UIC Law Review

Volume 55 | Issue 1 Article 5

2022

June Medical Services L.L.C v. Russo: Analyzing the Negative Impact of Maintaining the Status Quo on Abortion, 55 UIC L. Rev. 120 (2022)

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JUNE MEDICAL SERVICES L.L.C V. RUSSO: ANALYZING THE NEGATIVE IMPACT OF MAINTAINING THE STATUS QUO ON ABORTION

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I. INTRODUCTION

In 2020, a large population of Americans believed that a mask mandate during a global pandemic violated their Constitutional rights.[1] Conversely, a large sect of the American population also believed that the government limiting a woman's bodily autonomy is not a violation of Constitutional rights.[2] In 2016, Donald Trump vowed to only appoint "pro-life" Supreme Court justices if he were elected President.[3] And with the passing of the notorious Justice

* Colleen Reider, Juris Doctor Candidate 2022, UIC School of Law. I would like to thank everyone and anyone who helped me write this paper. I could not have done this without the encouragement and reinforcement from my family, friends, and professors. I would also like to thank the endless line of strong and independent women who have steered me on the path of fighting for the protection of women's rights, including the right to choose.

1. *See* John E. Finn, *The Constitution doesn't have a problem with mask mandates*, CONVERSATION (July 22, 2020), www.theconversation.com/the-constitution-doesnt-have-a-problem-with-mask-mandates-142335 [perma.cc/7AW7-FZ6A] (explaining that some Americans believe the Public Health Mandate requiring all Americans to wear a mask for public health purposes is a violation of their constitutional rights).

2. *See* Domenico Montanaro, *Poll: Majority Want to Keep Abortion Legal, but They Also Want Restrictions*, NPR (June 7, 2019), www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions [perma.cc/WN24-LMF7] (analyzing how many Americans believe abortion needs to be restricted and limited by allowing the government to govern the issue).

3. Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 19, 2016), www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [perma.cc/E7Q3-MJ7R]. On the possibility of overturning Roe v. Wade, 410 U.S. 113 (1972), President Trump said during his third televised debate with Democratic candidate Hillary Clinton, "[t]hat will happen automatically in my

Ruth Bader Ginsburg, Trump fulfilled this promise.[4]

On October 26, 2020, the Senate confirmed President Trump's nominee, Amy Coney Barrett, to the United States Supreme Court by a vote of 52-48.[5] Judge Barrett served on the Seventh Circuit Court of Appeals for three years, where she ruled in favor of restricting access to abortion[6] while also referring to abortion as being "always immoral."[7] Further, she shared that she does not agree with a strict adherence to the doctrine of stare decisis because it "is not a hard-and-fast rule in the Court's constitutional cases," and it would be better to enforce her "understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."[8] With the addition of Judge Barrett, there is now a six-to-three conservative-to-liberal majority on the Court.[9] Most of the

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opinion[] because I am putting pro-life justices on the court." Ron Elving, *Which Trump Should Be Believed on Overturning Roe v. Wade*, NPR (July 3, 2018), www.npr.org/2018/07/03/625410441/which-trump-should-be-believed-on-overturning-roe-v-wade [perma.cc/LB4S-RTV6].

4. Dan Mangan, *Trump says he will announce Supreme Court nomination to replace Justice Ruth Bader Ginsburg on Saturday*, CNBC (Sept. 22, 2020), www.cnbc.com/2020/09/22/trump-will-name-supreme-court-pick-to-replace-ginsburg-on-saturday.html [perma.cc/RZW8-8H2X]. On September 18, 2020, Justice Ruth Bader Ginsburg passed away at age 87 from complications of pancreatic cancer. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [perma.cc/MM8J-L2FB]. About six weeks later, the Senate confirmed Justice Amy Coney Barrett to the Court. Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing its Conservative Majority*, WASH. POST (Oct. 16, 2020), www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html [perma.cc/LG95-AEBK].

5. *See* Grace Segers, *Amy Coney Barrett sworn in as newest Supreme Court justice*, CBS (Oct. 27, 2020), www.cbsnews.com/news/amy-coney-barrett-supreme-court-justice-sworn-in/ [perma.cc/5Q2P-KH2N] (stating that the addition of Amy Coney Barrett to the Court is concerning Democrats over the fate of *Roe v. Wade* and the right to abortion).

6. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r. of Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting). Judge Barrett joined the dissent arguing in support of an Indiana law requiring physicians to inform the parents of a minor seeking an abortion. *Id*.

