at 3 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Stare decisis is not an

⁵ Breyer's opinion suggests that for the plurality, *Hellerstedt* and *June Medical* do not establish a "floor" for finding a burden undue, since Breyer intimates that even transfer agreements are beyond the pale:

Still other hospitals have requirements that abortion providers cannot satisfy because of the hostility they face in Louisiana. Many Louisiana hospitals require applicants to identify a doctor (called a "covering physician") willing to serve as a backup should the applicant admit a patient and then for some reason become unavailable. The District Court found "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician."

June Med. Servs., slip op. at 22-23 (record citations omitted); *cf. Hellerstedt*, 136 S. Ct. at 2318 (holding law establishing ambulatory surgical center requirements for abortion providers imposed an "undue burden" without specifying which requirements could pass muster and which could not).

“inexorable command,” but can only be overturned by additional factors, such as its administrability, fit with subsequent factual and legal developments, and reliance interests. “*Stare decisis* is pragmatic and contextual, not ‘a mechanical formula of adherence to the latest decision.’” *Id.* at 4 (citing *Helvering v. Hallock*, 309 U.S. 119 (1940)).⁶

While the parties agreed that the *Casey* undue burden standard applies, Roberts put forth his own understanding of the *Casey* undue burden standard. Significantly, Roberts disagreed that *Hellerstedt* interprets *Casey*’s undue burden standard to require courts to balance a law’s burdens with the benefits that law confers. In language that seemed derisive of the *Casey* “mystery passage,”⁷ Roberts mused:

In this context, courts applying a balancing test would be asked in essence to weigh the State’s interests in protecting the potentiality of human life and the health of the woman, on the one hand, against the woman’s liberty interest in defining her own concept of existence, of meaning, of the universe, and of the mystery of human life on the other. . . . There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. . . . Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an unanalyzed exercise of judicial will in the guise of a neutral utilitarian calculus.

Id. at 6 (internal citations omitted). Roberts contended that “[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. . . . *Casey* instead focuses on the existence of a substantial obstacle” *Id.*

Interpreting *Casey* as a balancing test would extend *Casey* beyond its holding and adopt the position advocated by former Justice John Paul Stevens in his partial dissent in *Casey*:

The only place a balancing test appears in *Casey* is in Justice Stevens’s partial dissent. “Weighing the State’s interest in potential life and the woman’s

⁶ Arguably, the Chief Justice protests a little too much. *June Medical* notwithstanding, the list of cases in which Roberts has voted to overturn precedent continues to grow. See, e.g., *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019) (Chief Justice Roberts wrote the opinion for a 5-4 majority overruling *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985)); *Citizens United v. Fed. Election Cmm’n*, 558 U.S. 310, 319 (2010) (Roberts voted to overturn *McConnell v Fed. Election Comm’n*, 540 U.S. 93 (2003)); *Janus v. Am. Fed. of St., Cty., and Mun. Emp.*, 138 S. Ct. 2448, 2460 (2018) (Roberts joined Justice Alito’s opinion to overturn *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

⁷ The passage, from the *Casey* joint plurality opinion, states, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” 505 at 851.

liberty interest,” Justice Stevens would have gone further than the [*Casey*] plurality to strike down portions of the State’s informed consent requirements and 24-hour waiting period. But that approach did not win the day.

Id. at 10 (citing *Casey*, 505 U.S. at 916–920 (opinion concurring in part and dissenting in part)).

“The upshot of *Casey* is clear,” Chief Justice Roberts said. *Id.* “The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional.” *Id.* at 9. Although the *Casey* Court at times discussed the benefits of the regulations, “these benefits were not placed on a scale opposite the law’s burdens. Rather, *Casey* discussed benefits in considering the threshold requirement that the State have a ‘legitimate purpose’ and that the law be ‘reasonably related to that goal.’ So long as that showing is made, the only question for a court is whether a law has the ‘effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’” *Id.* (quoting *Casey*, 505 U.S. at 877).⁸

Despite his professed adherence to the principle of stare decisis, a close reading of the Chief Justice’s opinion confirms that he utterly rejects *Hellerstedt* in favor of a vigorous *Casey* standard. “Stare decisis principles also determine how we handle a decision [*i.e.*, *Hellerstedt*] that itself departed from the cases that came before it [*i.e.*, *Casey*]. In those instances, ‘[r]emaining true to an “intrinsically sounder” doctrine established in prior cases [*Casey*] better serves the values of stare decisis than would following’ the recent departure [*Hellerstedt*].” *Id.* at 4 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (plurality opinion)). Thus, Chief Justice Roberts appears to add his fifth vote to the dissenters’ four to intentionally overturn *Hellerstedt sub silentio* (or at least sideline it) and to call for a return to a vigorous application of the *Casey* standard.⁹ Alito stated for

⁸ Chief Justice Roberts agreed with Justice Gorsuch that *Casey* “expressly disavowed any test as strict as strict scrutiny.” *June Med. Servs.*, slip op. at 10 n.2 (citing *June Med. Servs.*, slip op. at 20 (Gorsuch, J., dissenting)). In Roberts’ view, *Casey* recognized that strict scrutiny would give “too little acknowledgement and implementation” to the State’s “legitimate interests in the health of the woman and in protecting the potential life within her.” *Id.*

⁹ Chief Justice Roberts’ stare decisis reasoning appears rather ad hoc, combining the view that one decision can create binding precedent (reflecting the heyday of strict precedent in the Nineteenth Century – see Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent’s Commentaries*, 5 AVE MARIA L. REV. 47, 57 (2007)) – with the flexible doctrine of *Adarand Constructors*. Compare J. O’Connor’s plurality opinion in *Adarand*:

“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter’s admonition that “stare decisis is a principle of policy and not

four Justices in dissent that the Chief Justice “votes to overrule [*Hellerstedt*] insofar as it changed the *Casey* test,” *id.* at 4 (Alito, J., dissenting), and Roberts did not dispute the assertion. He likewise let lie Justice Kavanaugh’s statement that five Justices rejected the *Hellerstedt* cost-benefit balancing test. *Id.* at 1-2 (Kavanaugh, J., dissenting).

