

The Supreme Court Takes Up Abortion: What You Need to Know About *June Medical Services v. Gee*

By Rachel N. Morrison

Litigation Practice Group

About the Author:

Rachel Morrison serves as Litigation Counsel for Americans United for Life and is a member of the Federalist Society's Religious Liberties Practice Group Executive Committee. She filed an amicus brief on behalf of Americans United for Life in the case discussed in this article (see note 43).

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Other Views:

- Brief Amici Curiae of American College of Obstetricians and Gynecologists et al. in Support of Petitioners, *June Med. Servs. L.L.C. v. Gee*, No. 18-1323 (Vide 18-1460), (U.S. May 2019), https://supremecourt.gov/DocketPDF/18/18-1323/100434/20190520175434029_18-1323%20ACOG%20et%20al.%20cert.%20amicus%20brief.pdf.
- Brief Amici Curiae of Former Federal Judges and Department of Justice Officials in Support of Petitioners, *June Med. Servs. L.L.C. v. Gee*, No. 18-1323 (Vide 18-1460), (U.S. May 2019), https://supremecourt.gov/DocketPDF/18/18-1323/100379/20190520151804785_18-1323%20tsac%20FormerFederalOfficials.pdf.

The U.S. Supreme Court's October 2019 Term started off with a bang. In its first order following the long conference after the Justices' summer break, the Court agreed to hear cross petitions from a Louisiana abortion provider called June Medical Services and the state of Louisiana stemming from a challenge to Louisiana's admitting privileges law. The case, *June Medical Services v. Gee*, raises important issues concerning the future of abortion access and regulations in the United States, the correct application of *Whole Woman's Health v. Hellerstedt*, and perhaps even the continuing validity of *Roe v. Wade*.

I. THE LAW

The Louisiana law at issue is the Unsafe Abortion Protection Act (or Act 620).¹ The law requires physicians who perform abortions to have active admitting privileges at a hospital within 30 miles of the facilities where they perform abortions.² A physician has "active admitting privileges" if he or she "is a member in good standing of the medical staff" of a licensed hospital, "with the ability to admit a patient and to provide diagnostic and surgical services to such patient."³

The purpose of the law, as discussed throughout the state's briefing, is threefold. First, it creates uniformity in the law by bringing abortion providers under the same requirements that already applied to physicians providing similar types of services at other ambulatory surgical centers. Second, the law performs a credentialing function. Since hospitals perform more rigorous and intensive background checks than do abortion clinics in Louisiana, requiring a physician to have admitting privileges at a hospital ensures that the physician has the requisite skills and capacity to perform relevant procedures—in this case, abortions. Third, the law helps ensure that women who suffer complications from abortion procedures receive continuity of care by enabling the direct and efficient transfer of both the patient and her medical records to a local hospital.

II. THE LAWSUIT

On August 22, 2014—after Louisiana passed the law and prior to its effective date of September 14, 2014—June Medical Services, along with two other Louisiana abortion clinics and two Louisiana abortion doctors,⁴ filed a lawsuit in the Middle District of Louisiana requesting that the law be enjoined because it allegedly placed an undue burden on their patients' access to

¹ La. Sess. Law Serv. Act 620 (H.B. 388), § 1(A)(2)(a). Act 620 amended LA. REV. STAT. § 40:1299.35.2, recodified at LA. REV. STAT. § 40:1061.10. The law was sponsored by Representative Katrina Jackson, a Democrat.

² Act 620, § 1(A)(2)(a).

³ *Id.*

⁴ During the course of the litigation, the two other abortion clinics shut down (for reasons unrelated to Act 620) and dropped out of the case. For ease of reference, I refer to all plaintiffs as "June Medical."

abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court established the undue burden standard to determine whether an abortion regulation violates the Constitution.⁵ “[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁶

The district court entered a temporary restraining order, keeping Louisiana’s law from going into effect during preliminary injunction proceedings.⁷ After a bench trial, the court granted a preliminary injunction, holding that the admitting privileges requirement was facially unconstitutional and enjoining enforcement of the law.⁸ Louisiana’s request to the district court to stay the injunction pending appeal was denied, but its request to the Fifth Circuit Court of Appeals for an emergency stay pending appeal was granted.⁹ The Fifth Circuit explained, “Louisiana is likely to prevail in its argument that [June Medical] failed to establish an undue burden on women seeking abortions or that the Act creates a substantial obstacle in the path of a large fraction of women seeking an abortion.”¹⁰ The court also noted that a pending Supreme Court case—*Whole Woman’s Health v. Hellerstedt*¹¹—involved a nearly identical admitting privileges law in Texas.¹² The following day, June Medical filed an application in the Supreme Court to vacate the Fifth Circuit’s stay.¹³ A week later, the Supreme Court granted June Medical’s application and vacated the Fifth Circuit’s stay.¹⁴