7. John H. Garvey & Amy C. Barrett, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 316 (2005); *Judicial and Justice Department Pending Nominations*, Senate Judiciary Comm. Confirmation Hearing, 115th Cong. (2017) (statement of Amy Coney Barrett, Judicial Nominee, Seventh Circuit Court of Appeals) (demonstrating Judge Barrett's past opinions and statements about abortion always being immoral and her adherence to the teachings of the Catholic religion on important legal matters).

8. *See* Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1726 (2012-13) (showing that Judge Barret is not likely to follow the doctrine of stare decisis in upholding *Roe* due to her disagreement with the Court's adherence to the doctrine in general).

9. *See* Joan Biskupic, *The Supreme Court hasn't been this conservative since*

justices have shown their willingness to restrict access to the right to an abortion in their previous opinions and holdings.[10] This has dire implications for women and their right to undergo an abortion, as well as the landmark precedent set by *Roe v. Wade*.[11] Judge Barrett's appointment to the Supreme Court is the anti-abortion and conservative movement's absolute dream come true.[12]

In June 2020, the Court struck down a Louisiana abortion restriction that would have left Louisiana women with no abortion providers in the whole state.[13] Since this ruling, the Court, with the addition of Judge Barret, has taken up one abortion case finding against the abortion providers and patients,[14] and have recently taken up another on December 1, 2021.[15] Three months prior, the Court refused to grant a preliminary injunction blocking a Texas abortion law that amounts to a ban on abortions beginning after a woman reaches six weeks of pregnancy.[16] The future of the constitutional right for a woman to undergo an abortion is patently

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the 1930s, CNN (Sep. 26, 2020), www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html [perma.cc/A9XB-FZTV] (demonstrating that the Court would be incredibly conservative-leaning with the addition of Amy Coney Barrett to the bench alongside Justices Alito, Gorsuch, Thomas, Kavanaugh, and Chief Justice Roberts).

10. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016), *as revised* (June 27, 2016) (Alito, J., dissenting) (stating his disagreement with the holding of *Roe*); *id.* at 2330 (Chief Justice Roberts joining in the dissenting opinion) (indicating the Chief Justice's position that the holding of *Roe* was incorrect); *id.* at 2321 (Thomas, J., dissenting) (arguing in favor of a Texas abortion regulation that would severely burden a women's meaningful exercise of her right to undergo an abortion); June Med. Serv. L. L. C. v. Russo, 140 S. Ct. 2103, 2171 (2020) (Gorsuch, J., dissenting) (finding that abortion providers do not have standing to bring suit on behalf of their patients and that the Louisiana law did not restrict access to abortion); *id.* at 2182 (Kavanaugh, J., dissenting) (arguing in favor of a Louisiana abortion regulation that would have the effect of closing all abortion clinics in the state except for one).

11. Roe v. Wade, 410 U.S. 113 (1973), *holding modified by* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

12. *See* Nina Totenburg, *Amy Coney Barrett: A Dream for the Right, Nightmare for the Left*, NPR (Sept. 28, 2020), www.npr.org/2020/09/28/917554001/amy-coney-barrett-a-dream-for-the-right-nightmare-for-the-left [perma.cc/4UB7-FTM8] (explaining that because of then-Judge Barrett's religious and conservative beliefs and backgrounds, she is likely to vote against the pro-choice movement and the central tenants of a woman's decisional privacy to choose whether or not to terminate her pregnancy in future abortion cases if she is appointed to the U.S. Supreme Court).

13. *Russo*, 140 S. Ct. 2103 (2020).

14. *Jackson*, 141 S. Ct. 2494 (2021).

15. Amy Howe, *Roe v. Wade hangs in balance as reshaped court prepares to hear biggest abortion case in decades*, SCOTUS BLOG (Nov. 29, 2021), www.scotusblog.com/2021/11/roe-v-wade-hangs-in-balance-as-reshaped-court-prepares-to-hear-biggest-abortion-case-in-decades/ [perma.cc/2ZKA-YA85].

16. *See Jackson*, 141 S. Ct. at 2495 (blocking the proposal for a preliminary injunction to stop the abortion law from going into effect).

unprotected in the context of today's social and political climate.[17] But a majority of the American people agree with the precedent set by *Roe* and want it to remain.[18]

In order to fully comprehend the controversy behind the right to abortion in the American judicial and legal systems, Part II of this case note will discuss the relevant Supreme Court precedent dealing with the controversial abortion right that led to the Court's decision in the June 2020 case of *June Medical Services L.L.C. v. Russo*.[19] Part III of this case note will analyze the *Russo* decision where the Court struck down a state regulation finding that it significantly burdened a woman's right to choose whether or not to undergo an abortion by balancing the benefits of the regulation versus its burdens.[20] Part IV will demonstrate how the Court's review of *Russo* has resulted in the weakening of the abortion right and has opened it up to future legal uncertainty and criticism. Finally, Part V of this case note will provide a personal analysis of *Russo*. The issue surrounding the governmental regulation of the abortion right is significant today because, as women's rights activist and attorney Harriet Pilpel admonished, abortion "is in fact the most important single method of birth control in the world today."[21]

