No. 15A880

In the Supreme Court of the United States

JUNE MEDICAL SERVICES LLC D/B/A HOPE MEDICAL GROUP FOR WOMEN, ON BEHALF OF ITS PATIENTS, PHYSICIANS, AND STAFF; BOSSIER CITY MEDICAL SUITE, ON BEHALF OF ITS PATIENTS, PHYSICIANS, AND STAFF; CHOICE, INC., OF TEXAS D/B/A CAUSEWAY MEDICAL CLINIC, ON BEHALF OF ITS PATIENTS, PHYSICIANS, AND STAFF; JOHN DOE 1, M.D.; AND JOHN DOE 2, M.D.,
Applicants,

v.

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent.

ON EMERGENCY APPLICATION TO VACATE STAY OFPRELIMINARY INJUNCTION PENDING APPEAL

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* OPPOSITION TO EMERGENCY APPLICATION TO VACATE STAY

AND

***AMICUS CURIAE* OPPOSITION IN SUPPORT OF RESPONDENT BY EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND**

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* OPPOSITION TO EMERGENCY APPLICATION TO VACATE STAY

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Applicant Eagle Forum Education & Legal Defense Fund* respectfully requests leave both: (1) to file the accompanying opposition as *amicus curiae* in support of the respondent defendant-appellant (hereinafter, "Louisiana") to the emergency application by the plaintiffs-appellees (hereinafter, "Providers") to vacate

* By analogy to FED. R. APP. P. 29(c)(5) and this Court's Rule 37.6, counsel for applicant and *amicus curiae* authored this application and opposition in whole, and no counsel for a party authored the application or opposition in whole or in part, nor did any person or entity, other than the applicant/*amicus* and its counsel make a monetary contribution to preparation or submission of the application or opposition.

the appellate stay issued by the U.S. Court of Appeals for the Fifth Circuit in Providers' challenge to LA. REV. STAT. §40:1061.10(A)(2)(a) (hereinafter, "Act 620"); and (2) to file the opposition in 8½-by 11-inch format. Louisiana consents to this *amicus* filing, and the Providers did not consent.

IDENTITY AND INTERESTS OF APPLICANT

Eagle Forum Education & Legal Defense Fund ("Eagle Forum") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty years, Eagle Forum has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, Eagle Forum consistently has argued for judicial restraint under both Article III and separation-of-powers principles. For the foregoing reasons, Eagle Forum has direct and vital interests in the issues before this Court and respectfully requests leave to file the accompanying opposition in support of respondent Louisiana to the emergency application to vacate the Fifth Circuit's appellate stay.

REASONS TO GRANT *AMICUS* STATUS

By analogy to the Court's Rule 37.2(b), Eagle Forum respectfully seeks leave to file the accompanying *amicus curiae* opposition in support of the respondent. Given the abbreviated briefing schedule for the emergency application, Eagle Forum has elected to seek leave to file this application contemporaneously with the respondent's deadline to file its opposition, which lessens the opportunity for Eagle Forum to calibrate its filing to the arguments made by the respondent, but reduces the chance

that Eagle Forum's filing will disturb the briefing schedule.

Eagle Forum respectfully submits that the proffered opposition will bring several relevant matters to the Court's attention:

- The opposition addresses third-party standing – including this Court's relatively recent decisions in *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004), and *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) – to demonstrate that abortion providers lack standing to assert the constitutional rights of their hypothetical future patients. *See* Eagle Forum Opp'n at 6-9. Although various pre-*Kowalski* decisions have recognized abortion providers' third-party standing to assert their patients' rights, Eagle Forum argues that *Kowalski* and *Newdow* narrowed that doctrine (which had been "in need of what may charitably be called clarification," *id.* at 6 (*quoting Miller v. Albright,* 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring)), particularly with respect to hypothetical future relationships in which the plaintiff has potential conflicts of interest with the absent third parties. *Id.* at 7-8.
- Eagle Forum next demonstrates that plaintiffs who cannot proceed under the elevated scrutiny accorded third-party rights holders must proceed under the rational-basis test. *See* Eagle Forum Opp'n at 11.
- Eagle Forum demonstrates that plaintiffs cannot base standing on self-inflicted injuries or the alleged fear of enforcement that lacks a "credible threat" that the state will enforce the challenged statute. *See* Eagle Forum Opp'n at 5-6.

- Eagle Forum also demonstrates that plaintiffs did not establish standing for an as-applied challenge, which differs from standing for facial challenges. *See* Eagle Forum Opp'n at 12-13.
- On the merits, Eagle Forum argues that the undue-burden test of *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), has a narrower scope with respect to state laws that protect the women who seek abortions. Specifically, Eagle Forum argues that challengers to laws that protect maternal health must first prove that such laws are unnecessary before the undue-burden inquiry even arises. Accordingly, plaintiffs' undue-burden arguments are inapposite, even if the plaintiffs had standing to raise undue-burden claims. *See* Eagle Forum Opp'n at 13-16.
- In the alternative, Eagle Forum demonstrates that if the plaintiffs have standing to bring undue-burden claims, Act 620 does not impose undue burdens on abortion rights for several reasons:

  (1) Although this Court and the Courts of Appeal have acknowledged that as-applied and facial challenges can overlap, *see* Eagle Forum Opp'n at 18 (collecting cases), this action is a facial challenge – notwithstanding interim relief directed only to Providers – because the Providers' claims "reach beyond the particular circumstances of these plaintiffs." *Doe v. Reed*, 561 U.S. 186, 194 (2010). *See* Eagle Forum Opp'n at 17-19.

