No. 18-1323

In The Supreme Court of the United States

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

v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF RESPONDENT

Scott W. Gaylord
Counsel of Record
Professor of Law
ELON UNIVERSITY SCHOOL OF LAW
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTERESTS OF AMICUS[1]

CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and its focus on the dignity of the human person, CatholicVote is deeply concerned about the nature and scope of this Court's undue burden test in the wake of *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016). For the first time, *Hellerstedt* equated the undue burden standard with a balancing test, citing to two sections of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) even though neither of these sections balanced the benefits and burdens of the Pennsylvania regulations at issue. By substituting a new, subjective standard, *Hellerstedt* further narrowed the States' authority to pass reasonable regulations of abortion. CatholicVote, therefore, comes forward to support the right of States to regulate the medical profession, promoting their interests in maternal health and fetal human life by "seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973).

---

[1] Pursuant to Rule 37.2(a), counsel of record for each party received notice of the intent to file this amicus brief, and all parties consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Whereas *Casey* defined an undue burden as a substantial obstacle that interfered with "the woman's right to make the ultimate decision," 505 U.S. at 877, *Hellerstedt* introduced a novel balancing test into the undue burden analysis—one that is not rooted in the constitutional text or *Casey* itself. Post-*Hellerstedt*, lower courts are left to speculate as to the relative benefits and burdens of an abortion regulation. As *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), demonstrates, under this free form balancing test different judges are apt to reach different conclusions based on their idiosyncratic assessment of the possible benefits and burdens that flow from a state regulation (and frequently must do so in the context of a pre-enforcement challenge, which makes it virtually impossible to know the actual effect of the challenged legislation). *Hellerstedt*'s test is inconsistent with *Casey*, which expressly distinguishes the undue burden analysis from a utilitarian calculus: "The fact that a law which serves a valid purpose … has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874. Rather, invalidation is appropriate under *Casey* only if the "regulation imposes an undue burden on a woman's" right to an abortion by precluding her from making the ultimate decision. *Id.*; *see also id.* at 875 (criticizing *Roe*'s trimester framework because it "led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision"); *id.* at 879 (affirming the "central holding of *Roe*" that "a State may not prohibit any woman from making the

ultimate decision to terminate her pregnancy before viability").

Moreover, if (as the Fifth and Seventh Circuits have held) *Hellerstedt*'s balancing test applies to all abortion regulations, *see*, *e.g.*, *Planned Parenthood of Indiana and Kentucky, Inc. v. Comm'r of Indiana State Dept. of Health*, 896 F.3d 809 (7th Cir. 2018) ("*PPINK*"), then *Hellerstedt* suffers from the same shortcoming as *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)—"it undervalues the State's interest in the potential life within the woman." *Casey*, 505 U.S. at 875. By reducing the undue burden analysis to a utility function based on the perceived consequences of an abortion regulation, *Hellerstedt* undermines a State's broad authority under *Casey* and *Whalen v. Roe*, 429 U.S. 589 (1977), to regulate the medical profession "even if those measures do not further a health interest." *Casey*, 505 U.S. at 886. Thus, in *June Medical Services*, the Fifth Circuit reached the proper result but did so applying a test that is inconsistent with *Casey* and that has shown itself to be unworkable in practice.

ARGUMENT

I. *Hellerstedt*'s formulation of the undue burden test contradicts *Casey* and further entrenches this Court as the nation's *ex officio* medical board with the exclusive ability to determine whether an abortion regulation is constitutional.

In *Hellerstedt*, this Court applied a balancing test to Texas regulations that sought to promote the State's "valid" and "legitimate" interest in maternal

health. 136 S.Ct. at 2309. Under this test, courts are to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* Applying this test to Louisiana's Unsafe Abortion Protection Act (the "Act"), a divided Fifth Circuit panel upheld the Act, which was "premised on the state's interest in protecting maternal health." 905 F.3d at 791. In so doing, the Fifth Circuit reached the proper result under *Casey* because the Act does not preclude pregnant women in Louisiana from making the ultimate decision, not because the benefits of the Act outweigh its perceived burdens. Because *Casey* did not adopt a balancing test, this Court should, at a minimum, reject *Hellerstedt*'s novel interpretation of the undue burden standard and retain *Casey*'s substantial obstacle formulation, which recognizes that States have considerable authority to pass reasonable regulations relating to abortion.

A. *Hellerstedt*'s balancing test is inconsistent with *Casey*'s articulation and application of the undue burden standard.

Without fanfare or discussion, *Hellerstedt* significantly altered this Court's abortion jurisprudence. While invoking the undue burden language of *Casey*, *Hellerstedt* transformed the undue burden test into a balancing of benefits and burdens, requiring lower courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S.Ct. at 2309. In support of this novel standard, the majority cited to only two sections of *Casey*—those analyzing Pennsylvania's spousal notification and

parental notification requirements. *See id*. (invoking "balancing" in two parentheticals that describe *Casey* as "performing this balancing" with respect to each of these provisions).