II. BACKGROUND

Abortion practices have been a part of women's history long before the controversial debate landed at the courthouse stairs.[22] Abortion practices were once unregulated and accessible to American women of all different backgrounds until the practice

17. *See* Nora Ellman, *State Actions Undermining Abortion Rights in 2020*, CTR. FOR AM. PROGRESS (Aug. 27, 2020), www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/ [perma.cc/5QAK-5GTZ] (portraying the uncertain future of the abortion right due to the amount of abortion challenges and regulations being put into legislation during recent times).

18. Melissa Holzberg & Ben Kamisar, *Poll: Majority of adults don't support overturning Roe v. Wade*, NBC NEWS (Sept. 29, 2020), www.nbcnews.com/politics/2020-election/poll-majority-adults-don-t-support-overturning-roe-v-wade-n1241269 [perma.cc/W5UR-8BYF]. Sixty-six percent of adult Americans say they don't think the Supreme Court should overturn *Roe*. *Id.*

19. *Russo*, 140 S. Ct. 2103 (2020).

20. *Id.* at 2132.

21. Harriet Pilpel, *The Right of Abortion*, ATLANTIC (June 1969), www.theatlantic.com/magazine/archive/1969/06/the-right-of-abortion/303366/ [perma.cc/2DK5-M63J].

22. Treva B. Lindsey, *A concise history of the US abortion debate*, CONVERSATION (June 10, 2019), www.theconversation.com/a-concise-history-of-the-us-abortion-debate-118157 [perma.cc/EZ29-RXMU].

started to become criminalized.[23] By the twentieth century, every state had characterized abortion as a felony, but abortion services were still common and sought after by American women.[24] During the 1960s and 1970s, there was tremendous growth in anti- and pro-abortion organizations bringing the hotly contested issue of abortion back into the spotlight and into the courthouse.[25] This long history led to the Supreme Court's most important ruling for abortion services in U.S. history, *Roe v. Wade*.[26]

First, this section will examine the landmark precedent set by *Roe*, along with the holding's effects on abortion regulations during the years after it was set. Second, it will touch on how the Supreme Court decided to limit the scope of *Roe* in *Planned Parenthood v. Casey* by changing the standard for how cases dealing with the abortion issue were to be analyzed. Then, this section will explain this Court's established precedent in *Whole Women's Health v. Hellerstedt*, where the Court struck down restrictions placed on abortion providers for creating an undue burden on Texas Women's right to choose to undergo an abortion just three years earlier by the Court. Further, it will examine the admitting privileges requirement and "Targeted Regulation of Abortion Providers" ("TRAP") laws that have a negative effect on the preservation and security of the abortion right, including its future. Finally, this section will provide a brief factual and procedural background of the topic of this case note: *June Medical Services L.L.C. v. Russo*.

A. The Implied Fundamental Right to an Abortion: Roe v. Wade

Fundamental rights are those which are expressly enumerated in the Constitution[27] and have been recognized by the Supreme Court as being owed a "high degree of protection from government encroachment."[28] There are also rights deemed so fundamental that, although not enumerated in the Constitution, they are given a high degree of protection from government regulation and control, implied fundamental rights.[29] One of the earliest implied fundamental rights was the right to privacy, which was developed

23. *Id.*

24. *Id.*

25. *Id.*

26. *Roe*, 410 U.S. 113 (1973); *see* Lindsey, *supra* note 22 (detailing the long history surrounding societal and governmental attitudes relating to abortion).

27. *Fundamental right*, MERRIAM-WEBSTER, www.merriam-webster.com/legal/fundamental%20right [perma.cc/ZE37-FZET] (last visited Feb. 26, 2021).

28. *Fundamental Right*, CORNELL LAW SCH. LEGAL INFO. INST., www.law.cornell.edu/wex/fundamental_right [perma.cc/GA26-BM89] (last visited Feb. 26, 2021).

