

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JUNE MEDICAL SERVICES L.L.C.,)
ET AL.,)
 Petitioners,)
 v.) No. 18-1323
STEPHEN RUSSO, INTERIM SECRETARY,)
LOUISIANA DEPARTMENT OF HEALTH AND)
HOSPITALS,)
 Respondents.)

STEPHEN RUSSO, INTERIM SECRETARY,)
LOUISIANA DEPARTMENT OF HEALTH AND)
HOSPITALS,)
 Cross-Petitioner,)
 v.) No. 18-1460
JUNE MEDICAL SERVICES L.L.C.,)
ET AL.,)
 Respondents.)

Pages: 1 through 69
Place: Washington, D.C.
Date: March 4, 2020

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21 Washington, D.C.

22 Wednesday, March 4, 2020

23 The above-entitled matter came on for

24 oral argument before the Supreme Court of the

25 United States at 10:05 a.m.

1 APPEARANCES:
2
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11 for the United States, as amicus curiae,
12 supporting Stephen Russo, Interim Secretary,
13 Louisiana Department of Health and Hospitals.
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 18-1323, June Medical Services versus Russo, and the cross-petition, 18-1460, Russo versus June Medical Services.

Ms. Rikelman.

ORAL ARGUMENT OF JULIE RIKELMAN
ON BEHALF OF JUNE MEDICAL SERVICES L.L.C., ET AL.

MS. RIKELMAN: Mr. Chief Justice, and may it please the Court:

This case is about respect for the Court's precedent. Just four years ago, the Court held in Whole Woman's Health that the Texas admitting privileges law imposed an undue burden on women seeking abortions.

The Louisiana law at issue here, Act 620, is identical to the Texas law and was expressly modeled on it. After a trial, the district court ruled Act 620 unconstitutional, finding no material differences between this case and Whole Woman's Health. On burdens, it found that Act 620 would leave Louisiana with just one clinic and one doctor providing

1 abortions. At the same time, it found that Act
2 620 would do nothing for women's health.

3 In reversing the district court's
4 decision, the Fifth Circuit committed two
5 fundamental errors. First, it usurped the role
6 of the district court and disregarded nearly all
7 of its factual findings. Second, the Fifth
8 Circuit accepted legal arguments that this Court
9 rejected four years ago.

10 Nothing, however, has changed that
11 would justify such a legal about-face. In fact,
12 even more medical organizations have joined the
13 AMA and ACOG to say that admitting privileges
14 impose barriers to abortion with no benefit to
15 patients and that this impact is not state
16 dependent.

17 Finally, the state's eleventh-hour
18 objection to third-party standing runs up
19 against still more binding precedent. The Court
20 squarely held in Craig versus Boren that such
21 objections are waiveable, and the state
22 deliberately and strategically waived the issue
23 in the district court. And even if the state
24 could get past waiver, denying standing here
25 would contradict decades of this Court's

1 precedent in numerous areas of the law.

2 In short, Petitioners have third-party
3 standing, especially because Act 620 restricts
4 abortion by regulating them, rather than their
5 patients.

6 JUSTICE GINSBURG: Would you have done
7 anything different if it had been -- if the
8 third-party standing have been timely raised?

9 MS. RIKELMAN: Your Honor, we
10 certainly could have submitted additional
11 evidence in the court, but we believe that the
12 evidence that is already there is sufficient to
13 find third-party standing.

14 This Court has squarely found
15 third-party standing in at least four abortion
16 cases that are on point, as well as a number of
17 other cases such as Meyer, Craig, Carey, and the
18 Court's cases have been consistent in saying
19 that a plaintiff who is directly regulated by a
20 law has third-party standing.

21 JUSTICE ALITO: Would you agree with
22 the general proposition that a party should not
23 be able to sue ostensibly to protect the rights
24 of other people, if there is a real conflict of
25 interest between the party who is suing and

1 those whose rights the party claims to be
2 attempting to defend?

3 MS. RIKELMAN: No, Your Honor, not if
4 that party is directly regulated by the law in
5 question. And, in fact, this Court has allowed
6 third-party standing in cases where the state
7 argued that the third parties were protected by
8 the law and in a sense protected from the
9 plaintiffs.

10 JUSTICE ALITO: Really? That's
11 amazing. You think that if the plaintiff
12 actually has interests that are directly
13 contrary to those of the -- those individuals on
14 whose behalf the plaintiff is claiming to sue,
15 nevertheless that plaintiff can have standing?

16 MS. RIKELMAN: If the plaintiff is
17 directly regulated by the law. This Court has
18 allowed an attorney to bring third-party claims
19 against a statute that capped attorneys' fees in
20 favor of clients.

21 JUSTICE ALITO: Well, that's amazing.
22 Let's -- I mean -- I -- I -- suppose -- I know
23 you think that the admitting privileges
24 requirement serves no safety purpose, but
25 suppose that the regulation that was being

1 challenged was one that a lot of people might
2 think really did serve a safety purpose.

3 Let's say we're in a state where
4 physicians' assistants can perform abortions,
5 and a -- an abortion clinic wants to challenge
6 the training requirements for physicians'
7 assistants. It just thinks those are too
8 onerous and there's no justification for them.

9 Now, if they're wrong about that, it
10 implicates the interests of the women who may
11 want to get an abortion, but you would say the
12 clinic nevertheless can sue on behalf of those
13 women?

14 MS. RIKELMAN: This Court has squarely
15 held in many cases that a plaintiff directly
16 regulated by the law can sue, and those cases
17 make sense for at least two reasons, Your Honor.

18 First, because a plaintiff should not
19 be subject to severe penalties under an
20 unconstitutional rule. And, second, if the
21 plaintiff is the one directly regulated, then
22 they're -- it makes sense that they are the
23 appropriate plaintiff.

24 JUSTICE GINSBURG: And that --

25 MS. RIKELMAN: And that's clearly

1 true --

2 JUSTICE GINSBURG: That sounds -- that
3 sounds like a direct standing, not third-party
4 standing. But in this case, is there anything
5 like the conflict that Justice Alito had
6 mentioned? Is there a conflict?

7 MS. RIKELMAN: No, Your Honor, there
8 is not even a plausible conflict in this case
9 because this Court already held that admitting
10 privileges served no medical benefit, and the
11 district court here, after a trial, specifically
12 found that this law would serve no benefit and,
13 in fact, would harm the health of women in
14 Louisiana.

15 JUSTICE ALITO: But, you know, your
16 argument is using the merits to defeat -- to --
17 to support standing. There's a serious problem
18 with that.

19 MS. RIKELMAN: No, Your Honor. I
20 believe it's the state that's collapsing
21 standing and merits. And, again, this Court has
22 allowed third-party standing in cases where one
23 could argue that the state law in question was
24 protecting third parties from the plaintiffs.

25 In addition to Triplett, that was the

1 issue in Craig versus Boren. The law there was
2 a state law in Oklahoma, and the state claimed
3 that it was designed to protect young men from
4 buying beer in order to make sure that they were
5 safe and didn't get into traffic accidents.
6 That --

7 JUSTICE SOTOMAYOR: Counsel, is this
8 -- I -- I'm just wondering, are these doctors in
9 any different position than potential
10 plaintiffs, women, who feel burdened by this
11 law?

12 MS. RIKELMAN: No, Your Honor. And,
13 in fact, the state has not pointed to a single
14 thing that would have been different if one
15 woman had been joined in this lawsuit.

16 To the contrary, the issues that the
17 state says are the key issues in this case,
18 whether this law serves health and safety
19 benefits and how difficult it is for physicians
20 to obtain privileges, are issues that the
21 physicians are particularly well suited to
22 litigate.

23 And, again, this is a law --

24 JUSTICE SOTOMAYOR: So the point is
25 you have standing on behalf of those women who

1 feel burdened?

2 MS. RIKELMAN: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: To the extent that
4 other women may not have brought a suit, that's
5 irrelevant to the fact that there are some,
6 those burdened, who could have and would have,
7 if situations had permitted them to?

8 MS. RIKELMAN: That's absolutely
9 right, Your Honor.

10 JUSTICE ALITO: Well, then why can't
11 -- why shouldn't they be the ones to bring suit?

12 MS. RIKELMAN: Your Honor, this is a
13 law that restricts abortion by regulating the
14 physicians, rather than their patients. And so
15 it's appropriate for them to be the plaintiffs
16 here.

