

Nos. 18-1323, 18-1460

**IN THE SUPREME COURT OF THE
UNITED STATES**

JUNE MEDICAL SERVICES, LLC, on behalf of its
patients, physicians, and staff, d/b/a HOPE
MEDICAL GROUP FOR WOMEN; JOHN DOE 1;
JOHN DOE 2;

Petitioners/Cross-Respondents,

v.

DR. REBEKAH GEE, in her official capacity as
Secretary of the Louisiana Department of Health,

Respondent/Cross-Petitioner,

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

**BRIEF OF *AMICI CURIAE* OPERATION
RESCUE AND NATIONAL HISPANIC
CHRISTIAN LEADERSHIP CONFERENCE IN
SUPPORT OF RESPONDENT/CROSS-
PETITIONER**

Mathew D. Staver
(Counsel of Record)

Anita L. Staver
Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 671-1776
court@lc.org

Catherine W. Short
Allison K. Aranda
LIFE LEGAL DEFENSE
FOUNDATION
P.O. Box 2105
Napa, CA 94558
(707) 224-6675
kshort@lldf.org
akaranda@lldf.org
Counsel for Amici Curiae

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INTEREST OF AMICI¹

Operation Rescue is a leading pro-life advocacy organization that has worked for decades to uncover abortion clinic wrong-doing, expose it to the public, and bring the offenders to justice. Operation Rescue has developed peaceful, legal strategies for investigating abortion clinics and reporting unsafe conditions and illegal activities.

Operation Rescue also monitors the practices and safety records of individual abortion providers. In 2010, Operation Rescue began monitoring the investigation and prosecution of Kermit Gosnell.² In 2011, after years of state authorities ignoring, if not outright covering up for, Gosnell's dangerous, filthy,

¹ Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have consented to the filing of this Brief.

² Operation Rescue has compiled a comprehensive report on Kermit Gosnell, with links to pertinent documentation, *available at* <http://www.operationrescue.org/archives/historic-archive-operation-rescues-exclusive-reports-on-convicted-murderer-kermit-gosnell/> (last visited December 27, 2019).

and illegal abortion practice, a grand jury investigated his operations and delivered a scathing 260-page report documenting both Gosnell's crimes and the state authorities' fecklessness in dealing with him. As the report stated:

The employees of the state and local health departments and the prosecutors for the Board of Medicine are charged with protecting the public health. Very few that Operation Rescue encountered in its investigation came even close to fulfilling that duty. These officials seemed oblivious to the connection between their dereliction and the deaths and injuries that Gosnell inflicted under their watch.

Those at the State Department of Health ("DOH") who were responsible for assuring the health and safety of women and infants delivered live at abortion clinics were astoundingly passive when it came to inspections or responding to complaints. The department's attorneys were encouraged to misinterpret laws so that the department could evade its duty to protect public health. DOH employees were only too glad to go along with the charade. The prosecutors for the Board of Medicine, who are charged with sanctioning bad

doctors, appeared determined not to discipline even one of the worst doctors in the region.

Numerous city health department employees went about their jobs going in and out of Gosnell's clinic, performing some particular task to promote public health, while ignoring the most squalid, unsafe conditions imaginable in a Philadelphia health care facility. One diligent employee, Lori Matijkiw, who reported what she saw, expected her supervisors to do something. They did nothing.³

Operation Rescue was instrumental in bringing national attention to Gosnell's trial and conviction in 2013. This publicity, in turn, led to many states reviewing their laws and policies for oversight of abortion practitioners.⁴

Operation Rescue has also worked to uncover, document, and expose legal violations by abortion providers in many states, including California, Wisconsin, Florida, and Louisiana. Unfortunately,

³ In re County Investigating Grand Jury XXIII (Misc, No. 0009901-2008) *available at* <http://operationrescue.org/pdfs/GrandJuryWomensMedical.pdf>, at 260.

⁴ The admitting privileges requirement that is the subject of this challenge was passed in 2014.

time and again, Operation Rescue has found that those charged with enforcing health and safety regulations have refused or neglected to do so in the context of abortion services.