29. *Id.*

from the realization that intangible things, such as thoughts, sensations, and emotions, were in need of being recognized.[30] Eventually, in 1965, the Supreme Court recognized that citizens of the United States had an implied fundamental right of privacy which broadly encompassed different interests of individuals.[31] In *Griswold v. Connecticut*, the Court reasoned that the Ninth Amendment in conjunction with several constitutional guarantees emanating from the First, Third, Fourth, and Fifth Amendments, allowed for the implied fundamental right of privacy even though it's not specifically enumerated in the Constitution.[32] Justice Douglas ruled that within the several constitutional guarantees of the First, Third, Fourth, and Fifth Amendments are various "zones of privacy" on which the government should not be able to encroach upon.[33]

In *Roe*, Justice Blackmun ruled that a woman's decision to undergo an abortion is within the zones of privacy advanced in *Griswold*.[34] Therefore, that decision is encompassed within the implied fundamental right of privacy and is owed strong protection against governmental and state intrusion.[35] This was the first time the Supreme Court recognized a woman's implied fundamental right to choose to undergo an abortion.[36] The Court struck down burdensome abortion regulations using a strict scrutiny standard and rigid trimester framework that would continue to be the standard of review for abortion regulations for years to come.[37] To satisfy strict scrutiny, state governments must prove they had a compelling state interest in regulating abortions and that the legislative means in doing so were the least restrictive means available.[38]

Roe invalidated a Texas law that prohibited women from seeking a first trimester abortion for any reason except when it would save their life.[39] The State of Texas argued that it had an

30. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

31. Griswold v. Connecticut, 381 U.S. 479 (1965).

32. *Id.* at 484-85.

33. *Id.*

34. *Griswold*, 381 U.S. at 479.

35. *See Roe*, 410 U.S at 153-54 (rationalizing the implied fundamental right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

36. *Id. (*"We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

37. *Id.* at 162-63.

38. *See* United States. v. Carolene Prods. Co., 304 U.S. 144, 152, n. 4 (1938) (establishing that when the government is attempting to regulate the fundamental rights of an individual, there needs to be a higher standard of review in place, such as strict scrutiny).

39. *Roe*, 410 U.S. at 164-66.

important interest in protecting the potential life of a fetus because "life begins at conception."[40] The state also argued that the law protected the health of the mother from risks emanating from the abortion procedure.[41] The *Roe* court recognized that a woman's right to decide whether or not to terminate her pregnancy was an interest encompassed within this implied fundamental right of privacy.[42] But even though the Court recognized a woman's right to choose, it is not absolute and states still have the discretion to regulate abortion in order to safeguard compelling interests of maternal health, medical standards, and the protection of potential life.[43]

Justice Blackmun relied on evidence to show that abortion is relatively safe if performed early in a pregnancy and mortality rates are lower in abortion than they are in normal childbirth.[44] Based on this evidence, the Court held that a state's regulation prohibiting a first trimester abortion does not reasonably relate to the state's interest in preserving maternal health because these risks do not become compelling interests until the end of the first trimester.[45] Additionally, the Court found no evidence that life begins at conception and recognized that a state only has a compelling interest in preserving potential life when there is a viable fetus involved, which can be found only after the first trimester.[46] The Court rejected the states' interests because they did not outweigh a woman's privacy interest in deciding to undergo an abortion.[47] The Court expressly recognized that a woman's right to choose during the first trimester falls within the purview of the implied fundamental right of privacy.[48] The Court also divided pregnancy into three equal trimesters, giving the greatest strength to a woman's implied fundamental right to choose within the first trimester of pregnancy.[49] Because a woman's right to choose was deemed an implied fundamental right of privacy, strict scrutiny was

40. *Id.* at 159.

41. *Id.*

42. *Id.* at 153; History.com Editors, *Roe v. Wade*, HISTORY (July 22, 2021), www.history.com/topics/womens-rights/roe-v-wade [perma.cc/3Y4B-UMG7].

43. *Roe*, 410 U.S. at 149-52.

44. *Id.* at 149.

45. *Id.* at 162-63.

46. *Id.* at 163.

47. *Id.* at 162; *see* Reuters Staff, *Explainer: Supreme Court's Roe v. Wade decision hinged on women's right to privacy*, Reuters (Sept. 23, 2020), www.reuters.com/article/us-usa-court-abortion-roevwade-explainer/explainer-supreme-courts-roe-v-wade-decision-hinged-on-womens-right-to-privacy-idUSKCN26E1LU [perma.cc/5JG5-JVJF] (indicating that even though the Court agreed that Texas had a legitimate interest in protecting the health of the pregnant woman, there would be a more significant detriment in denying a woman's choice and right to choose due to the acceptance of this state interest).

48. *Roe*, 410 U.S. at 164.