17 Again, the --

18 JUSTICE ALITO: Well, but --

19 MS. RIKELMAN: -- state has pointed to
20 --

21 JUSTICE ALITO: -- the -- the
22 constitutional right at issue is not a
23 constitutional right of abortion clinics, is it?
24 It's the right of women.

25 MS. RIKELMAN: That's correct, Your

1 Honor, but in order for women to access their
2 right to abortion, they need to be able to
3 access those services.

4 JUSTICE ALITO: Do -- do you think a
5 party can have third-party -- there can be
6 third-party standing if there is no hindrance
7 whatsoever to the bringing of suit by the people
8 whose rights are at stake?

9 MS. RIKELMAN: This Court has allowed
10 third-party standing in cases where the law
11 directly regulates the plaintiff without a
12 showing of hindrance. For instance, in Craig
13 versus Boren, there was clearly no hindrance.

14 But I would also say that the Court
15 doesn't need to reach these issues here because
16 the state strategically and deliberately waived
17 third-party standing.

18 JUSTICE ALITO: Well, I think that's
19 highly debatable that they waived it. They
20 certainly didn't raise it in the district court,
21 but whether they -- they affirmatively waived it
22 is quite debatable.

23 MS. RIKELMAN: Your Honor at JA 45,
24 the state explicitly conceded third-party
25 standing and urged the district court to reach

1 the undue burden claim, saying that it had a
2 keen interest in removing any cloud upon the
3 validity of its law, that this case was the
4 proper vehicle for doing so.

5 JUSTICE ALITO: It's a -- it's a
6 highly debatable interpretation of that passage,
7 which I've read numerous times.

8 What the state was saying was that the
9 -- while the temp -- if a temporary restraining
10 order was issued, the lawsuit should continue to
11 go forward. And they said there wouldn't be an
12 impediment to the lawsuit going forward, because
13 the doctors would have standing.

14 And what I think they may have been
15 saying in that instance is that they would have
16 standing under the law that was applicable at
17 that time. We -- and we could debate what was
18 actually said, but I think it's quite a stretch
19 of the record for you to say there was an
20 affirmative waiver.

21 MS. RIKELMAN: Your Honor, at JA 45
22 there was a deliberate waiver. And the -- and
23 the state did it strategically because it was
24 attempting to take advantage of favorable Fifth
25 Circuit precedent at the time because the Fifth

1 Circuit had just upheld the Texas admitting
2 privileges law.

3 Again, the state specifically urged
4 the district court to decide the undue burden
5 claim, saying that this case was the proper --
6 proper vehicle for resolving the constitutional
7 issues and that any delay wouldn't serve
8 judicial efficiency.

9 JUSTICE GINSBURG: It wasn't raised in
10 -- in the district court or in the court of
11 appeals. It was -- it cropped up in a -- wasn't
12 it a cross-petition for cert?

13 MS. RIKELMAN: That's correct, Your
14 Honor.

15 JUSTICE GINSBURG: And might you have,
16 if you had a timely notice, just as insurance,
17 joined a patient or two?

18 MS. RIKELMAN: Yes, Your Honor. And,
19 in fact, it would be profoundly unfair to allow
20 the state to raise the objection for the first
21 time five years into this litigation after it
22 urged the district court to decide the undue
23 burden claim and then pursued the undue burden
24 claim through multiple rounds of appeals.

25 It didn't even raise the issue when

1 this case came before the Court in 2016 on the
2 stay. The first time that it raised an
3 objection was when it filed its cross-petition
4 for cert.

5 And, again, at JA 45, it deliberately
6 and strategically waived this issue.

7 JUSTICE BREYER: How many abortion
8 cases has -- has the Court either expressly or
9 silently allowed the doctors to sue on behalf of
10 the women? I -- I counted eight, but maybe
11 that's overstating it.

12 How many abortion cases in this Court?

13 MS. RIKELMAN: At least eight, Your
14 Honor. And I believe at least four of them
15 squarely allowed standing in precisely these
16 circumstances.

17 JUSTICE BREYER: So if we didn't in
18 this case, it would require either directly or
19 indirectly overruling eight cases of this Court?

20 MS. RIKELMAN: That's correct. And,
21 in fact, in Danforth and Akron the same type of
22 law was at issue. It was a law that the state
23 claimed was designed to protect the health and
24 safety of women but the Court allowed the
25 physicians to bring the claim and to show that,

1 in fact, the law didn't further health and
2 safety.

3 JUSTICE ALITO: In how many of those
4 cases did the Court discuss the issue of
5 conflict of interest?

6 MS. RIKELMAN: The Court in Danforth
7 specifically said that the plaintiffs had
8 standing. It wasn't discussed in terms of the
9 words conflict, Your Honor, but, again, the same
10 types of arguments were in front of the Court --

11 JUSTICE ALITO: Was it --

12 MS. RIKELMAN: -- because the state --

13 JUSTICE ALITO: Was it a footnote in
14 Danforth?

15 MS. RIKELMAN: I don't believe so,
16 Your Honor. I believe it was a foot -- footnote
17 in Akron but in Danforth it was --

18 JUSTICE ALITO: Yeah.

19 JUSTICE GINSBURG: You made a point
20 about Craig versus Boren, that the ostensible
21 purpose of the law was to save the vulnerable
22 young men from the evils of 3.2 beer?

23 MS. RIKELMAN: That's correct, Your
24 Honor, and the Court allowed the saloon keeper
25 to bring the third-party standing claim. Again,

1 in Triplet the Court allowed an attorney to
2 challenge a law designed to cap attorneys' fees.
3 And in Carey the Court allowed a mail order
4 contraceptive company to challenge a law that
5 was designed to limit the prescription of
6 contraceptives to pharmacists, again, claiming
7 that that was about protecting the health and
8 safety of people.

9 So the Court has allowed third-party
10 standing in many cases that are squarely on
11 point.

12 CHIEF JUSTICE ROBERTS: Counsel, do
13 you agree that the inquiry under Hellerstedt is
14 a factual one that has to proceed
15 state-by-state?

16 MS. RIKELMAN: Your Honor, I think
17 that facts may vary, but what we know is that
18 the district court held a trial here and found
19 that there were no material differences between
20 this case and --

21 CHIEF JUSTICE ROBERTS: No, no, I
22 know, but if -- if the issue, the statutes are
23 on the books in other states, and if the issues
24 are raised there, is the same inquiry required
25 in each case?

1 You have to have the district court
2 examine the availability of specific clinics and
3 the admitting privileges of doctors so that the
4 litigation could be -- the results could be
5 different in different states?

6 MS. RIKELMAN: Two points, if I may,
7 Your Honor. This Court held in Whole Woman's
8 Health that the Texas admitting privileges law
9 was medically unnecessary and its burdens were
10 undue. That holding should clearly apply to
11 Louisiana's identical law, and certainly the
12 Court's reasoning is applicable in Louisiana.

13 Now, the burdens of a law may vary,
14 but a law that has no benefits and doesn't serve
15 any valid state interest is much more likely to
16 impose an undue burden. And --

17 JUSTICE KAVANAUGH: If a -- if a state
18 passed an admitting privileges law therefor, and
19 suppose a state had ten clinics and two doctors
20 for each clinic, but all 20 doctors could easily
21 get the admitting privileges, so that there
22 would be no effect on the clinics, no effect on
23 the doctors who perform abortions, and,
24 therefore, no effect on the women who obtain
25 abortions, would a law be constitutional in that

1 state?

2 MS. RIKELMAN: That law may still be
3 unconstitutional if it's restricting access
4 because of the 30-mile limit, Your Honor, but
5 that's very different from the situation here
6 where the district court concluded --

7 JUSTICE KAVANAUGH: If it didn't --
8 I'm sorry to interrupt -- if it didn't, though,
9 put aside the 30-miles, assume all the doctors
10 who currently perform abortions can obtain
11 admitting privileges, could you say that the law
12 still imposes an undue burden, even if there
13 were no effect?

14 MS. RIKELMAN: That law would have no
15 benefit, Your Honor, and it may pose a much
16 harder question than this case.

