No. 18-1323

In the

Supreme Court of the United States

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

v.

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

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICI CURIAE* OF SAMARITAN'S PURSE, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSITUTUTE, AND NATIONAL LEGAL FOUNDATION

in support of the Respondent

Steven W. Fitschen
James A. Davids
The National Legal Foundation
524 Johnstown Road
Chesapeake, VA 23322

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904

Counsel for Amici Curiae

QUESTION PRESENTED

The courts below conducted *Casey*'s "undue burden" analysis by looking only at the abortion clinics in the State that were operating at the time the challenged statute was enacted. However, under this Court's precedent, there is no right to have either the State or private parties perform or finance abortions. The question this case presents is this:

> Whether, in performing *Casey*'s undue burden analysis, it is error to consider only *current* abortion providers, rather than all who could qualify to provide abortions in the State while giving effect to the challenged regulation.

Table of Contents

Table of Authorities

Cases

Constitution and Rules

Other Authorities

Interests of the *Amici Curiae*[1]

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse adheres to the Scriptural, life-affirming truth that we are all made in the image of God and have value, dignity and worth, whether born or unborn. We believe salvation is through Jesus Christ alone, who was conceived and existed in the womb of Mary, evidencing absolute confirmation of the value, meaning, and purpose of the unborn. As part of its ministries, Samaritan's Purse is committed to encouraging mothers to carry their children to term and to support them in doing so. It assists mothers in need around the world to care for their children, both born and unborn.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest

---

[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which human life is valued, religious liberty thrives, and marriage and families flourish. Many of its public policy efforts focuses on protecting human life at all stages, which includes the regulation of abortion facilities to provide basic safety standards that protect women who elect to have an abortion.

The **Illinois Family Institute** (IFI) is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for medical personnel, including particularly in the area of abortion, as guaranteed by the federal and state constitutions and the Illinois Health Care Right of Conscience Act.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Louisiana, because of its effect on the rights of people of faith, especially with respect to supporting contentious issues like abortion and laws regulating it.

SUMMARY OF ARGUMENT

The plurality in *Casey*[2] held that, when a State places a "substantial obstacle in the path" of a woman's ability to procure an abortion, it "impose[s] an undue burden on the right."[3] At the same time, this Court has repeatedly held that a woman has no right to compel the State to finance or otherwise support her abortion right or to force private individuals to accommodate her.

The only way to harmonize these lines of cases is for this Court to recognize that, when considering whether a State's regulation of abortion imposes an undue burden, the analysis should not focus on the *current* number of abortion clinics in the State and how they are affected. Instead, it should analyze whether, despite the regulation, there are still adequate *potential* abortion facilities that are qualified to perform abortions.

The litigants in *Whole Woman's Health v. Hellerstedt*[4] and in this case below focused only on *current*, not *qualified*, providers. However, *Whole Woman's Health* is not *stare decisis* on what is the proper analysis for the simple reason that the issue was never addressed. This Court should correct this analytical error and harmonize its precedent.

---

[2] *Planned P'hood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).
[3] *Id.* at 877-78 (plurality op.).
[4] 136 S. Ct. 2292 (2016).

ARGUMENT

I. The Undue Burden Analysis Must Look at All Potential Abortion Facilities in the State, Not Just Those in Existence When a Law Was Enacted.

Casey instructs that a State law may not unduly burden a woman's access to an abortion.[5] At the same time, a State is not required to provide access to, or funding of, abortions. Thus, when analyzing whether a particular State law unduly burdens a woman's abortion right, the proper analysis is to determine whether, after enactment, sufficient potential abortion facilities remain. The focus in the courts below on actual abortion facilities currently in the State was erroneous.

A. A Woman Has No Right to Require Either the State or Private Individuals to Provide Her Ready Access to an Abortion.

A person who wishes to exercise her First Amendment rights of speech, press, and assembly by advertising and then holding an event at which she speaks does not have the right to have the State pay for her newspaper cost or facility rental. The same has long held true for the abortion right first recognized in *Roe v. Wade*.[6]

---

[5] 505 U..S. at 877-78 (plurality op.); *see also Bellotti v. Baird*, 428 U.S. 132, 147 (1976).
[6] 410 U.S. 113 (1973).