III. THE SUPREME COURT’S INTERVENING *HELLERSTEDT* DECISION

At the end of June 2016, the Supreme Court issued its decision in *Hellerstedt*. By a 5-3 vote (Justice Antonin Scalia passed away shortly before the opinion came down), the Court invalidated two provisions of Texas’ H.B. 2, which required abortion doctors to have admitting privileges at a local hospital and abortion facilities to follow certain surgical-center standards.¹⁵

These provisions were unconstitutional, the Court said, because they created an undue burden on abortion access.¹⁶

Notably, the *Hellerstedt* Court modified *Casey*’s undue burden standard by requiring that “courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”¹⁷ After weighing the benefits and burdens of Texas’ law, the Court ultimately invalidated the two provisions because “[e]ach place[d] a substantial obstacle in the path of women seeking a previability abortion.”¹⁸ Citing the record 22 times, the majority opinion explained that the district court “applied the correct legal standard” when it “considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony.”¹⁹

After *Hellerstedt* came down, the Fifth Circuit remanded the case back to the district court to “engage in additional fact finding required by” *Hellerstedt*.²⁰ On April 25, 2017, the district court entered final judgment and permanently enjoined the law.²¹ After weighing the evidence, the district court “found that Act 620 confers only minimal” health benefits, but “substantial burdens,” and ruled that, on its face, “Act 620 places an unconstitutional undue burden on women seeking abortion in Louisiana.”²²

IV. FIFTH CIRCUIT DECISION

On appeal, the Fifth Circuit reversed and ruled 2-1 in favor of Louisiana’s law, explaining that there were “stark differences” between the facts and evidence in the Texas case and the facts and evidence in Louisiana’s case.²³ Unlike in Texas, there was no evidence that any abortion clinic would close in Louisiana as the result of the law.²⁴ After a detailed examination of the factual record, the Fifth Circuit concluded that Act 620 would—at worst—cause up to one hour of delay for abortion procedures at one of Louisiana’s three clinics.²⁵

June Medical appealed to the en banc Fifth Circuit, but the judges voted 9-6 to deny rehearing the case en banc.²⁶ The court also denied a stay pending appeal.²⁷

5 505 U.S. 833 (1992).

6 *Id.* at 877.

7 *June Med. Servs. LLC v. Caldwell*, No. 3:14-CV-00525-JWD-RLB, 2014 WL 4296679 (M.D. La. Aug. 31, 2014).

8 *June Med. Servs. LLC v. Kliebert*, 158 F. Supp. 3d 473 (M.D. La. 2016).

9 *June Med. Servs. L.L.C. v. Gee*, 814 F.3d 319 (5th Cir. 2016).

10 *Id.* at 328.

11 136 S. Ct. 2292 (2016).

12 See *June Med. Servs.*, 814 F.3d at 328 n.16 (noting that the interests at issue in *Hellerstedt* were not implicated in the case).

13 Application to Vacate Stay, *June Med. Servs., L.L.C. v. Gee*, No. 15A880 (U.S. Feb. 25, 2016), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15a880.htm>.

14 Order Granting Application, *June Med. Servs., L.L.C. v. Gee*, No. 15A880 (U.S. Mar. 4, 2016), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15a880.htm>.

15 136 S. Ct. at 2300.

16 *Id.*

17 *Id.* at 2309; see also *id.* at 2310 (stating that the district court applied the correct legal standard when it “weighed the asserted benefits against the burdens”).

18 *Id.* at 2300.

19 *Id.* at 2310.

20 *June Med. Servs. L.L.C. v. Gee*, No. 16-30116 (5th Cir. Aug. 24, 2016) (per curiam).

21 *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017).

22 *Id.* at 86.

23 *June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787, 791 (5th Cir. 2018).

24 *Id.*

25 *Id.* at 813.

26 *June Med. Servs. L.L.C. v. Gee*, 913 F.3d 573 (5th Cir. 2019) (per curiam).

