No. 17-2879

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK W. HOPKINS, M.D., M.P.H.,
Plaintiff-Appellee,

v.

LARRY JEGLEY, PROSECUTING ATTORNEY FOR PULASKI COUNTY, AND SUCCESSORS IN OFFICE, IN HIS OFFICIAL CAPACITY, ET AL.,
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 SUPPORTING DEFENDANTS-APPELLANTS AND OPPOSING PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND FOR REHEARING EN BANC

TIMOTHY BELZ
CLAYTON PLAZA LAW GROUP, LC
112 South Hanley Rd.
Suite 200
St. Louis, MO 63105
tbelz@olblaw.com
314-726-2800 Ext. 214

CATHERINE GLENN FOSTER
STEVEN H. ADEN
Counsel of Record
KATIE GLENN
NATALIE M. HEJRAN
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave., N.W.
Suite 500
Washington, DC 22036
Steven.Aden@aul.org
Telephone: 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.

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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 regularly evaluate 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 model bills aimed at protecting the health and safety of women and girls who choose abortion. *See* Ams. United for Life, DEFENDING LIFE 2020 (2020 ed.) (state policy guide providing model bills that protect women's health). Several of the Arkansas provisions at issue in this case are similar to AUL model legislation. *Cf.* Ark. Code Ann. § 12-18-108 *with* Child Protection Act, section 8, *in* DEFENDING LIFE 2020, at 325.

[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. Defendants-Appellants have consented to the filing of this brief. Plaintiff-Appellee has not responded.

ARGUMENT

Rehearing and En Banc Review Are Not Warranted Because the Eighth Circuit Panel Correctly Applied the *Casey* Standard in Vacating and Remanding the District Court's Decision.

At issue before the Court is whether the Eighth Circuit correctly vacated and remanded the lower court's decision on the ground that it wrongly applied the cost-benefit test set out in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), rather than the undue burden test reestablished in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020) (Roberts, C.J., concurring in the judgment). Because Chief Justice Robert's concurring opinion in *June Medical* is controlling, the Eighth Circuit's holding is correct.

Under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is an "undue burden" and therefore an unconstitutional infringement on a woman's fundamental right of privacy. 505 U.S. 833, 877 (1992). In *Hellerstedt*, the Court suggested that the *Casey* standard includes a cost-benefit analysis, which would require that "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S. Ct. at 2309. But as the Eighth Circuit rightly held, *June Medical* reestablished the undue burden standard of *Casey* as the proper standard for

assessing the constitutionality of an abortion restriction. *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam) (citing *Casey*, 505 U.S. at 877).

In his concurrence in *June Medical*, Chief Justice Roberts provided the necessary fifth vote to affirm the Court's judgment and hold Louisiana Act 620 unconstitutional. *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment). Chief Justice Roberts agreed with the plurality's holding that Act 620 imposed a substantial obstacle to abortion, relying on the virtually identical language of Act 620 and the statute struck down in *Hellerstedt*, as well as the principle of *stare decisis*. *Id*. However, Chief Justice Roberts expressly *rejected* the plurality's reliance on a cost-benefit analysis. *Id*. at 2135–2139. According to the Chief Justice, a cost-benefit analysis requires Justices to act as legislators with an "'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" *Id*. at 2136 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)). In this regard, Chief Justice Roberts reaffirmed that a proper application of the *Casey* standard "look[s] to whether there was a substantial burden, not whether benefits outweighed burdens." *Id*. at 2137.

Chief Justice Robert's opinion in *June Medical* controls here. In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position

taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Citing *Marks*, the Eighth Circuit correctly stated that "Chief Justice Robert's vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling." *Hopkins*, 968 F.3d at 915.

Yet the district court, "without the benefit of Chief Justice Roberts's separate opinion . . . applied the [*Hellerstedt*] cost-benefit standard to the challenged [Arkansas] laws." *Id*. The district court also improperly relied on *Hellerstedt's* "holding that the 'statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with this Court's case law.'" *See id*. (quoting *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1058 (E.D. Ark. 2017), *amended*, No. 4:17-CV-00404-KGB, 2017 U.S. Dist. LEXIS 229062 (E.D. Ark. Aug. 2, 2017)) (quoting *Hellerstedt*, 136 S. Ct. at 2310). In *June Medical*, Chief Justice Roberts "emphasized the 'wide discretion' that courts must afford to legislatures in areas of medical uncertainty." *Id*. (quoting *June Med. Servs.*, 140 S. Ct. 21 at 2136 (Roberts, C.J., concurring in the judgment)) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)).

Therefore, because the proper test here is the undue burden test reestablished in *June Medical*, not the cost-benefit test utilized in *Hellerstedt*, the Eighth Circuit's decision to vacate and remand the lower court's decision was proper.

CONCLUSION

For the reasons set forth above, *Amici* respectfully urge the court to deny Plaintiffs-Appellees' Petition for Rehearing and for Rehearing En Banc.

Respectfully submitted,

STEVEN H. ADEN
Counsel of Record
CATHERINE GLENN FOSTER
KATIE GLENN
NATALIE M. HEJRAN
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave., N.W.
Suite 500
Washington, DC 22036
Steven.Aden@aul.org
Telephone: 202-741-4917

TIMOTHY BELZ
CLAYTON PLAZA LAW GROUP, LC
112 South Hanley Rd.
Suite 200
St. Louis, MO 63105
tbelz@olblaw.com
314-726-2800 Ext. 214

Counsel for Amicus Curiae

October 14, 2020.

CERTIFICATE OF COMPLIANCE

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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 970 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Steven H. Aden
STEVEN H. ADEN
Counsel of Record
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave., N.W.
Suite 500
Washington, DC 22036
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae

October 14, 2020

CERTFICATE OF SERVICE

I certify that on October 14, 2020, I electronically filed the foregoing brief with the Clerk of Court throughout 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
1150 Connecticut Ave., N.W.
Suite 500
Washington, DC 22036
Steven.Aden@aul.org
(202) 741-4917

Counsel for Amicus Curiae