Chief Justice Roberts cited to the Supreme Court’s decision in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), as illustrative of the proper understanding of *Casey*’s undue burden standard. In *Mazurek*, a challenge to a state law restricting the performance of abortions to licensed physicians, it was “uncontested that there was insufficient evidence of a ‘substantial obstacle’ to abortion.” *Id.* at 10 (Roberts, C.J., concurring) (citing *Mazurek*, 520 U.S. at 972). In fact, the *Mazurek* Court found that the abortion providers’ argument that all health evidence contradicted the State’s claim that there was a health basis for the law was “squarely foreclosed by *Casey* itself.” *Id.* at 10-11 (citing *Mazurek*, 520 U.S. at 973). Thus, “[u]nder *Casey*, abortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being ‘reasonably related’ to a ‘legitimate purpose,’” the Chief Justice concluded. *Id.* at 10 n.2 (quoting *Casey*, 505 U.S. at 878, 882).

On the merits, the Chief Justice noted that *Hellerstedt* held that Texas’s admitting privileges requirement placed “a substantial obstacle in the path of women seeking a previability abortion.” *Id.* at 1. The Texas and Louisiana statutes are nearly identical, he said. *Id.* at 2, 12, 16. Here, the District Court found the Louisiana law would restrict access to the same degree or worse than the Texas law in *Hellerstedt*, and that the Louisiana law would result in “longer waiting times for appointments, increased crowding and increased associated health risk.” *Id.* at 14 (citing *June Med. Servs.*, 250 F. Supp. 3d at 81). It further determined that Louisiana hospitals may deny admitting privileges for reasons unrelated to a doctor’s competency, *id.* at 14-15, and that the five remaining Louisiana abortion doctors had attempted in good faith to comply with the statute, but had little success. *Id.* at 15 (referencing *June Med. Servs.*, 250 F. Supp. 3d at 78). Under clear error, Chief Justice Roberts would not disturb these factual conclusions, although he noted that the holding was “fact-specific.” *Id.* at 15 n.6, 16.

a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.” Remaining true to an “intrinsically sounder” doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. *In such a situation, “special justification” exists to depart from the recently decided case.*

Adarand Constructors, 515 U.S. at 231 (emphasis added) (quoting *Helvering*, *supra*, 309 U.S. at 119 (Frankfurter, J., majority opinion) (citation omitted)). Roberts fails to explain why, if the “*Adarand* [or *Helvering*] doctrine” applies to *Hellerstedt*, it couldn’t apply to *Casey* or to *Roe*.

Finally, Chief Justice Roberts only addressed the standing argument in a brief footnote, indicating that “for the reasons the plurality explains,” he agreed the abortion providers had third party standing. *Id.* at 12 n.4. His failure to explain why, coupled with the fact that the plurality cited two reasons why they found standing – waiver and precedent – and that Roberts was not specific about which reason (or both) was the basis for his position, appear to leave the issue wide open for future cases.

Although the Chief Justice had the option of joining the plurality, or merely stating his concurrence in the judgment, he chose to articulate his position in some depth. Thus, unlike former Justice Anthony Kennedy, who simply joined the Court’s opinion in *Hellerstedt* without voicing his own opinion on the decision, 136 S. Ct. at 2300, Chief Justice Roberts’ views are in the open, and serve as a framework for advocacy going forward. This is especially true given that Roberts’ views represent a fifth vote for any future abortion decision by the current Court.

Dissenting Opinion of Justice Alito.

Justice Alito would have remanded the case to the district court to require the joinder of a plaintiff with standing, but he also disagreed on the merits, finding there to be serious factfinding and conflict problems.

Justice Alito charged the plurality and the Chief Justice with error in holding that the admitting privileges requirement serves no valid purpose. *June Med. Servs.*, slip op. at 9 (Alito, J., dissenting). “Under our precedent, the critical question in this case is whether the challenged Louisiana law places a ‘substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’ *Casey*, 505 U. S., at 877 (plurality opinion). If a law like that at issue here does not have that effect, it is constitutional.’ *Id.* at 884 (joint opinion of O’Connor, Kennedy, and Souter, JJ.)” *June Med. Servs.*, slip op. at 3 (Alito, J., dissenting). But June Medical argues that the standard should be lowered to “a law that has no effect on women’s access to abortion is nevertheless unconstitutional if it is not needed to protect women’s health,” Alito said. This argument may suit the business interests of abortion providers who desire to be free of otherwise neutrally-applied health and safety regulations, he said, but this test was rejected in *Casey* because it preferences abortionists over other regulated parties. *Id.* at 3-4.

Admitting privileges demonstrate a higher level of competence and performance than merely holding a medical license, Alito maintained. *Id.* at 5. Hospitals continuously determine competency and performance, whereas the state medical licensing board has no continued oversight. *Id.* at 6-7. Alito cited to the plethora of evidence of bad actors in Louisiana abortion facilities not being restrained by the licensing board or by their employers. *Id.* at 7-8. Citing to the amicus brief that Americans United for Life filed on

behalf of 207 members of Congress, Justice Alito observed, “Because hospitals continue to evaluate doctors after privileges are granted, they may discover information that assists the Board in carrying out its responsibilities. In the past, hospitals have forwarded such information to the Board, and such referrals have led the Board to take serious disciplinary actions.” *Id.* at 7 (citing Br. for 207 Members of Cong. as *Amici Curiae* at 18-19, 19-20, *June Med. Servs. v. Russo*, 591 U.S. ____ (U.S. Jan. 2, 2020) (No. 18-1323) (noting “lifetime ban from obstetric surgery in Louisiana” and “one-year probation of medical license”). While there is plenty of room for discussion of the value of the law, that is not the Court’s role, but the role of State legislatures, Alito said. *Id.* at 8-9 (quoting *Gonzales*, 550 U.S. at 163). “When confronted with a genuine dispute about a law’s benefits, we have afforded legislatures ‘wide discretion’ in assessing whether a regulation serves legitimate medical need and is medically reasonable even in the face of medical and scientific uncertainty.” *Id.* (quoting *Gonzales*, 550 U.S. at 163).