27 Order, *June Med. Servs., L.L.C. v. Gee*, No.17-30397 (5th Cir. Jan. 25, 2019), <https://www.supremecourt.gov/DocketPDF/18/1>

V. EMERGENCY STAY PENDING APPEAL

The same day the Fifth Circuit denied the stay request—January 25, 2019—June Medical made an emergency stay request to the U.S. Supreme Court, asking the Court to stop Louisiana’s law that was set to go into effect on February 4 from being enforced while a petition for certiorari was submitted to the Court.²⁸

In order for the Supreme Court to put Louisiana’s law on hold while the case was being appealed, there had to be: (1) a “reasonable probability” that the Court (i.e., four Justices) would agree to take the case; (2) a “fair prospect” that a majority of the Justices would ultimately find the law unconstitutional; and (3) a “likelihood of irreparable harm” that would result if the stay was denied.²⁹

Louisiana opposed June Medical’s stay request, arguing that the law should not be put on hold because this is not the type of case the Court will normally agree to take since June Medical did not identify any conflict in the circuit courts and its disagreement with the Fifth Circuit panel is mainly over how best to interpret the facts.³⁰

The request was made to Justice Samuel Alito as the Justice in charge of emergency requests from the Fifth Circuit, and he referred it to the full Court. On February 1, Justice Alito ordered an “administrative stay,” or a temporary hold, through Thursday, February 7 on Louisiana’s law to give the Justices more time to review the arguments made by June Medical and Louisiana.³¹ The order specified that this temporary hold “does not reflect any view regarding the merits” of the case.³²

Late Thursday night, just hours before Louisiana’s admitting privileges law would go into effect, the Court agreed 5–4 to grant June Medical’s emergency stay request, putting Louisiana’s law on hold while the case is appealed.³³

No rationale was given for the Court’s decision, which is normal for emergency requests. And despite dissenting in *Hellerstedt*, Chief Justice John Roberts joined the Court’s more liberal justices—Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—in (presumably) agreeing

that there was a “reasonable probability” the Court would agree to take the case and ultimately find the law unconstitutional.

Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh would have denied the abortion providers’ request and allowed Louisiana’s law to go into effect. Justice Kavanaugh wrote a dissent, pointing out the many “factual uncertainties” involved in the case and saying there was no reason at that time for the Court to stay the law because if abortion doctors in Louisiana really could not obtain admitting privileges, they could file as-applied challenges at that point.³⁴

According to the order, the stay on Louisiana’s law would automatically be lifted if the case was not timely appealed, if the Court decided not to take the case after all, or if the Court issued a final judgment.³⁵

VI. CERT PETITION AND CONDITIONAL CROSS-PETITION

In April 2019, June Medical filed a petition for certiorari.³⁶ The question presented was: “Whether the Fifth Circuit’s decision upholding Louisiana’s law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court’s binding precedent in [*Hellerstedt*].”³⁷

June Medical argued that the decision below conflicts with the Supreme Court’s decision in *Hellerstedt*, which struck down a nearly identical admitting privileges law as unconstitutional.³⁸ They claimed that Louisiana’s law lacks health and safety benefits and will burden women seeking abortions in Louisiana. Therefore, under *Hellerstedt*’s requirement to “consider the burdens a law imposes on abortion access together with the benefits those laws confer,” the “non-existent benefits are outweighed by its extensive burdens.”³⁹ June Medical even went so far as to tell the Court that summary reversal is appropriate and that the Fifth Circuit disregarded binding precedent.⁴⁰

Louisiana opposed June Medical’s petition, arguing that the Fifth Circuit made no legal error and emphasizing the multiple complex issues of fact and law, which made the case procedurally unsuited to further review.⁴¹ If the Court did grant review, Louisiana said it would only be appropriate to clarify or limit *Hellerstedt*.⁴²

[8A774/81802/20190125210126462_4%20Order%20Opposing%20Motion%20for%20Stay.pdf](https://www.supremecourt.gov/DocketPDF/18/18A774/81802/20190125210126462_4%20Order%20Opposing%20Motion%20for%20Stay.pdf).

28 Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, *June Med. Servs. L.L.C. v Gee*, No. 18A774 (U.S. Jan. 25, 2019), https://www.supremecourt.gov/DocketPDF/18/18A774/81802/20190125210017962_Motion%20to%20Stay%20Mandate%20SCOTUS%20Final.pdf.
29 *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).
30 Objection to Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, *June Med. Servs. L.L.C. v Gee*, No. 18A774 (U.S. Jan. 31, 2019), https://www.supremecourt.gov/DocketPDF/18/18A774/86542/20190131142745421_Opp%20to%20SCT%20MTS.pdf.
31 On Application for Stay, *June Med. Servs. L.L.C. v Gee*, No. 18A774 (U.S. Feb. 1, 2019).
32 *Id.*
33 On Application for Stay, *June Med. Servs., L.L.C. v Gee*, No. 18A774 (U.S. Feb. 7, 2019), https://www.supremecourt.gov/opinions/18pdf/18a774_3ebh.pdf.