49. *Id.* at 163.

used.[50]

Roe is a landmark case that established the precedent that gives strength to women's reproductive and civil rights, but it has been unprotected and attacked since the day it was decided.[51] During the years closely following the decision in *Roe*, legal abortion services skyrocketed throughout the United States and mortality rates of pregnant women decreased.[52] But it also came with an increase in state level regulations attempting to create exceptions to *Roe* and involve areas of law that the precedent did not address.[53] Instead of *Roe* serving as an established precedent for women's right to choose, it was attacked and contested by many individuals which eventually led to its modification.[54]

B. Narrowing the Scope of Roe: The Emergence of the Undue Burden Standard

Roe established that strict scrutiny would be used when analyzing governmental and state regulations that restrict a woman's access to an abortion.[55] Due to the controversy caused by its holding, the Court narrowed *Roe*'s scope in *Planned Parenthood of S.E. Pennsylvania v. Casey* by lowering the standard of review from strict scrutiny to the undue burden standard.[56] Under this new standard, the government has the burden of demonstrating that the regulation does not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of

50. *Carolene Prods. Co.*, 304 U.S. at 152, n. 4.

51. *Roe v. Wade: The Constitutional Right to Access Safe, Legal Abortion*, PLANNED PARENTHOOD, www.plannedparenthoodaction.org/issues/abortion/roe-v-wade [perma.cc/JDK9-2RS4] (last visited Dec. 30, 2021).

52. *See* Willard Cates, Jr., David A. Grimes & Kenneth F. Schulz, *The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003) (indicating that after the legalization of abortion by *Roe*, abortions increased to 1.6 million in 1980 and continued at the rate through the 1990s).

53. *Roe v. Wade - Then and Now*, CTR. FOR REPROD. RIGHTS (July 7, 2007), www.reproductiverights.org/document/roe-v-wade-then-and-now [perma.cc/3VPG-KZ4P] (attesting that the decisional privacy of women to choose to undergo an abortion was under attack like no other right had been before it by the state legislatures).

54. *See id.* (reviewing the countless attacks on and the undermining of the holding of *Roe* by state legislatures leading to its narrowing of scope and medication in *Casey*).

55. *Roe*, 410 U.S. at 162-63.

56. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 876 (1992) (establishing the undue burden standard as the appropriate standard of review for state abortion regulations recognizing that abortions don't only affect the pregnant women, but also other individuals and the state interests of protecting and preserving potentiality of life and maternal health).

a non-viable fetus."[57] In *Casey*, the Court did not throw out the central holding of *Roe* but modified it to balance the compelling state interests of protecting the potentiality of life and maternal health against the privacy right of the pregnant woman.[58]

1. Factual Findings Differing from Roe

In *Casey*, the Court decided that the rigid trimester framework and strict scrutiny standard applied in *Roe* undermined the important state interests of protecting the potentiality of life.[59] *Roe*'s rigid trimester framework was thrown out, but the Court noted that a state could legally still regulate abortion after a woman's pregnancy reached the crucial point of "fetal viability."[60] According to *Casey*, the recent advances in neonatal care had "advanced viability to a point somewhat earlier" than what was decided in *Roe*.[61] Because of this new found crucial point of viability, some state abortion regulations during the first trimester could now be found constitutional.[62] This included regulations that involved the state taking steps before viability to ensure that the choice to undergo an abortion was "thoughtful and informed."[63] The Court even went so far as to recognize that regulations that have the effect of persuading pregnant women to choose childbirth over abortion are constitutional, while regulations that coerce this decision are not.[64] Additionally, the Court decided that because all medical procedures can be regulated by the states to further its health and safety interests, the same premise should be afforded to abortion.[65] But "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion" cannot be upheld under the undue burden standard.[66] Therefore, unlike *Roe*, the undue burden standard was deemed the

57. *Id.* at 877.

58. *Id.* at 878.

59. *Id.*

60. *Id.* at 872; *see* Adam Liptak, *Fetal Viability, Long an Abortion Dividing Line, Faces a Supreme Court Test*, N.Y. TIMES (Nov. 28, 2021), www.nytimes.com/2021/11/28/us/politics/supreme-court-mississippi-abortion-law.html (exampling that the *Casey* Court found the viability line workable and open to regulation).

61. *See Casey*, 505 U.S. at 860 (arguing that due to the advancements in neonatal care, viability can be found during the first trimester, meaning that state abortion regulations can be considered constitutional during the first trimester of a women's pregnancy).

62. *Id.* at 872.

63. *Id.*

64. *See Id.* at 872-73, 878 (illustrating the modification made by the Court's decision to allow regulations and the government to persuade women to undergo childbirth as opposed to abortion, which was forbidden under the *Roe* decision).