  (2) With respect to the greater travel times and expense allegedly associated with reaching Louisiana abortion facilities that remain open, "the

incidental effect of making it more difficult or more expensive to procure an abortion" is not enough "to invalidate" a "law [that] serves a valid purpose" under *Casey, see* Eagle Forum Opp'n at 19-20 (*quoting Casey,* 505 U.S. at 874, *and citing Greenville Women's Clinic v. Comm'r,* 317 F.3d 357, 363 (4th Cir. 2002); *Women's Medical Prof'l Corp. v. Baird,* 438 F.3d 595, 598 (6th Cir. 2006); *Women's Health Ctr. of West Cnty., Inc. v. Webster,* 871 F.2d 1377, 1382 (8th Cir. 1989); *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 547 (9th Cir. 2004)).

(3) Act 620 does not violate the "large-fraction" test discussed in *Casey* for two reasons. First, for a statewide, generally applicable abortion regulation, the fraction's denominator is the population of women of childbearing age statewide, as the Fifth Circuit held. App. 13a. Second, the less than one-tenth of Louisiana women affected is not a "large fraction" for purposes of facial invalidity. *Id.*; Eagle Forum Opp'n at 20-22.

(4) Eagle Forum analyzes Act 620 under the rational-basis test that applies to Providers' challenge and demonstrates that the rational-basis test does not allow courtroom factfinding to overturn legislative judgments, but instead requires plaintiffs to negate the *theoretical* connection between the legislative purpose and the legislative means. Eagle Forum Opp'n at 22-25.

- Finally, Eagle Forum analyzes the remaining three criteria for interim relief, which tip in Louisiana's favor due to Providers' lack of third-party standing to enforce future patients' *Roe-Casey* rights and their unlikelihood of prevailing on the merits. *See* Eagle Forum Opp'n at 25-28.

These issues are all relevant to this Court's decision on the emergency application to vacate the Fifth Circuit's stay, and Eagle Forum respectfully submits that its opposition will aid the Court.

REASONS TO ALLOW FILING IN 8½-BY 11-INCH FORMAT

Eagle Forum respectfully submits that the Court's rules require applicants to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as Eagle Forum has done here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, Eagle Forum would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Moreover, Eagle Forum respectfully submits that it proffers an *opposition*, not a *brief*. Due to the expedited briefing schedule, the expense, and especially the delay of booklet-format printing, as well as the rules' ambiguity on the appropriate procedure, Eagle Forum has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, Eagle Forum files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, Eagle Forum commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format).

REQUESTED RELIEF

Eagle Forum respectfully requests leave to file the accompanying opposition as *amicus curiae* to Providers' emergency application to vacate the appellate stay. In addition, Eagle Forum also requests leave to file its opposition – at least initially – in

8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

CONCLUSION

For the foregoing reasons, the application for leave to file the accompanying opposition to Providers' emergency application to vacate the Fifth Circuit's appellate stay should be granted.

Dated: March 2, 2016

Respectfully submitted,

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AMICUS CURIAE OPPOSITION TO APPLICATION TO VACATE APPELLATE STAY

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") respectfully submits that the Circuit Justice (or the full Court if referred to the full Court) should deny the emergency application to vacate the U.S. Court of Appeals for the Fifth Circuit's appellate stay pending the filing of a petition for a writ of *certiorari.* Eagle Forum's interests are set out in the accompanying application for leave to file.

INTRODUCTION

Several abortion clinics and doctors (collectively, hereinafter "Providers") have brought a facial challenge against the head of Louisiana's Department of Health and Hospitals (hereinafter "Louisiana") to enjoin enforcement of the statutory requirement that clinic-based abortion doctors "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." LA. REV. STAT. §40:1061.10(A)(2)(a) (hereinafter, "Act 620"). Working under *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), and Fifth Circuit precedent, the district court found that Louisiana had a non-pretextual and rational basis for Act 620, but found that Act 620 has the effect of placing an "undue burden" on women seeking an abortion in Louisiana. The district court thus preliminarily enjoined Louisiana's enforcing Act 620 against Providers and entered a judgment; after the district court declined to stay its ruling pending appeal,

Louisiana moved for a stay in the Fifth Circuit, which granted an appellate stay. Providers have asked this Court to vacate that stay.

STANDARD OF REVIEW

In considering applications to vacate an appellate stay, Circuit Justices weigh serious and irreparable harm, the likelihood of this Court's reviewing the case after final disposition in the appellate court, and whether the appellate court demonstrably erred in issuing the stay. Providers' Appl. at 18 (collecting cases). Applicants who seek interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without relief, that the balance of equities favors them versus the defendants' harm from interim relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Although this appeal concerns only a preliminary injunction, Providers still must establish their standing, *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983), which appellate courts review *de novo*. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). Even where lower courts have discretion, appellate courts review legal issues *de novo* because a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990).