34 *Id.* at 4 (Kavanaugh, J., dissenting).
35 *Id.* at 1 (majority opinion).
36 Petition for Writ of Certiorari, *June Med. Servs. L.L.C. v Gee*, No. 18-1323 (U.S. Apr. 17, 2019), https://www.supremecourt.gov/DocketPDF/18/18-1323/96862/20190417170452829_2019-04-16%20Petition%20for%20a%20Writ%20of%20Certiorari.pdf.
37 *Id.* at i.
38 *Id.*
39 *Id.* at 31 (first quotation quoting *Hellerstedt*, 136 S. Ct. at 2309).
40 *Id.* at 32–35.
41 Brief in Opposition at 21–35, *June Med. Servs. L.L.C.*, No. 18-1323, (U.S. July 19, 2019), https://www.supremecourt.gov/DocketPDF/18/18-1323/108674/20190719131435281_18-1323%20BIO--PDF.pdf.
42 *Id.* at 36–39.

In addition to opposing June Medical's petition, Louisiana filed a conditional cross-petition, arguing that if the Court agrees to take the case, it should also consider whether abortion providers can be assumed to have third-party standing to challenge health and safety regulations, such as Louisiana's admitting privileges law.⁴³

Ordinarily, parties must bring a lawsuit on their own behalf, but sometimes third parties can bring a lawsuit on behalf of another. Usually, the Court's third-party standing doctrine requires: (1) a "close" relationship between the third party and the person who possess the right, and (2) a "hinderance" to the possessor's ability to protect his own interests.⁴⁴ But this changed in the abortion context after the Supreme Court's decision in *Singleton v. Wulff*, in which the Court stated that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."⁴⁵ Since then and based on this generality, many lower courts and even the Supreme Court have generally assumed that abortion providers have third-party standing on behalf of women seeking abortions without any meaningful, particularized analysis (as is required in other contexts) of whether there is a close relationship between abortion providers and their patients and a hinderance to the patients' ability to sue on their own behalf.⁴⁶

Louisiana also raised the issue in its conditional cross-petition of whether objections to prudential standing (including

third-party standing) are waivable or not, pointing to a circuit split.⁴⁷

June Medical opposed the cross-petition, arguing that Louisiana had waived its challenge to third-party standing, that third-party standing is subject to waiver, and that there is no underlying circuit split for the court to resolve.⁴⁸ They argued that settled precedent establishes that abortion providers have third-party standing and there is no reason for the Court to revisit the issue.⁴⁹

VII. COURT GRANTS CERT ON BOTH PETITIONS

On October 4, 2019—the first day orders were issued from the Justices' long conference after the summer break—the Court granted both petitions for certiorari and consolidated the cases for briefing and one hour of oral argument.⁵⁰ The questions presented are:

1. Whether abortion providers can be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf;
2. Whether objections to prudential standing are waivable; and
3. Whether the U.S. Court of Appeals for the 5th Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court's binding precedent in *Whole Woman's Health v. Hellerstedt* (2016).

Oral argument will likely be set for late winter or early spring 2020.

VIII. ISN'T LOUISIANA'S LAW THE SAME AS TEXAS' LAW IN *HELLERSTEDT*?

The first thing usually mentioned about this case is that Louisiana's law is materially similar or identical to the Texas law that the Supreme Court found unconstitutional in 2016 in *Whole Woman's Health v. Hellerstedt*.⁵¹ But the Court's ruling in *Hellerstedt* does not mean that all admitting privileges laws are per se unconstitutional or that there is sufficient evidence in the record that Louisiana's law will lead to the closure of a large number of abortion clinics in Louisiana. Determining whether an abortion regulation is unconstitutional under the undue burden test is a fact-intensive inquiry that requires state-specific evidence that the law causes a substantial obstacle to abortion access. Therefore,

43 Conditional Cross-Petition, *Gee v. June Med. Servs. L.L.C.*, No. 18-1460 (Vide 18-1323), (U.S. May 20, 2019), https://www.supremecourt.gov/DocketPDF/18/18-1460/100385/20190520152745385_June%20I%20CCP.pdf.