65. *Id.* at 874.

66. *Id.* at 878.

appropriate standard of review for state abortion regulations because the right to choose is not absolute, and not all governmental regulations of abortion can be considered undue.[67]

2. Saying Goodbye to Strict Scrutiny in the Abortion Context

The narrowing of the scope of review by the Court in *Casey* preserved the central tenants of *Roe* but also opened the door to heavy state regulation designed to "persuade" women to choose childbirth instead of an abortion.[68] The Court's decision was clear that, if a governmental regulation imposed an undue burden on a woman's meaningful exercise of her implied fundamental right to choose, it would be considered unconstitutional, no matter how compelling the state's interests in protecting the potentiality of life and maternal health might be.[69] But if the regulation merely makes it more difficult for a pregnant woman to exercise her decisional privacy, then the regulation will be upheld.[70] The last important modification that the *Casey* Court made was that states could now regulate in a way that completely prohibited abortion of viable fetuses.[71]

Casey may not be as well-known as *Roe*, but it is important because it changed the way courts were to review abortion regulations in the future.[72] The modifications made in *Casey* left unanswered important questions.[73] The Court never defined what

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67. *Id.* at 876.

68. *Id.* at 872-73, 878; *see* Emily Crockett, *How the Supreme Court weakened Roe v. Wade and set the stage for a new abortion case*, VOX (Mar. 1, 2016), www.vox.com/2016/1/22/10815708/roe-v-wade-supreme-court-weakened-abortion [perma.cc/Z69X-TUX9] (emphasizing that the Casey holding opened the doors to a host of new restrictions that would likely have been held as unconstitutional under a *Roe* analysis).

69. *Casey*, 505 U.S. at 878.

70. *Id.* at 873-74.

71. *Id.* at 879; *Roe*, 410 U.S. at 160 (defining fetal viability at "about seven months (twenty-eight weeks) but may occur earlier, even at twenty-four weeks").

72. Nina Martin, *The Most Important Abortion Case You Never Heard About*, PROPUBLICA (Feb. 29, 2016), www.propublica.org/article/the-most-important-abortion-case-you-never-heard-about [perma.cc/HXS3-FBWZ] (explaining how *Casey* developed a new abortion legal standard that gave greater latitude to regulate abortion and led to conservative legislatures taking advantage and enacting abortion regulations that made it more difficult for women to obtain access to abortion services).

73. *See generally* Margaret Talbot, *The Supreme Court's Just Application Of The Undue-Burden Standard For Abortion*, NEW YORKER (June 27, 2016), www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion [perma.cc/7VBT-6FZU] (indicating that the *Casey* court never clearly defined what an undue burden was, or how to specifically apply the standard); *see* Gillian E. Metzger, *Unburdening the*

substantial obstacles would be considered an undue burden.[74] *Casey* only created a subjective test in which the individual judges have to decide for themselves what constitutes an undue burden.[75] Therefore, the *Casey* decision provided little guidance on how the undue burden standard was to be applied.[76]

C. Supplying Guidance: Asserting the Benefits vs. the Burdens

Twenty-four years after the Court's decision in *Casey*, *Whole Women's Health v. Hellerstedt* supplied guidance on how the undue burden standard was to be applied.[77] In *Hellerstedt*, the Court struck down two Texas abortion regulations that conveyed insufficient medical benefits to justify the burdens they placed on a Texas woman meaningfully exercising her right to choose.[78] Justice Breyer decided that the appropriate application of the undue burden standard was to balance the real-world benefits versus the burdens that state abortion regulations have on a woman's right to choose.[79] Justice Breyer struck down the physician's admitting privileges and surgical center requirements because the burdens they imposed heavily outweighed the benefits of the regulation.[80]

1. Admitting Privileges Requirement

The admitting privileges requirement imposed by Texas's House Bill 2 regulation required physicians who performed abortions to have their own individual hospital admitting privileges within thirty miles of the clinic where the abortion was to be performed.[81] Before this change in law, abortion providers were required "to have admitting privileges or have a working

Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence, 94 COL. L. REV. 2025, 2031 (Oct. 1994) (detailing that judges have to apply their own subjective approach and analysis of facts when deciding if they satisfy the undue burden standard because there was no clearly defined analysis or rule developed in *Casey*).

74. *See* Margaret Talbot, *supra* note 73 (explaining that judge's had no clear rule or standard to follow in determining what could be considered an undue burden); Metzger, *supra* note 73 at 2031 (arguing that the *Casey* Court never provided a clear definition or test for judges to consider in cases dealing with the undue burden standard and abortion).