Hellerstedt should not be deemed controlling, Justice Alito said. *Id.* at 10-11. *Hellerstedt*’s decision was based on the effect of the act, not the language, but is now applied by the plurality and the concurrence to require a decision based on the language, not the effect. *Id.* at 10. But the application of this kind of law is a fact-based inquiry in each State, Alito observed, and there is no reason to think it would apply the same way everywhere. *Id.* The factors to consider include demand for abortion, geography, the number of abortion facilities and doctors, the distribution of the population, and abortionists’ ability to obtain privileges. *Id.* at 9-10. Unlike the *Hellerstedt* post-enforcement claim, the impact of Louisiana’s law was pre-enforcement, which was purely hypothetical, Alito observed. *Id.* at 11. Further, he said, the district judge made an inference about whether the doctors in this case would be able to obtain privileges, based in large part on the testimony of June Medical’s director and applying the “good faith” test. *Id.* at 13. This is already a nebulous test, Alito said, and there was no evidence that the judge considered the incentives of certain parties in their testimony:

If these doctors had secured privileges, that would have tended to defeat the lawsuit. Not only that, acquiring privileges would have subjected all the doctors to the previously described hospital monitoring, as well as any other obligations that a hospital imposed on doctors with privileges, such as providing unpaid care for the indigent. Thus, in light of the situation at the time when the doctors made their attempts to get privileges, they had an incentive to do as little as they thought the District Court would demand, not as much as they would if they stood to benefit from success.

Id. at 13-14 (citation omitted). Justice Alito went through the allegations of each of the Does concerning why they failed to obtain hospital privileges and described why perhaps they could not even meet the “good faith” standard. *Id.* at 15-24.

Justice Alito next addressed the third-party standing issue, although Justice Kavanaugh did not join this part of his dissent. *Id.* at 24. He asserted that the plurality’s holding that Louisiana had waived any objection to third-party standing was a misreading of the record, and while the Fifth Circuit declined to rule on the issue, the Supreme Court took up the issue on Louisiana’s cross-petition. *Id.* at 24-25. “We have a strong reason to decide the question of third-party standing because it implicates the integrity of future proceedings that should occur in this case,” Alito said. *Id.* at 25. “This case should be remanded for a new trial, and we should not allow that to occur without a proper plaintiff. Nothing compels us to forbear from addressing this issue.” *Id.* Justice Alito offered a clear rule for third-party standing in the abortion context:

When an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion provider seeking to strike down that law should not be able to rely on the constitutional rights of women. Like any other party unhappy with burdensome regulation, the provider should be limited to its own rights.

Id. at 26. This rule is supported by precedent and follows from general principles regarding conflicts of interest, Alito argued. The Court has already held third-party standing is inappropriate where a potential conflict of interest exists between the plaintiff and the third party. *Id.* at 26 (citing *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 9, 15 n.7 (2004)). In this case, June Medical fails both prongs of the third-party standing test. The plaintiff’s own testimony demonstrates that there is no “close relationship,” and sometimes they spend as little as “2-3 minutes” together. *Id.* at 28. There is also no “hindrance” to the third party bringing a suit, Alito noted, as courts use pseudonyms for plaintiffs regularly, there is a sufficient pool of legal help available to those seeking to challenge abortion restrictions, and mootness is not a concern because of the “capable-of-repetition-yet-evading-review” exception that has been invoked in the abortion context. *Id.* at 29. “[I]t is deeply offensive to our rules of standing to permit [abortion businesses] to sue in the name of their patients when they challenge laws enacted to protect their patients’ safety,” he concluded. *Id.* at 33.

Dissenting Opinion of Justice Thomas.

Justice Thomas filed a separate dissent, in which he asserted that third-party standing is an Article III jurisdictional requirement, and that the courts below lacked jurisdiction to proceed to the merits. *June Med. Servs.*, slip op. at 3-4 (Thomas, J., dissenting). Justice Thomas’ dissent seems clearly designed to lay out the stare decisis factors to set the stage for the next challenge to third-party standing in abortion cases.

“There is no controlling precedent that sets forth the blanket rule advocated for by plaintiffs here—i.e., abortionists may challenge health and safety regulations based solely

on their role in the abortion process,” said Thomas. *Id.* at 3. Thomas maintained that because standing is jurisdictional, “No waiver, however explicit, could relieve us of our independent obligation to ensure that we have jurisdiction before addressing the merits of a case.” *Id.* The Court’s “prudential standing” rule has been inconsistently applied and has been ratcheted back in recent cases, Thomas observed. *Id.* at 5 (citing *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) and *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). Most recently, in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Court appeared to incorporate the rule against third-party standing into its understanding of Article III’s injury-in-fact requirement. *Id.* (referencing *Spokeo*, 136 S. Ct.). *Spokeo* held that to establish an injury-in-fact, a plaintiff must “show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* (citing *Spokeo*, 136 S. Ct. at 1548 (internal citation omitted)).