17 But in this case the district court
18 after a trial explicitly found that the burdens
19 of this law would be severe, and it would leave
20 only one physician to serve 10,000 people per
21 year in the entire state. And the --

22 JUSTICE ALITO: Well, the Fifth
23 Circuit went through what the district court had
24 said about the various doctors. And it was
25 proper for the Fifth Circuit to review the

1 district court's findings for clear error, was
2 it not?

3 MS. RIKELMAN: Yes, Your Honor. Clear
4 error is the standard. And we believe that the
5 district court's findings are more than
6 plausible under the standard here.

7 JUSTICE ALITO: Well, let's take one
8 example. Let's take Doe Number 2. Doe Number 2
9 is a plaintiff in this case, right?

10 MS. RIKELMAN: Yes, Your Honor.

11 JUSTICE ALITO: So he had -- he didn't
12 have -- it would be counter to his own interests
13 for him to make a super effort to get admitting
14 privileges, wouldn't it, because he'd be
15 defeating his own claim?

16 MS. RIKELMAN: No, Your Honor. Doe 2
17 brought this lawsuit to protect the rights of
18 his patients. And the district court found that
19 he was competent and qualified and that he made
20 good faith efforts to obtain --

21 JUSTICE ALITO: All right. So if --
22 all right. We can argue about whether he had a
23 conflict of interest or not.

24 He previously had admitting privileges
25 at a hospital in the Shreveport area, did he

1 not?

2 MS. RIKELMAN: Yes, Your Honor.

3 JUSTICE ALITO: A predecessor of
4 Christus Schumpert?

5 MS. RIKELMAN: Yes, Your Honor.

6 JUSTICE ALITO: He testified that he
7 didn't apply for admitting privileges there
8 because it's a Catholic hospital; isn't that
9 right?

10 MS. RIKELMAN: That was part of the
11 testimony. But, in addition, the bylaws of that
12 hospital showed that there would be admissions
13 requirements that Doe 2 couldn't meet.

14 JUSTICE ALITO: All right. Well, he
15 testified directly: I did not apply there
16 because it's a Catholic hospital. Is that not
17 correct?

18 MS. RIKELMAN: That's correct, Your
19 Honor.

20 JUSTICE ALITO: All right. Doe Number
21 3 performs abortions, does he not?

22 MS. RIKELMAN: Yes.

23 JUSTICE ALITO: Doe Number 3 has
24 admitting privileges there?

25 MS. RIKELMAN: He has admitting

1 privileges that require 50 admissions per year
2 which he is able to satisfy because he has an
3 obstetrics practice. And that's why he was the
4 only physician with privileges.

5 The state's own credentialing expert
6 in this case conceded that outpatient physicians
7 like these who never intend to treat patients in
8 the hospital will not be able to get privileges,
9 and the hospital bylaws included many criteria
10 that these physicians could never satisfy,
11 including residency --

12 JUSTICE ALITO: When Doe Number 2
13 explained why he didn't apply to this hospital,
14 he said, in part, because it's not a place where
15 I would feel comfortable. Didn't he say that?

16 MS. RIKELMAN: He did, Your Honor.
17 Doe 2 focused his efforts on hospitals where he
18 thought he had the best chance of obtaining
19 privileges. He had had privileges at LSU and
20 wasn't even able to get privileges there.

21 JUSTICE ALITO: Did the district court
22 mention any of these facts?

23 MS. RIKELMAN: Yes, Your Honor. The
24 district court's opinion was very careful, and
25 its -- its decision and finding that these

1 physicians would not be able to get privileges
2 was based on at least four points.

3 One, the fact that they applied and
4 attempted to get privileges at 15 hospitals over
5 one and a half years.

6 Two, that the state's key
7 credentialing expert conceded that physicians
8 who never intended to treat patients in the
9 hospital will not get privileges.

10 JUSTICE SOTOMAYOR: Footnote: That's
11 Doctor Number 6.

12 MS. RIKELMAN: All of these physicians
13 are outpatient physicians, Your Honor.

14 JUSTICE SOTOMAYOR: No, but Number 6
15 is only a medical doctor.

16 MS. RIKELMAN: That's correct.

17 JUSTICE SOTOMAYOR: He hasn't done any
18 surgical procedures since 2004 and 2005.

19 MS. RIKELMAN: That's correct. And
20 the state's expert also conceded that a
21 physician who provides only medication and
22 counseling would never be able to get
23 privileges.

24 In addition, the district court's
25 burdens findings were supported by what happened

1 when this law actually took effect for a brief
2 time in 2016 and abortion access in Louisiana
3 was devastated.

4 And, of course, the finding of every
5 district court that has held a trial on a
6 similar law has been that these laws will
7 restrict access to abortion. And here the
8 district court found that this law would leave
9 Louisiana with just one clinic in one state to
10 serve about 10,000 people per year.

11 And that would mean that hundreds of
12 thousands of women would now live more than 150
13 miles from the closest provider. And the
14 burdens were actually more severe than this
15 Court found in Whole Woman's Health.

16 JUSTICE SOTOMAYOR: Can we go to Doe
17 3, the doctor who had the active OB-GYN
18 practice? He's only a part-time doctor in Hope.

19 MS. RIKELMAN: That's correct.

20 JUSTICE SOTOMAYOR: There's been much
21 talk about his statement or findings by the
22 district court that he was a superseding cause
23 to the Act because he, on his own, will not
24 practice in that -- in Hope if this law goes
25 into effect because he would be the only doctor.

1 But putting that aside, he also
2 testified -- I'm sorry -- the Hope manager
3 testified that he only does a limited number of
4 abortions, and without the other doctor, that
5 clinic would have to close.

6 MS. RIKELMAN: That's absolutely
7 right, Your Honor. The district court found
8 that without Doe 1, the primary provider at
9 Hope, Hope would not be a viable going concern.
10 So regardless of Doe 3's testimony, Hope would
11 have to close because Doe 3 was providing fewer
12 than 30 percent of the abortion services of that
13 clinic.

14 The primary provider was unable to get
15 privileges, and Hope would close, meaning that
16 women living in northern Louisiana would now
17 have to travel hundreds of additional miles, for
18 a law that has no benefit, in order to access
19 abortion services.

20 JUSTICE KAVANAUGH: Could I --

21 JUSTICE SOTOMAYOR: There's no dispute
22 here about Doe 1.

23 MS. RIKELMAN: That's correct.

24 JUSTICE SOTOMAYOR: The other side,
25 that finding it says is right. Now Doe 3,

1 whether or not he would quit or not, the clinic
2 would have to close because it wouldn't have a
3 Doe 1?

4 MS. RIKELMAN: Correct.

5 JUSTICE SOTOMAYOR: So, at least with
6 respect to that. With respect to Doe 6, that's
7 a medical doctor only who hasn't been in a
8 hospital for over ten years. So it seems
9 implausible, given that every single hospital
10 mentioned by the district court in that area has
11 requirements of in-patient -- of receiving
12 patients by the doctor, and he can't fulfill
13 that under any circumstances, correct?

14 MS. RIKELMAN: That's correct.

15 JUSTICE SOTOMAYOR: All right.

16 JUSTICE KAVANAUGH: Can I follow up on
17 the Chief Justice's earlier question and mine as
18 well? Are you saying that admitting privileges
19 laws are always unconstitutional, such that we
20 don't have to look at the facts in -- state by
21 state? Or are you saying that actually you do
22 look at the facts state by state, and in some
23 states, admitting privileges laws could be
24 constitutional, if they impose no burdens?

25 MS. RIKELMAN: Your Honor, the burdens

1 may vary, but a law that has no benefit and
2 serves no valid state interest, which is what
3 this Court held in Whole Woman's Health, is much
4 more likely to be an undue burden.

5 JUSTICE KAVANAUGH: Could an admitting
6 privileges law of this kind ever have a valid
7 purpose, in your view?

8 MS. RIKELMAN: No, Your Honor. The
9 medical consensus against these laws is clear.

10 JUSTICE KAVANAUGH: So your view is
11 that they're unconstitutional in any state,
12 regardless of the facts?

13 MS. RIKELMAN: They certainly serve no
14 valid state interest. And, in fact, the
15 district court here found that this law was a
16 solution for a problem that didn't exist and
17 would actually jeopardize this -- health and
18 safety of people in Louisiana.