Within a few years of *Roe*, two decisions affirmed that States are not required to fund elective abortions, even though a woman may have a right to one. In *Maher v. Roe*,[7] this Court held that a State did not have a constitutional duty to fund elective abortions, even though it paid for childbirth services through the federal Medicaid program.[8] In *Poelker v. Doe*,[9] this Court found no constitutional defect in a city's refusal to pay for abortions at its municipal hospital.[10] In that case, the restriction was motivated in part by the fact that the OBGYN doctors at the hospital were drawn from a Jesuit-operated institution opposed to abortion.[11]

This Court reinforced that the State does not have to facilitate abortion in two cases in 1980. In *Harris v. McRae*,[12] this Court upheld the Hyde Amendment, which prohibited federal funds being used for payment of elective abortions.[13] And in *Williams v. Zbaraz*,[14] this Court rejected a challenge to a State law that prohibited public funds from being used for any abortions except to save the life of the mother.[15] Then, in 1989, this Court found constitutional a similar Missouri law in *Webster v. Reproductive Health Services*[16] that prohibited the use of public funds, employees, and facilities to

---

[7] 432 U.S. 464 (1977).
[8] *Id.* at 469-80.
[9] 432 U.S. 519 (1977).
[10] *Id.* at 521.
[11] *Id.* at 520.
[12] 448 U.S. 297 (1980).
[13] *Id.* at 311-18.
[14] 448 U.S. 358 (1980).
[15] *Id.* at 368-69.
[16] 492 U.S. 490 (1989).

provide abortions. The Court reiterated that such prohibitions place no governmental obstacle in the path of a woman who wants to have an abortion.[17]

The holdings in these five cases rest on three basic propositions. First, the existence of a personal constitutional right does not carry along with it a duty of the State to fund the exercise of that right. As stated in *Maher*, "The Constitution imposes no obligation on the States to pay the pregnancy-related Medicaid expenses of indigent women, or indeed to pay any of the Medicaid expenses of indigents."[18] Or, as the *Harris* Court reiterated it more broadly, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to financial resources to avail herself of the full range of protected choices."[19] To provide a parallel context, an individual has freedom of the press under the First Amendment to print a magazine, but the State does not have to pay for her publishing endeavor.[20]

Second, this Court noted in *Maher* that the State's decision to fund childbirth but not abortion "place[d] no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[21] It observed that the fact that indigency "may make it difficult—and in some cases, perhaps, impossible—

---

[17] *Id.* at 507-11.
[18] 432 U.S. at 469.
[19] 448 U.S. at 316.
[20] *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545-46 (1983) (holding that Congress has no duty to subsidize First Amendment rights); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (same).
[21] 432 U.S. at 474.

for some women to have abortions" was not a result of the State's regulation.[22] In this, the Court recognized that there are what we will call "market forces" that affect the ability of a woman to exercise her abortion right and that the State has no duty to overcome these market forces for her.

Third, the *Maher* Court noted that a State may "make a value judgment favoring childbirth over abortion" and "may implement that judgment by the allocation of public funds."[23] Indeed, this Court in *Harris* upheld the Hyde Amendment because it "bears a rational relationship to its legitimate interest in protecting the potential life of the fetus."[24] Moreover, the Court recognized that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[25] In *Webster*, this Court reinforced that "[n]othing in the Constitution requires States to enter or remain in the business of performing abortions."[26]

---

[22] *Id.*; *see also Harris*, 448 U.S. at 316-17.

[23] 432 U.S. at 474; *see also Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (the State may regulate abortion "in furtherance of its legitimate interests . . . to promote respect for life, including life of the unborn"); *Casey*, 505 U.S. at 846 (maj. op.) (same), 871, 878 (plurality op.) (same).

[24] 448 U.S. at 324. Of course, science amply confirms that a fetus is not "potential life," but actual life. *See Gonzales*, 550 U.S. at 158-60 (referring to "life of the unborn" and an aborted fetus as a "child," "infant," and "infant life"). If a fetus dies of natural causes, the mother miscarries the child.

[25] *Id.* at 325.

[26] 492 U.S. at 510.