The ability of abortionists to sue by asserting standing on behalf of clients has not been “settled,” despite the plurality’s position, said Justice Thomas. *Id.* at 10. Although the Court has allowed these suits to proceed, it has rarely addressed the standing issue. *Id.* The only case to directly address this issue was *Singleton* in 1976, in which a plurality of Justices found standing, and Justice Stevens agreed in concurrence based on the financial interest of the abortionists. *Id.* at 10-11 (citing *Singleton, supra*, at 113-118, 121) (challenging a State’s regulation against providing Medicare reimbursements for abortion). In this case, the abortionists’ only claim is the violation of purported substantive due process rights of their patients, Thomas pointed out. *Id.* at 12.

Further, Louisiana’s law represents a constitutionally valid exercise of the State’s traditional police powers, Thomas argued, since the Constitution does not constrain the States’ ability to regulate or even prohibit abortion. *Id.* at 14. “This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the ‘legal fiction’ of substantive due process. As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone.” *Id.* (quoting *McDonald v. Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment). “The idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical,” Thomas charged. *Id.* at 17.

“The fact that no five Justices can agree on the proper interpretation of our precedents today evinces that abortion jurisprudence remains in a state of utter entropy,” Justice Thomas concluded. *Id.* at 18-19.¹⁰ “[T]his Court’s abortion jurisprudence has failed

¹⁰ Even Justice Alito apparently would create a new standard of review on remand: “[T]he District Court should conduct a new trial and determine, based on proper evidence, whether enforcement of Act 620 would

to deliver the ‘principled and intelligible’ development of the law that stare decisis purports to secure.” *Id.* at 19. “Because we can reconcile neither *Roe* nor its progeny with the text of our Constitution, those decisions should be overruled.” *Id.* at 20.

Dissenting Opinion of Justice Gorsuch.

The first of Justice Gorsuch’s “eight reasons” why the Court’s holding in *June Medical* was wrong was that there was ample legislative and trial record evidence to prove that Act 620 would benefit the public by requiring abortion doctors and facilities to meet certain health and safety standards. *June Med. Servs.*, slip op. at 2-5 (Gorsuch, J., dissenting). The legislature heard testimony about doctors reusing single-use instruments and utilizing rusty or dirty surgical instruments, and emergency physicians providing medical assistance to women abandoned by their abortion doctors after the procedure, he noted. *Id.* at 3-4. Moreover, while other health facilities such as outpatient surgical centers have had to meet certain standards for health and safety, there has been no detriment to the health of Louisiana citizens and no massive shut-down of ambulatory surgical centers, he noted. *Id.* at 5. The Court ignored all of this evidence to hold that there was no benefit from Act 620. “[T]he plurality declares that the law before us holds no benefits for the public and bears too many social costs. All while sharing virtually nothing about the facts that led the legislature to conclude otherwise,” Gorsuch concluded. *Id.* at 2.

Second, Justice Gorsuch said, *June Medical* lacked third-party standing because there was no “close relationship” between the plaintiffs and the women in whose name they had sued. *Id.* at 6. “[T]he abortion providers before us seek only to assert the constitutional rights of an undefined, unnamed, indeed unknown, group of women who they hope will be their patients in the future.” *Id.* Nor did the plaintiffs identify a hindrance preventing the women impacted by the law from pursuing a suit of their own. *Id.* at 6-7. Moreover, even if the plaintiffs could demonstrate third-party standing, it would be negated by the conflict of their interests, since Act 620 seeks to protect women from unsafe abortion providers – some of whom are plaintiffs in the case. *Id.* at 7.

Nor did Louisiana waive the standing argument, Justice Gorsuch argued for his third point. The standing issue of was passed on in the lower courts, he said, and moreover, forfeited or waived arguments can be heard by the Court if there are concerns about third-party rights. *Id.* at 7-8.

Fourth, echoing Justice Alito’s dissenting opinion in *Hellerstedt*, 136 S. Ct. at 2343 n.11, Justice Gorsuch maintained that the Court misapplied the “substantial obstacle” test by analyzing whether there will be a burden on women who are “actually” restricted by

diminish the number of abortion providers in the State to such a degree that women’s access to abortions would be substantially impaired.” *June Med. Servs.*, slip op at 3 (Alito, J., dissenting).

the law – not whether there will be a burden on all women in Louisiana. “Any woman not burdened by the challenged law is deemed ‘irrelevant’ to the analysis,” he pointed out. *June Med. Servs.*, slip op. at 10 (Gorsuch, J., dissenting). Instead of asking if the law is unconstitutional in all its applications, the Court demands the law be constitutional in all its applications in order to be upheld.¹¹

Fifth, he would not have found the “irreparable harm” necessary for the issuance of an injunction. Instead of demonstrating that irreparable harm was likely, he said, June Medical argued generalized doomsday assumptions about mass closures of abortion clinics. *Id.* at 11-12. “[T]oday’s decision proceeds to accept one speculative proposition after another to arrive at what can only be called a worst case scenario,” he said. *Id.* at 11.

Sixth, he said, instead of reviewing the lower court’s application of the law critically, the Court engaged in a deferential review and adopted the lower court’s application. “Today’s decision proceeds on the remarkable premise that, even if the district court was wrong on the law, a duly enacted statute must fall because the lower court wasn’t *clearly* wrong.” *Id.* at 15. “Not only does today’s decision treat factual questions as if they were legal ones, it treats legal questions as if they were facts,” he contended. *Id.*

Seventh, Justice Gorsuch took issue with the Chief Justice’s failure to provide a clear and predictable rule for lower courts to apply. “[U]nder the concurrence’s test it seems possible that even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access. Such a result would appear to create yet another discontinuity with *Casey*, which expressly disavowed any test as strict as strict scrutiny.” *Id.* at 20 (referencing *Casey*, 505 U.S. at 871).

