

SUPREME COURT OF THE UNITED STATES

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

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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.)

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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 had 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 JUSTICE SOTOMAYOR: Counsel --

7 MS. RIKELMAN: That --

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

9 --

10 JUSTICE ALITO: Well, then --

11 MS. RIKELMAN: -- Your Honor.

12 JUSTICE ALITO: -- why can't -- why
13 shouldn't they be the ones to bring suit?

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

19 Again, the --

20 JUSTICE ALITO: Well, but --

21 MS. RIKELMAN: -- state has pointed to

22 --

23 JUSTICE ALITO: -- the -- the
24 constitutional right at issue is not a
25 constitutional right of abortion clinics, is it?

1 It's a right of women.

2 MS. RIKELMAN: That's correct, Your
3 Honor, but in order for women to access their
4 right to abortion, they need to be able to
5 access those services.

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

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

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

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

25 MS. RIKELMAN: Your Honor at JA 45,

1 the state explicitly conceded third-party
2 standing and urged the district court to reach
3 the undue burden claim, saying that it had a
4 keen interest in removing any cloud upon the
5 validity of its law, that this case was the
6 proper vehicle for doing so.

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

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

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

23 MS. RIKELMAN: Your Honor, at JA 45
24 there was a deliberate waiver. And the -- and
25 the state did it strategically because it was

1 attempting to take advantage of favorable Fifth
2 Circuit precedent at the time because the Fifth
3 Circuit had just upheld the Texas admitting
4 privileges law.

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

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

15 MS. RIKELMAN: That's correct, Your
16 Honor.

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

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

1 claim through multiple rounds of appeals.

2 It didn't even raise the issue when
3 this case came before the Court in 2016 on the
4 stay. The first time that it raised an
5 objection was when it filed its cross-petition
6 for cert.

7 And, again, at JA 45, it deliberately
8 and strategically waived this issue.

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

14 How many abortion cases in this Court?

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

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

22 MS. RIKELMAN: That's correct. And,
23 in fact, in Danforth and Akron the same type of
24 law was at issue. It was a law that the state
25 claimed was designed to protect the health and

1 safety of women but the Court allowed the
2 physicians to bring the claim and to show that,
3 in fact, the law didn't further health and
4 safety.

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

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

13 JUSTICE ALITO: Was it --

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

15 JUSTICE ALITO: Was it a footnote in
16 Danforth?

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

20 JUSTICE ALITO: Yeah, but --

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

25 MS. RIKELMAN: That's correct, Your

1 Honor, and the Court allowed the saloon keeper
2 to bring the third-party standing claim. Again,
3 in Triplet the Court allowed an attorney to
4 challenge a law designed to cap attorneys' fees.
5 And in Carey the Court allowed a mail order
6 contraceptive company to challenge a law that
7 was designed to limit the prescription of
8 contraceptives to pharmacists, again, claiming
9 that that was about protecting the health and
10 safety of people.

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

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

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

23 CHIEF JUSTICE ROBERTS: No, no, I
24 know, but if -- if the issue, the statutes are
25 on the books in other states, and if the issues

1 are raised there, is the same inquiry required
2 in each case?

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

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

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

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

1 no effect on the women who obtain abortions,
2 would a law be constitutional in that state?

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

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

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

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

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

1 proper for the Fifth Circuit to review the
2 district court's findings for clear error, was
3 it not?

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

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

11 MS. RIKELMAN: Yes, Your Honor.

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

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

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

25 He previously had admitting privileges

1 at a hospital in the Shreveport area, did he
2 not?

3 MS. RIKELMAN: Yes, Your Honor.

4 JUSTICE ALITO: A predecessor of
5 Christus Schumpert?

6 MS. RIKELMAN: Yes, Your Honor.

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

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

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

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

21 JUSTICE ALITO: All right. Doe Number
22 3 performs abortions, does he not?

23 MS. RIKELMAN: Yes.

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

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

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

12 JUSTICE ALITO: When Doe --

13 MS. RIKELMAN: -- including residency.

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

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

23 JUSTICE ALITO: Did the district court
24 mention any of these facts?

25 MS. RIKELMAN: Yes, Your Honor. The

1 district court's opinion was very careful, and
2 its -- its decision and finding that these
3 physicians would not be able to get privileges
4 was based on at least four points.

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

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

12 JUSTICE SOTOMAYOR: Footnote: That's
13 Doctor Number 6.

14 MS. RIKELMAN: All of these physicians
15 are outpatient physicians, Your Honor. I think
16 --

17 JUSTICE SOTOMAYOR: No, but Number 6
18 is only a medical doctor.

19 MS. RIKELMAN: That's correct.

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

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

1 privileges.

2 In addition, the district court's
3 burdens findings were supported by what happened
4 when this law actually took effect for a brief
5 time in 2016 and abortion access in Louisiana
6 was devastated.

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

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

19 JUSTICE SOTOMAYOR: Can we go to Doe
20 3, the doctor who had the active OB-GYN
21 practice? He's only a part-time doctor in Hope.

22 MS. RIKELMAN: That's correct.

23 JUSTICE SOTOMAYOR: There's been much
24 talk about his statement or findings by the
25 district court that he was a superseding cause

1 to the Act because he, on his own, will not
2 practice in that -- in Hope if this law goes
3 into effect because he would be the only doctor.

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

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

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

23 JUSTICE KAVANAUGH: Could I --

24 JUSTICE SOTOMAYOR: There's no dispute
25 here about Doe 1.

1 MS. RIKELMAN: That's correct.

2 JUSTICE SOTOMAYOR: The other side,
3 that finding it says it's right. Now Doe 3,
4 whether or not he would quit or not, the clinic
5 would have to close because it wouldn't have a
6 Doe 1?