It directly follows that, if the Constitution does not require the State to fund or facilitate an individual right such as speech, assembly, or abortion, then the Constitution does not require a private individual or entity to do so, either. Particularized to abortion, the Constitution does not require private doctors, nurses, clinics, or hospitals to perform or facilitate abortions. It is their personal choice, a choice that is itself protected by the Constitution.[27] Such decisions are part of the "market forces" that may affect a woman's ability to exercise her abortion right but that she has no constitutional right to require either the State or private persons to help her overcome.

B. To Harmonize with the Right Not to Facilitate Abortion, the Undue Burden Analysis Must Consider All Who Could Qualify as Abortion Providers, Not Just Actual Providers.

Just as "it simply does not follow" that a woman's abortion right carries with it an entitlement to have the State pay for its exercise,[28] neither does it follow that she is entitled to have a doctor or healthcare facility perform an abortion she may wish to have. In other words, the abortion right recognized by this Court in *Roe* does not create an affirmative duty for someone else to provide it. Rather, it provides a limited prohibition on state action only, such that, when a woman has the means and opportunity to

---

[27] *See* U.S. Const. amends. I, IX, X.
[28] *Harris,* 448 U.S. at 316.

exercise her right, the State may not unduly prevent her from doing so.

In addition to a woman's right to abort being subject to reasonable regulation by the State in the interests of health and safety, it is subject to market forces with respect to providers. The Constitution provides no right to have an abortion facility or abortion doctors available in a State. Nor does it guarantee that abortion doctors or abortion facilities that begin operating in a State will continue to do so. Market forces operate continually to limit or improve abortion options, irrespective of a State's regulation.

Thus, when determining whether a State's regulation of abortion presents an "undue burden" on a woman's right to choose abortion, it is a basic analytical error to ignore market forces. After all, market forces may cause facilities or doctors that do not perform abortions at the time a regulation is enacted to decide to do so later, motivated by increased demand, attractive remuneration, ideological reasons, or a combination of these and other considerations. Thus, the proper question is this: after enactment of the State's regulation, what facilities and doctors could still be *qualified* to perform abortion services.

In this case, the lower courts, while relying on this Court's recent decision in *Whole Woman's Health*, failed to consider this critical factor. Instead, they looked only at abortion facilities and abortion doctors operating at the time of Louisiana's enactment of the law and assessed the effect of the

law only on them.[29] However, they failed to consider the total number of existing facilities and doctors in the State who were still legally and professionally qualified to perform abortions after the law's enactment and who could have decided to perform them. That analysis is essential to determining whether the challenged law, rather than market forces, imposes an undue burden on a woman's right to abortion. The fact that one abortion facility has opened in the State does not somehow make the State responsible for the fact that market forces have prevented others from doing so.

C. This Court Can and Should Take Judicial Notice That Louisiana Has Numerous Health Care Facilities with Doctors Who Are Still Qualified to Perform Abortions, Such That the Challenged Regulation Does Not Impose an Undue Burden.

Publicly available information, readily obtained, shows that Louisiana has over 100 hospitals with around-the-clock services distributed throughout the State.[30] This information "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and so this Court

---

[29] *See June Med. Servs. v. Gee*, 905 F.3d 787, 793-815 (5th Cir. 2018), *rev'g June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27, 39-83 (M.D. La. 2017).

[30] *See* https://www.ahd.com/states/hospital_LA.html (listing 108 hospitals) (last visited Oct. 17, 2019); https://en.wikipedia.org/wiki/List_of_hospitals_in_Louisiana (last visited Oct. 17, 2019) (source: HHS Program Provider Directory Spreadsheet–Dept. of Health–State of La.).

may take judicial notice of it.[31] A map of Louisiana identifying hospital locations throughout the State is found at Appendix A to this brief.

Obviously, all Louisiana's general hospitals are staffed by doctors who have admitting privileges at those same hospitals. Thus, all of Louisiana's hospitals could provide abortions while complying with Louisiana's law requiring abortionists to have admitting privileges at hospitals within 30 miles of the abortion operation. With this broad coverage of the State by qualifying facilities, it is not even necessary to canvass the additional clinics and surgical centers in the State that are staffed by doctors within 30 miles of a hospital in which they have admitting privileges.