The problem is that *Casey* did not apply a balancing test to either of these abortion regulations. *See id*. at 2324 (Thomas, J., dissenting) (describing how "the majority radically rewrites the undue burden test," turning it into a "free form balancing test" that "is contrary to *Casey*"). Although *Casey* summarized the lower court's "detailed findings of fact regarding the effect of this statute" as well as several studies of domestic violence, *Casey*, 505 U.S. at 888-92, the plurality *never* weighed the burdens imposed on women seeking an abortion against the benefits of informing their spouses. Rather, the plurality determined that mandating spousal notification imposed a "substantial obstacle" because it would "prevent a significant number of women from obtaining an abortion." *Id*. at 893. Instead of performing a benefit-burden calculus, the Court emphasized the substantial barrier that spousal notification imposed on "a woman's choice to undergo an abortion." *Id*. at 895. The requirement was unconstitutional because it imposed an effective ban "as surely as if the Commonwealth had outlawed abortion in all cases." *Id*. at 894.

The plurality mentioned 'balance" only once in its discussion of Pennsylvania's spousal notification provision. While recognizing that the husband "has a 'deep and proper concern and interest … in his wife's pregnancy and in the growth and development of the fetus she is carrying,'" *Casey* concluded that "[b]efore birth" that interest must yield to the interests of the woman: "Inasmuch as it is the

woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the *balance* weighs in her favor." *Id*. at 895-96 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976)) (emphasis added). And given that the balance tipped markedly in favor of the woman during pregnancy, *Casey* considered only whether the spousal notification provision "'fundamentally affect[ed] [her] decision whether to bear or beget a child.'" *Id*. at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). The plurality never balanced the benefits and burdens of the notification requirement because that regulation substantially impeded a pregnant woman's ability to decide whether to end her pregnancy. *Id*. at 898 (emphasis added).

The plurality confirmed this interpretation of the undue burden test when it adopted "[t]he principles that guided the Court in *Danforth*" as "our guides today." *Id*. at 897. In *Danforth*, the Court held that Missouri's spousal consent requirement was unconstitutional because "the State … interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference." *Danforth*, 428 U.S. at 70 n.11. Regardless of the benefits and burdens of the spousal consent requirement, Missouri lacked the authority to regulate or proscribe abortion during the first trimester and, therefore, could "[]not delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Id*. at 69. Following *Danforth*, *Casey* struck down Pennsylvania's spousal notification provision for the same reason—it "enable[d] the husband to

wield an effective veto over his wife's decision." *Casey*, 505 U.S. at 897; *id.* at 898 (adopting *Danforth*'s reasoning that "[t]he husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife"). For the many women who are victims of spousal abuse, "the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*." *Id.* at 897. Accordingly, *Casey*'s discussion of the spousal notification provision provides no support for *Hellerstedt*'s balancing test.

Hellerstedt's reliance on the plurality's analysis of Pennsylvania's parental consent requirement is similarly misplaced. Although *Casey* acknowledged that informed parental consent would enable parents to "consult with [their daughter] in private" and "discuss the consequences of her decision in the context of the values and moral or religious principles of their family," the plurality did not weigh such alleged benefits against some identified set of burdens. Instead, consistent with *Danforth* and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) ("*Akron II*"), *Casey* concluded that Pennsylvania could not give another person a veto power over a minor's decision to have an abortion—even if that person was her parent. *See Casey*, 505 U.S. at 899 (citing *Akron II*, 497 U.S. at 510-19); *Akron II*, 497 U.S. at 510 ("*Danforth* established that, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require parental consent."). Such a veto power would constitute a substantial obstacle to a minor's

exercise of her right to choose an abortion. Pennsylvania's parental consent provision was constitutional, however, because it enabled minors to obtain an abortion absent parental consent if a court determined "that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interest." *Casey*, 505 U.S. at 899. Thus, the plurality did not conclude that the benefits of Pennsylvania's parental consent statute outweighed its burdens; it determined that the law did not prevent a young woman from deciding whether to have an abortion.