7 MS. RIKELMAN: Correct.

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

17 MS. RIKELMAN: That's correct.

18 JUSTICE SOTOMAYOR: All right.

19 JUSTICE KAVANAUGH: Can I follow up on
20 the Chief Justice's earlier question and mine as
21 well? Are you saying that admitting privileges
22 laws are always unconstitutional, such that we
23 don't have to look at the facts in -- state by
24 state? Or are you saying that actually you do
25 look at the facts state by state, and in some

1 states, admitting privileges laws could be
2 constitutional, if they impose no burdens?

3 MS. RIKELMAN: Your Honor, the burdens
4 may vary, but a law that has no benefit and
5 serves no valid state interest, which is what
6 this Court held in Whole Woman's Health, is much
7 more likely to be an undue burden.

8 JUSTICE KAVANAUGH: Could an admitting
9 privileges law of this kind ever have a valid
10 purpose, in your view?

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

13 JUSTICE KAVANAUGH: So your view is
14 that they're unconstitutional in any state,
15 regardless of the facts?

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

22 JUSTICE SOTOMAYOR: Would this be --

23 MS. RIKELMAN: -- in Louisiana.

24 JUSTICE SOTOMAYOR: -- different if --
25 if they did something as limited as, for

1 example, you have to be admitted somewhere,
2 because some -- being admitted somewhere does
3 further credentialing benefits? But this was
4 you have to be admitted within 30 miles. Some
5 of these doctors were admitted further away, but
6 they still were credentialed by someone,
7 correct?

8 MS. RIKELMAN: That's correct, Your
9 Honor. If credentialing were the true goal of
10 this law, the 30-mile limit would make no sense.
11 And one of the practical real-world impacts, if
12 this law were to take effect, is that women in
13 the Baton Rouge area would now have to travel
14 320 miles back and forth to New Orleans to see
15 the same exact physician that they previously
16 could have seen --

17 JUSTICE SOTOMAYOR: How many --

18 MS. RIKELMAN: -- in Baton Rouge.

19 JUSTICE SOTOMAYOR: -- miles from the
20 northern -- from the Hope area?

21 MS. RIKELMAN: It's 320 miles, Your
22 Honor, from Shreveport to New Orleans. And from
23 Baton Rouge back and forth, because of the
24 two-trip law, it's 320 miles. And, again, they
25 would be making that trip to see the same exact

1 physician who had been previously providing
2 services in Baton Rouge. And that has no
3 benefit to women's health. It will only hurt
4 their health, which is exactly what the district
5 court found here.

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

13 MS. RIKELMAN: That --

14 JUSTICE GINSBURG: And so --

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

23 And the standard of care at that point
24 is for her to go to the hospital closest to her
25 home. And, of course, about 40 percent of

1 abortions in Louisiana are medication abortions,
2 and any complication from those abortions will
3 always happen when the patient is at home,
4 which, again, is what this Court recognized in
5 Whole Woman's Health.

6 And that is one of the reasons why the
7 AMA and ACOG are clear that these laws have no
8 medical benefits whatsoever and only impose
9 barriers to abortion. And that is true in every
10 state, regardless of the state circumstances.

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

20 And, again, it concluded that there is
21 no basis to distinguish this case from Whole
22 Woman's Health and instead the burdens of this
23 law would be even more severe than the Texas law
24 that this Court struck down in Whole Woman's
25 Health.

1 JUSTICE ALITO: Hope is the -- the
2 name under which June Medical does business; is
3 that correct?

4 MS. RIKELMAN: Yes, Your Honor.

5 JUSTICE ALITO: Was -- was June
6 Medical's license suspended for regulatory
7 violations?

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Murrill.

19 ORAL ARGUMENT OF ELIZABETH MURRILL
20 ON BEHALF OF STEPHEN RUSSO, INTERIM SECRETARY,
21 LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

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

24 The Fifth Circuit correctly held that
25 the plaintiffs in this case failed to carry

1 their burden -- their heavy burden of proof that
2 is required to facially invalidate a state law.
3 Louisiana's decision to require abortion
4 providers to have admitting privileges was
5 justified by abundant evidence of
6 life-threatening health and safety violations,
7 malpractice, noncompliance with professional
8 licensing rules, legislative testimony from
9 post-abortive women, testimony from doctors who
10 took care of abortion providers' abandoned
11 patients.

12 The substantive due process claim that
13 plaintiffs assert on their patients' behalf
14 hinged upon their assertion that they would not
15 be able to get privileges, but they can and they
16 did. Their claims also fail for an independent
17 reason.

18 So they do not meet the modern,
19 rigorous rule for third-party standing. So,
20 instead, they invite this Court to exempt them
21 from the rule.

22 This Court should decline to make
23 abortion providers unique among federal
24 plaintiffs and reaffirm that even abortion
25 providers must comply with the same rules as all

1 the other litigants.

2 Doctors and healthcare providers and
3 healthcare facilities are heavily regulated for
4 ethics reasons and for consumer protection. And
5 in this context, the conflict between the
6 plaintiffs and the individuals that the law
7 seeks to protect should defeat the close
8 relationship prong of third-party standing.

9 Apart from that conflict, the record
10 shows that they do not have a close relationship
11 with their patients and individual women have
12 litigated abortion cases on their own for
13 decades.