19 JUSTICE SOTOMAYOR: Would this be
20 different if -- if they did something as limited
21 as, for example, you have to be admitted
22 somewhere, because some -- being admitted
23 somewhere does further the credentialing
24 benefits? But this was you have to be admitted
25 within 30 miles. Some of these doctors were

1 admitted further away, but they still were
2 credentialed by someone, correct?

3 MS. RIKELMAN: That's correct, Your
4 Honor. If credentialing were the true goal of
5 this law, the 30-mile limit would make no sense.
6 And one of the practical real-world impacts, if
7 this law were to take effect, is that women in
8 the Baton Rouge area would now have to travel
9 320 miles back and forth to New Orleans to see
10 the same exact physician that they previously
11 could have seen --

12 JUSTICE SOTOMAYOR: How many --

13 MS. RIKELMAN: -- in Baton Rouge.

14 JUSTICE SOTOMAYOR: -- miles from the
15 northern -- from the Hope area?

16 MS. RIKELMAN: It's 320 miles, Your
17 Honor, from Shreveport to New Orleans. And from
18 Baton Rouge back and forth, because of the
19 two-trip law, it's 320 miles. And, again, they
20 would be making that trip to see the same exact
21 physician who had been previously providing
22 services in Baton Rouge. And that has no
23 benefit to women's health. It will only hurt
24 their health, which is exactly what the district
25 court found here.

1 JUSTICE GINSBURG: You haven't
2 mentioned, and it's odd, the 30 mile from the
3 clinic, when most of these abortions don't have
4 any complications and the patient never gets
5 near a hospital, but if she needs a hospital,
6 it's certainly not going to be the one near the
7 clinic. She will be home.

8 MS. RIKELMAN: That --

9 JUSTICE GINSBURG: And so --

10 MS. RIKELMAN: That's exactly right,
11 Your Honor. That's what this Court recognized
12 in Whole Woman's Health and one of the reasons
13 why it concluded the law is medically
14 unnecessary, because the -- the complication
15 rate is extremely small to begin with, but when
16 complications do occur, it's almost always after
17 the woman has been left the clinic.

18 And the standard of care at that point
19 is for her to go to the hospital closest to her
20 home. And, of course, about 40 percent of
21 abortions in Louisiana are medication abortions,
22 and any complication from those abortions will
23 always happen when the patient is at home,
24 which, again, is what this Court recognized in
25 Whole Woman's Health.

1 And that is one of the reasons why the
2 AMA and ACOG are clear that these laws have no
3 medical benefits whatsoever and only impose
4 barriers to abortion. And that is true in every
5 state, regardless of the state circumstances.

6 These laws will always put barriers to
7 abortion while serving no health and safety
8 benefits. And, in fact, the district court here
9 found that abortion in Louisiana in the years
10 before the law was extremely safe, with a very
11 low rate of complications, that Hope had an
12 excellent safety record, and that its physicians
13 were competent and qualified to provide abortion
14 services.

15 And, again, it concluded that there is
16 no basis to distinguish this case from Whole
17 Woman's Health and instead the burdens of this
18 law would be even more severe than the Texas law
19 that this Court struck down in Whole Woman's
20 Health.

21 JUSTICE ALITO: Hope is the -- the
22 name under which June Medical does business; is
23 that correct?

24 MS. RIKELMAN: Yes, Your Honor.

25 JUSTICE ALITO: Was -- was June

1 Medical's license suspended for regulatory
2 violations?

3 MS. RIKELMAN: It was briefly, Your
4 Honor, in 2010. And the court heard testimony
5 about that and rejected the state's allegations
6 after listening to the clinic's administrator
7 and looking at the evidence in the record. It
8 concluded that Hope has an excellent safety
9 record and that its physicians are qualified and
10 competent.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Murrill.

14 ORAL ARGUMENT OF ELIZABETH MURRILL
15 ON BEHALF OF STEPHEN RUSSO, INTERIM SECRETARY,
16 LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

17 MS. MURRILL: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 The Fifth Circuit correctly held that
20 the plaintiffs in this case failed to carry
21 their burden -- their heavy burden of proof that
22 is required to facially invalidate a state law.
23 Louisiana's decision to require abortion
24 providers to have admitting privileges was
25 justified by abundant evidence of

1 life-threatening health and safety violations,
2 malpractice, noncompliance with professional
3 licensing rules, legislative testimony from
4 post-abortive women, testimony from doctors who
5 took care of abortion providers' abandoned
6 patients.

7 The substantive due process claim that
8 plaintiffs assert on their patients' behalf
9 hinged upon their assertion that they would not
10 be able to get privileges, but they can and they
11 did. Their claims also fail for an independent
12 reason.

13 So they do not meet the modern,
14 rigorous rule for third-party standing. So,
15 instead, they invite this Court to exempt them
16 from the rule.

17 This Court should decline to make
18 abortion providers unique among federal
19 plaintiffs and reaffirm that even abortion
20 providers must comply with the same rules as all
21 the other litigants.

22 Doctors and healthcare providers and
23 healthcare facilities are heavily regulated for
24 ethics reasons and for consumer protection. And
25 in this context, the conflict between the

1 plaintiffs and the individuals that the law
2 seeks to protect should defeat the close
3 relationship prong of third-party standing.

4 Apart from that conflict, the record
5 shows that they do not have a close relationship
6 with their patients and individual women have
7 litigated abortion cases on their own for
8 decades.

9 I'd like to first address why this
10 case is different from Hellerstedt and then
11 address standing and waiver.

12 The -- the -- the state presented
13 abundant evidence of how this case is different.
14 The law was different, the facts are different.
15 The regulatory structure is different. And the
16 record is different. And all of those things
17 dictated a different result.

18 So the Fifth Circuit focused on -- one
19 of the things that the Fifth Circuit focused on
20 was credentialing. The record in this case
21 demonstrates that there is no credentialing that
22 is performed by these facilities. They alleged
23 that they had robust policies, but they don't
24 read them and they don't follow them.

25 JUSTICE GINSBURG: What sense does the

1 30-mile limit make, considering that --
2 certainly for medication abortions and for the
3 overwhelming number of other abortions?

4 MS. MURRILL: Justice Ginsburg --

5 JUSTICE GINSBURG: If the woman has a
6 problem, it will be her local hospital that will
7 -- she will need to go to for the care, not
8 something 30 miles from the clinic, which does
9 have no necessary relationship to where she
10 lives.

11 MS. MURRILL: Justice Ginsburg, that
12 regulation is consistent with the regulation
13 that we have in our office surgery regulations
14 and our ambulatory surgery regulations, so it is
15 consistent with our regulatory structure.

16 We also had evidence in the record of
17 women who did require transfers. I think there
18 is at least -- Doe 3 testified unambiguously
19 that he had to transfer four patients who had
20 punctured uteruses and were hemorrhaging --

21 JUSTICE GINSBURG: What about --

22 MS. MURRILL: -- and he took care of
23 them.

24 JUSTICE GINSBURG: What about a D&C
25 after a miscarriage? As I understand it, these

1 two procedures are very much alike.

2 Are similar regulations, about 30
3 miles, and admitting privileges applicable to a
4 D&C following a miscarriage?

5 MS. MURRILL: Under the ambulatory
6 surgery center regs, yes. Under the office
7 practice regs which do not regulate abortion
8 clinics, a doctor who doesn't have a -- have a
9 residency in the proper scope of care would have
10 to have admitting privileges and would have to
11 have them within a 30-mile radius of -- of the
12 clinic. So it's the same requirement.

13 JUSTICE GINSBURG: It is the same.

14 MS. MURRILL: Yes.

15 JUSTICE GINSBURG: I thought there was
16 something in the record suggesting there was no
17 such requirement for D&C following a
18 miscarriage.

19 MS. MURRILL: The office practice
20 regulations are not as tightly regulated as
21 ambulatory surgery centers, which are facility
22 licensing. These are separate licensing
23 constructs.

24 Facilities are licensed by the
25 Louisiana Department of Health, as are

1 ambulatory surgery centers. And both require
2 all the medical staff to have admitting
3 privileges.

4 The -- the requirement under ASC says
5 geographically close, and it is interpreted
6 under the regs as the same way. So we don't
7 interpret it differently. We're applying them
8 consistently and we're reading those regulations
9 the same.