The National Hispanic Christian Leadership Conference (“NHCLC”) is America’s largest Hispanic Christian evangelical organization. NHCLC was founded in 1995 and, on May 1, 2014, merged with Conela, a Latin America-based organization, to become NHCLC/Conela, representing more than 500,000 churches throughout the world. Among the seven directives that guide NHCLC/Conela is a directive focused on the sanctity of human life. Under that directive, NHCLC/Conela members pledge to work to bring assistance, comfort, and care to pregnant women in need and to those who have undergone abortion. NHCLC/Conela members are deeply concerned about the medical care available to pregnant women and the unsafe conditions that were present in Louisiana prior to the passage of Louisiana Act 620 (“Act 620”). NHCLC/Conela members have witnessed the devastating effects that substandard medical care has had on pregnant women, and in particular on Hispanic women, and therefore urge this Court to uphold Act 620.

SUMMARY OF THE ARGUMENT

As the notorious case of Kermit Gosnell illustrated, legislatures cannot always rely on the executive branch of state government to monitor the activities of abortion providers, nor to enforce the

law in the face of even flagrant and repeated violations of state health and safety regulations. Politics intrude, and abortion politics are particularly intrusive.

Gosnell's shocking history is not the only example of state prosecutors and medical boards failing to take action against repeat offenders and substandard practitioners. Operation Rescue has gathered voluminous documentation of the same pattern of prosecutorial negligence allowing abortion practitioners to continue to injure women, all in the service of the "right to choose."

An admitting privileges statute such as Louisiana Act 620 (hereafter "Act 620") is a legitimate and necessary tool in the toolbox of legislatures to ensure that the state's abortion practitioners are not operating at the level of Kermit Gosnell. As Justice Alito acknowledged in *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2344 (2016): "If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes."⁵

⁵ See House Research Org., Laubenberg et al., Bill Analysis 10 (July 9, 2013), online at <http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf> ("Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic").

Stare decisis is no bar to upholding Act 620. The Fifth Circuit properly concluded that, unlike the statute at issue in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), Act 620’s “admitting-privileges requirement performs a real, and previously unaddressed, credentialing function **that promotes the wellbeing of women seeking abortion.**” *June Med. Servs., LLC v. Gee*, 905 F.3d 787, 806 (5th Cir. 2018) (emphasis added).

LEGAL ARGUMENT

I. THE FIFTH CIRCUIT PROPERLY FOUND THAT THE RECORD EVIDENCE BEFORE THE LOUISIANA LEGISLATURE ESTABLISHED THAT ACT 620 WOULD PROTECT WOMEN’S HEALTH BY ENSURING PHYSICIAN COMPETENCE AND PROMOTING CONTINUITY OF CARE.

The necessary and appropriate review of the circumstances surrounding Louisiana’s enactment of Act 620 reveals that Petitioners’ unilateral declaration of victory on the grounds of *stare decisis* is unwarranted. As the Fifth Circuit properly held, the record evidence before the Louisiana legislature “plainly evidences an intent to promote women’s health.” *Gee*, 905 F.3d at 805. In fact, the record evidence showed – in direct contrast to *Hellerstedt* – that Act 620 “seeks to accomplish that goal by ensuring a higher level of physician competence and by requiring continuity of care.” *Id.* The comprehensive record evidence shows why this

Court should uphold Act 620, even under *Hellerstedt*.

The introduction of Act 620 itself demonstrated Louisiana’s purpose behind it: “Representative Katrina Jackson explained [that] ‘if you are going to perform abortions in the State of Louisiana, you’re going to do so in a safe environment and in a safe manner that offers women the optimal protection and care of their bodies.’” *Id.* at 791. While considering Act 620, the legislature was presented with evidence from women who experienced complications from abortions and “had been treated harshly by the provider.” *Id.* “Cindy Collins with Louisiana Abortion Recovery testified that when she underwent an abortion and began to hemorrhage, ‘the abortion doctor could see that something had gone wrong but, instead of assisting her, **told her to get up and get out.**’” *Id.* at 792 (emphasis added). Further testimony also revealed that there were substantial health and safety violations reported at various abortion clinics in Louisiana.⁶

“The record for Louisiana contains testimony from abortion providers themselves.” *Id.* at 805. That testimony “explain[ed] that the hospitals perform more rigorous and intense background checks than do the clinics.” *Id.* By contrast, “beyond ensuring that the provider has a current medical license, [the clinics] do not appear to undertake any review of a provider’s competency” and “do not even

⁶ This testimony is also similar to the findings of Operation Rescue. *See infra* Section II.

appear to perform criminal background checks.” *Id.* Moreover, Act 620 only requires that abortion providers **conform to requirements that other medical professionals must satisfy**. *Id.* (“the Act brings the requirements regarding outpatient abortion clinics into conformity with the **preexisting** requirement that physicians at ambulatory surgical centers must have privileges at a hospital within the community”) (original emphasis). As such, there is no special requirement imposed solely on abortion providers – just a requirement that they maintain the same privileges that other equally situated medical professionals do under Louisiana law. *See id.* at 806 (“Louisiana was **not** attempting to target or single out abortion facilities.” (emphasis added)).