Full disclosure: I filed an amicus brief on behalf of Americans United for Life (AUL), where I serve as Litigation Counsel, arguing that abortion providers should not be assumed to have third-party standing to bring legal challenges against health and safety regulations on behalf of their patients. See Brief Amicus Curiae of Americans United for Life in Support of Cross Petitioner, *Gee v. June Med. Servs. L.L.C.*, No. 18-1460 (Vide 18-1323), (U.S. June 24, 2019), <https://aul.org/wp-content/uploads/2019/06/18-1460-Amicus-Brief-of-Americans-United-for-Life.pdf>. AUL's brief explains that June Medical brought the current legal challenge against a backdrop of serious health and safety violations by Louisiana abortion clinics and professional disciplinary actions against and substandard medical care by Louisiana abortion doctors. The violations and disciplinary actions by Louisiana abortion providers documented in the brief demonstrate that June Medical does not have a close relationship with their patients and should not have third-party standing:

There is an inherent conflict of interest between abortion providers and their patients when it comes to state health and safety regulations. It is impossible for abortion clinics and doctors to share or represent the interests of their patients when they seek to *eliminate* the very regulations designed to protect their patients' health and safety.

Id. at 3–4.

44 *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

45 428 U.S. 106, 118 (1976).

46 *Cf. Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting) ("[A] plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases.").

47 Conditional Cross-Petition at i.

48 Opposition to Conditional Cross-Petition for a Writ of Certiorari, *Gee v. June Med. Servs. L.L.C.*, No. 18-1460 (Vide 18-1323), (U.S. Aug. 23, 2019), https://www.supremecourt.gov/DocketPDF/18/18-1460/113451/20190823150745557_18-1460%20Plaintiffs%20Opposition%20to%20Conditional%20Cross%20Pet.pdf.

49 *Id.*

50 Order List: 588 U.S. (U.S. Oct. 4, 2019), https://www.supremecourt.gov/orders/courtorders/100419zr_onkq.pdf.

51 136 S. Ct. 2292.

the Justices will look at all of the specific factual nuances in the record to determine whether this case is *Hellerstedt* 2.0 or if there are “stark differences” between Texas and Louisiana, as the Fifth Circuit held.

IX. WHO HAS STANDING?

Regarding the first question presented, the assumption of third-party standing for abortion providers has been called into question by academics and judges alike, including most notably Justice Thomas.⁵² In Thomas’ *Hellerstedt* dissent, he stated:

The Court’s third-party standing jurisprudence is no model of clarity. Driving this doctrinal confusion, the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake. And this case reveals a deeper flaw in straying from our normal rules: when the wrong party litigates a case, we end up resolving disputes that make for bad law.⁵³

Given comments like this, Justice Thomas may jump at the opportunity to provide clarity to the Court’s third-party standing doctrine in the abortion context.

If the Court clarifies its doctrine on standing and requires that there be a close relationship between abortion providers and their patients and a hinderance to their patients’ ability to sue on their own behalf in order for abortion providers to legally challenge an abortion regulation, it will presumably kick the case back down to the district court to decide in the first instance whether June Medical has standing to challenge Louisiana’s law. The case could then be resolved by the Supreme Court on a procedural issue clarifying the standard for third-party standing, without an actual determination on the merits of the constitutionality of Louisiana’s law, or even whether June Medical does or does not have standing in this particular case.

If, however, the Court decides that abortion providers can be presumed to have third-party standing to challenge abortion regulations on behalf of their patients or that objections to prudential standing are waivable, such that it is too late for Louisiana to raise a challenge to June Medical’s standing, it would presumably reach the merits on the third question presented—whether the Fifth Circuit’s decision to uphold Louisiana’s admitting privileges law conflicts with *Hellerstedt*.

X. WHAT IS THE CORRECT INTERPRETATION OF *HELLERSTEDT*?

The third question presented in the case would allow the Court to clarify the correct interpretation and application of *Hellerstedt*. Since the Court’s decision in 2016, lower courts and parties have disagreed over what *Hellerstedt* requires when it says that a court must consider “the burdens a law imposes on abortion access together with the benefits those laws confer.”⁵⁴

⁵² See, e.g., Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 NOTRE DAME L. REV. 1369 (2009) (arguing that abortion providers generally fail to meet the prudential requirements for asserting third-party standing on behalf of their patients).

⁵³ 136 S. Ct. at 2322 (internal citation omitted).

⁵⁴ *Id.* at 2309.