14 I'd like to first address why this
15 case is different from Hellerstedt and then
16 address standing and waiver.

17 The -- the -- the state presented
18 abundant evidence of how this case is different.
19 The law was different, the facts are different.
20 The regulatory structure is different. And the
21 record is different. And all of those things
22 dictated a different result.

23 So the Fifth Circuit focused on -- one
24 of the things that the Fifth Circuit focused on
25 was credentialing. The record in this case

1 demonstrates that there is no credentialing that
2 is performed by these facilities. They alleged
3 that they had robust policies, but they don't
4 read them and they don't follow them.

5 JUSTICE GINSBURG: What --

6 MS. MURRILL: They --

7 JUSTICE GINSBURG: -- sense does the
8 30-mile limit make, considering that --
9 certainly for medication abortions and for the
10 overwhelming number of other abortions?

11 MS. MURRILL: Justice Ginsburg --

12 JUSTICE GINSBURG: If the woman has a
13 problem, it will be her local hospital that will
14 -- she will need to go to for the care, not
15 something 30 miles from the clinic, which does
16 have no necessary relationship to where she
17 lives.

18 MS. MURRILL: Justice Ginsburg, that
19 regulation is consistent with the regulation
20 that we have in our office surgery regulations
21 and our ambulatory surgery regulations, so it is
22 consistent with our regulatory structure.

23 We also had evidence in the record of
24 women who did require transfers. I think there
25 is at least -- Doe 3 testified unambiguously

1 that he had to transfer four patients who had
2 punctured uteruses and were hemorrhaging --

3 JUSTICE GINSBURG: What about --

4 MS. MURRILL: -- and he took care of
5 them.

6 JUSTICE GINSBURG: What about a D&C
7 after a miscarriage? As I understand it, these
8 two procedures are very much alike.

9 Are similar regulations, about 30
10 miles, and admitting privileges applicable to a
11 D&C following a miscarriage?

12 MS. MURRILL: Under the ambulatory
13 surgery center regs, yes. Under the office
14 practice regs which do not regulate abortion
15 clinics, a doctor who doesn't have a -- have a
16 residency in the proper scope of care would have
17 to have admitting privileges and would have to
18 have them within a 30-mile radius of -- of the
19 clinic. So it's the same requirement.

20 JUSTICE GINSBURG: It is the same.

21 MS. MURRILL: Yes.

22 JUSTICE GINSBURG: I thought there was
23 something in the record suggesting there was no
24 such requirement for D&C following a
25 miscarriage.

1 MS. MURRILL: The office practice
2 regulations are not as tightly regulated as
3 ambulatory surgery centers, which are facility
4 licensing. These are separate licensing
5 constructs.

6 Facilities are licensed by the
7 Louisiana Department of Health, as are
8 ambulatory surgery centers. And both require
9 all the medical staff to have admitting
10 privileges.

11 The -- the requirement under ASC says
12 geographically close, and it is interpreted
13 under the regs as the same way. So we don't
14 interpret it differently. We're applying them
15 consistently and we're reading those regulations
16 the same.

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

21 I mean, I understand the idea that the
22 impact might be different in different places,
23 but as far as the benefits of the law, that's
24 going to be the same in each state, isn't it?

25 MS. MURRILL: No. I don't think the

1 benefit -- I mean, I think that a state could
2 certainly show greater benefits, depending on
3 what their regulatory structure is and what the
4 facts are on the ground in that state. I think
5 we absolutely could show that we -- that it
6 serves a greater benefit.

7 In our situation, for example, we've
8 demonstrated that the doctors don't do
9 credentialing, that the -- the LSBME testimony
10 from the executive director from Dr. Mutah in
11 the record, at JA 1373, she testified
12 specifically that the LSBME doesn't do
13 credentialing for procedures.

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

16 JUSTICE SOTOMAYOR: I'm sorry.

17 MS. MURRILL: -- robust policies, it
18 would do.

19 JUSTICE SOTOMAYOR: I'm sorry. There
20 are laws that require credentialing to be done
21 by the state with respect to these doctors,
22 correct? They have to get a license and they
23 have to have certain competencies to get the
24 license.

25 And they also -- the license is

1 suspended if they're committed -- if they are
2 convicted of a criminal act. You're -- you're
3 making it sound like there is no state licensing
4 of these doctors. They are licensed. They are
5 --

6 MS. MURRILL: Justice --

7 JUSTICE SOTOMAYOR: -- regulated. You
8 --

9 MS. MURRILL: -- Sotomayor, they are
10 -- they are licensed by the state as -- and
11 Doctor -- Dr. Ceclia Mouton testified
12 specifically at JA 1373 that the Board does not
13 do credentialing. That is not our role.

14 JUSTICE SOTOMAYOR: But didn't --

15 MS. MURRILL: Our role is --

16 JUSTICE SOTOMAYOR: -- they also --

17 MS. MURRILL: -- to licensing
18 generally.

19 JUSTICE SOTOMAYOR: -- testify that
20 they -- but they did ensure that each of these
21 doctors was skilled in the procedures that they
22 were performing?

23 MS. MURRILL: No. In fact, Doe 3
24 hired a radiologist and an ophthalmologist to
25 perform abortions at one point in time. So they

1 clearly were not --

2 JUSTICE SOTOMAYOR: But he was --

3 MS. MURRILL: -- complying.

4 JUSTICE SOTOMAYOR: -- supervising
5 what they were doing. That's what he testified
6 to.

7 MS. MURRILL: That is not within the
8 scope of care. And our record clearly
9 demonstrates that you should have a residency
10 and you should have training in the area in
11 which you are performing surgical procedures.