10 CHIEF JUSTICE ROBERTS: Do you agree
11 that the benefits inquiry under the law is going
12 to be the same in every case, regardless of
13 which state we're talking about?

14 I mean, I understand the idea that the
15 impact might be different in different places,
16 but as far as the benefits of the law, that's
17 going to be the same in each state, isn't it?

18 MS. MURRILL: No. I don't think the
19 benefit -- I mean, I think that a state could
20 certainly show greater benefits, depending on
21 what their regulatory structure is and what the
22 facts are on the ground in that state. I think
23 we absolutely could show that we -- that it
24 serves a greater benefit.

25 In our situation, for example, we've

1 demonstrated that the doctors don't do
2 credentialing, that the -- the LSBME testimony
3 from the executive director from Dr. Mutah in
4 the record, at JA 1373, she testified
5 specifically that the LSBME doesn't do
6 credentialing for procedures.

7 That's what the hospital would do.
8 And that's what, if the clinic had --

9 JUSTICE SOTOMAYOR: I'm sorry.

10 MS. MURRILL: -- robust policies, it
11 would do.

12 JUSTICE SOTOMAYOR: I'm sorry. There
13 are laws that require credentialing to be done
14 by the state with respect to these doctors,
15 correct? They have to get a license and they
16 have to have certain competencies to get the
17 license.

18 And they also -- the license is
19 suspended if they are committed -- if they are
20 convicted of a criminal act. You're -- you're
21 making it sound like there is no state licensing
22 of these doctors. They are licensed. They are
23 regulated.

24 MS. MURRILL: Justice Sotomayor, they
25 are -- they are licensed by the state as -- and

1 Doctor -- Dr. Ceclia Mouton testified
2 specifically at JA 1373 that the Board does not
3 do credentialing. That is not our role.

4 JUSTICE SOTOMAYOR: But didn't they
5 also --

6 MS. MURRILL: Our role is licensing
7 generally.

8 JUSTICE SOTOMAYOR: -- testify that
9 they -- but they did ensure that each of these
10 doctors was skilled in the procedures that they
11 were performing?

12 MS. MURRILL: No. In fact, Doe 3
13 hired a radiologist and an ophthalmologist to
14 perform abortions at one point in time. So they
15 clearly were not --

16 JUSTICE SOTOMAYOR: But he was --

17 MS. MURRILL: -- complying.

18 JUSTICE SOTOMAYOR: -- supervising
19 what they were doing. That's what he testified
20 to.

21 MS. MURRILL: That is not within the
22 scope of care. And our record clearly
23 demonstrates that you should have a residency
24 and you should have training in the area in
25 which you are performing surgical procedures.

1 So it would not comply even with our
2 office practice regs for a doctor to -- a
3 radiologist to perform abortions. That would
4 not comply with our standard of care.

5 JUSTICE SOTOMAYOR: Was he doing a
6 surgical procedure or was he doing a medical
7 abortion?

8 MS. MURRILL: He was performing
9 surgical abortions, to the best of my knowledge.
10 There is no indication that he wasn't. I
11 believe that the testimony is that he was
12 performing all -- he wasn't restricting his
13 practice.

14 There's not a lot of testimony in the
15 record about what he -- those doctors were
16 doing, other than he hired them.

17 But to your -- to your question --

18 JUSTICE SOTOMAYOR: We're not even
19 talking about them. We're talking about these
20 doctors and their credentials.

21 MS. MURRILL: Oh --

22 JUSTICE SOTOMAYOR: And -- and I don't
23 -- and I'm sort of still at a mystery to me why,
24 if what's important to you is the credentialing,
25 why the 30-mile limit has significance?

1 MS. MURRILL: Because it's not just
2 credentialing. It is all of the other factors
3 that also play into it. It does provide
4 continuity of care. It does cover for -- it
5 does address --

6 JUSTICE SOTOMAYOR: How can the --

7 MS. MURRILL: -- the non-compliance
8 with health --

9 JUSTICE SOTOMAYOR: If there is no --

10 MS. MURRILL: -- and safety
11 regulations.

12 JUSTICE SOTOMAYOR: -- continuity of
13 care, this law itself permits a doctor to either
14 have admitting privileges or to be in contract
15 with someone who does.

16 So it's not necessary that there be
17 continuity of care in a hospital. The -- the
18 only thing is the credential, you said, is to
19 make sure that they have the skill level.

20 But if they're credentialed somewhere
21 else, they have the skill level.

22 MS. MURRILL: Justice Sotomayor, they
23 did not even comply with the transfer
24 requirement. They did not comply with multiple
25 health -- health and safety requirements in the

1 state.

2 So part of what the credentialing --

3 JUSTICE SOTOMAYOR: Was this all --

4 MS. MURRILL: -- part of what --

5 JUSTICE SOTOMAYOR: -- before the

6 district court?

7 MS. MURRILL: Yes.

8 JUSTICE SOTOMAYOR: All right. And

9 the district court looked at it and found

10 explanations that were adequate for each and

11 didn't come to the conclusions you did or the

12 legislature did.

13 I thought the standard of review for

14 the Fifth Circuit here was whether there was a

15 plausible basis in the record for the

16 conclusions the district court reached?

17 MS. MURRILL: The district court judge

18 ignored all of the health and safety violations.

19 He ignored an entire category of courtesy

20 privileges if we're talking about compliance. I

21 mean, I would -- I would like to take us back to

22 the point that they could and did get

23 privileges. And their primary --

24 JUSTICE KAGAN: General Murrill,

25 before you --

1 MS. MURRILL: -- assumption from the
2 beginning was --

3 JUSTICE KAGAN: -- do that -- before
4 you do that, please. On this credentialing
5 point, which you've mentioned several times, and
6 of course Whole Woman's Health discussed that
7 and said a state can't say it's doing this for
8 credentialing purposes if the hospital's reasons
9 for denying admitting privileges have nothing to
10 do with the doctor's quality.

11 And that was true in Whole Woman's
12 Health and it's true here, too, that there's a
13 great deal of evidence in the record that
14 indicates that admissions privileges rest on
15 many things.

16 It could rest on qualifications, but
17 it could rest on the number of patients a doctor
18 has. It could rest on whether a doctor --
19 whether a particular hospital needs more
20 providers.

21 It could rest, too, it could rest on a
22 general view that they don't want abortion
23 providers in that hospital.

24 So given that that's all true, it was
25 true in Texas and it's true here, it seems that

1 Whole Woman's Health precludes you from making
2 this credentialing argument, doesn't it?

3 MS. MURRILL: No, I don't think that
4 it does at all. I mean, in our case it was
5 demonstrably different. They could and did get
6 privileges. So all of the -- the -- the
7 conjecture and the speculation about the reasons
8 why they might be denied privileges were proved
9 to be untrue.

10 JUSTICE GINSBURG: Is it not --

11 MS. MURRILL: They were able to get
12 privileges.

13 JUSTICE GINSBURG: Is it not the fact
14 that most hospitals in Louisiana, in order to
15 get admitting privileges, you have to admit a
16 certain number of patients?

17 Abortion providers will never, if
18 that's -- if they're not also doing obstetrics
19 and gynecology, they will never qualify because
20 their patients don't go to the hospital.

21 There's one finding in that respect,
22 and you can tell me if there's any dispute about
23 it, but this circuit didn't seem to contest this
24 finding of the district court, that a hospital
25 transfer was required far less than once a year

1 or less than one per several thousand patients.

2 Most of the people who get abortions
3 never have any need to go to a hospital. Isn't
4 that so?

5 MS. MURRILL: Justice Ginsburg, to
6 your first point about the -- the privileging
7 and the minimum requirements, every -- every set
8 of bylaws in our record shows that there is a
9 category of courtesy privileges that permits low
10 admit from anywhere --

11 JUSTICE GINSBURG: My question is --

12 MS. MURRILL: -- from zero to a dozen.

13 I --

14 JUSTICE GINSBURG: -- is there
15 anything inaccurate about this determination
16 that access to a hospital --

17 MS. MURRILL: I think, yes.

18 JUSTICE GINSBURG: -- was required far
19 less than once a year, less than one per several
20 thousand patients?

21 MS. MURRILL: Yes. It is inaccurate
22 because what the record demonstrated is that
23 they don't know what their qualification -- what
24 their complication rates are. They all
25 testified that they don't know because women

1 don't follow up with them or they don't follow
2 up with women.