Perhaps recognizing that neither of these provisions supported *Hellerstedt*'s balancing test, Judge Higginbotham cited an entirely different section of *Casey* in support of *Hellerstedt*'s test. *See* 905 F.3d at 829 (Higginbotham, J., dissenting) (citing *Casey*, 505 U.S. at 877-79). Judge Higginbotham's effort to ground *Hellerstedt*'s novel balancing test in *Casey*, though, confronts the same difficulty. The section to which he cites outlines the plurality's "guiding principles" but does not mention, let alone apply, a balancing test. *Casey*, 505 U.S. at 877. The plurality's first principle specifies "[w]hat is at stake"—"the woman's right to make the ultimate decision." *Id.* A regulation that imposes an undue burden, which *Casey* defined as a substantial obstacle, is unconstitutional if "it has that effect on her right of choice," *i.e.*, precludes her from making the ultimate choice. *Id.* at 878. And this is wholly consistent with *Casey*'s articulation of the "central holding of *Roe*"—that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at

879. According to the plurality's express principles, then, a substantial obstacle is not an obstacle that imposes substantially more (or perhaps simply more)[2] burdens than benefits; it is a barrier that precludes a woman's exercise of her "right to make the ultimate decision." *Id*. at 877. Thus, neither the spousal and parental consent provisions nor the plurality's general principles support *Hellerstedt*'s balancing test.

Moreover, none of the other sections of *Casey* support such a standard. When analyzing

---

[2] Lower courts have conducted the balancing in different and inconsistent ways. District courts in the Fifth and Eighth Circuits have decided that "[a] regulation will not be upheld unless the benefits it advances outweigh the burdens it imposes." *Hopkins v. Jegley*, 267 F .Supp.3d 1024, 1055-56 (E.D. Ark. 2017); *Hellerstedt II*, No. A-16-CA-1300, 2018 BL 30317, at *6 (W.D. Tex. Jan. 29, 2018). A district court in the Eleventh Circuit, on the other hand, has interpreted *Hellerstedt* to require a sliding scale under which a State must show a greater purported benefit as the burden increases. *West Ala. Women's Center v. Miller*, 299 F. Supp.3d 1244, 1262 (M.D. Ala. 2017). Moreover, the Seventh Circuit insists that, "[i]f a burden *significantly* exceeds what is *necessary* to advance the state's interests, it is 'undue.'" *PPINK*, 896 F.3d at 827 (emphasis added) (quoting *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015)). And the Eighth Circuit takes *Hellerstedt* to require courts to determine whether a regulation's "benefits are substantially outweighed by the burdens it imposes." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). The uneven application of *Hellerstedt*'s balancing test further demonstrates the problems that attend such an amorphous standard.

Pennsylvania's informed consent requirement, *Casey* concluded that informed consent provisions are "part of the practice of medicine," which is "subject to reasonable licensing and regulation by the State." *Id.* at 884. In support of this position, the plurality cited *Whalen*, which upheld a New York law that required physicians to prepare prescriptions for certain drugs in triplicate and to file at least one of the copies with the State.

In the section of *Whalen* to which *Casey* referred, this Court held that States have broad latitude to regulate the practice of medicine provided that such regulations do not: (1) preclude public access to a legitimate medical procedure or treatment, (2) prevent a patient from deciding, in consultation with her physician, whether to pursue the procedure or treatment, or (3) condition the doctor's ability to pursue a particular procedure on government (or any other third-party) consent. *Whalen*, 429 U.S. at 603. In *Whalen*, as in *Casey*, this Court explained that what "is at stake" is the ability of a patient to make the ultimate decision in consultation with her physician. *Casey*, 505 U.S. at 877; *Whalen*, 429 U.S. at 603 ("Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication."). As long as "the decision … is left entirely to the physician and the patient," the State has substantial freedom to adopt reasonable regulations that may affect the decision-making process. *Id.*

Casey directly applied the principles articulated in *Whalen* to the abortion context. Given that "the doctor–patient relation [in the abortion context] is entitled to the same solicitude it receives in other

contexts," *Casey*, 505 U.S. at 884, the constitutionality of government regulations of abortion (or any other procedure) is not predicated on an *ad hoc* balancing of benefits and burdens. Rather, such regulations are permissible if they (1) do not prevent women (or other patients) from deciding in consultation with their physicians to have an abortion (or other procedure) and (2) do not require women to obtain governmental or third-party consent prior to having an abortion. *See id.* at 897 (striking down Pennsylvania's spousal notification provision because it gave the husband "an effective veto over his wife's decision"). Regardless of the particular benefits or burdens that flow from abortion regulations, such statutes violate the Constitution only if they constitute a substantial obstacle, one that "deprive[s] women of the ultimate decision." *Id.* at 875.

Subsequent decisions of this Court confirm this interpretation of *Casey*'s undue burden test. In *Mazurek* and *Gonzales*, this Court upheld abortion regulations directed at maternal health (*Mazurek*) and promoting fetal human life (*Gonzales*) even when there was no empirical evidence that the regulations advanced the State's asserted interest. In *Mazurek*, the Court sustained a Missouri law requiring physicians to perform abortions even though (1) there were no legislative findings supporting the law, and (2) those challenging the law alleged that "all health evidence contradict[ed] the claim that there is any health basis for the law." *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam). The Court explained that "this line of argument"—that the law should be struck down because of its alleged lack of benefits—"is squarely

foreclosed by *Casey* itself." *Id.*; *see also Hellerstedt*, 136 S.Ct. at 2324 (Thomas, J., dissenting). Moreover, *Mazurek* confirmed that *Casey* "emphasized that '[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*.'" 520 U.S. at 973 (quoting *Casey*, 505 U.S. at 885) (emphasis in *Mazurek*). Put another way, *Mazurek* concluded that the physician-only requirement was constitutional even if non-doctors could provide the same benefit because it did not impose a substantial obstacle on a woman's right to choose. *Id.* at 971-72; *Casey*, 505 U.S. at 884-85 ("Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden.").