12 So it would not comply even with our
13 office practice regs for a doctor to -- a
14 radiologist to perform abortions. That would
15 not comply --

16 JUSTICE SOTOMAYOR: Was he doing --

17 MS. MURRILL: -- with our standard of
18 care.

19 JUSTICE SOTOMAYOR: -- a surgical
20 procedure or was he doing a medical abortion?

21 MS. MURRILL: He was performing
22 surgical abortions, to the best of my knowledge.
23 There is no indication that he wasn't. I
24 believe that the testimony is that he was
25 performing all -- there -- he wasn't restricting

1 his practice.

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

5 But to your -- to your question --

6 JUSTICE SOTOMAYOR: We're not even
7 talking about them. We're talking about these
8 doctors and their credentials.

9 And --

10 MS. MURRILL: Oh.

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

15 MS. MURRILL: Because it's not just
16 credentialing. It is all of the other factors
17 that also play into it. It does provide
18 continuity of care. It does cover for -- it
19 does address --

20 JUSTICE SOTOMAYOR: How can the --

21 MS. MURRILL: -- the non-compliance
22 with health --

23 JUSTICE SOTOMAYOR: If there is no --

24 MS. MURRILL: -- and safety
25 regulations.

1 JUSTICE SOTOMAYOR: -- continuity of
2 care, this law itself permits a doctor to either
3 have admitting privileges or to be in contract
4 with someone who does.

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

9 But if they're credentialed somewhere
10 else, they have the skill level.

11 MS. MURRILL: Justice Sotomayor, they
12 did not even comply with the transfer
13 requirement. They did not comply with multiple
14 health -- health and safety requirements in the
15 state.

16 So part of what the credentialing --

17 JUSTICE SOTOMAYOR: Was this all --

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

19 JUSTICE SOTOMAYOR: -- before the
20 district court?

21 MS. MURRILL: Yes.

22 JUSTICE SOTOMAYOR: All right. And
23 the district court looked at it and found
24 explanations that were adequate for each and
25 didn't come to the conclusions you did or the

1 legislature did.

2 I thought the standard of review for
3 the Fifth Circuit here was whether there was a
4 plausible basis in the record for the
5 conclusions the district court reached?

6 MS. MURRILL: The district court judge
7 ignored all of the health and safety violations.
8 He ignored an entire category of courtesy
9 privileges if we're talking about compliance. I
10 mean, I would -- I would like to take us back to
11 the point that they could and did get
12 privileges. And their primary --

13 JUSTICE KAGAN: General Murrill,
14 before you --

15 MS. MURRILL: -- assumption from the
16 beginning was --

17 JUSTICE KAGAN: -- do that -- before
18 you do that, please. On this credentialing
19 point, which you've mentioned several times, and
20 of course Whole Woman's Health discussed that
21 and said a state can't say it's doing this for
22 credentialing purposes if the hospital's reasons
23 for denying admitting privileges have nothing to
24 do with the doctor's quality.

25 And that was true in Whole Woman's

1 Health and it's true here, too, that there's a
2 great deal of evidence in the record that
3 indicates that admissions privileges rest on
4 many things.

5 It could rest on qualifications, but
6 it could rest on the number of patients a doctor
7 has. It could rest on whether a doctor --
8 whether a particular hospital needs more
9 providers.

10 It could rest, too, it could rest on a
11 general view that they don't want abortion
12 providers in that hospital.

13 So given that that's all true, it was
14 true in Texas and it's true here, it seems that
15 Whole Woman's Health precludes you from making
16 this credentialing argument, doesn't it?

17 MS. MURRILL: No, I don't think that
18 it does at all. I mean, in our case it was
19 demonstrably different. They could and did get
20 privileges. So all of the -- the -- the
21 conjecture and the speculation about the reasons
22 why they might be denied privileges were proved
23 to be untrue.

24 JUSTICE GINSBURG: Is it not --

25 MS. MURRILL: They were able to get

1 privileges.

2 JUSTICE GINSBURG: Is it not the fact
3 that most hospitals in Louisiana, in order to
4 get admitting privileges, you have to admit a
5 certain number of patients?

6 Abortion providers will never, if
7 that's -- if they're not also doing obstetrics
8 and gynecology, they will never qualify because
9 their patients don't go to the hospital.

10 There's one finding in that respect,
11 and you can tell me if there's any dispute about
12 it, but this circuit didn't seem to contest this
13 finding of the district court, that a hospital
14 transfer was required far less than once a year
15 or less than one per several thousand patients.

16 Most of the people who get abortions
17 never have any need to go to a hospital. Isn't
18 that so?

19 MS. MURRILL: Justice Ginsburg, to
20 your first point about the -- the privileging
21 and the minimum requirements, every -- every set
22 of bylaws in our record shows that there is a
23 category of courtesy privileges that permits low
24 admit from anywhere --

25 JUSTICE GINSBURG: My question is --

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

2 I -- I --

3 JUSTICE GINSBURG: -- is there
4 anything inaccurate about this determination
5 that access to a hospital --

6 MS. MURRILL: I think, yes.

7 JUSTICE GINSBURG: -- was required far
8 less than once a year, less than one per several
9 thousand patients?

10 MS. MURRILL: Yes. It is inaccurate
11 because what the record demonstrated is that
12 they don't know what their qualification -- what
13 their complication rates are. They all
14 testified that they don't know because women
15 don't follow up with them or they don't follow
16 up with women.