75. Metzger, *supra* note 73 at 2031.

76. *Id.* at 2035 (stating that "the opinion failed to explain how the effects of regulations should be calculated, how much of an effect is necessary for a finding of undue burden, or what types of effects are relevant.").

77. *Hellerstedt*, 136 S. Ct. 2292.

78. *Id.* at 2299.

79. *Id.* at 2309.

80. *Id.* at 2299.

81. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2020).

arrangement with a physician(s) who ha[d] admitting privileges at a local hospital in order to ensure the necessary back up for medical complications."[82] The previous law supplied abortion providers with more options to legally perform abortion services. The state argued that the purpose of this requirement was "to help ensure that women have easy access to a hospital should complications arise."[83] But based on the evidence presented before the Court, abortion in Texas was extremely safe with low rates of complications and almost no deaths before the passage of this requirement.[84] There was no health related problem that the requirement aimed to cure.[85] The district court found that the admitting privileges requirement had the effect of decreasing the number of Texas abortion facilities from forty to around twenty, creating an undue burden on a woman's right to choose.[86] In effect, there would have been "fewer doctors, longer waiting times, and increased crowding."[87] The Court held that the admitting privileges requirement imposed too many burdens on Texas women attempting to access abortion services, and combined with the absence of significant health benefits, it placed a substantial obstacle in the path of Texas women exercising their right to choose.[88] Consequently, the Court struck down the admitting privileges requirement.[89]

2. Ambulatory Surgical Center Requirement

The second provision of Texas's House Bill 2 was the ambulatory-surgical center requirement.[90] This law required abortion facilities to meet numerous health and safety requirements, including meeting the minimum standards for ambulatory surgical centers.[91] The district court was presented with considerable evidence that the surgical center requirement did not benefit patients and was not necessary.[92] The district court found that "women will not obtain better care or experience more

82. 25 TEX. ADMIN. CODE § 139.56 (2020).

83. *Hellerstedt*, 136 S. Ct. at 2311.

84. *See id.* (the evidence included a collection of five studies on abortion complications during the first trimester showing that the highest rate of complications was less than one percent, expert testimony stating that complications are rare and rarely require transfer to a hospital, figures of three studies on abortion complications during the second trimester that showed the highest rate of these complications was less than one percent, etc.).

85. *Id.*

86. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014).

87. *Hellerstedt*, 136 S. Ct. at 2313.

88. *Id.*

89. *Id.*

90. TEX. HEALTH & SAFETY CODE ANN. § 245.010 (West 2020).

91. *Id.*

92. *Hellerstedt*, 136 S. Ct. at 2315.

frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility."[93] The surgical center provision imposed a requirement that was not based on differences between abortion and other procedures that were reasonably related to preserving women's health.[94] Further, the implementation of this requirement had the potential of further decreasing the number of abortion clinics in Texas.[95] The district court indicated from this evidence that the few abortion providers left would not be able to meet the demand for abortion services for the entire State of Texas.[96]

The Court held that there was ample evidence to uphold the district court's finding that the surgical center requirement placed a substantial obstacle in the way of a Texas woman seeking an abortion.[97] Much like the admitting privileges requirement, the surgical center requirement provided little to no health benefits for women, imposed a substantial obstacle, and constituted an undue burden on a woman's right to choose.[98] Justice Breyer balanced the benefits and the burdens created by the Texas regulation to decide whether an undue burden was imposed on Texas women looking to meaningfully exercise their right to undergo an abortion.[99] Four years after Breyer's guidance on the standard in *Hellerstedt*, *June Medical Services L.L.C. v. Russo* was heard by the Court.[100] But this time the future of the abortion right would be left unprotected and uncertain.

D. TRAP Laws and The Controversial Admitting Privileges Requirement

In both the most recent Supreme Court cases examining the abortion rights issue, *Hellerstedt* and *Russo*, state regulations attempting to enforce an admitting privileges requirement on

93. *Lakey*, 46 F. Supp. 3d at 684.

94. *Id.*

95. *Hellerstedt*, 136 S. Ct. at 2316.

96. *Lakey*, 46 F. Supp 3d at 682.

97. *See Hellerstedt*, 136 S. Ct. at 2316 (supporting the district court's conclusion that "many of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary").

98. *Id.* at 2318 (relying on the evidence presented to the district court that indicated closures of almost half the forty abortion clinics in Texas, impossible demands and standards abortion clinics would be required to meet, and the irrelevant and little to no health benefits that the requirement imposes).

99. *Id.* at 2309.