In a similar fashion, *Gonzales v. Carhart* upheld a federal ban on intact D&E without any mention of a balancing test. Given that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women," 550 U.S. 124, 162 (2007), the Court could not and did not weigh the benefits and burdens of banning the procedure. Instead, the Court deferred to the legislature, allowing Congress to legislate based on *its* assessment of the relative benefits and burdens of the ban. *Id.* at 164. Consistent with *Casey*, *Gonzales* concluded that "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their

status above other physicians in the medical community." *Id.* at 163. Even if, as Justice Ginsberg suggested in her dissent, the federal partial-birth abortion ban "saves not a single fetus from destruction, for it targets only a *method* of performing abortion," *id.* at 181 (Ginsberg, J., dissenting), the ban was constitutional. That is, the majority did not require the government to demonstrate that specific benefits outweighed particular burdens; rather, the majority upheld the ban based on "a *reasonable inference* that a necessary effect of the regulation and the knowledge it conveys *will be to encourage some women* to carry the infant to full term." *Id.* at 160 (emphasis added).

Accordingly, if this Court decides to retain the undue burden standard, it should reject *Hellerstedt*'s balancing test, which is inconsistent with *Casey*, *Whalen*, *Danforth*, *Mazurek*, and *Gonzales*, and return to *Casey*'s "guiding principles" that permit States to pass abortion regulations that "serve[] a valid purpose, one not designed to strike at the right itself" even if such regulations have "the incidental effect of making it more difficult or more expensive to procure an abortion." *Casey*, 505 U.S. at 874.

B. The balancing test has proven to be unworkable, relying on a highly speculative pre-enforcement assessment of a regulation's impact that enables lower courts to reach conclusions that conflict with *Casey*'s holdings.

A recent Seventh Circuit decision highlights another problem with *Hellerstedt*'s balancing test—it leaves lower courts to guess as to the proper

weighting of a regulation's purported benefits and burdens without any guidance from the Constitution or this Court's abortion precedents. *See Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, No. 17-2428, Denial of Petition for Rehearing and Rehearing En Banc (7th Cir. 2019). Concurring in the denial of rehearing en banc, Judge Easterbrook, joined by Judge Sykes, argued that *Hellerstedt*'s balancing test does not provide a workable standard:

> The "undue burden" approach announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court's opinions. How much burden is "undue" is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute, such as the one Indiana has enacted. Three circuit judges already have guessed how that inquiry would come out; they did not agree. The quality of our work cannot be improved by having eight more circuit judges try the same exercise. It is better to send this dispute on its way to the only institution that can give an authoritative answer.

Id. at *3-4 (Easterbrook, J., concurring in the denial of rehearing en banc).

According to Judge Easterbrook, the balancing that *Hellerstedt* now requires is untethered from both the text of the Constitution and this Court's pre-*Hellerstedt* decisions. As a result, different judges are free to perform the balancing differently—from each other as well as from the legislators who passed the challenged regulation. All lower courts can do is guess how this Court will ultimately weigh the alleged benefits and burdens.[3] Hence, Judges Easterbrook and Sykes concluded that the case should be sent on to the Supreme Court—the only body that can give a definitive assessment of the benefits and burdens post-*Hellerstedt*.

The "eye of the beholder" nature of the balancing is evident in *June Medical Services* as well. In the wake of *Hellerstedt*, the district court concluded that the Act was facially unconstitutional. *See June Medical Services*, 905 F.3d at 791. Specifically, the district court "found 'minimal' health benefits but

---

[3] This task is made all the more difficult when a State is regulating based on its interest in fetal human life. *Casey* overturned portions of *Thornburgh* and *Akron* because both cases undervalued that interest. *Casey*, 505 U.S. at 882. *Casey*, though, never assigned a specific value to that interest. And it is far from clear that assessing the value of an unborn human life falls within the judicial function, which might explain why the plurality in *Casey* required only that a regulation promoting fetal human life be "a reasonable measure to ensure an informed choice, one which *might cause* the woman to choose childbirth over abortion." *Id.* at 883 (emphasis added).