3 So they really don't know what their
4 complication rates are. And they did testify
5 that they had direct transfers that resulted in
6 women having hysterectomies --

7 JUSTICE KAGAN: Well is it right --

8 MS. MURRILL: -- and hemorrhaging.

9 JUSTICE KAGAN: Is it -- is it right
10 that there is evidence in the record that Hope
11 Clinic has served over 3,000 women annually for
12 23 years, so that's around 70,000 women, and has
13 transferred only four patients ever to a
14 hospital?

15 MS. MURRILL: And there is evidence in
16 the record that they really don't know that
17 that's an accurate rate because they don't track
18 their complications. They really don't know
19 what their numbers are.

20 JUSTICE KAGAN: Well, they know --

21 MS. MURRILL: So they testified --

22 JUSTICE KAGAN: They know whether they
23 have transferred women to a hospital, and it's
24 four. I mean, I don't know of a medical
25 procedure where it's lower than that of any

1 kind.

2 MS. MURRILL: Justice Kagan, it's four
3 that they know of --

4 JUSTICE GINSBURG: You don't -- you
5 don't --

6 MS. MURRILL: -- and that they don't
7 track the numbers.

8 JUSTICE GINSBURG: You don't dispute
9 that, among medical procedures, first trimester
10 abortion is among the safest, far safer than
11 childbirth?

12 MS. MURRILL: Justice Ginsburg, a
13 first-trimester abortion can be either medical
14 or surgical. And even if it's medical, the
15 doctor should have the qualifications to -- to
16 be able to handle the most likely complication
17 of that procedure, which is a surgical abortion.

18 So under the standard of care in
19 Louisiana, even if it's a medical -- even if
20 it's a medication abortion, the doctor should be
21 able to handle a surgical abortion and be
22 qualified to do that.

23 I think the record is questionable
24 about whether Doe 1 can even do that because --

25 JUSTICE BREYER: Oh, Doe 1, everybody

1 agreed, including the Fifth Circuit, that Doe 1
2 is barred by this new law. The old law said
3 that you have to have admitting privileges or a
4 written transfer agreement.

5 So it's a little hard to see how this
6 improves anything since you had to have a
7 written transfer agreement anyway; isn't that
8 true or not?

9 MS. MURRILL: Which Doe 1 did not
10 comply with.

11 JUSTICE BREYER: Well, well why -- all
12 right. But then I don't know why the Fifth
13 Circuit court of appeals, which seemed to have
14 problems with the district court, agreed with
15 the district court as to Doe 1, but that isn't
16 my question.

17 My question is we're not going to
18 solve this at oral argument. I mean, what I've
19 done, and I'm sure the others have, is I've gone
20 through the district court findings and I have
21 gone through the court of appeals findings, and
22 I have looked at the relevant bits of the record
23 through my office and will do more of that.

24 So I think Doe 2 is your weakest case.
25 I think there are others that are stronger. But

1 I'd like your opinion, your opinion, about which
2 of these Does is your strongest? And I'll be
3 sure to look very carefully at that.

4 MS. MURRILL: My -- Justice Breyer, I
5 just want to understand your question.

6 JUSTICE BREYER: You don't
7 understand --

8 MS. MURRILL: My strongest --

9 JUSTICE BREYER: I'm saying which is
10 strongest -- by the strongest, I mean you're
11 trying to make an argument, and you have four
12 Does that you have to deal with. Okay?

13 MS. MURRILL: So --

14 JUSTICE BREYER: And so I want to
15 know, of your opinion, in respect to which Doe
16 is your argument the strongest. Your argument
17 is that the Fifth Circuit was right to overturn
18 a fact finding and, with Doe 3, a credibility
19 finding of the district court. That's your
20 argument.

21 Now, you have to support that. And I
22 want to know in respect to which Doe you feel
23 it's the strongest support for you?

24 MS. MURRILL: And I go in order?

25 JUSTICE BREYER: Yeah --

1 MS. MURRILL: Can I give you more than
2 one?

3 JUSTICE BREYER: -- you can give me
4 all of them if you want, but you don't have that
5 much time.

6 MS. MURRILL: All right. So --

7 JUSTICE BREYER: And if you have a --
8 if you want to say they're all equally strong,
9 fine. That's okay, you can say that because I
10 have an opinion about Doe 2, at least, and --
11 and you can say what you want.

12 MS. MURRILL: Well, I mean -- I think
13 that there's evidence in virtually all of them
14 that they sabotaged their own applications and
15 that Doe 5 was -- and Doe -- Doe 5 obtained
16 privileges in Baton Rouge and New Orleans, as to
17 only one doctor to back him up in Baton Rouge,
18 and all of the doctors agreed that is not
19 difficult to satisfy.

20 Doe 2 simply --

21 JUSTICE BREYER: So they don't all
22 agree. I mean, that's -- I don't think. But
23 we're not going to get -- all I want to know is
24 a number. And the reason is we have limited
25 time and I could spend two hours --

1 MS. MURRILL: Well, I --

2 JUSTICE BREYER: -- discussing with
3 you Doe 2, 3, 4. All I want to know is which
4 should I look at specially hard?

5 MS. MURRILL: I would look at Doe 6 --

6 JUSTICE BREYER: All right.

7 MS. MURRILL: -- who applied to one
8 out of nine --

9 JUSTICE BREYER: All right.

10 MS. MURRILL: -- hospitals in New
11 Orleans.

12 JUSTICE BREYER: That's what I think.

13 MS. MURRILL: That's a -- that's a
14 good example.

15 JUSTICE BREYER: All right.

16 JUSTICE SOTOMAYOR: That -- that's a
17 great example, because he's the doctor who does
18 only medical abortions, not surgical. He hadn't
19 done a surgical procedure for over 12 years.
20 And your state's own expert testified that it
21 was not likely that he was going to get
22 privileges anywhere because he only did medical
23 procedures, never saw a patient. In virtually
24 all of the hospitals, if not all of them, even
25 if there wasn't -- like in Tulane, even if there

1 wasn't a minimum number of patients that had to
2 be admitted before you got privileges, you had
3 to see a certain number of patients in the
4 hospital per year to maintain your privileges.
5 And he couldn't meet that requirement. So you
6 talk about him applying to only one hospital in
7 a situation where it was guaranteed that he
8 couldn't meet the requirements of any hospital.

9 My understanding of hospital practice
10 today is you got to stay alive only if somebody
11 sees patients --

12 MS. MURRILL: Yep.

13 JUSTICE SOTOMAYOR: -- because if they
14 don't see patients, they're of no value to the
15 hospital. If the patients aren't admitted and
16 there's no circumstance in which this doctor is
17 going to admit a patient because he does no
18 surgical procedures --

19 MS. MURRILL: Justice Sotomayor, I
20 think the record shows that the -- that they can
21 get privileges, they did get privileges, and
22 there's nothing in the bylaws that prohibits
23 them from being --

24 JUSTICE BREYER: Your -- your own
25 expert, Dr. Marier, testified, it is unlikely

1 that a doctor who, like Doe 6 does -- does what
2 Justice Sotomayor said, would "probably not" be
3 able to obtain "active admitting and surgical
4 privileges."

5 Now, that was your expert. And the
6 basis of that -- and various other things -- the
7 district court finds that he didn't have to
8 apply to all the hospitals because there was no
9 point because your expert said he probably could
10 not get them. And it's on the basis of that
11 kind of thing that the district court held that
12 he was likely not to be able to practice.

13 Where does the Fifth Circuit able to
14 say that that was clearly wrong?

15 MS. MURRILL: Justice Breyer, the
16 Fifth Circuit did a searching review of the
17 record just as is -- it is instructed to do by
18 Whole Woman's Health. And -- and -- in the
19 brief amount of time that I have left, I would
20 like to say just one thing about standing.

21 I think that the record is -- the
22 reason why it demonstrates that these doctors
23 should not be able to challenge a regulation
24 that protects people -- that -- that is intended
25 to protect a class of people from a certain type

1 of activity. It's health and safety
2 regulations.