SUMMARY OF ARGUMENT

Providers claim that Act 620 violates the *Casey* undue-burden test and thus unconstitutionally limits the abortion rights found in *Roe v. Wade*, 410 U.S. 113 (1974). This Court must deny Providers' requested relief because they lack third-party standing to assert future patients' *Roe-Casey* rights (Sections II.A.1-II.A.2) and

Act 620 does not exceed the state authority recognized in *Casey* (Sections II.B-II.C). Providers and their patients do not suffer cognizable injury from either doctors' decisions to leave their abortion practices for reasons not caused by Act 620 or doctors who claim enforcement exposure where none exists (Section II.A). To the extent that Providers have standing at all, they must proceed under their own rights, which implicate the more deferential rational-basis standard of review that Providers cannot meet (Sections II.A.3, II.C.2.b). Notwithstanding the district court's entry of a preliminary injunction in favor of only the named plaintiffs here, this action remains a facial challenge, based not only on the means by which Providers established their standing but also on the pleadings, the reach of the claims to third parties, the course of the litigation, and the relief sought (Sections II.A.4, II.C.1).

On the merits, and contrary to Providers' claims, Act 620 has a sound public-health basis, which federal courts do not second guess under this Court's precedents (Sections II.B, II.C.2.b-II.C.2.c). With respect to greater travel times and expense that Act 620 allegedly will cause, "the incidental effect of making it more difficult or more expensive to procure an abortion" is not enough "to invalidate" a "law [that] serves a valid purpose" under *Casey,* 505 U.S. at 874 (Section II.C.2). Notwithstanding that the interim relief is directed only to Providers, the fact that Providers' claims reach beyond their particular circumstances to Louisiana women of childbearing age and non-party abortion doctors makes this litigation a facial challenge (Section II.C.1), which the Fifth Circuit properly held must fail under the *Casey* "large-fraction" test (Section II.C.2.a).

Given Providers' low likelihood of succeeding on the merits and their lack of third-party standing, Providers do not meet the other three criteria for interim relief (Sections III.A-III.C).

ARGUMENT

I. A GRANT OF *CERTIORARI* IS UNLIKELY.

Providers argue that they meet the first criterion for vacating an appellate stay because this Court granted not only a stay, *Whole Woman's Health v. Cole*, 135 S.Ct. 2923 (2015), but also a writ of *certiorari*, 136 S.Ct. 499, in response to the Fifth Circuit's decision in *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) ("*WWH*"). In the unlikely event that there are five votes for a *pertinent* pro-abortion position in the *WWH* litigation, Providers might indeed expect a "GVR" order, but it is even more likely that a pro-abortion ruling in the as-applied *WWH* litigation would have no bearing in this facial challenge. As a purely facial challenge, *see* Sections II.A.4, II.C.1, *infra*, this litigation is more similar to the purely facial challenge in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583 (5th Cir. 2014) ("*Abbott II*") – which the Texas-based abortion industry elected not to appeal – than it is to the subsequent – and as-applied – *WWH* challenge that Providers' Texas counterparts elected to bring. In all likelihood, the Louisiana-based abortion industry would make the same choice. Accordingly, a grant of *certiorari* is insufficiently likely.

II. PROVIDERS ARE UNLIKELY TO PREVAIL.

This section demonstrates that Providers are unlikely to prevail. To prove their entitlement to the "extraordinary and drastic remedy" they seek, Providers must

have not only a likelihood of prevailing on the merits relief, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), but also standing, even for interim relief. *Lyons,* 461 U.S. at 103. Providers cannot make either showing.

A. Providers lack standing not only to assert future patients' *Roe-Casey* "undue-burden" rights but also for this challenge to Act 620.

To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). Two of these criteria are relevant here. First, to qualify its pre-enforcement threat of injury as sufficiently "actual or imminent," a plaintiff must establish a "credible threat" of enforcement against that plaintiff. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Second, under the causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA,* 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976); *Petro-Chem Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) (R.B. Ginsburg, J.). Under the circumstances, the declines in abortion access attributed to Dr. Doe 2 (who – although he disputes it – has sufficient admitting privileges and

thus faces no "credible threat" of enforcement, App. 108a-111a[1]) and Dr. 3 (who will exit his abortion practice for reasons other than Act 620, App. 128a) are not injuries caused by or attributable to Act 620.

In addition to this constitutional baseline, standing doctrine also includes prudential elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). Moreover, appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary,* 501 U.S. 312, 316 (1991), and the party invoking federal jurisdiction bears the burden of proof on each step of the jurisdictional analysis. *Defenders of Wildlife,* 504 U.S. at 561. Here, Providers lack third-party standing to assert future patients' *Roe-Casey* rights and lack standing to assert self-inflicted injuries or non-imminent enforcement of Act 620.

1. Prudential limits on third-party standing bar Providers from asserting patients' rights under *Roe-Casey*.

While Eagle Forum does not dispute that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Providers and their *future* patients who may seek abortions at

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[1] Dr. Doe 2's concern about changing interpretations of the admitting-privilege requirement is misplaced because the courts will rely on Louisiana's representations about Dr. Doe 2's compliance with Act 620, which thus will become issue-preclusive of that question. *Montana v. U.S.*, 440 U.S. 147, 153 (1979); *cf. U.S. v. Vuitch*, 402 U.S. 62, 95 (1971) (courts have jurisdiction to decide their jurisdiction).

Providers' clinics: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski,* 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright,* 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). After *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Providers lack third-party standing to assert *Roe-Casey* rights. Providers' invocation of third-party standing also fails for two reasons beyond *Kowalski.*

First, Providers' challenge to Act 620 seeks to undermine legislation that Louisiana enacted to protect women from abortion-industry practices, a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from an "identity of interests"[2] – the putative third-party

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[2] *See, e.g., Lepelletier v. FDIC,* 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.,* 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow,* 542 U.S. at 15 n.7. Under *Newdow,* Providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of Providers' lawsuit is to enjoin Louisiana from protecting those very same women from Providers' substandard care.