'substantial burdens'" under *Hellerstedt*'s "fact-bound" analysis. *Id.* at 793. After a "[c]areful review of the record," a panel majority of the Fifth Circuit disagreed, noting "stark differences between the record before us and that which the Court considered in [*Hellerstedt*]." *Id.* at 791. Based on its detailed analysis of the Act's likely impact on access to abortion, the majority concluded that the Louisiana law, unlike Texas's admitting privileges requirement, was "not a substantial burden at all, much less a substantial burden on a large fraction of women." *Id.* at 815. The Fifth Circuit, therefore, reversed and dismissed.

Drawing on the same record, Judge Higginbotham dissented, concluding that the Act "will substantially burden women's access to abortion with no demonstrable medical benefit." *Id.* at 816 (Higginbotham, J., dissenting). The dissent emphasized that "[t]he divergence between the findings of the district court and the majority is striking." *Id.* The Fifth Circuit judges disagreed as to how *Hellerstedt*'s balancing should come out, leaving the parties to look to this Court, "the only institution that can give an authoritative answer." *Planned Parenthood of Indiana and Kentucky, Inc.*, No. 17-2428 at *4 (Easterbrook, J., concurring). As a result, *Hellerstedt* has accentuated the problem the plurality identified in *Webster v. Reproductive Health Services*—that the Court's abortion cases establish this Court as "the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." 492 U.S. 490, 518-19 (1989) (plurality opinion) (internal quotation marks omitted).

In addition, given that the identification, weighting, and balancing of benefits and burdens is highly subjective under *Hellerstedt*, lower courts are apt to reach results that contradict this Court's prior holdings. For example, in *PPINK*, the Seventh Circuit struck down an Indiana ultrasound provision that required women to have an ultrasound 18-hours before an abortion (instead of immediately before as mandated under Indiana's prior ultrasound law). *See PPINK*, 896 F.3d at 812. In balancing the benefits and burdens, the panel gave minimal weight to the State's interests in fetal human life and maternal health, causing the panel to invalidate the Indiana provision even though it advanced the same state interests and imposed the same burdens as the 24-hour waiting period that the plurality upheld in *Casey*.

In *PPINK*, Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") did not challenge the fact that Indiana required women to have an ultrasound prior to the abortion procedure; it contested only the change in the timing of the ultrasound. According to PPINK, the alleged undue burden on women resulted from Indiana's mandating that the ultrasound occur at least 18-hours before the procedure. *Id.* at 813. And the Seventh Circuit agreed, taking "the obstacle to access" to be "the burden of travelling twice to a clinic." *Id.* at 827. In particular, the Seventh Circuit highlighted the "additional travel expenses, childcare costs, loss of entire days' wages, risk of losing jobs, and potential danger from an abusive partner" for women who must make two visits to PPINK facilities to comply with the law. *Id.*

The Seventh Circuit's burden analysis is virtually identical to the district court's evaluation of the burdens resulting from Pennsylvania's 24-hour waiting period in *Casey*, which burdens also resulted from a woman's having "to make a minimum of two visits to an abortion provider." *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1351 (E.D. Pa. 1990); *PPINK*, 896 F.3d at 819 ("All of the burden in this case originates from the lengthy travel that is required of some women who have to travel far distances for an ultrasound appointment at least eighteen hours prior to an abortion."). In both cases, the courts emphasized that the regulations burdened women seeking an abortion by:

- Delaying the procedure longer than the state-mandated waiting period. *See Casey*, 744 F. Supp. at 1351 (noting that because most clinics "do not perform abortions on a daily basis," most women will face "delays far in excess of 24 hours"); *PPINK*, 896 F.3d at 820 (describing how "women had to wait longer to have an abortion" given that the clinics that perform abortions are available "at limited times").
- Increasing travel distances. *See Casey*, 744 F. Supp. at 1352 (explaining that many women "must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider"); *PPINK*, 896 F.3d at 819 (noting that for women in Fort Wayne, Indiana "the closest ultrasound machine is 87 miles away in Mishawaka (174 miles round trip)").

- Increasing costs from the additional travel. *See Casey*, 744 F. Supp. at 1352 (describing how doubling the travel time "will necessarily add either the costs of transportation or overnight lodging or both to the overall cost of her abortion"); *PPINK*, 896 F.3d at 820 (setting out the anticipated costs of the ultrasound requirement "above and beyond the cost of the abortion itself").
- Causing the loss of wages and increasing the costs for food and child care. *See Casey*, 744 F. Supp. at 1352 (expressing concern that the added delay may cause women to "lose additional wages or other compensation" or "to incur additional expenses for food and child care"); *PPINK*, 896 F.3d at 819 (describing how "[a] second lengthy trip" would require "a second missed day of work" and "child care for an additional day").
- Increasing the threat to battered women of physical or psychological abuse. *See Casey*, 744 F. Supp. at 1352 (stating that the burden would be felt most heavily by those "who have the least financial resources" and those who "have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave"); *PPINK*, 896 F.3d at 821 (discussing the "impact on victims of domestic violence" who now had "to arrange to be away for all or most of two days").
- Failing to provide any offsetting medical benefit from waiting. *See Casey*, 744 F. Supp. at 1352 (concluding that the waiting period

> "serves no legitimate medical interest"); *PPINK*, 896 F.3d at 831 (upholding the district court's conclusion "that the ultrasound law 'imposes significant burdens against a near absence of evidence that the law promotes either of the benefits asserted by the State'").