“The benefit from conformity **was not presented in [*Hellerstedt*]**, nor were the reasons beyond conformity—continuity of care, qualifications, communication, and preventing abandonment of patients.” *Id.* (emphasis added). It was for this reason that the Fifth Circuit recognized that “unlike in [*Hellerstedt*], the record here indicates that the admitting-privileges requirement performs **a real, and previously unaddressed, credentialing function** that promotes the well-being of women seeking abortion.” *Id.* (emphasis added).

For these reasons, *stare decisis* is of no help to the Petitioners. As this Court recognized in *Hellerstedt* itself, “the constitutionality of a statute predicated upon the existence of a particular state of

facts may be challenged by showing to the court that those facts have ceased to exist . . . A statute valid as to one set of facts may be invalid as to another.” *Hellerstedt*, 136 S. Ct. at 2306 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) and *Nashville, C. & St. L.R. Co. v. Walters*, 294 U.S. 405, 415 (1935)) (emphasis added).⁷

Accordingly, this Court should affirm the decision of the Fifth Circuit and uphold the constitutionality of Act 620.

II. OPERATION RESCUE’S NUMEROUS INVESTIGATIONS REVEAL THAT, DESPITE AMPLE DOCUMENTATION OF WRONGDOING, PUBLIC OFFICIALS OFTEN FAIL TO ENFORCE HEALTH AND SAFETY LAWS AGAINST ABORTION PROVIDERS, AND LAWS SUCH AS ACT 620 ARE NECESSARY TO

⁷ Indeed, “[s]tare decisis is not an inexorable command.” *Payne v. Tennessee*, 501 U.S. 808, 823 (1992) (emphasis added); *Janus v. Am. Fed’n of State, Cnty. & Mun. Empls., Council 31*, 138 S. Ct. 2448, 2478 (2018) (same). Instead, *stare decisis* “is a principle of policy and **not a mechanical formula of adherence to the latest decision.**” *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (emphasis added). *Stare decisis* “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment.” *Janus*, 138 S. Ct. at 2478.

**PROTECT THE HEALTH AND SAFETY
OF WOMEN SEEKING ABORTIONS.**

Throughout its history of investigations, Operation Rescue has gathered evidence of wrongdoing and substandard medical care by abortion providers. Repeatedly it has presented that evidence to the public officials charged with enforcing statutes and regulations, only to have it ignored or buried for years, if not permanently. Several illustrative case histories demonstrate the substandard care and wrongdoing that frequently occur at abortion facilities not subject to certain standards of competency.

**A. Operation Rescue's Investigations
Reveal that the Lack of Admitting-
Privileges Requirements Often
Results in Harm to Women Seeking
Abortions.**

**1. Bernard Smith's History of
Hospitalizing Women
Seeking Abortions.**

Bernard Smith is believed to have been responsible⁸ for the hospitalization of a woman transported from a for-profit abortion business in

⁸ The other doctor employed by Affiliated Medical Services who might have been responsible is Neville Duncan, who seven years earlier pled no contest to charges of disorderly conduct (for beating his wife) and possession of cocaine.

Milwaukee, Wisconsin. The abortion business, Affiliated Medical Services, was owned by Dennis Cristensen, who had also previously owned and operated an abortion clinic in Rockford, Illinois, **until it was shut down by the Illinois Department of Public Health** because of “serious health and safety violations.”⁹ Indeed, the Illinois health department found that all three of his abortion rooms “failed to ensure a sanitary environment,” had “brown substances” on surgical equipment and gloves, and failed to employ a registered nurse for procedures, as required by state law.¹⁰

Although a complaint was filed against Smith’s license in 2007, it did not stop him from continuing to practice at the clinic, where, in 2011, his substandard practices resulted in the hospitalization of two women **in one day**.¹¹

⁹ Cheryl Sullenger, *Abortionist Denied Hospital Privileges in WI After His IL Abortion Biz Shut Down*, Illinois Review (June 24, 2014), available at <https://illinoisreview.typepad.com/illinoisreview/2014/06/abortionist-denied-hospital-privileges-in-wi-after-his-il-abortion-business-shut-down.html> (last visited Dec. 30, 2019).