Second, the instances where courts have found standing for abortion doctors typically involve laws that apply equally to *all abortions* and to *all abortion doctors,* so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions.[3] In finding standing, the Fifth Circuit (App. 4a) relied on *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976), and *Doe v. Bolton*, 410 U.S. 179, 188 (1973), which

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[3] Prior Supreme Court and Circuit decisions that found abortion doctors to have standing without expressly addressing third-party standing are inapposite for two reasons. First, decisions that considered only Article III standing without considering prudential third-party limits are not binding precedents on the unaddressed third-party issues. *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004). As such, those "drive-by jurisdictional rulings" have "no precedential effect" on third-party standing. *Steel Co.,* 523 U.S. at 91. Second, because the Fifth Circuit recognizes that prudential limits on standing can be waived by failing to raise them, *Bd. of Miss. Levee Comm'rs v. EPA,* 674 F.3d 409, 417-18 (5th Cir. 2012), a Fifth Circuit decision cannot be read to reject an argument *sub silentio* that a defendant *waived* by failing to raise it.

are inapposite for two different reasons. First, *Singleton* does not support third-party standing because only a plurality supported that position, *Singleton*, 428 U.S. at 118 (plurality), but the fifth vote sets a holding. *Marks v. U.S.*, 430 U.S. 188, 193 (1977). The fifth *Singleton* vote rejected third-party standing, *Singleton,* 428 U.S. at 121-22 (Stevens, J., concurring in part), which thus makes *Singleton*-based standing depend on the plaintiff's own standing. Second, the statute at issue in *Bolton*, 410 U.S. at 182-83, criminalized abortions in the interest of protecting the fetus – with certain exceptions for the mother's health, rape, or birth defects – such that an identity of interests existed between women seeking abortions and doctors performing them.

Here, by contrast, Louisiana regulates in the interest of pregnant women who contemplate abortions and imposes no pertinent restrictions on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, the doctors and the patients may have an identical interest. With Act 620, however, all abortion doctors do not share the same interests as future abortion patients. Indeed, Providers do not even share the same interests as all abortion doctors. Without an identity of interests between Providers and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.

2. This Court can and should consider prudential limits on Providers' third-party standing to raise the *Roe-Casey* rights of future patients.

Even if Louisiana does not raise Providers' lack of third-party standing to enforce the *Roe* and *Casey* rights of future patients, Eagle Forum encourages the court

to resolve that important issue. The circuits are split on whether prudential limits on justiciability – such as third-party standing – are waivable, *compare Miss. Levee Comm'rs,* 674 F.3d at 417-18 *with Animal Legal Defense Fund, Inc. v. Espy,* 29 F.3d 720, 723 n.2 (D.C. Cir. 1994), and it is not clear that *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S.Ct. 1377, 1386-88 (2014), resolved that split.[4]

Even if waiver could apply here, however, that would not limit this Court's – or any federal court's – authority to raise prudential limits *sua sponte:* "even in a case raising only prudential concerns, the question … may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI,* 538 U.S. 803, 808 (2003). Simply put, on questions of *judicial* restraint, the parties cannot bind the judiciary: "To the extent that questions … involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases,* 419 U.S. 102, 138 (1974). Indeed, simple logic dictates that judges can enforce *judge-made* prudential limits on justiciability, regardless of the parties' positions. Were it otherwise, judges could never adopt a new prudential limit without simultaneously rejecting it as having been waived.

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[4] *Lexmark* concerned the jurisdictional versus prudential status of the zone-of-interest test applied to whether a party had a statutory cause of action. *Id.* That does not preclude a jurisdictional nature for third-party or *jus tertii* standing.

3. To the extent that they can establish *their own* Article III standing, Providers must proceed under the rational-basis test, which Providers cannot meet.

When a party – like Providers here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre.* Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health,* 462 U.S. 416, 438 (1983) ("lines drawn … must be reasonable"). As in *Arlington Heights*, however, the fact that Providers may have their own independent standing is meaningless because there is no question that Providers (like MHDC) cannot prevail under the standard of review – namely, rational-basis review – applicable to their injuries. Indeed, Providers lost on this issue in district court, App. 146a, and this Court should reject their rational-basis claims here. *See* Section II.C.2.b, *infra.*

4. Standing for as-applied challenges differs from standing for facial challenges, and Providers have brought a facial challenge and established standing – if at all – only for a facial challenge.

The district court's injunction applies to Providers as named individuals and entities, not to the Act 620's enforcement generally. App. 159a. Providers claim that this "as-applied" relief makes their action an as-applied challenge, to which the large-fraction rule for facial challenges is inapposite. Providers' Appl. at 23-25, 28 n.19. Although Eagle Forum respectfully submits that this remains a facial challenge, *see* Section II.C.1, *infra*, this section simply demonstrates that the rules for facial and as-applied standing differ, and this action followed the facial-standing approach.