The Seventh Circuit panel determined that these burdens were "undue" because Indiana did not provide "any evidence that [the ultrasound requirement] serves the intended goal of persuading women to carry a pregnancy to term." *Id*. at 833. Instead of considering the importance of Indiana's interest in potential life generally, the Seventh Circuit demanded specific evidence that having an ultrasound 18-hours before an abortion (as opposed to immediately before) led some unspecified number of women to continue their pregnancies. *Id*. at 828-29.

If the Seventh Circuit is correct that *Hellerstedt*'s balancing test applies to all abortion regulations, then *PPINK* directly conflicts with *Casey* and *Gonzales*. If this Court upheld the regulations in *Casey* and *Gonzales* under a balancing test, this Court must have concluded that the States' interest in potential life outweighed the burdens imposed by the 24-hour waiting period and the federal ban on partial-birth abortion. *Casey*, 505 U.S. at 886 (upholding the 24-hour waiting period despite its being "particularly burdensome" "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others"). That is, contrary to the Seventh Circuit, *Casey* and *Gonzales* must have

given considerable weight to the State's "legitimate and substantial interest in preserving and promoting fetal life," *Gonzales*, 550 U.S. at 145, even though those cases required very little in terms of direct, quantifiable benefits from the regulations.

For example, *Casey* upheld Pennsylvania's 24-hour waiting period because of "[t]he *idea* that important decisions will be more informed and deliberate if they follow some period of reflection." 505 U.S. at 885 (emphasis added). Unlike the Seventh Circuit, *Casey* did not demand specific evidence showing that "the additional time to reflect advanced [the State's] interests." *PPINK*, 896 F.3d at 830. Rather, *Casey* concluded that Pennsylvania could "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest," 505 U.S. at 886, and even though there was no evidence that any women changed their minds after receiving the information 24-hours before (instead of immediately before) the procedure. *See id.* at 885 (rejecting *Akron*'s invalidation of a 24-hour notice period, which was based on the *Akron* Court's not being "convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course"). Because the 24-hour waiting period—like Indiana's ultrasound requirement—"facilitates the wise exercise of th[e] right [to decide to terminate a pregnancy free of undue State regulation], it cannot be classified as an interference with the right *Roe* protects." *Id.* at 887. Under *Casey*, even if requiring an ultrasound 18-hours prior to the abortion procedure has not yet persuaded a woman to continue her pregnancy, it remains "a reasonable

measure to ensure an informed choice, one which *might* cause the woman to choose childbirth over abortion." *Id*. at 883 (emphasis added).

Similarly, *Gonzales* upheld the federal ban on partial-birth abortion based on a "reasonable inference" about its "necessary effect … and the knowledge it conveys." 550 U.S. at 160. The *Gonzales* Court, however, did not require the government to provide specific evidence supporting its interest: "While we find *no reliable data* to measure the phenomenon, it seems *unexceptionable* to conclude some women come to regret their choice to abort." *Id*. at 159 (emphasis added); *Casey*, 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."); *Gonzales*, 550 U.S. at 159-60. Consequently, if *Casey* and *Gonzales* applied a balancing test (which they did not), Indiana's ultrasound regulation also must survive that test because it promotes the same interest in potential life and is based on the same "idea that important decisions will be more informed and deliberate if they follow some period of reflection." *Casey*, 505 U.S. at 885.

The fact that judges can and do reach such differing conclusions regarding the weighting and balancing of the States' interests in fetal human life and maternal health militates against retaining *Hellerstedt*'s balancing test. If this Court maintains *Casey*'s undue burden standard, it should go back to its original understanding of that test under which

an undue burden is a substantial obstacle, *i.e.*, an obstacle that "prohibit[s] any woman from making the ultimate decision to terminate her pregnancy before viability." *Id*. at 879.

II. By introducing a weighing of potential benefits and burdens, *Hellerstedt* impermissibly limits the States' authority to regulate the medical profession under *Casey* and *Whalen*.

If Louisiana's admitting privileges requirement does not impose a substantial obstacle to a woman's access to abortion (either because Louisiana's interest in maternal health outweighs the burdens imposed or because the Act does not preclude a woman seeking an abortion from making the ultimate decision), then *Casey* and *Whalen* instruct that only rational basis review applies. *Id*. at 884 (explaining that "the practice of medicine" is "subject to reasonable licensing and regulation by the State"); *Whalen*, 429 U.S. at 597. Applying rational basis review to abortion regulations that do not preclude a woman's making the ultimate decision ensures that such regulations are subject to the same standard of review as other public safety regulations. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that Washington's ban on assisted suicide must "be rationally related to legitimate government interests"); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (upholding a state law regulating the fitting and replacement of lenses where "it might be thought that the particular legislative measure was a rational way to correct it"). And Louisiana's regulation easily meets this deferential standard.