¹⁰ Operation Rescue, *Notorious Rockford Abortion Mill Closed By State* (October 3, 2011), available at <http://www.operationrescue.org/archives/notorious-rockford-abortion-mill-closed-by-state/> (last visited Dec. 30, 2019).

¹¹ *Id.*

In 2013, both Smith and Cristensen were denied hospital admitting privileges by three area hospitals, which they sought solely to further their legal challenge to Wisconsin's admitting privileges law. The law was later permanently enjoined, allowing them to continue performing abortions without admitting privileges. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

2. James Scott Pendergraft's Malpractice Judgment for Substandard Abortion Practices.

In 2011, James Scott Pendergraft was found liable for over \$37 million in damages as the result of a late-term abortion procedure in 2001. Before the conclusion of the lawsuit, Pendergraft, apparently seeing the handwriting on the wall, had transferred the assets from his five for-profit abortion clinics in Florida to various other entities, including an abortion facility run by his former wife and a medical marijuana dispensary.

In 2015, Pendergraft was arrested and charged with drug distribution and performing abortions out of his van in a state where he did not hold a medical license.¹² In 2011, while his medical

¹² Human Defense Initiative, *Notorious Late-Term Abortionist Loses Medical License* (Dec. 28, 2018), available at <https://humandefense.com/notorious-late-term-abortionist-loses-medical-license/> (last visited Dec. 30, 2019).

license was suspended, Pendergraft continued to perform “partial” late-term abortions whereby he would inject the unborn child’s heart with digoxin or insert an air bubble through the women’s abdomen to kill the child, only to have them then travel to a different clinic to have the dead child removed from the womb.¹³

Only in 2018, after five prior license suspensions and multiple criminal convictions for drug offenses, was Pendergraft’s medical license permanently suspended -- at least in Florida.¹⁴

3. Donald Clyde Willis’ Record-Setting Hospitalization Practice.

Donald Clyde Willis graduated from medical school in 1976. At various points in his medical career, he has been licensed to practice in Alaska, Hawaii, Nevada, Oregon, Washington, and California.

Willis is a suicide survivor (gunshot to the head) with documented mental health issues that caused Alaska to demand his medical license surrender.¹⁵ After his suicide attempt, he was

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Cheryl Sullenger, *Abortionist Who Attempted Suicide Botches Laminaria Inspection; Woman Rushed To Hospital, Operation Rescue* (Jan. 25,

institutionalized in a mental health facility in Washington.¹⁶

Following his release, Willis moved to California to evade the permanent restrictions imposed on his medical license by Washington, Oregon, and Alaska. The restrictions included strict monitoring and routine appointments with a mental health professional. Willis also has a history of financial difficulties, having declared bankruptcy in 2010.

In 2017, Willis began work at FPA Women's Health, a for-profit abortion clinic in Bakersfield, California. **During his first year there, six women were transported by ambulance to a nearby hospital, including three in a single month.**¹⁷ Operation Rescue, in conjunction with local pro-life activists, filed a complaint with the Medical Board of California, but Willis continues to practice in California to this day.

2018), *available* *at*
<https://www.operationrescue.org/archives/abortionist-who-attempted-suicide-botches-laminaria-insertion-woman-rushed-to-hospital/> (last visited Dec. 30, 2019).

¹⁶ *Id.*

¹⁷ *Id.*

4. Louisiana Abortion Practitioners' Records Do Not Fare Any Better.

The Delta Clinic of Baton Rouge, operated by Leroy Brinkley, who also contracted abortion services with Kermit Gosnell, had a long history of abortion abuses. Violations and reports of filthy conditions date back to 1998. Two women, Ingar Weber and Sheila Hebert, died from botched abortions they received at Delta, yet no one was held accountable.¹⁸

In 2011, Operation Rescue filed a complaint with the Louisiana State Board of Medical examiners on behalf of a woman who was told that her injuries received at the hands of abortion providers at the Delta Clinic required that she have a complete hysterectomy.¹⁹ Operation Rescue obtained documentation that proved her complications were never reported as required by

¹⁸ Operation Rescue, *Not The Only House of Horrors: Troubled Baton Rouge Abortion Mill Has Disturbing Ties To Gosnell*, (Jan. 25, 2011), available at <https://www.operationrescue.org/archives/not-the-only-house-of-horrors-troubled-baton-rouge-abortion-mill-has-disturbing-ties-to-gosnell/> (last visited Dec. 30, 2019).