Standing for as-applied and facial challenges are different. *See Bowen v. Kendrick*, 487 U.S. 589, 618 (1988); *Quinn v. Millsap*, 491 U.S. 95, 103 n.9 (1989). Here, the lower courts found standing for all plaintiffs based on the standing of only one plaintiff (Dr. Doe 1). App. 4a-5a. While that type of one-plaintiff standing works for a facial challenge, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), each plaintiff that seeks as-applied injunctive relief must establish *their own* standing for *their own* injunctive relief: "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular* plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added); *see, e.g., Fednav, Ltd. v. Chester*, 547 F.3d 607, 615-18 (6th Cir. 2008); *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1340 (11th Cir. 2013); *Fontenot v. McCraw*, 777 F.3d 741, 746-47 (5th Cir. 2015); *cf. DaimlerChrysler Corp v. Cuno*, 547 U.S. 332,

352-53 (2006). Thus, the clear indication is that the lower courts analyzed this litigation – and found Provider's standing – only as a facial challenge, notwithstanding the grant of interim relief only to Providers.

B. Even if *Casey* applied, Act 620 would not trigger undue-burden review

The *Casey* undue-burden test would not apply here, even if Providers had standing. In their cramped reading of *Casey,* Providers restrict states' latitude to protect the health and safety of women who seek abortions, which conflicts with federalism and establishes unsound policy. Under that reading, *Casey* would have weakened Louisiana's police power to protect its citizens in an area of traditional state and local concern (namely, public health) where the federal government lacks a corresponding police power. That would have left only the judiciary and abortion providers to protect the public from abortion providers, which is to say it would leave no one who is both qualified *and* disinterested to protect public health. Eagle Forum respectfully submits that that is not – and cannot be – the law.

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local concern.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (*quoting Hillsborough County v. Automated Med. Labs., Inc.,* 471 U.S. 707, 719 (1985)) (second and third alterations in *Medtronic*). For their part, the federal Executive and Congress lack a corresponding police power to take up the slack: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison,* 529 U.S.

598, 618-19 (2000). As indicated, if states cannot regulate the abortion industry's excesses, and the federal government cannot, that leaves only the judiciary and the abortion industry itself.

The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Gonzales v. Carhart,* 550 U.S. 124, 163-64 (2007) (courts are not "'the country's *ex officio* medical board'") (*quoting Webster v. Reproductive Health Serv.,* 492 U.S. 490, 518-19 (1989) (plurality opinion)); *cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice medicine than they are to practice social engineering. Because the judiciary is not a credible regulator, Providers' narrow reading of states' flexibility under *Casey* would make abortion a self-regulated industry.

The abortion industry itself is not a credible self-regulating industry. It throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (abortion industry opposed South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. LeBlanc,* 729 F.3d 427 (5th Cir. 2013) (abortion industry opposed Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). Claims that states target the abortion industry for *unwarranted* scrutiny have it

precisely backwards. The abortion industry's lack of transparency calls out for *heightened regulation,* vis-à-vis other, less-politicized medical practices.

When regulating to require "medically competent personnel under conditions insuring maximum safety for the woman," *Connecticut v. Menillo,* 423 U.S. 9, 10-11 (1975); *Mazurek*, 520 U.S. at 971; *Roe,* 410 U.S. at 150, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales,* 550 U.S. at 164 (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales,* 550 U.S. at 163. That holding from *Gonzales* applies even more so here.

Indeed, as Eagle Forum reads *Casey,* that is precisely what this Court intended in adopting the *Casey* framework, which balances competing state and individual interests. Significantly, *Roe* concerned states' ability to *prohibit* abortions in the interest of the *unborn child* and the state's interest in that new life. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. On the application of the police power to protecting the *pregnant woman's* health, this Court never has ruled that the right to a particular abortion method trumps the states' interest in public health. As Eagle Forum understands *Casey,* the undue-burden test does not arise for "necessary" regulation of abortion procedures to protect women seeking an abortion. *See Casey,*

505 U.S. at 878 (only *unnecessary* regulations of women's health trigger further inquiry under *Casey*). Moreover, as explained in Sections II.C.2.b-II.C.2.c, *infra*, the necessity analysis falls under the rational-basis test.

Specifically, following *Roe, Menillo,* and *Mazurek, Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey,* 505 U.S. at 878. The only prohibition in the *Casey* prong applicable to pregnant women is that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (emphasis added). That requirement poses two elements to a *Roe-Casey* claim against state regulations protecting maternal health: (1) the maternal-health regulation is unnecessary; *and* (2) the regulation has either the purpose or effect of presenting a substantial obstacle. Under *Casey*, then, Providers here must satisfy *both* elements. If the regulation is not "unnecessary," that ends the analysis: there is no *Casey-Roe* violation.

C. Act 620 does not impose an undue burden on *Roe-Casey* rights.

Providers argue primarily that Act 620 has the effect of placing a substantial obstacle in the path of a woman seeking an abortion, in alleged violation of *Casey*. Although this Court should not reach the *Casey* merits at all, *see* Section II.A, *supra,* and the *Casey* undue-burden analysis should not even arise when states adopt *necessary* protections for pregnant women who seek abortions, *see* Section II.B, *supra,* Act 620 would not impose an undue burden under *Casey,* even if that test applied to this litigation. This subsection analyzes why Providers' facial challenge must fail.

1. Providers have brought a facial challenge.

Although Providers claim that the district court's preliminary injunction – by providing relief only to the named plaintiffs – makes this an as-applied challenge, Providers' Appl. at 23-25, 28 n.19, the lower courts not only expressly conducted a facial large-fraction analysis and noted that Providers "emphatically" disavowed an as-applied challenge, App. 7a, 142a, 61a n.14, but also treated this as a facial challenge for purposes of standing. *See* Section II.A.4, *supra*. As explained in this section, this action was filed as, and remains, a facial challenge.