17 So they really don't know what their
18 complication rates are. And they did testify
19 that they had direct transfers that resulted in
20 women having hysterectomies --

21 JUSTICE KAGAN: Well is it right --

22 MS. MURRILL: -- and hemorrhaging.

23 JUSTICE KAGAN: Is it -- is it right
24 that there is evidence in the record that Hope
25 Clinic has served over 3,000 women annually for

1 23 years, so that's around 70,000 women, and has
2 transferred only four patients ever to a
3 hospital?

4 MS. MURRILL: And there is evidence in
5 the record that they really don't know that
6 that's an accurate rate because they don't track
7 their complications. They really don't know
8 what their numbers are.

9 JUSTICE KAGAN: Well, they know --

10 MS. MURRILL: So they testified --

11 JUSTICE KAGAN: They know whether
12 they've transferred women to a hospital, and
13 it's four. I mean, I don't know of a medical
14 procedure where it's lower than that of any
15 kind.

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

18 JUSTICE GINSBURG: You don't -- you
19 don't --

20 MS. MURRILL: -- and that they don't
21 track the numbers.

22 JUSTICE GINSBURG: You don't dispute
23 that, among medical procedures, first trimester
24 abortion is among the safest, far safer than
25 childbirth?

1 MS. MURRILL: Justice Ginsburg, a
2 first-trimester abortion can be either medical
3 or surgical. And even if it's medical, the
4 doctor should have the qualifications to -- to
5 be able to handle the most likely complication
6 of that procedure, which is a surgical abortion.

7 So under the standard of care in
8 Louisiana, even if it's a medical -- even if
9 it's a medication abortion, the doctor should be
10 able to handle a surgical abortion and be
11 qualified to do that.

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

14 JUSTICE BREYER: Oh, Doe 1, everybody
15 agreed, including the Fifth Circuit, that Doe 1
16 is barred by this new law. The old law said
17 that you have to have admitting privileges or a
18 written transfer agreement.

19 So it's a little hard to see how this
20 improves anything since you had to have a
21 written transfer agreement anyway; isn't that
22 true or not?

23 MS. MURRILL: Which Doe 1 did not
24 comply with.

25 JUSTICE BREYER: Well, well -- all

1 right. But then I don't know why the Fifth
2 Circuit court of appeals, which seemed to have
3 problems with the district court, agreed with
4 the district court as to Doe 1, but that isn't
5 my question.

6 My question is we're not going to
7 solve this at oral argument. I mean, what I've
8 done, and I'm sure the others have, is I've gone
9 through the district court findings and I have
10 gone through the court of appeals findings, and
11 I have looked at the relevant bits of the record
12 through my office and will do more of that.

13 So I think Doe 2 is your weakest case.
14 I think there are others that are stronger. But
15 I'd like your opinion, your opinion, about which
16 of these Does is your strongest? And I'll be
17 sure to look very carefully at that.

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

20 JUSTICE BREYER: You don't
21 understand --

22 MS. MURRILL: My strongest --

23 JUSTICE BREYER: I'm saying which is
24 strongest -- by the strongest, I mean you're
25 trying to make an argument, and you have four

1 Does that you have to deal with. Okay?

2 MS. MURRILL: So --

3 JUSTICE BREYER: And so I want to
4 know, of your opinion, in respect to which Doe
5 is your argument the strongest. Your argument
6 is that the Fifth Circuit was right to overturn
7 a fact finding and, with Doe 3, a credibility
8 finding of the district court. That's your
9 argument.

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

13 MS. MURRILL: And I go in order?

14 JUSTICE BREYER: Yeah --

15 MS. MURRILL: Can I give you more than
16 one?

17 JUSTICE BREYER: -- you can give me
18 all of them if you want, but you don't have that
19 much time.

20 MS. MURRILL: All right. So --

21 JUSTICE BREYER: And if you have a --
22 if you want to say they're all equally strong,
23 fine. That's okay, you can say that because I
24 have an opinion about Doe 2, at least, and --
25 and you can say what you want.

1 MS. MURRILL: Well, I mean -- I think
2 that there's evidence in virtually all of them
3 that they sabotaged their own applications and
4 that Doe 5 was -- and Doe -- Doe 5 obtained
5 privileges in Baton Rouge and New Orleans, asked
6 only one doctor to back him up in Baton Rouge,
7 and all of the doctors agreed that is not
8 difficult to satisfy.

9 Doe 2 simply --

10 JUSTICE BREYER: They don't all agree.
11 I mean, that's -- I don't think. But we're not
12 going to get -- all I want to know is a number.
13 And the reason is we have limited time and I
14 could spend two hours --

15 MS. MURRILL: Well, I --

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

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

20 JUSTICE BREYER: All right.

21 MS. MURRILL: -- who applied to one
22 out of nine hospitals in New Orleans.

23 JUSTICE BREYER: That's what I think.

24 MS. MURRILL: That's a -- that's a
25 good example.

1 JUSTICE BREYER: All right.

2 JUSTICE SOTOMAYOR: That -- that's a
3 great example, because he's the doctor who does
4 only medical abortions, not surgical. He hadn't
5 done a surgical procedure for over 12 years.
6 And your state's own expert testified that it
7 was not likely that he was going to get
8 privileges anywhere because he only did medical
9 procedures, never saw a patient. In virtually
10 all of the hospitals, if not all of them, even
11 if there wasn't -- like in Tulane, even if there
12 wasn't a minimum number of patients that had to
13 be admitted before you got privileges, you had
14 to see a certain number of patients in the
15 hospital per year to maintain your privileges.
16 And he couldn't meet that requirement. So you
17 talk about him applying to only one hospital in
18 a situation where it was guaranteed that he
19 couldn't meet the requirements of any hospital.