¹⁹ *Id.*

law.²⁰ No action was taken against the abortionist who injured the woman or against the facility.

Delta then hired Nsikan M. St. Martin, who had been arrested for illegal drug and firearm possession. Meanwhile, the clinic continued to fail health inspections throughout 2017 and again in 2018 when a staggering 51 pages of citations were noted. In March 2019, a patient was rushed from Delta Clinic to the hospital. The physician reported to be present at the clinic at the time was James C. DeGueurce. In 2009, the Louisiana Board of Medical Examiners referred a disciplinary matter involving DeGueurce to the Attorney General's office.²¹

²⁰ Operation Rescue, *Medical Emergency Hospitalizes Woman From Abortion Clinic with Ties to Gosnell* (Mar. 22, 2019), available at <https://www.operationrescue.org/archives/medical-emergency-hospitalizes-woman-from-abortion-clinic-with-ties-to-gosnell/> (last visited Dec. 30, 2019).

²¹ *Id.*; see also <https://abortiondocs.org/wp-content/uploads/2019/03/April-2009minutes.pdf> (last visited Dec. 30, 2019)

B. Act 620's Admitting-Privilege Requirements Are Necessary to Protect Against the Types of Harm Uncovered and Documented in Operation Rescue's Investigations, and Are a Proper Means of Furthering Louisiana's Interest in Protecting Women's Health and Safety.

As the foregoing examples illustrate, Louisiana legislators could reasonably decide that an admitting privileges requirement was a desirable, even necessary, safeguard to ensure that unqualified doctors are not performing surgical procedures on unsuspecting women. Admitting privileges provide a mechanism for ensuring professional medical competency that is independent of state medical boards and administrative agencies subject to political pressure or simply the pressure of overwork and underfunding. By leveraging the nationwide system of "professional peer review," the legislature can protect against "incompetent physicians [moving] from state to state without disclosure or discovery of the physician's previous damaging or incompetent performance." 42 U.S.C. §11101.

Contrary to the circumstances this Court faced in *Hellerstedt*, Louisiana presented evidence of benefit from the admitting-privileges requirement in Act 620. *Gee*, 905 F.3d at 805. Had an admitting-privileges requirement been in place in 2011, perhaps the two women who died as a result of the

actions of shoddy abortion practitioners at Delta Clinic might still be alive.

That states, including Louisiana, have a legitimate interest to promote and protect the health and safety of their citizens, including women seeking abortions, is beyond dispute and firmly entrenched in this Court's abortion jurisprudence, going all the way back to 1973. *See e.g., Roe v. Wade*, 410 U.S. 113, 150 (1973) ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure **maximum safety** for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise." (emphasis added)).²²

²² *See also, Hellerstedt*, 136 S. Ct. at 2309; *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992) ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) ("Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting." (quoting American College of Obstetricians and Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 54 (5th ed.

That is precisely the legitimate interest that Louisiana properly sought to protect with Act 620. Operation Rescue’s comprehensive and long-running investigations into the unsafe, unlawful, and unethical practices of numerous abortion providers, and the record evidence before the Legislature, showed that something more was needed to protect the health and safety of Louisiana’s citizens.

CONCLUSION

Act 620 furthers Louisiana’s legitimate interest in ensuring the “maximum safety” of women seeking abortions. *Roe*, 410 U.S. at 150. As demonstrated *supra*, the Louisiana legislature and the Fifth Circuit both properly found that Act 620 uses the recognized advantage of an admitting privileges requirement in ensuring physician competency, while abiding by this Court’s abortion jurisprudence. This Court should affirm the constitutionality of Act 620.

1982)); *Gonzales v. Carhart*, 550 U.S. 124, 163, 127 S. Ct. 1610, 1636, 167 L. Ed. 2d 480 (2007) (“The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.”).

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Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 671-1776
court@lc.org

Catherine W. Short
Allison K. Aranda
LIFE LEGAL DEFENSE
FOUNDATION
P.O. Box 2105
Napa, CA 94558
(707) 224-6675
kshort@lldf.org
akaranda@lldf.org
Counsel for Amici Curiae