Eighth and finally, Justice Gorsuch argued that the Chief Justice had announced a newly discovered test from *Hellerstedt*: a substantial obstacle test that requires the consideration of burdens without considering the benefits of the law. This, he said, is not *stare decisis* at all, but a misapplication of *stare decisis*. *Id.* at 19.¹²

¹¹ This aspect of Justice Gorsuch’s dissenting opinion suggests that he would be receptive to the argument that the impact of abortion restrictions should be gauged by the standard of *Salerno, United States v. Salerno*, 481 U.S. 739, 745 (1987), rather than a version of the *Casey* “undue burden” standard. The *Salerno* standard for facial challenges states that a law will not be held unconstitutional unless “no set of circumstances exists under which the Act would be valid.” *Id.*

¹² Justice Gorsuch’s dissenting opinion highlights the fact that *June Medical* seems to freeze the Chief Justice in his own idiosyncratic version of *stare decisis*. The four Justices in the plurality propound a vigorous balancing test from *Hellerstedt*, and hence have no occasion to reconsider either that case or *Planned Parenthood v. Casey*, let alone *Roe*. Justices Thomas, Alito, Gorsuch, and Kavanaugh all disagree with the Chief Justice’s personal version of precedent.

Dissenting Opinion of Justice Kavanaugh.

Justice Kavanaugh, along with four other members of the Court, rejected the cost-benefit standard in *Hellerstedt* by joining Justice Alito’s dissenting opinion. For himself, Kavanaugh stated that additional factfinding was necessary to properly evaluate Act 620. “[T]he factual record at this stage of plaintiffs’ facial, pre-enforcement challenge does not adequately demonstrate that the three relevant doctors (Does 2, 5, and 6) cannot obtain admitting privileges or, therefore, that any of the three Louisiana abortion clinics would close as a result of the admitting-privileges law.” *June Med. Servs.*, slip op. at 2 (Kavanaugh, J., dissenting). Justice Kavanaugh would have remanded the case for further fact-finding on this issue. *Id.*¹³

ANALYSIS

- I. *Casey*’s undue burden standard is the correct test for abortion litigation.
 - A. The Supreme Court effectively overruled *Hellerstedt*’s balancing test.

In *June Medical Services*, the plurality followed *Casey* and *Hellerstedt*’s standards. *Casey* applies an undue burden standard, which holds a statute unconstitutional if the statute “while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman’s choice.” *June Med. Servs.*, slip op. at 16 (plurality opinion) (internal citation omitted). *Hellerstedt* clarified that “[u]nnecessary health regulations’ impose an unconstitutional ‘undue burden’ if they have ‘the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.’” *Id.* *Hellerstedt* then applied a balancing test that “consider[s] the burdens a law imposes on abortion access together with the benefits those laws confer.” *Id.* at 16 (plurality opinion). Under these tests, the plurality held unconstitutional the Louisiana admitting privileges regulation.

The Chief Justice rejected *Hellerstedt*’s balancing test, which requires Justices to act as legislators with an “‘unanalyzed exercise of judicial will’ in the guise of a ‘neutral utilitarian calculus.’” *Id.* at 6 (Roberts, C.J., concurring) (internal citation omitted). Instead, Chief Justice Roberts applied *Casey*’s undue burden test to the facts in *June*

¹³ It is worth noting that the Supreme Court has four Justices (*June Medical*’s dissent) that understand the facts and law of abortion better than any four that have been on the Court at any time. The dissenters have a better understanding of the practical utility of admitting privileges in *June Medical* than they had in *Hellerstedt*. And Justice Gorsuch’s questions about Louisiana and the record in Louisiana seem to go to the failures of the Court’s abortion doctrine as a whole. Despite being one of the newest members of the Court, Gorsuch doesn’t write like an ingenue to the abortion debate. He calls the factfinding by federal judges “the judicial version of a hunter’s stew,” *June Med. Servs.*, slip op. at 17 (dissenting), and ends his 21-page dissent with the sober caution, “it [the Court’s decision] is a sign we have lost our way.” *Id.* at 21.

Medical. Roberts reaffirmed that *Casey* “look[s] to whether there is a substantial burden, not whether benefits outweighed burdens.” *Id.* at 8.

The four dissenters join the Chief Justice in effectively overruling *Hellerstedt*’s balancing test. Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, “agree that *Hellerstedt* should be overruled insofar as it changed the *Casey* test.” *Id.* at 4 (dissenting). Justice Gorsuch noted that “[t]he benefits and burdens [of *Hellerstedt*’s balancing test] are incommensurable, and they do not teach such things in law school.” *Id.* at 18 (Gorsuch, J., dissenting). Thus, the Chief Justice and four dissenters created a Supreme Court majority that *sub silentio* overruled *Hellerstedt*’s balancing test.

Notably, Justice Thomas would go further than the other Justices. Justice Thomas would overrule all abortion precedents. *Roe* and “its progeny” are inconsistent with the Constitution, according to Justice Thomas. *Id.* at 20 (Thomas, J., dissenting). Fundamentally, Justice Thomas does not recognize a substantive due process right for a woman to kill her unborn child. *Id.* at 14. However, as discussed below, *Casey*’s undue burden standard remains the test for abortion litigation.

B. *Casey*’s “large fraction test” has fallen by the wayside.

The Supreme Court virtually ignored *Casey*’s large fraction test in *June Medical*. Only the plurality and Justice Gorsuch discussed the test at all. The plurality affirmed that under *Casey*, a State’s abortion-related law is facially unconstitutional if “it will operate as a substantial obstacle to a woman’s choice to undergo an abortion” in ‘a large fraction of the cases in which [it] is relevant.’” *Id.* at 39 (plurality) (internal citation omitted). The plurality then noted that *Hellerstedt* reaffirmed *Casey*’s large fraction test by defining a large fraction as “those women for whom the provision is an actual rather than an irrelevant restriction.” *Id.* at 39 (internal citation omitted). The plurality concluded that Louisiana’s admitting privileges regulation “places a substantial obstacle in the path of a large fraction of those women seeking an abortion for whom it is a relevant restriction.” *Id.* at 40. However, beyond this cursory discussion, the plurality did not go into an analysis of *Casey*’s large fraction test.