3 As a practical matter and -- and even
4 yesterday this Court was talking about the fact
5 that consumers are protected by certain body of
6 laws. That's what we are doing with health and
7 safety regulations.

8 JUSTICE GINSBURG: How does that
9 differ from Craig against Boren?

10 MS. MURRILL: Craig against Boren and
11 -- first of all, had a beer buyer who was a
12 first-party plaintiff in the beginning of the
13 case all the way through until it became -- got
14 -- until it was on appeal. In addition to that,
15 the state --

16 JUSTICE GINSBURG: Yes, but he didn't
17 count. The case rode on the owner of the Honk
18 'n Holler's standing. Craig turned 21. He was
19 no longer subject to the law.

20 MS. MURRILL: Which is why I believe
21 it's better characterized as a mootness case,
22 but I would also point out the law at issue --

23 JUSTICE GINSBURG: But the standing --
24 the Court went on to the merits solely on the
25 basis of the beer seller's standing, and you've

1 got a state regulation that is -- ostensibly was
2 designed to protect these vulnerable boys from
3 drinking beer and getting into accidents.

4 MS. MURRILL: May I?

5 CHIEF JUSTICE ROBERTS: Very -- very,
6 very briefly, counsel.

7 MS. MURRILL: Justice Ginsburg, my --
8 my answer to that is that the -- the buyer in
9 that case was much more just -- it was much more
10 just a financial transaction. Their interests
11 were better aligned because he was not
12 prohibited from consuming or possessing the
13 alcohol. So it --

14 CHIEF JUSTICE ROBERTS: Thank you.

15 MS. MURRILL: -- really wasn't a
16 health --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 General Wall.

20 ORAL ARGUMENT OF JEFFREY B. WALL
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING STEPHEN RUSSO, INTERIM SECRETARY,
23 LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

24 MR. WALL: Mr. Chief Justice, and may
25 it please the Court:

1 Petitioners' counsel began this
2 morning by saying that this case is about
3 respect for the Court's precedents, but she went
4 on to acknowledge two rather remarkable
5 propositions that flow from the logic of
6 Petitioners' position and that are nowhere to be
7 found in the Court's cases.

8 To you, Justice Alito, that the
9 plaintiffs may bring this suit even if there is
10 a potential or actual conflict of interest with
11 Louisiana women. And to you, Justice Kavanaugh,
12 that this law would be unconstitutional even if
13 all providers in Louisiana already had admitting
14 privileges or could easily get them.

15 I do think, though, Petitioners did
16 acknowledge what is in the Court's cases, which
17 is, to your question, Mr. Chief Justice, that
18 the burdens may vary by state. At that point
19 under the substantial obstacle test, we ought to
20 be talking about Does 2, 5, and 6, and how much
21 of a burden there actually was on them, instead
22 of pivoting to the benefits.

23 And to -- to you, Justice Alito,
24 that's not a clear error question. Nobody
25 disputes what the doctors did. We're all agreed

1 on the facts. There's no factual dispute about
2 what the doctors did and didn't do. It's about
3 how rigorously we -- we're going to --

4 JUSTICE GINSBURG: But what sense --

5 MR. WALL: -- review their fairly
6 modest efforts.

7 JUSTICE GINSBURG: What sense does
8 this 30-mile -- that's what I don't understand.
9 I think everybody also agrees that the most
10 likely place the woman will be if she needs to
11 be in a hospital, she'll be at home. She won't
12 -- and her home has no necessary relationship to
13 30 miles from a clinic.

14 MR. WALL: So two points, Justice
15 Ginsburg. Again, that's going straight to the
16 benefits and bypassing the burdens, not looking
17 first to whether there's a substantial obstacle.

18 But to go straight to your question,
19 all admitting privileges requirements of which I
20 am aware, and they're fairly uncontroversial in
21 the medical field, have some distance
22 limitation. And I think the -- the benefits
23 that they go to, the most obvious is the
24 continuity of care, right, because you want the
25 doctor to be able to admit them at some nearby

1 hospital, and at least in some rural areas,
2 there isn't always a hospital right around the
3 road, so you draw it 15 or 20 or 30 miles. And
4 with respect to credentialing, it makes sense to
5 think --

6 JUSTICE GINSBURG: But it just --

7 MR. WALL: -- that the doctors --

8 JUSTICE GINSBURG: -- it just supposed
9 starting out from the clinic where she won't be.
10 She's not going to be at the clinic.

11 MR. WALL: Well, that's often true,
12 Justice Ginsburg, but the record here, unlike in
13 Hellerstedt, reveals that sometimes it's not
14 true, that sometimes women develop complications
15 in the clinic and, in fact, Doe 3, who I think
16 on this record is probably the most competent of
17 the Does and is the medical director at Hope,
18 said that he has on occasion had a patient who
19 develops a problem like a perforated uterus and
20 admitted into the hospital and treated it.

21 So even Doe 3 thinks of that as a best
22 medical practice. Now, granted, we don't know
23 how often it happens and, Justice Kagan, I'm
24 prepared to concede that it may not happen all
25 that often.

1 I don't think anybody knows the real
2 rate. But the point is that it does happen.
3 And when it does it's very serious.

4 JUSTICE GINSBURG: But it would --

5 MR. WALL: And Louisiana --

6 JUSTICE GINSBURG: It would never
7 happen to the -- when you go to the clinic just
8 to take two pills and go home.

9 MR. WALL: Well, if you develop a
10 complication at home, it's not -- the -- it's
11 not clear that you won't call the clinic and say
12 to your doctor I'm having a problem, and your
13 doctor will say then go to the following
14 hospital where I have privileges, I'll meet you
15 there.

16 Now, that's not to say as a patient
17 that's necessarily what you would want. But
18 it's hard for me to believe that women in
19 Louisiana wouldn't at least want the option to
20 be treated by the doctor --

21 JUSTICE SOTOMAYOR: Mr. Wall --

22 MR. WALL: -- they saw at the clinic.

23 JUSTICE SOTOMAYOR: -- are you taking
24 the position that there is no woman in Louisiana
25 who doesn't feel burdened by this law?

1 MR. WALL: I -- I'm taking the
2 position that --

3 JUSTICE SOTOMAYOR: No, no. Answer
4 that question.

5 MR. WALL: Well --

6 JUSTICE SOTOMAYOR: Is there at least
7 one potential woman you believe that could bring
8 this lawsuit?

9 MR. WALL: I assume that there are,
10 but they have not sued --

11 JUSTICE SOTOMAYOR: Let's stop a
12 moment. Assuming -- we assume, because it's
13 logical, okay, the woman who lives 300 -- there
14 is going to be some woman who lives 330 miles
15 away, who is going to say that's an unusually
16 long period of time for me to have to drive and
17 then drive back the same day. All right?

18 But putting or -- or the next day.
19 Putting that aside, where is there a conflict
20 between that woman and the doctor? If that
21 woman is going to take the position that this
22 law unduly burdens me, what's the potential
23 conflict?

24 She's going to come in and say you
25 doctors could get credentialing so I really

1 shouldn't sue? You doctors haven't really made
2 an effort so I really shouldn't sue?

3 What sane woman who's a plaintiff is
4 going to have a conflict with a doctor who wants
5 to protect her rights by doing what they can to
6 comply with the law, or not, but their interests
7 are not misaligned, they want to achieve the
8 same holding, that this law unduly burdens her
9 right to abortion.

10 The -- I -- I -- I'm -- I don't see a
11 conflict with that.

12 MR. WALL: Well, I would say two
13 things, Justice Sotomayor: Their interests are
14 not necessarily aligned. One is the interest of
15 for-profit providers and not being regulated in
16 particular ways. The other is the interest of
17 women in their own health and safety.

18 Now, I don't know how those would have
19 played out if the women had filed suit. I don't
20 know --

21 JUSTICE SOTOMAYOR: Well, please tell
22 me --

23 MR. WALL: -- how they would have --

24 JUSTICE SOTOMAYOR: -- what you
25 imagined.

1 MR. WALL: But to give you a couple of
2 examples --

3 JUSTICE SOTOMAYOR: Okay.

4 MR. WALL: -- just to give you -- it's
5 not clear to me that women would have brought
6 facial challenge. Maybe all of the current
7 providers in Louisiana --

8 JUSTICE BREYER: How do you deal with
9 this? I mean, I -- I have read the briefs. I
10 understand there are good arguments on both
11 sides. Indeed, in the country people have very
12 strong feelings and a lot of people morally
13 think it's wrong and a lot of people morally
14 think the opposite is wrong.