Pro-abortion groups urge a broad reading, claiming that if there is no (or a de minimis) benefit of the law, *any* demonstrated burden—no matter how small—renders the law unconstitutional. Several pro-abortion groups have also brought a novel challenge under *Hellerstedt*, arguing that a state’s entire abortion regulatory scheme, or a group of a state’s abortion laws, cumulatively create an undue burden.⁵⁵ This new claim is referred to as a “cumulative burden claim” or “cumulative effects challenge.”⁵⁶

On the other hand, states defending their abortion regulations urge a more narrow reading of *Hellerstedt*, pointing out that the Court explicitly relied on *Casey* when it invalidated Texas’ law⁵⁷ and that *Casey*’s standard “asks courts to consider whether any burden imposed on abortion access is ‘undue.’”⁵⁸ Thus, a regulation on abortion cannot be unconstitutional unless the law places a substantial obstacle in the path of a woman seeking an abortion *and* its “numerous burdens substantially outweigh[] its benefits.”⁵⁹

Hellerstedt has created confusion for state legislators who are unsure what type of abortion-related health and safety laws (if any) they can pass. If the Court gets to the merits or at least opines on what the standard of review is for determining the constitutionality of abortion regulations, *Hellerstedt*’s requirements should be made clearer to parties, judges, and state legislators.

Four of the five Justices in the *Hellerstedt* majority are still on the Court: Justices Ginsburg, Breyer (the author), Sotomayor, and Kagan. The three dissenting Justices remain as well: Chief Justice Roberts and Justices Thomas and Alito. There are two new Justices: Justices Gorsuch replaced Justice Scalia, who passed away shortly before the *Hellerstedt* opinion was issued, and Justice Kavanaugh replaced Justice Kennedy, who joined the majority. This case presents the first opportunity for both Justices Gorsuch and Kavanaugh to rule on the merits of an abortion decision addressing the application of *Hellerstedt*, *Casey*, and *Roe*.

None of the four Justices in the *Hellerstedt* majority will likely disagree with that opinion, especially considering they voted

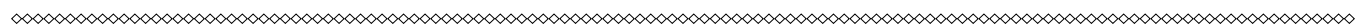
⁵⁵ See, e.g., Complaint, *Planned Parenthood of Ariz., Inc. v. Brnovich*, No. 19-207 (D. Az. Apr. 11, 2019); Complaint, *Whole Women’s Health Alliance v. Hill*, No. 18-1904 (S.D. Ind. June 21, 2018); Amended Complaint, *June Med. Servs. v. Gee*, No. 17-404 (M.D. La. June 11, 2018); Amended Complaint, *Jackson Women’s Health Org. v. Currier*, No. 18-171 (S.D. Miss. Apr. 9, 2018); Complaint, *Whole Women’s Health Alliance v. Paxton*, No. 18-500 (W.D. Tex. June 14, 2018); Complaint, *Falls Church Medical Center v. Oliver*, No. 18-4238 (E.D. Va. June 20, 2018).

⁵⁶ So far, one district court judge has thrown this claim out and a Fifth Circuit panel has held that *Hellerstedt* “is not precedent” for this novel claim. See Order, *Falls Church Medical Center v. Oliver* No. 18-4238 (E.D. Va. Sept. 26, 2018) (dismissing cumulative burden claim); Order, *In re: Rebekah Gee*, No. 1930353, Slip. Op. at *30 (5th Cir. Oct. 18, 2019) (stating *Hellerstedt* does not support “cumulative-effects challenges”).

⁵⁷ See *Hellerstedt*, 136 S. Ct. at 2300 (“We must here decide whether two provisions of Texas’ House Bill 2 violate the Federal Constitution as interpreted in *Casey*.”); *id.* at 2309 (“We begin with the standard, as described in *Casey*.”); *id.* at 2309 (“The rule announced in *Casey*, however, requires . . .”).

⁵⁸ *Id.* at 2310.

⁵⁹ *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017).



to grant June Medical's emergency stay, but the new opinion could provide more clarity as to what *Hellerstedt* requires. It is, however, an open question whether the four Justices will be able to obtain a fifth vote. Interestingly, Chief Justice Roberts voted to grant the emergency stay of Louisiana's law pending appeal to the Court. It is unclear whether he did this because he has reconsidered his earlier dissent in *Hellerstedt* or for some other reason.

XI. CONCLUSION

Court-watchers are paying attention. For many, how the Court chooses to resolve this case, including its interpretation and application of *Hellerstedt*, will indicate the direction the Court is moving on the abortion issue.