The Act is directed at the protection of maternal health. Rather than single out abortion for special, uniquely burdensome regulation, the Act subjects abortion clinics to the same admitting privileges requirement that already applied to ambulatory surgical centers ("ASCs"). *See* La. Admin. Code § 48:4541(A), (B); La. Sess. Law Serv. Act 620, § 1(A)(2)(a). In this way, the Act treats abortion clinics the same as other outpatient surgery venues without subjecting the clinics to all of the regulations governing ASCs. *Compare with Hellerstedt*, 136 S.Ct. at 2300. As the Fifth Circuit noted, the Act seeks "to promote women's health … by ensuring a higher level of physician competence and by requiring continuity of care." 905 F.3d at 805. Consistent with Louisiana's regulations governing ASCs, requiring doctors who perform abortions to have admitting privileges at nearby hospitals is rationally related to the State's legitimate and important interest in physician competence and continuity of care. *See Roe*, 410 U.S. at 150 (noting a State's "legitimate interest in seeing to it that abortions, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient").

Hellerstedt's balancing test, though, threatens to significantly restrict a State's ability to alter the timing or content of its abortion regulations, thereby undermining *Whalen*'s recognition that States have broad authority to regulate the medical profession. In this case, the district court permanently enjoined Louisiana's attempt to extend its admitting privileges requirement to abortion clinics. Although the prior Louisiana law required physicians at abortion clinics to have admitting privileges or a

written transfer agreement, La. Admin. Code § 48:4407(A)(3) (2003), the district court and Judge Higginbotham interpreted *Hellerstedt* to prevent Louisiana from treating abortion doctors consistently with other doctors who perform outpatient surgeries. Having made the initial decision to allow doctors working at abortion clinics to have only a transfer agreement, Louisiana could not change the requirement to align abortion clinics and ASCs because Louisiana could not establish a sufficient benefit under *Hellerstedt*. Even though the admitting privileges requirement does not impose a substantial obstacle on women and actually promotes "continuity of care, qualifications, communication, and preventing abandonment of patients," *June Medical Services*, 905 F.3d at 806, the district court and the dissent would have precluded Louisiana's effort to apply the same standard to abortion clinics and ASCs. *Hellerstedt*'s balancing test, therefore, improperly restricts the States' authority over "the practice of medicine," which includes "reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884.

In *PPINK*, the Seventh Circuit applied *Hellerstedt* in a similar fashion, preventing Indiana from altering the timing of its ultrasound requirement. Applying a balancing test, the Seventh Circuit considered only the specific, quantifiable benefits to fetal human life that flow from having the ultrasound at least 18-hours before (instead of immediately prior to) the abortion procedure. In so doing, the Seventh Circuit made it nearly impossible for Indiana to move its ultrasound requirement earlier even if the State determined that the woman's decision would "be more informed and

deliberate if [it] follow[ed] some period of reflection." *Id*. at 885.

The Seventh Circuit's analysis departed significantly from *Casey* and *Whalen*. Whereas *Casey* concluded that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure," *id*., the Seventh Circuit determined Indiana lacked the regulatory authority to require that an ultrasound be performed 18-hours prior to the abortion procedure. The Seventh Circuit reached this conclusion even though *Casey* confirmed that Pennsylvania's requiring disclosures 24-hours before an abortion easily satisfied rational basis review: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Id*.

Indiana's ultrasound provision provided women with (1) the opportunity to receive important, truthful, and nonmisleading information as well as (2) time to reflect on that information. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012) (concluding that while ultrasounds are "more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*, they "are the epitome of truthful, non-misleading information" and "are not different in kind"); *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc) (recognizing that a

State can adopt reasonable informed consent regulations that "require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."). Under *Casey* and *Whalen*, such truthful, nonmisleading disclosures related to abortion are subject to only rational basis scrutiny. *See Casey*, 505 U.S. at 882 (overruling *Akron and Thornburgh* as "inconsistent with *Roe*'s acknowledgment of an important interest in potential life" because they struck down "truthful, nonmisleading information" that was reasonably related to the abortion decision). But the Seventh Circuit never reached the rational basis inquiry because it invalidated Indiana's ultrasound requirement under *Hellerstedt*'s balancing test.