Justice Gorsuch criticized the plurality’s view of *Casey*’s large fraction test. “[T]he plurality winds up asking only whether the law burdens a very large fraction of the people that it burdens . . . this circular test is unlike anything we apply to facial challenges anywhere else.” *Id.* at 10 (Gorsuch, J., dissenting). Yet, beyond Justice Gorsuch’s critique and the plurality’s cursory discussion, the Supreme Court did not mention *Casey*’s large fraction test in *June Medical*.

C. Chief Justice Roberts interpreted *Casey*'s undue burden test, but no Justices endorsed the Chief Justice's interpretation.

Chief Justice Roberts interpreted *Casey* as a two-part test, and clarified that *Casey*'s undue burden test does not apply strict scrutiny. Rather, "under *Casey*, abortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being 'reasonably related' to a 'legitimate purpose.'" *Id.* at 10 n.2 (Roberts, C.J., concurring). In this regard, the Chief Justice indicated that abortion regulations (1) must be reasonably related to a legitimate purpose and (2) must not pose a substantial obstacle to women seeking abortion.

Only Justice Gorsuch addressed the Chief Justice's *Casey* interpretation. Gorsuch rejected the Chief Justice's two-part *Casey* test, indicating that under "even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access. Such a result would appear to create yet another discontinuity with *Casey*, which expressly disavowed any test as strict as strict scrutiny." *Id.* at 2 (Gorsuch, J., dissenting). In this regard, only the Chief Justice endorsed his own *Casey* two-part test.

D. The Supreme Court presumes *Casey*'s undue burden standard is constitutional until challenged.

The validity of *Casey*'s undue burden test is left open for a future challenge. Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh emphasized that the *Casey* undue burden test was not challenged in *June Medical*. In turn, the Chief Justice and three dissenters would not consider the constitutional validity of *Casey* in *June Medical*. In this manner, *Casey*'s undue burden test is presumed valid until challenged in a future case.

Chief Justice Roberts began his undue burden analysis in *June Medical* by indicating that the State and abortion providers agreed that the undue burden standard is the appropriate test. *Id.* at 4 (Roberts, C.J., concurring). As such, "[n]either party has asked [the Supreme Court] to reassess the constitutional validity of that standard." *Id.* This introductory paragraph indicates that *Casey*'s undue burden test is the presumed test for abortion litigation. However, Chief Justice Roberts left open the issue of *Casey*'s validity for future challenges.

Likewise, Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, stated, "Unless *Casey* is reexamined – and Louisiana has not asked us to do that – the test it adopted should remain the governing standard." *Id.* at 4 (Alito, J., dissenting). Justice Kavanaugh also separately noted, "The State has not asked the Court to depart from the *Casey* standard." *Id.* at 1 n.1 (Kavanaugh, J., dissenting). Thus, the Supreme Court did not

analyze the constitutionality of *Casey*'s undue burden test because the parties did not challenge it.

Notably, Justice Gorsuch twice indicated that the undue burden test emerged from a *Casey* "plurality." *Id.* at 20 (Gorsuch, J., dissenting). By emphasizing *Casey*'s test as a plurality decision, Justice Gorsuch highlighted the unsettled precedent and fractured court decisions behind abortion jurisprudence. However, Chief Justice Roberts pushed back against Justice Gorsuch's characterization of a *Casey* plurality, noting that the "joint opinion is nonetheless considered the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977), as the narrowest position supporting the judgment." *Id.* at 4 n.1 (Roberts, C.J., concurring).

- II. Defendants should aggressively challenge abortion providers' third-party standing after *June Medical*.

Although the Supreme Court held plaintiffs had third-party standing in *June Medical*, third-party standing doctrine is not settled. Defendants can challenge plaintiff abortion providers' lack of standing, but challenges should come at the trial court level.

- A. The Supreme Court has not settled third-party standing doctrine.

The plurality and Chief Justice held that the *June Medical* plaintiffs had third-party standing. Relying upon precedent, the plurality indicated, "We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulation." *June Med. Servs.*, slip op. at 13. The Court generally has permitted third-party standing in cases where "enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Id.* at 14. In turn, "the State's strategic waiver and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing." *Id.* at 16. However, the plurality's "well-established precedents" are not as well-established as the plurality claimed.

The plurality relied upon *Craig v. Boren*, 429 U.S. 190 (1976), and *Department of Labor v. Triplett*, 494 U.S. 715 (1990). *Id.* at 14-15. The *Craig* Court permitted a beer vendor to assert the third-party rights of underage men to challenge restrictions on sales of 3.2% beer to 18- to 21-year-old men. 429 U.S. at 192-193. The *Triplett* Court allowed an attorney to challenge a Department of Labor rule that required approval for attorney fee arrangements. 494 U.S. at 720-721. Similarly, the plurality concluded that *June Medical* plaintiffs could challenge abortion regulations. *June Med. Servs.*, slip op. at 13.