With respect to facial versus as-applied challenges, four general observations warrant mention. First, "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales,* 550 U.S. at 168 (interior and alterations omitted), because courts "prefer … to enjoin only the unconstitutional applications of a statute while leaving other applications in force" and "to sever [a statute's] problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328-29 (2006). Second, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Third, "'[o]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.'" *Id.* (*quoting* Richard H. Fallon, Jr., *As-Applied Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000)). Fourth, and finally, the two forms of review are different enough that "upholding [a statute] against a facial challenge … [need] not

… resolve future as-applied challenges" to the same statute. *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410, 412 (2006) (*per curiam*); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991) ("[t]hat the regulation may be invalid as applied … does not mean that the regulation is facially invalid").

The upshot of these observations is that, while the differences between the two forms of review are important, the categories can overlap. *See, e.g., Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 (1st Cir. 2014); *Mulholland v. Marion County Election Bd.*, 746 F.3d 811, 819 (7th Cir. 2014); *Doe v. Reed*, 561 U.S. 186, 194 (2010) (acknowledging that plaintiffs' claim "has characteristics of both" as-applied and facial challenge); Fallon, *As-Applied and Facial Challenges*, 113 HARV. L. REV. at 1341 ("facial challenges are less categorically distinct from as-applied challenges than is often thought"). As such, the "label is not what matters." *Reed*, 561 U.S. at 194. Instead, the "important point is [whether] plaintiffs' claim and the relief that would follow … reach beyond the particular circumstances of these plaintiffs." *Id.* When that reach beyond the parties is present, the claims "must therefore satisfy [the] standards for a facial challenge to the extent of that reach." *Id.* Against that backdrop, Eagle Forum respectfully submits that almost any abortion-related claim brought by an abortion doctor on behalf of patients against maternal-health regulations is facial.

As explained, with these maternal-health regulations and unlike cases like *Bolton*, Providers do not have an identity of interests with their patients. *See* Section II.A.1, *supra.* Instead, again in contrast to abortion laws that outlaw an entire type of procedure for all women and all doctors, Providers' undue-burden claims hinge

entirely on extraneous non-parties. If new abortion clinics opened or new doctors became available, these doctors would have no case to bring. Thus, notwithstanding that the district court provided interim injunctive relief only to Providers, these claims remain the same facial claims that the parties litigated in district court.

2. Providers cannot prevail in their facial challenge.

This Court's decisions provide two modes of analysis to assess a statute's viability vis-à-vis a facial challenge such as this: the *Salerno* no-set-of-circumstances test, and the *Casey* large-fraction test. *Compare U.S. v. Salerno,* 481 U.S. 739, 745 (1987) *with Casey,* 505 U.S. at 895. While there is some complexity as to the correct standard to apply to facial challenges, the result here is the same, whichever test this Court uses. Because Providers fail under either test for facial challenges, the Court need not decide that debate here. *See Gonzales,* 550 U.S. at 167-68 (declining to resolve the issue where case resolved the same under each test). Because Act 620 is plainly permissible under a *Casey* undue-burden analysis in the geographical areas sufficiently convenient to Louisiana's remaining clinics, Act 620 is not facially unconstitutional under *Salerno*; the only question is whether Act 620 is unconstitutional in a large fraction of cases under *Casey*.

Although it did not outline the undue-burden test with mathematical precision for impermissible travel burdens, *Casey* did by example indicate what constitutes *permissible* travel burdens, without setting an upper bound on impermissible burdens. *Casey,* 505 U.S. at 874. Several appellate courts have recognized as much when applying the undue-burden test to increased travel distances to reach the facilities that remain open when, as a factual matter, some abortion facilities close

after a state adopts an additional abortion regulation. *Greenville Women's Clinic v. Comm'r,* 317 F.3d 357, 363 (4th Cir. 2002); *Women's Medical Prof'l Corp. v. Baird,* 438 F.3d 595, 598 (6th Cir. 2006); *Women's Health Ctr. of West Cnty., Inc. v. Webster,* 871 F.2d 1377, 1382 (8th Cir. 1989); *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 547 (9th Cir. 2004); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583 (5th Cir. 2014). When a state "law … serves a valid purpose," *see* Section II.C.2.b, *infra,* and "has the incidental effect of making it more difficult or more expensive to procure an abortion," the added difficulty or expense "cannot be enough to invalidate it." *Casey,* 505 U.S. at 874. *Casey* requires more than Providers have proved or can prove.

a. Act 620 does not violate the "large-fraction" test for facial challenges.

As Louisiana will explain in more detail, the uncontested evidence shows that Act 620 will impact less than one in ten[5] Louisiana women. Eagle Forum respectfully submits that one-tenth of the relevant population does not qualify as a large fraction under *Casey*. As such, this facial challenge may not proceed.

Where it applies, the large-fraction test is essentially a relaxed version of the

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[5] The one-tenth figure (actually, slightly less than 10%) represents the number of Louisiana women of reproductive age who live more than 150 miles from an abortion clinic due to Act 620 divided by the total number of Louisiana women of reproductive age. App. 13a. Although the large-fraction issue first arose in *Casey* in a situation that involved married women (*i.e.,* a subset of the total population), *Casey,* 505 U.S. at 894, here we have a statewide rule that applies to every abortion facility. As such, the proper denominator to assess Act 620's impacts is the statewide population of women of reproductive age.