The conclusion is obvious that Louisiana's law does not unduly restrict access to abortion—only market forces do. But *Roe* and its progeny do not override such market forces or require a State to provide relief itself by stepping in when private, qualifying individuals and facilities decline to facilitate a woman's abortion right.[32] Indeed, States

---

[31] Fed. R. Evid. 201(b)(2). "The court . . . may take judicial notice on its own," *id.* (c)(1), and "may take judicial notice at any stage of the proceeding." *Id.* (d). The majority in *Whole Woman's Health* repeatedly used data garnered from *amicus* briefs in that case. *See, e.g.*, 136 S. Ct. at 2317-18.

[32] *See Webster*, 492 U.S. at 510; *Harris*, 448 U.S. at 324; *Maher*, 432 U.S. at 474; *see also Whole Woman's Health*, 136 S. Ct. at 2344-46 (Alito, J., dissenting) (noting various market forces that may have contributed to a clinic closure that could not properly be attributed to the challenged statute or "factored into the access analysis").

may constitutionally disfavor and discourage abortion and, instead, favor and encourage women to carry their babies to term.[33] The remedy for those who want greater availability to abortion procedures in the State is to convince doctors and facilities who could do so to make them available.

II. *Stare Decisis* Does Not Prevent This Court from Correcting *Whole Woman's Health*'s Improper Approach of Focusing Just on Facilities and Doctors Already Performing Abortions, Rather Than All Qualified Facilities and Doctors.

Whole Woman's Health applied the wrong analysis, considering only the active abortion facilities in the State and the effect of the challenged legislation on them, instead of all abortion facilities and doctors in the State still qualified to perform abortions in conformity with the law.[34] The majority based its finding of undue burden on the facts that, "as of the time of the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half from about 40 to about 20" and the distances women would have to travel to facilities still performing abortion operations, giving no consideration to facilities that could have potentially performed an abortion in conformity with the challenged law.[35] In considering Louisiana's similar law, the courts below

---

[33] *See Maher*, 432 U.S. at 474.
[34] 136 S. Ct. at 2312-13.
[35] *Id.*

naturally looked to *Whole Woman's Health*, repeating the analytical error.[36]

But this court is not bound by that error and should correct it. The issue was not identified or presented by the parties in *Whole Woman's Health*, and so the issue of whether only actual or all potentially available abortion facilities should be considered was not decided. Thus, *Whole Woman's Health* has no *stare decisis* effect on the issue: "Questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred."[37]

And even if the analysis used in *Whole Woman's Health* were considered to have the weight of *stare decisis*, it should still be corrected: (a) it is dealing with a constitutional, judicially created remedy that cannot be corrected by legislation;[38] (b) considering only operating abortion facilities is not easily workable,[39] as such facilities can open or close for a

---

[36] 905 F.3d at 793-815; 250 F. Supp. 3d at 39-83.

[37] *Ill. Bd. of Elections* v. *Socialist Workers Party,* 440 U. S. 173, 183 (1979), *quoting Webster* v. *Fall,* 266 U. S. 507, 511 (1925), *quoted in United States v. Shabani*, 513 U.S. 10, 16 (1994); *see also NASA v. Wilson,* 562 U.S. 134, 163-64 (2010) (Scalia, J., concurring); *e.g.*, *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998) (holding that drive-by jurisdictional rulings "have no precedential effect").

[38] *See, e.g., Janus v. Am. Fed'n of State, Cnty., and Mun. Workers*, 138 S. Ct. 2448, 2478 (2018); *Seminole Tribe v. Fla.*, 517 U.S. 44, 63 (1996); *United States v. Scott*, 437 U.S. 82, 101 (1978).

[39] *See Janus*, 138 S. Ct. at 2479, 2481; *Montejo v. La.*, 556 U.S. 778, 792 (2009).

multitude of intertwined reasons and require mini-trials on the facts of each one;[40] (c) the precedent is not settled, but only of a few years duration;[41] (d) there was no reasoned analysis of the issue in *Whole Woman's Health*;[42] and (e) any reliance interests are insubstantial.[43]

CONCLUSION

After Louisiana's enactment of the challenged laws, hospitals with doctors with admitting privileges who were qualified to perform abortions were plentiful in the State. It was analytical error to ignore this fact in the undue burden analysis. Instead, the courts below, relying on *Whole Woman's Health*, performed the analysis based on an implicit assumption that *Roe* and its progeny require the