The dissenters in *June Medical* criticized the comparison of *Craig* and *Triplett* plaintiffs to abortion providers. *June Med. Servs.*, slip op. at 31 (Alito, J., with Thomas, Gorsuch, and Kavanaugh, JJ., dissenting). *Craig* and *Triplett*'s facts ensured fair

representation of third-party interests. *Craig* had a co-plaintiff male, Curtis Craig, under the age of 21 in the below proceedings. When Craig turned 21, his claim was mooted. Thus, Craig's co-plaintiff, a beer vendor, was the remaining plaintiff. Notably, *Craig* appellees had not raised an objection to third-party standing. Unlike the facts in *June Medical*, *Craig*'s facts indicated nothing about a conflict of interest between the beer vendor and underage males. *Id.*

The *Triplett* attorney likewise had fair representation of third-party interests. In *Triplett*, a state bar ethics committee filed a disciplinary proceeding in state court against an attorney. Unlike *June Medical*'s plaintiffs, the *Triplett* attorney did not initiate litigation. The *Triplett* case also arose in a state court. Accordingly, with a state court forum, the *Triplett* case followed state third-party standing rules. Moreover, the *Triplett* attorney represented known claimants. In contrast, *June Medical* abortion providers asserted a hypothetical relationship with future clients. *Id.* at 31-32. Thus, the *Craig* and *Triplett* cases did not present a conflict of interest within third-party standing. In contrast, a conflict of interest exists when abortion providers, on behalf of their patients, challenge health and safety regulations intended to protect abortion patients.

The plurality noted that *June Medical* is not the first abortion case to address abortion provider standing to challenge health and safety regulations. *Id.* at 15 (plurality) (referencing *Doe v. Bolton*, 410 U.S. 179, 195 (1973); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 76 (1976); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 435 (1983)). Yet previous challenges to abortion health and safety regulations have not settled the issue of conflict of interest in abortion third-party standing. As Justice Thomas pointed out in *June Medical*, the plurality cited abortion cases that only cursorily considered third-party standing questions. *June Med. Servs.*, slip op. at 10-11 n.3 (Thomas, J., dissenting). Justice Thomas indicated, "The [*Doe* and *Akron*] Court[s] did not engage in any meaningful Article III analysis or refer to this Court's third-party standing doctrine." *Id.* at 11 n.3. *Doe* co-plaintiffs were pregnant women so abortion providers' third-party standing was "a matter of no great consequence" in *Doe v. Bolton*. *Id.* at 10 n.3 (quoting *Doe*, 410 U.S. at 188). The abortion providers in *Doe* and *Danforth* also brought the suit, and had standing, to vindicate their own right to practice their profession. *Id.* at 11 n.3. Ultimately, the Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Here, abortion cases only cursorily have examined the third-party standing of abortion providers to challenge health and safety regulations. The blatant conflict of interest between providers and patients is an "unaddressed jurisdictional defect" that leaves the issue open. Brief for the United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits at 13 n.1, *June Med. Servs. v. Russo*, 591 U.S. ____ (U.S. Jan. 2, 2020) (No. 18-1323) (referencing *Lewis*, 518 U.S. at 352 n.2).

June Medical also has not decided the broader issue of third-party standing as a prudential doctrine. Justice Thomas noted that it is “puzzling that a majority of the Court insists on continuing to treat the rule against third-party standing as prudential” in light of *Lexmark Int’l, Inc. v. Static Control Components*, 572 U.S. 118 (2014)). A unanimous Supreme Court in *Lexmark* questioned the validity of prudential standing doctrine. *Id.* *Lexmark* specifically addressed third-party standing in dicta, noting, “The limitations on third-party standing are harder to classify; we have observed that third-party standing is ‘closely related to the question whether a person in the litigant’s position will have a right of action on the claim,’ . . . but most of our cases have not framed the inquiry in that way.” *Lexmark Int’l*, 572 U.S. at 127 n.3. However, *Lexmark* did not present any issues of third-party standing, so the Supreme Court indicated, “consideration of the doctrine’s proper place in the standing firmament can await another day.” *Id.* In this regard, the Supreme Court has not settled third-party standing doctrine.

Notably, third-party standing is the only unsettled prudential standing doctrine. Case law has classified three areas of prudential standing: zone of interests, generalized grievances, and third-party standing. The *Lexmark* court decided that zone of interests doctrine was improperly classified as prudential standing. Rather, it goes to constitutional standing and whether the party has a right to sue under this substantive statute. *Id.* at 127. The *Lujan* court also determined that generalized grievances are based on Article III standing. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 573-574 (1992). Thus, third-party standing is the only unsettled prudential standing doctrine. In sum, third-party standing, both as a general doctrine and as particularly applied to abortion litigation, is unsettled. Defendants should continue to challenge abortion providers’ lack of standing, and public interest lawyers should more aggressively weigh in as amici on third-party standing questions.

- B. The Chief Justice’s perfunctory statement on third-party standing invites future challenges.

Chief Justice Roberts joined the plurality in holding that the *June Medical* plaintiffs had standing. *June Med. Servs.*, slip op. at 12 n.4 (Roberts, C.J., concurring in the judgment). However, the Chief Justice limited the holding on third-party standing to *June Medical* plaintiffs. In turn, the Chief Justice’s concurrence leaves the third-party standing issue open for future abortion litigation. Chief Justice Roberts briefly notes, “For the reason the plurality explains . . . I agree that the abortion providers *in this case* have standing to assert the constitutional rights of their patients.” *Id.* at 12 n.4 (emphasis added). Chief Justice Roberts has not set a precedent for abortion cases. Rather, Chief Justice Roberts purposefully has left the third-party standing question open for future cases. Again, the plurality holds, “the State’s strategic waiver and a long line of well-established precedents foreclose its belated challenge to the plaintiffs’ standing.” *Id.* at 16

(plurality). As discussed above, however, the dissenters established that these “well-established precedents” are shaky at best. Defendants should challenge plaintiff abortion providers’ standing.

- C. Defendants should raise third-party standing challenges at the trial court level.