In so doing, the Seventh Circuit not only narrowed the State's interest in fetal human life, but also restricted the State's authority to alter the nature and timing of its regulations. The Seventh Circuit's application of *Hellerstedt*, therefore, threatens to usurp the legislative function. *See Harris v. McRae*, 448 U.S. 297, 326 (1980) (explaining that "'when an issue involves policy choices as sensitive as those implicated [here], the appropriate forum for their resolution in a democracy is the legislature'") (quoting *Maher v. Roe*, 432 U.S. 464, 479 (1977)); *Webster*, 492 U.S. at 518-19 (plurality opinion). Instead of considering whether the ultrasound requirement imposed a substantial obstacle (thereby preventing a woman's ability to decide whether to have an abortion), the Seventh Circuit limited its inquiry to a comparison of Indiana's current and prior ultrasound laws.

While the panel assumed there might be benefits from having an ultrasound at some point prior to the abortion procedure, it prohibited Indiana from relying on those benefits when justifying its regulation under *Hellerstedt*'s balancing test. *See PPINK*, 896 F.3d at 826 ("Therefore, the benefits of having an ultrasound at some time prior to an abortion (without regard to the 'eighteen hour prior' requirement) are irrelevant.").

Under *PPINK*'s interpretation of *Hellerstedt*, then, a State's initial decision as to the timing of an abortion regulation may preclude subsequent changes. When initially considering whether to adopt an ultrasound regulation, Indiana could require the ultrasound to be performed immediately before the abortion procedure, while another State in the Seventh Circuit presumably could mandate an ultrasound 18-hours before the procedure. Both regulations would be constitutional because both States could claim the benefits that flow from having an ultrasound at some point prior to the abortion. Having made its initial decision, though, Indiana is now precluded under *PPINK* from changing its mind and providing a waiting period after the ultrasound because Indiana cannot claim any of the benefits that flow from having an ultrasound generally. Indiana must demonstrate that specific benefits flow from having the ultrasound 18-hours before the abortion. Consequently, given *Hellerstedt*, States must carefully consider the scope and timing of any regulation that promotes their interest in potential life because, once they enact such a regulation, they will be able to alter the requirement only if they can prove that the specific benefits of the *change* (as opposed to the general benefits of that type of

regulation) outweigh the burdens created by that change.

This interpretation of the undue burden test directly conflicts with *Casey* and *Whalen*, which taken together recognize that States have broad authority to regulate pursuant to their interest in fetal human life. After all, *Casey* overturned *Akron* and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) for this very reason: "[W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. The Seventh Circuit's use of *Hellerstedt*'s balancing test reintroduces the reasoning in *Akron* and *Thornburgh*, and similarly undermines the States' authority to determine (1) the type of truthful, nonmisleading information that should be given before an abortion as well as (2) the timing of that information—even though both decisions advance the States' interests in "ensuring a decision that is mature and informed" and in "express[ing] a preference for childbirth over abortion." *Id.* at 883. Given that "important decisions will be more informed and deliberate if they follow some period of reflection," any test that precludes States from adopting a reasonable waiting period is inconsistent with *Casey* and should be rejected. *Id.* at 885.

CONCLUSION

As Justice Black explained in *Griswold v. Connecticut*, "[o]ne of the most effective ways of … expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible … in meaning." 381 U.S. 479, 509 (1965) (Black, J., dissenting). *Hellerstedt* did just that. In place of *Casey*'s undue burden test, which was meant to protect "the central holding of *Roe*"—that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *id*. at 879—*Hellerstedt* introduced a balancing test. Under this novel approach, courts are required to focus on "the burdens a law imposes on abortion access together with the benefits those laws confer," 136 S.Ct. at 2309, instead of whether a given regulation precludes a woman from deciding whether to terminate her pregnancy.

Hellerstedt's highly subjective and elastic balancing test is nowhere to be found in *Casey* or in the text of the Constitution. By substituting a balancing regime for *Casey*'s undue burden analysis, *Hellerstedt* further narrowed the scope of state authority over an area that the Constitution (prior to *Roe*) left to the States. Accordingly, because "the Constitution says absolutely nothing about [abortion], and … the longstanding traditions of American society have permitted it to be legally proscribed," *Casey*, 505 U.S. at 980 (Scalia, J., dissenting), this Court should, at a minimum, return to *Casey*'s understanding of an undue burden, invalidating a regulation only if a court finds that

the regulation precludes a woman's making the ultimate decision.

Of course, history and legislative practice at the founding up until *Roe* still support the dissent's conclusion in *Casey* "that *Roe* was wrongly decided, and that it can and should be overruled consistently with [this Court's] traditional approach to *stare decisis* in constitutional cases." *Id*. at 944 (Rehnquist, C.J., dissenting). This Court, therefore, should use *June Medical Services* as a vehicle to "get out of this area, where [it has] no right to be, and where [it does] neither [the Court] nor the country any good by remaining." *Id*. at 1002 (Scalia, J., dissenting).

Respectfully submitted,

Scott W. Gaylord
Professor of Law
Elon University School of Law
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel of Record for Amicus Curiae

January 2, 2020