20 My understanding of hospital practice
21 today is you got to stay alive only if somebody
22 sees patients --

23 MS. MURRILL: If --

24 JUSTICE SOTOMAYOR: -- because if they
25 don't see patients, they're of no value to the

1 hospital. If the patients aren't admitted and
2 there's no circumstance in which this doctor is
3 going to admit a patient because he does no
4 surgical procedures --

5 MS. MURRILL: Justice Sotomayor, I
6 think the record shows that the -- that they can
7 get privileges, they did get privileges, and
8 there's nothing in the bylaws that prohibits
9 them from being --

10 JUSTICE BREYER: Your -- your own
11 expert, Dr. Marier, testified, it is unlikely
12 that a doctor who, like Doe 6 does -- does what
13 Justice Sotomayor said, would "probably not" be
14 able to obtain "active admitting and surgical
15 privileges."

16 Now, that was your expert. And the
17 basis of that -- and various other things -- the
18 district court finds that he didn't have to
19 apply to all the hospitals because there was no
20 point because your expert said he probably could
21 not get them. And it's on the basis of that
22 kind of thing that the district court held that
23 he was likely not to be able to practice.

24 Where does the Fifth Circuit able to
25 say that that was clearly wrong?

1 MS. MURRILL: Justice Breyer, the
2 Fifth Circuit did a searching review of the
3 record just as is -- it is instructed to do by
4 Whole Woman's Health. And -- and -- in the
5 brief amount of time that I have left, I would
6 like to say just one thing about standing.

7 I think that the record is -- the
8 reason why it demonstrates that these doctors
9 should not be able to challenge a regulation
10 that protects people -- that -- that is intended
11 to protect a class of people from a certain type
12 of activity. It's health and safety
13 regulations.

14 As a practical matter and -- and even
15 yesterday this Court was talking about the fact
16 that consumers are protected by certain body of
17 laws. That's what we are doing with health and
18 safety regulations.

19 JUSTICE GINSBURG: How does that
20 differ from Craig against Boren?

21 MS. MURRILL: Craig against Boren and
22 -- first of all, had a beer buyer who was a
23 first-party plaintiff in the beginning of the
24 case all the way through until it became -- got
25 -- until it was on appeal. In addition to that,

1 the state --

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

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

9 JUSTICE GINSBURG: But the standing --
10 the Court went on to the merits solely on the
11 basis of the beer seller's standing, and you've
12 got a state regulation that is -- ostensibly was
13 designed to protect these vulnerable boys from
14 drinking beer and getting into accidents.

15 MS. MURRILL: May I?

16 JUSTICE SOTOMAYOR: It's a dangerous
17 --

18 CHIEF JUSTICE ROBERTS: Very -- very,
19 very briefly, counsel.

20 MS. MURRILL: Justice Ginsburg, my --
21 my answer to that is that the -- the buyer in
22 that case was much more just -- it was much more
23 just a financial transaction. Their interests
24 were better aligned because he was not
25 prohibited from consuming or possessing the

1 alcohol. So it --

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MS. MURRILL: -- really wasn't a
4 health --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 General Wall.

8 ORAL ARGUMENT OF JEFFREY B. WALL

9 FOR THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING STEPHEN RUSSO, INTERIM SECRETARY,
11 LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

12 MR. WALL: Mr. Chief Justice, and may
13 it please the Court:

14 Petitioners' counsel began this
15 morning by saying that this case is about
16 respect for the Court's precedents, but she went
17 on to acknowledge two rather remarkable
18 propositions that flow from the logic of
19 Petitioners' position and that are nowhere to be
20 found in the Court's cases.

21 To you, Justice Alito, that the
22 plaintiffs may bring this suit even if there is
23 a potential or actual conflict of interest with
24 Louisiana women. And to you, Justice Kavanaugh,
25 that this law would be unconstitutional even if

1 all providers in Louisiana already had admitting
2 privileges or could easily get them.

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

11 And to -- to you, Justice Alito,
12 that's not a clear error question. Nobody
13 disputes what the doctors did. We're all agreed
14 on the facts. There's no factual dispute about
15 what the doctors did and didn't do. It's about
16 how rigorously we -- we're going to --

17 JUSTICE GINSBURG: But what sense --

18 MR. WALL: -- review their fairly
19 modest efforts.

20 JUSTICE GINSBURG: What sense does
21 this 30-mile -- that's what I don't understand.
22 I think everybody also agrees that the most
23 likely place the woman will be if she needs to
24 be in a hospital, she'll be at home. She won't
25 -- and her home has no necessary relationship to

1 30 miles from a clinic.

2 MR. WALL: So two points, Justice
3 Ginsburg. Again, that's going straight to the
4 benefits and bypassing the burdens, not looking
5 first to whether there's a substantial obstacle.

6 But to go straight to your question,
7 all admitting privileges requirements of which I
8 am aware, and they're fairly uncontroversial in
9 the medical field, have some distance
10 limitation. And I think the -- the benefits
11 that they go to, the most obvious is the
12 continuity of care, right, because you want the
13 doctor to be able to admit them at some nearby
14 hospital, and at least in some rural areas,
15 there isn't always a hospital right around the
16 road, so whether you draw it 15 or 20 or 30
17 miles. And with respect to credentialing, it
18 makes sense to think --

19 JUSTICE GINSBURG: But it just --

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

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

24 MR. WALL: Well, that's often true,
25 Justice Ginsburg, but the record here, unlike in

1 Hellerstedt, reveals that sometimes it's not
2 true, that sometimes women develop complications
3 in the clinic and, in fact, Doe 3, who I think
4 on this record is probably the most competent of
5 the Does and is the medical director at Hope,
6 said that he has on occasion had a patient who
7 develops a problem like a perforated uterus and
8 admitted into the hospital and treated it.