The timing of the third-party standing challenge is key. In *June Medical*, the State only raised the third-party standing challenge in its *certiorari* cross-petition to the Supreme Court. Future cases should raise the challenge at the trial court level to preserve the argument. A standing challenge at the lower court would avoid the issue of whether parties waived a third-party standing argument. Rather, the challenge would go directly to whether a conflict of interest precludes abortion providers from asserting their patients’ constitutional rights.

THE ROAD FORWARD

The question going forward is, “What is the likelihood of victory in the courts for pro-life States defending their abortion laws?” The answer is that although the result in *June Medical* is extremely unfortunate for Louisiana, it may represent progress for the States in general. Here’s why:

June Medical settled nothing whatsoever in the legal fight over abortion, except that Louisiana’s Act 620 cannot be enforced. The Chief Justice’s separate opinion was calculated to settle nothing, and in fact, to invite future abortion cases.

June Medical does not settle whether emergency admission laws are permissible, only that Louisiana’s was not.

June Medical does not settle whether abortion businesses may sue on behalf of their patients to overturn health and safety laws; in fact, before *June Medical*, that seemed to be established. Now, it is an open question that will be vigorously litigated from the trial court onward, and AUL will stand ready to provide the States with the data on dirty and dangerous abortion practices to help them oppose abortionists.

After *June Medical*, it is at least clear that the majority of Justices have abandoned the *Hellerstedt* “balancing test” for abortion laws, by which federal judges were called on to balance the benefits and burdens of abortion legislation and strike down those laws that, on balance, were more burdensome than beneficial. That in itself is a big step forward for pro-life legal advocates and States, shrinking the power of district judges to “legislate from the bench” through the kind of factfinding and

analysis best reserved for elected lawmakers determining how to enact law and policy.

June Medical does not settle how big an obstacle to abortion a law must present before being held unconstitutional. Little is said about the so-called “large fraction test,” and it seems to have been an afterthought. Consequently, it does not appear that any Justice is seriously interested in attempting to quantify an objective level of impact on abortion required to show an “undue burden.” Obligated to explain what the rule in *Casey* provides, the Chief Justice simply resorted to reiterating what portions of the Pennsylvania abortion law were upheld and which portion was struck down. The fact that *Casey*’s standard now appears hopelessly subjective further highlights the unworkability of the rule.

June Medical does not settle the question of when *stare decisis* should be applied. The Chief Justice has voted to overturn precedent in numerous cases since he came to the Court in 2005 (notably *Citizens United*, *Janus*, and *Franchise Tax Board* – see n.6, *supra*), against criticism that he was playing fast and loose with respect to prior decisions. But he has also refused to vote to overturn precedent in numerous cases besides *June Medical*, leaving doubt as to the standard he is applying. At a minimum, it can only be said that his view of *stare decisis* is idiosyncratic, like many of his jurisprudential views, and depends on a showing that “special justification” exists for overturning precedent beyond that a mistake was made. This gives the States and pro-life policy advocates the opportunity to speak more clearly and forcefully on the reasons why *Roe* and *Casey* should no longer apply, including their unworkability, changes in fact and law, and the fact that women do not truly “rely” on abortion to succeed.

After *June Medical*, there are four Justices on the Court who are opposed to or at least skeptical about the “right to abortion” found in *Roe* and *Casey*, and one who seems ambivalent. That leaves room for good, strong legal advocacy, which the pro-life community will continue to apply with vigor.

After *June Medical*, the Court granted certiorari and vacated and remanded (GVR’d) two Seventh Circuit decisions from Indiana for further consideration in light of *June Medical*. See *Box v. Planned Parenthood of Indiana & Kentucky* (No. 18-1019) (ultrasound viewing requirement) (vacated and remanded for further consideration in light of *June Med. Servs.* July 2, 2020); *Box v. Planned Parenthood of Indiana & Kentucky* (No. 19-816) (application of *Hellerstedt* analysis to parental involvement law). The decision to GVR those cases signals that a majority of the Court (including, presumably, the Chief Justice) believe that the rule announced in *June Medical* may provide a basis for the petitioning party, i.e., Indiana, to prevail. Hopefully, those courts will affirm that pro-life laws pass

muster under *June Medical* when they do not shutter a large number of abortion facilities (and they would not operate to do so in Indiana).

By AUL's count, about 60 new cases were filed by Planned Parenthood, the Center for Reproductive Rights, the ACLU, and other organizations after *Hellerstedt*, utilizing the loose "balancing test" of that case to challenge many laws that had previously been declared constitutional, including parental involvement provisions, surgical center regulations, and others. In six states, abortion advocates filed "omnibus" lawsuits challenging virtually the entirety of abortion laws in those states, under the pretext that, taken together, the laws impose an "undue burden" on abortion access. *June Medical* should help states turn aside many of those challenges.

AUL will continue to promote our model legislation to hundreds of pro-life lawmakers and policy advocates. *June Medical* does not call for any substantial revision of our legislative strategy. Going into the 2021 legislative session, we anticipate demand for strengthened abortion facility regulations, with separate approaches for surgical and chemical abortion and mandatory disclosure of the therapeutic options available after chemical abortions.

In 1992, the Court's decision in *Casey* was widely regarded as a tremendous loss for the pro-life community, and many folded their cards, believing that the Court would never repudiate a "right to abortion." But the truth was that *Casey* actually provided the legal basis for reinvigorated state legislation of abortion, and the abortion rate in America began to drop precipitously, falling by 60% since that time. Those who abandoned ship did so just as the movement for life was beginning to win. *June Medical* is a *Casey* moment for us, and far from packing in and going home, we will answer the call to redouble our efforts to protect life. We are already winning in the court of public opinion and in the enormous numbers of Americans who are turning away from abortion as a tragic and dangerous choice. If we do not grow weary and lose heart, we will reap a harvest of lives saved and life-saving laws preserved.ⁱ

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