15 And in Casey, and the later cases, I
16 think personally the Court is struggling with
17 the problem of what kind of rule of law do you
18 have in a country that contains both sorts of
19 people. Not -- all right. So, therefore, I
20 take Casey as given.

21 And I think eight cases where you've
22 given standing, I mean, we could go back and
23 reexamine Marbury versus Madison, but really we
24 have eight cases in the abortion area, we have
25 several cases in other areas, and Whole Woman's

1 Health picks that up. Casey picks that up. And
2 you really want us to go back and reexamine
3 this, let's go back and reexamine Marbury versus
4 Madison.

5 And -- and you have good arguments.
6 But why depart from what was pretty clear
7 precedent?

8 MR. WALL: I -- I don't want to go
9 back to 1789, Justice Breyer, but I -- I do --

10 JUSTICE BREYER: You want to go back
11 for 40 years?

12 MR. WALL: Well, I think what we want
13 to say is that in none of those cases has the
14 Court ever considered and -- and signed off in
15 the face of a potential or actual conflict of
16 interest.

17 So, yes, this is an argument that has
18 never been in front of Court and we don't think
19 the Court now faced with it should accept it.
20 And if --

21 CHIEF JUSTICE ROBERTS: General, I
22 know you have limited time. I understand the
23 point that the impact of the -- the law varies
24 from state to state, but why do you look at each
25 state differently if the benefits of the law --

1 they're not going to change from state-to-state.

2 MR. WALL: So I -- I disagree, Mr.
3 Chief Justice. I think the variance isn't going
4 to be as wide as on the burden side. But take
5 credentialing, for instance.

6 I think the Petitioners would have to
7 say that if you had a state that really did
8 focus on competence and the hospitals really
9 were vetting for competence, now, they can
10 dispute whether that happens here --

11 JUSTICE KAGAN: I mean, that wasn't
12 this case, right?

13 MR. WALL: Well, I -- I -- I would say
14 that competence is, I think, a pretty key factor
15 in what the hospitals do. And if you look at
16 the joint --

17 JUSTICE KAGAN: On this record?

18 MR. WALL: I think if you look at the
19 joint commission standards that are in the
20 record, but my only point to the Chief Justice
21 was that however we -- however we think about
22 that, they can vary depending on how the
23 credentialing system works in a particular
24 state.

25 If I can just make one last point on

1 the merits. I -- I don't really think it's a
2 clear error standard, Justice Alito. It's how
3 rigorously are we going to review pretty modest
4 efforts.

5 Doe 2 did not apply to a hospital
6 where he used to have privileges and Doe 3
7 currently has privileges.

8 Doe 5 got privileges at Touro Hospital
9 in New Orleans and just needed to get a covering
10 doctor in Baton Rouge. And Doe 6 didn't apply
11 to Touro in New Orleans where Doe 5 has
12 privileges. So Doe 5 did the thing that
13 Petitioners are here saying can't be done.

14 And it's hard to figure out what the
15 basis for distinction is, because the -- the
16 cites they give in their brief, and it's pretty
17 general and pretty thin, to be honest, but when
18 you really trace it back, it seems to be the
19 hospital bylaws.

20 And Touro, as best we can tell, seems
21 to have bylaws that look like the ones that they
22 say would keep people from getting privileges.

23 JUSTICE BREYER: The answer -- each of
24 those has an answer. I mean, they say, look,
25 the ones who didn't get the -- did get the

1 privileges practice in OB-GYN practice, and so
2 they had women who, in fact, were admitted to
3 hospitals. And the ones who don't are the ones
4 who do medical abortion. You've heard that.

5 MR. WALL: And -- and --

6 JUSTICE BREYER: Okay. And on the
7 other one, as far as, I mean, Doe 2, Doe 2 says
8 I -- I -- I tried to get a covering doctor. He
9 said no. The other covering doctors, there's no
10 point because I'm in Baton Rouge -- is that
11 where he was, I think, Doe 2 -- and he said,
12 look, it's a tougher climate here. Really tough
13 for people who perform abortions. Quite
14 different from New Orleans.

15 And I was told by one that don't do it
16 because you try to get the covering doctor and
17 that doctor would be subject to picketing,
18 dah-dah-dah. Okay. We have all seen that.

19 So we have gone through it. We'll go
20 through it more. What do you want to say?

21 MR. WALL: So I -- I think Doe 2's in
22 -- in Shreveport. But far more importantly,
23 what I would say is this: In a pre-enforcement
24 setting, that sort of debate back and forth
25 isn't enough to carry the burden.

1 What ought to have to happen is these
2 physicians ought to have to put their
3 applications where their mouths are and then
4 we'll find out, once they have applied to the
5 full range of hospitals, whether they really
6 can't, whether Doe 2 really can't at Christus,
7 whether Doe 5 really can't find a covering
8 doctor in Baton Rouge, whether Doe 6 really
9 can't at Touro.

10 JUSTICE KAVANAUGH: Can that be done?

11 JUSTICE GINSBURG: Is it not --

12 MR. WALL: But on this record I'm very
13 skeptical that they can't.

14 JUSTICE GINSBURG: Is it not -- is it
15 not a reality, is it not really the fact, that
16 almost all hospitals in the State of Louisiana
17 do have an admission, you have to have an
18 admission record in order to admit patients?
19 There is something in the record to that effect
20 that you -- you don't get -- if you don't send
21 patients to the hospital, you don't get
22 admission privileges.

23 CHIEF JUSTICE ROBERTS: You may
24 answer.

25 MR. WALL: Justice Ginsburg, I think

1 that's difficult to square with the fact that
2 Doe 5, who does not have an OB-GYN practice, got
3 privileges at Touro. I think Petitioners
4 acknowledge that there are not explicit patient
5 minimums. They call them implicit.

6 But the kinds of requirements that
7 they are pointing to are the sorts of things
8 that look like they would have precluded Doe 5
9 and didn't. These ought to play themselves out
10 in a post-enforcement context, not as here.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 General.

13 MR. WALL: Thank you.

14 CHIEF JUSTICE ROBERTS: Five minutes,
15 Ms. Rikelman.

16 REBUTTAL ARGUMENT OF JULIE RIKELMAN ON
17 BEHALF OF JUNE MEDICAL SERVICES L.L.C., ET AL.

18 MS. RIKELMAN: Your Honor, the lack of
19 benefits of these laws is not state-dependent.
20 The medical consensus is clear that in no state
21 do they serve health and safety benefits.

22 And, in fact, even the federal
23 government a few months ago removed an admitting
24 privileges requirement from its regulations of
25 surgery centers nationwide, finding that the

1 requirement is medically unnecessary and imposes
2 burdens.

3 And as Justice Kagan asked, this Court
4 rejected an alleged credentialing benefit in
5 Whole Woman's Health. And after holding a
6 trial, the district court rejected that this law
7 would serve a credentialing benefit in
8 Louisiana.

9 With respect to burdens, the district
10 court found that this law would be extremely
11 burdensome, more so than the Texas law in Whole
12 Woman's Health. And its finding that these
13 physicians would not be able to get privileges
14 is supported by at least four aspects of the
15 record.

16 The fact that they tried to get
17 privileges at 15 hospitals over one and a half
18 years under the court's supervision; the fact
19 that the state's expert conceded that outpatient
20 physicians who don't have a hospital-based
21 practice are unlikely to get privileges; the
22 fact that abortion access was thrown into chaos
23 when this law actually took effect; and the
24 hospital bylaws themselves, which included a
25 variety of criteria that these physicians could

1 never meet, including residency requirements.

2 And, finally, I'd like to point out
3 that this is not, in fact, a pre-enforcement
4 challenge. The state has recognized that,
5 including in its state papers before this Court.
6 The district court allowed the law to take
7 effect but enjoined its penalties and supervised
8 the physicians' efforts to get privileges over a
9 year and a half. Again, the state has
10 previously acknowledged that this is not a
11 pre-enforcement challenge.

12 If there are no further questions.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 11:05 a.m., the case
17 was submitted.)

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