9 So even Doe 3 thinks of that as a best
10 medical practice. Now, granted, we don't know
11 how often it happens and, Justice Kagan, I'm
12 prepared to concede that it may not happen all
13 that often.

14 I don't think anybody knows the real
15 rate. But the point is that it does happen.
16 And when it does it's very serious.

17 JUSTICE GINSBURG: But it would --

18 MR. WALL: And Louisiana --

19 JUSTICE GINSBURG: It would never
20 happen to the -- when you go to the clinic just
21 to take two pills and go home.

22 MR. WALL: Well, if you develop a
23 complication at home, it's not -- the -- it's
24 not clear that you won't call the clinic and say
25 to your doctor I'm having a problem, and your

1 doctor will say then go to the following
2 hospital where I have privileges, I'll meet you
3 there.

4 Now, that's not to say as a patient
5 that's necessarily what you would want. But
6 it's hard for me to believe that women in
7 Louisiana wouldn't at least want the option to
8 be treated by the doctor --

9 JUSTICE SOTOMAYOR: Mr. Wall --

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

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

14 MR. WALL: I -- I'm taking the
15 position that --

16 JUSTICE SOTOMAYOR: No, no. Answer
17 that question.

18 MR. WALL: Well --

19 JUSTICE SOTOMAYOR: Is there at least
20 one potential woman you believe that could bring
21 this lawsuit?

22 MR. WALL: I assume that there are --

23 JUSTICE SOTOMAYOR: All right. Now --

24 MR. WALL: -- but they have not sued

25 --

1 JUSTICE SOTOMAYOR: -- stop a moment.
2 Assuming -- we assume, because it's logical,
3 okay, the woman who lives 300 -- there is going
4 to be some woman who lives 330 miles away, who's
5 going to say that's an unusually long period of
6 time for me to have to drive and then drive back
7 the same day. All right?

8 But putting or -- or the next day.
9 Putting that aside, where is there a conflict
10 between that woman and the doctor? If that
11 woman is going to take the position that this
12 law unduly burdens me, what's the potential
13 conflict?

14 She's going to come in and say you
15 doctors could get credentialing so I really
16 shouldn't sue? You doctors haven't really made
17 an effort so I really shouldn't sue?

18 What sane woman who's a plaintiff is
19 going to have a conflict with a doctor who wants
20 to protect her rights by doing what they can to
21 comply with the law, or not, but their interests
22 are not misaligned, they want to achieve the
23 same holding, that this law unduly burdens her
24 right to abortion.

25 The -- I -- I -- I'm -- I don't see a

1 conflict with that.

2 MR. WALL: Well, I would say two
3 things, Justice Sotomayor: Their interests are
4 not necessarily aligned. One is the interest of
5 for-profit providers and not being regulated in
6 particular ways. The other is the interest of
7 women in their own health and safety.

8 Now, I don't know how those would have
9 played out if the women had filed suit. I don't
10 know --

11 JUSTICE SOTOMAYOR: Well, please tell
12 me --

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

14 JUSTICE SOTOMAYOR: -- what you
15 imagine.

16 MR. WALL: But to give you a couple of
17 examples --

18 JUSTICE SOTOMAYOR: Okay.

19 MR. WALL: -- just to give you -- it's
20 not clear to me that women would have brought
21 facial challenge. Maybe all of the current
22 providers in Louisiana --

23 JUSTICE BREYER: How do you deal with
24 this? I mean, I -- I have read the briefs. I
25 understand there are good arguments on both

1 sides. Indeed, in the country people have very
2 strong feelings and a lot of people morally
3 think it's wrong and a lot of people morally
4 think the opposite is wrong.

5 And in Casey, and the later cases, I
6 think personally the Court is struggling with
7 the problem of what kind of rule of law do you
8 have in a country that contains both sorts of
9 people. Not -- all right. So, therefore, I
10 take Casey as given.

11 And I think eight cases where you've
12 given standing, I mean, we could go back and
13 reexamine Marbury versus Madison, but really we
14 have eight cases in the abortion area, we have
15 several cases in other areas, and Whole Woman's
16 Health picks that up. Casey picks that up. And
17 you really want us to go back and reexamine
18 this, let's go back and reexamine Marbury versus
19 Madison.

20 And -- and you have good arguments.
21 But why depart from what was pretty clear
22 precedent?

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

25 JUSTICE BREYER: You want to go back

1 for 40 years?

2 MR. WALL: Well, I think what we want
3 to say is that in none of those cases has the
4 Court ever considered and -- and signed off in
5 the face of a potential or actual conflict of
6 interest.

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

11 CHIEF JUSTICE ROBERTS: General, I
12 know you have limited time. And I understand
13 the point that the impact of the -- the law
14 varies from state to state, but why do you look
15 at each state differently if the benefits of the
16 law -- they're not going to change from
17 state-to-state.

18 MR. WALL: So I -- I -- I disagree,
19 Mr. Chief Justice. I think the variance isn't
20 going to be as wide as on the burden side. But
21 take credentialing, for instance.