Salerno no-set-of-circumstances test. Whereas *Salerno* allows facial challenges only when *all* of a statute's applications violate the constitutional requirement, the large-fraction test relaxes the test to allow facial challenges to proceed against laws with *some* valid applications, provided that a large fraction of cases violate the constitutional requirement. Under the circumstances, it would be remarkable to consider the less than one-tenth of Louisiana women impacted by Act 620 as a large fraction of the alternative *Salerno* requirement (namely, ten-tenths).

In a recent decision, this Court touched upon the proper denominator for evaluating facial challenges:

> [W]hen addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.

City of Los Angeles v. Patel, 135 S.Ct. 2443, 2451 (2015). Two aspects of *Patel* bear emphasis.

First, contrary to the City's arguments that the analysis should consider instances when officers had a warrant or that involved exigent circumstances, this Court held that those instances do not count because the challenged law was not implicated: either the warrant or the exigency authorized the review, not the law. *Id.* Here, by contrast, Act 620 applies statewide both to abortion facilities that can meet

it with current or additional medical staff and to those that cannot meet it.

Second, the *Patel* sentence about laws' "do[ing] no work where the subject … has consented" applies in the warrant context at issue in *Patel*, but cannot generalize to analyze facial challenges by focusing solely on the subset of affected persons who *do not* acquiesce to a law: that would mean that the non-compliant portion is always 100%. In the context of Act 620, abortion facilities that elect to comply continue to count as valid applications of Act 620 because Act 620 continues to regulate those facilities, including which doctors can perform abortions there. For statewide regulatory requirements, it would make no sense under *Casey* to count only the facilities that challenge a law.

b. Act 620 does not violate the rational-basis test.

Although they lost on the issue in district court, App. 146a, and did not raise it in this Opposition to Emergency Motion for Stay Pending Appeal in the Fifth Circuit, Providers ask this Court to find that Act 620 does not satisfy the rational-basis test. *See* Providers' Appl. at 32 n.22 ("Applicants may still assert this as an alternative ground for affirmance in the pending appeal."). Because the Fifth Circuit did not pass upon the issue and Providers did not press it there, this Court should disregard Providers' rational-basis claims. *U.S. v. Williams,* 504 U.S. 36, 41 (1992). To the extent that it considers the issue, however, this Court must find that Act 620 meets the rational-basis test.

Under that test, "[i]t is enough … that it *might be* thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488 (1955) (emphasis added). Louisiana women are

essentially dropped from Providers' clinics into Louisiana's hospital system due to abortion-related complications, many of them life-threatening. To overturn the legislative response under the rational-basis test, Providers must do more than marshal "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original); *F.C.C. v. Beach Comm., Inc.,* 508 U.S. 307, 315 (1993) ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Even if it were possible to "negate" that "*theoretical* connection" between Act 620's provisions and safety, Providers have neither made nor even attempted the required showing. As such, Providers' collection of courtroom fact-finding (Providers' Appl. at 31 & n.21) is simply beside the point.

Unlike strict-scrutiny, the availability of less-restrictive alternatives does not undermine measures because, with the rational-basis test, it is "irrelevant … that other alternatives might achieve approximately the same results." *Vance v. Bradley,* 440 U.S. 93, 103 n.20 (1979); *Dallas v. Stanglin,* 490 U.S. 19, 26-28 (1989); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316-17 (1976). As the Eighth Circuit recognized, a similar Missouri law "furthers important state health objectives" by "ensur[ing] both that a physician will have the authority to admit his patient into a hospital whose resources and facilities are familiar to him and that the patient will gain immediate access to secondary or tertiary care." *Women's Health*

Ctr. of West Cnty., 871 F.2d at 1381. Insofar as the rational-basis test does not require less-restrictive alternatives, Providers admit a safety benefit by arguing that Louisiana's pre-Act 620 regulatory regime provides sufficient safety. Providers' Appl. at 12 (*citing* La. Admin. Code tit. 48, pt. 1 §4423(B)(3)(c)). Further, federal Medicare regulations agree. *See* 42 C.F.R. §416.41(b) (mandating either a written transfer agreement or admitting privileges with a local hospital for certain Medicare facilities); 47 Fed. Reg. 34,082, 34,086 (1982) (mandate "ensure[s] that patients have immediate access to needed emergency or medical treatment in a hospital"). Perhaps most damning, though, is the abortion industry's recent advocacy for having doctors who "'[i]n the case of emergency' can 'admit patients to a nearby hospital (no more than 20 minutes away).'" *Abbott II*, 748 F.3d at 595 (*quoting* National Abortion Federation, Having an Abortion? Your Guide to Good Care (2000)). While the industry may have disavowed its recent guidance, that about face is not the same thing as negating the *theoretical connection* between admitting privileges and patient safety, *Clover Leaf Creamery*, 449 U.S. at 463-64, which is Providers' evidentiary burden.

c. The *Casey* undue-burden test does not entail weighing benefits versus burdens.

Providers argue that – even if Act 620 has *some* benefit to women – that benefit remains far less than the burden. Providers' Appl. at 32-34. While the phrase "undue burden" perhaps begs the question, linguistically, about which burdens are "due" and which are "undue," that inquiry is neither relevant here nor what this Court meant by adopting the phrase in *Casey*.