---

[40] *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2312-13. The trial court in this case, on remand to apply the decision in *Whole Woman's Health*, held trial over a two-week period after substantial discovery (with multiple deposition transcript being admitted in lieu of live testimony) and issued over 40 pages of findings and analysis in the Federal Supplement, all the while reviewing only five clinics and six doctors. 250 F. Supp. 3d at 35-88; *see also June Med. Servs.*, 905 F.3d at 805 (*Whole Woman's Health* requires a "fact-intensive review"), 793-801 (summarizing and analyzing factual findings of trial court), 816-33 (Higginbotham, J., dissenting) (same).

[41] *See Manuel v. Joliet*, 137 S. Ct. 911, 914 (2017); *see, e.g.*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

[42] *See Janus,* 138 S. Ct. at 2479; *Casey*, 505 U.S. at 863 ("*Plessy* was wrong the day it was decided").

[43] *See Janus*, 138 S. Ct. at 2484.

State to guarantee a woman the ability to procure an abortion when market forces, including the woman's own economic condition and the choices of other individuals, make it hard for her to do so. This Court has rejected that assumption in case after case. This Court should harmonize its case law, correct the analytical error begun in *Whole Woman's Health*, and affirm the Fifth Circuit on methodologically proper grounds.

Respectfully submitted
this 2nd day of January 2020,

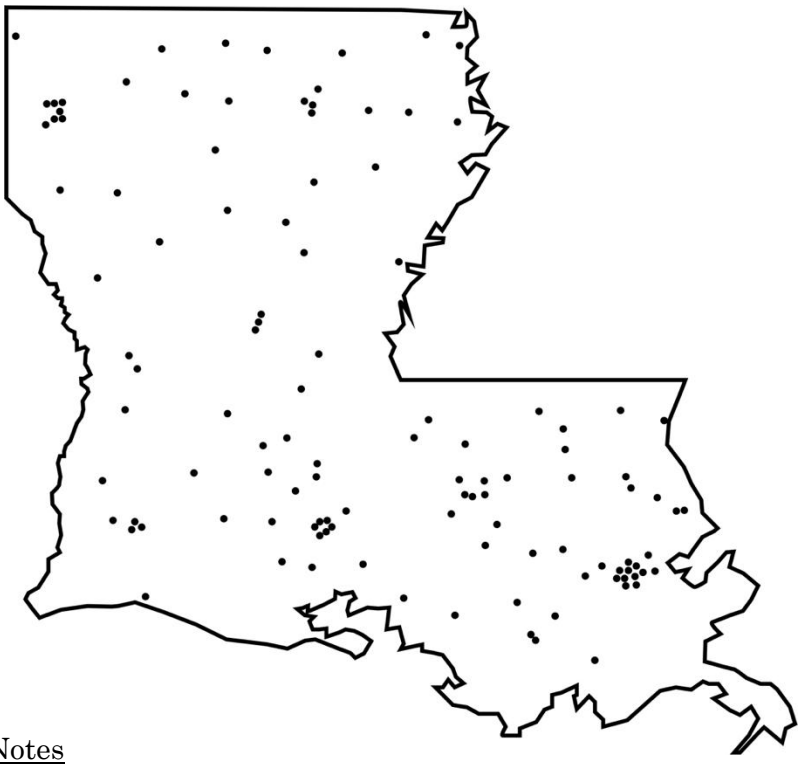
/s/ Frederick W. Claybrook, Jr
Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
Rick@Claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, VA 23322

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904

APPENDIX

Tier I Hospitals in Louisiana as of January 2017



Notes

1. Source: http://ldh.la.gov/assets/oph/Center-EH/envepi/GIS/Maps/2017-01-28_State_Map.pdf (last visited Nov. 26, 2019).
2. "Tier I Hospitals" are defined as general hospitals with emergency department capabilities 24/7. https://cdn.ymaws.com/www.lhaonline.org/resource/resmgr/HHS/Pan_Flu_Plan_2014.pdf (last visited Nov. 26, 2019).
3. This diagram only provides a close approximation of the locations identified in the source. 2017 data is the most recent available from the source.