22 I think the Petitioners would have to
23 say that if you had a state that really did
24 focus on competence and the hospitals really
25 were vetting for competence -- now, they can

1 dispute whether that happens here --

2 JUSTICE KAGAN: I mean, that wasn't
3 this case, right?

4 MR. WALL: Well, I -- I -- I would say
5 that competence is, I think, a pretty key factor
6 in what the hospitals do. And if you look at
7 the joint --

8 JUSTICE KAGAN: On -- on this record?

9 MR. WALL: I think if you look at the
10 joint commission standards that are in the
11 record, but my only point to the Chief Justice
12 was that however we -- however we think about
13 that, they can vary depending on how the
14 credentialing system works in a particular
15 state.

16 If I can just make one last point on
17 the merits. I -- I don't really think it's a
18 clear error standard, Justice Alito. It's how
19 rigorously are we going to review pretty modest
20 efforts.

21 Doe 2 did not apply to a hospital
22 where he used to have privileges and Doe 3
23 currently has privileges.

24 Doe 5 got privileges at Touro Hospital
25 in New Orleans and just needed to get a covering

1 doctor in Baton Rouge. And Doe 6 didn't apply
2 to Touro in New Orleans where Doe 5 has
3 privileges. So Doe 5 did the thing that
4 Petitioners are here saying can't be done.

5 And it's hard to figure out what the
6 basis for distinction is, because the -- the
7 cites they give in their brief, and it's pretty
8 general and pretty thin, to be honest, but when
9 you really trace it back, it seems to be the
10 hospital bylaws.

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

14 JUSTICE BREYER: The answer -- each of
15 those has an answer. I mean, they say, look,
16 the ones who didn't get the -- did get the
17 privileges practice in OB-GYN practice, and so
18 they had women who, in fact, were admitted to
19 hospitals. And the ones who don't are the ones
20 who do medical abortion. You've heard that.

21 MR. WALL: And -- and --

22 JUSTICE BREYER: Okay. And on the
23 other one, as far as, I mean, Doe 2, Doe 2 says
24 I -- I -- I tried to get a covering doctor. He
25 said no. The other covering doctors, there's no

1 point because I'm in Baton Rouge -- is that
2 where he was, I think, Doe 2 -- and he said,
3 look, it's a tougher climate here. Really tough
4 for people who perform abortions. Quite
5 different from New Orleans.

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

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

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

17 What ought to have to happen is these
18 physicians ought to have to put their
19 applications where their mouths are and then
20 we'll find out, once they have applied to the
21 full range of hospitals, whether they really
22 can't, whether Doe 2 really can't at Christus,
23 whether Doe 5 really can't find a covering
24 doctor in Baton Rouge, whether Doe 6 really
25 can't at Touro.

1 JUSTICE KAVANAUGH: Can that be done?

2 JUSTICE GINSBURG: Is it not --

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

5 JUSTICE GINSBURG: Is it not -- is it
6 not a reality, is it not really the fact, that
7 almost all hospitals in the State of Louisiana
8 do have an admission, you have to have an
9 admission record in order to admit patients?
10 There is something in the record to that effect
11 that you -- you don't get -- if you don't send
12 patients to the hospital, you don't get
13 admission privileges.

14 CHIEF JUSTICE ROBERTS: You may
15 answer.

16 MR. WALL: Justice Ginsburg, I think
17 that's difficult to square with the fact that
18 Doe 5, who does not have an OB-GYN practice, got
19 privileges at Touro. I think Petitioners
20 acknowledge that there are not explicit patient
21 minimums. They call them implicit.

22 But the kinds of requirements that
23 they are pointing to are the sorts of things
24 that look like they would have precluded Doe 5
25 and didn't. These ought to play themselves out

1 in a post-enforcement context, not as here.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 General.

4 MR. WALL: Thank you.

5 CHIEF JUSTICE ROBERTS: Five minutes,
6 Ms. Rikelman.

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

9 MS. RIKELMAN: Your Honor, the lack of
10 benefits of these laws is not state-dependent.
11 The medical consensus is clear that in no state
12 do they serve health and safety benefits.

13 And, in fact, even the federal
14 government a few months ago removed an admitting
15 privileges requirement from its regulations of
16 surgery centers nationwide, finding that the
17 requirement is medically unnecessary and imposes
18 burdens.

19 And as Justice Kagan asked, this Court
20 rejected an alleged credentialing benefit in
21 Whole Woman's Health. And after holding a
22 trial, the district court rejected that this law
23 would serve a credentialing benefit in
24 Louisiana.

25 With respect to burdens, the district

1 court found that this law would be extremely
2 burdensome, more so than the Texas law in Whole
3 Woman's Health. And its finding that these
4 physicians would not be able to get privileges
5 is supported by at least four aspects of the
6 record.

7 The fact that they tried to get
8 privileges at 15 hospitals over one-and-a-half
9 years under the court's supervision; the fact
10 that the state's expert conceded that outpatient
11 physicians who don't have a hospital-based
12 practice are unlikely to get privileges; the
13 fact that abortion access was thrown into chaos
14 when this law actually took effect; and the
15 hospital bylaws themselves, which included a
16 variety of criteria that these physicians could
17 never meet, including residency requirements.

18 And, finally, I'd like to point out
19 that this is not, in fact, a pre-enforcement
20 challenge. The state has recognized that,
21 including in its state papers before this Court.
22 The district court allowed the law to take
23 effect but enjoined its penalties and supervised
24 the physicians' efforts to get privileges over a
25 year and a half. Again, the state has

1 previously acknowledged that this is not a
2 pre-enforcement challenge.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 The case is submitted.

7 (Whereupon, at 11:05 a.m., the case
8 was submitted.)

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