At the outset, the undue-burden test does not even apply to maternal-health regulations if those regulations are necessary under *Casey*. *See* Section II.B, *supra*; *see also Harris v. McRae,* 448 U.S. 297, 325-26 (1980) ("[i]t is not the mission of this Court or any other to decide whether the balance of competing interests … is wise social policy"); *Lee Optical*, 348 U.S. at 487 ("it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement"). Accordingly, the wisdom of Act 620 does not come up under the *Casey* analysis.

Second, as *Casey* explained, "an 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." *Casey,* 505 U.S. at 877. The question is whether "a substantial obstacle" exists, not whether that obstacle serves a worthy purpose. Perhaps "impermissible burden" would have been a more accurate shorthand, but the clear implication is that the mere phrase "undue" does not itself invite any speculation on how to balance which burdens are due or undue.

III. THE OTHER STAY CRITERIA TIP IN LOUISIANA'S FAVOR.

Although the unlikelihood of Providers' prevailing on the merits should be dispositive, Eagle Forum also addresses three other stay factors. None of these factors justify vacating the Fifth Circuit's stay.

A. Providers' harms are either not their own or largely financial.

To demonstrate their irreparable harm, Providers rely primarily on irreparable harm that their hypothetical future abortion patients will suffer, Providers' Appl. at 34-36, but also on abortion businesses that will close and then be unable to reopen. *Id.* at. 36. The former is not Providers' injury to assert, and the

latter is insufficient to justify a stay. Specifically, for stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the plaintiff] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[6]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* Thus, the inquiry into irreparable harm includes an inquiry into the plaintiff's standing to raise the claim for injunctive relief, as well as the requirement to *show* a sufficiently severe injury or threatened injury. Providers' showing on both prongs falls short of the level needed for a stay.

First, as indicated in Section II.A, *supra,* Providers lack third-party standing to assert the rights of their future patients. Under *Graddick,* therefore, the *Roe-Casey* rights of those women are not "interests that [Providers] properly represent[]." *Id.* Instead, Providers must assert their own injuries (*e.g.,* additional expense, loss of business) as the basis for their irreparable harm.

Second, with respect to the severity of the Providers' injury or threatened injury, Providers' business-related injuries are not compelling because an abortion practice is not a relationship-based business where one expects repeat business from the same customers, such that going temporarily out of business would allow (even

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6 Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

require) customers to form relationships with other providers. Indeed, it is a major tenet of Providers' theory of the case that Act 620-compliant abortion facilities will not sprout up in Providers' absence. If Providers are correct, they will have no trouble reestablishing their businesses should they ultimately prevail here.

B. The balance of equities tips toward Louisiana.

The third stay criterion is the balance of equities, which tips in Louisiana's favor because the merits tip in Louisiana's favor. Thus, the truism that governments have no interest in enforcing unconstitutional laws does not apply where the plaintiff is unlikely to prevail in establishing the challenged law's unconstitutionality. Here, assuming *arguendo* that Providers even have a claim on the merits, Providers' weak showing on the merits therefore weighs heavily against them.

Even if those other issues remained neutral here, Louisiana has sovereign interests in protecting the public health and conserving the public fisc with regard to the women patients dumped into Louisiana emergency rooms by the abortion industry. Further, Act 620 fulfills Louisiana's police-power duty to ensure the health and safety of Louisianans. Second, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd ("EMTALA"), requires Louisiana hospitals to treat these women, even if they are unable to pay for their care. In that way, Providers pass the downside costs of their abortion practices onto the Louisiana medical system, with which Louisiana has an obvious interest.[7] Insofar as the federal government

[7] EMTALA is an unfunded federal mandate (*i.e.,* the federal government has not provided states with funding to accomplish EMTALA's federal mandate).

recently relied on hospitals' EMTALA-imposed costs to cover uninsured patients as a basis to insert the federal government into healthcare, it would be unjustified to deny Louisiana the right to regulate an industry whose business model calls for dumping its complications into Louisiana's emergency rooms.

C. The public interest favors maintaining the stay.

The fourth stay criterion is the public interest. In litigation like this, where the parties dispute the lawfulness of government programs, this last criterion collapses into the merits, 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4, because there is a "greater public interest in having governmental agencies abide by [applicable] laws that govern their … operations." *Washington v. Reno,* 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court sides with Louisiana on the merits, the public interest will tilt decidedly toward Louisiana: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). Accordingly, for the reasons set out in Section II, *supra, amicus* Eagle Forum respectfully submits that this final criterion should favor Louisiana.

CONCLUSION

This Court should deny Providers' emergency application to vacate the Fifth Circuit's appellate stay pending the filing of a petition for a writ of *certiorari.*

Dated: March 2, 2016

Respectfully submitted,

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing application for leave to file and the accompanying opposition are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 7 and 28 pages (and 1,431 and 7,675 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: March 2, 2016

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 2nd day of March 2016, one true and correct copy of the foregoing application for leave to file and the accompanying opposition was served by U.S. Priority Mail on the following counsel:

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(In addition to the foregoing service by mail, the undersigned also certifies that on the same day, a PDF copy of the foregoing was served via electronic mail on the parties' counsel of record to the email addresses shown above.)

The undersigned further certifies that, on this 2nd day of March 2016, an original and ten true and correct copies of the foregoing application for leave to file and the accompanying opposition were served on the Court by hand delivery.

Executed March 2, 2016, at Washington, DC,

_____
Lawrence J. Joseph