100. *See Russo*, 140 S. Ct. at 2112 (representing that Russo is a case with almost identical facts to *Hellerstedt* that ended with the Court striking down an admitting privileges requirement as unconstitutional*).*

abortion providers were found unconstitutional.[101] The admitting privilege requirement is known as a form of TRAP law.[102] These laws target abortion providers for unnecessary medical and political state regulations.[103] TRAP laws are specifically made to weaken access to the abortion right and attempt to end access to abortion all together through the closure of abortion clinics.[104] Admitting privileges are difficult to obtain because they often require providers to live within a certain distance from the hospital and for them to admit a certain number of patients a year.[105] In the United States, abortion providers are already subject to strict regulations that ensure patient safety.[106]

Despite these laws intending to effectuate a state's interest in preserving patient health and safety, there is much debate as to whether the requirements actually further said interest.[107] Less than 0.5% of abortion patients have a complication resulting in hospitalization, and if complications do arise there is the Emergency Medical Treatment and Labor Act ("EMTALA") that requires the patient to be treated at a hospital.[108] With these regulations already in place, it does not seem fair to suggest that TRAP laws serve the purpose or interest in which the states suggest they do.[109] In fact, TRAP laws have the effect of discouraging

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101. *Id.* at 2127; *Hellerstedt*, 136 S. Ct. at 2313.

102. Lisa M. Brown, Esq., *The Trap: Targeted Regulation of Abortion Providers*, NAT'L ABORTION FED'N (2007), www.prochoice.org/pubs_research/publications/downloads/about_abortion/trap_laws.pdf [perma.cc/ZGP2-3KDH].

103. *Id.*

104. *See Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 2020), www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws [perma.cc/W7PM-PQNA] [hereinafter GUTTMACHER INST.] (stating that TRAP laws "set standards that are intended to be difficult, if not impossible, for providers to meet").

105. Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, GUTTMACHER POL'Y REV. (June 25, 2013), www.guttmacher.org/gpr/2013/06/trap-laws-gain-political-traction-while-abortion-clinics-and-women-they-serve-pay-price [perma.cc/5FQD-EJVB].

106. *Id.* Abortion providers are already subject to regulations such as state licensing requirements, federal workplace safety requirements, and medical ethics. *Id.*

107. *See* GUTTMACHER INST.*, supra* note 104 (stipulating that admitting privileges does not actually further any compelling state interests but rather inhibit and burden access to abortion by forcing abortion providers to quit providing their services because they cannot obtain these privileges).

108. *Id.; see* Emergency Medical Treatment and Labor Act, 42 USC 1395dd. (indicating that a hospital must treat a patient who comes in with major complications, including abortion patients); Ushma D. Upadhyay, *Incidence of Emergency Department Visits and Complications after Abortion*, 125 AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS 175, 175-83 (Jan. 2015).

109. *See* GUTTMACHER INST., *supra* note 104 (detailing that admitting

abortion providers from offering services and make access to these services extremely burdensome.[110] As of 2007, thirty-four states had some type of TRAP law. As TRAP laws become more prevalent and continue building off one another, it will become increasingly difficult for providers to perform abortion services and for clinics to remain open.[111] These laws remain a major challenge against a woman's right to choose and for the legal future of the abortion right.

E. A Brief Introduction to June Medical Services L.L.C. v. Russo

Russo is one of the most recent cases testing the Court's willingness to protect a woman's implied fundamental right to choose against a state's interest in women's health and potentiality of life.[112] It also tested the Court's willingness to do so in front of President Trump's appointments to the Supreme Court.[113]

Abortion clinics and providers brought the action against the State of Louisiana with the purpose of barring the enforcement of Louisiana's Unsafe Abortion Protection Act ("Act 620").[114] Act 620 required that all Louisiana abortion providers obtain admitting privileges at a hospital within thirty miles of the location where they perform abortions.[115] It was almost identical to the Texas statute that the Court struck down three years prior in *Hellerstedt*.[116] Just like in *Hellerstedt*, the district court did not find

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privilege requirements are often used as TRAP laws designed to burden and end access to abortion services).

110. *See* Gold & Nash, *supra* note 105 (describing the difficulty for abortion providers to obtain these privileges and the direct effect this difficulty has on clinic closures and the decrease of providers supplying abortion services).

111. *Id.; see* GUTTMACHER INST., *supra* note 104 (providing statistics and information on how regulations requiring abortion providers to obtain hospital admitting privileges is forcing clinic closures and providers to quit performing abortion services).

112. *Russo*, 140 S. Ct. at 2112.

113. Emma Green, *What the Supreme Court's Abortion Decision Means*, ATLANTIC (June 29, 2020), www.theatlantic.com/politics/archive/2020/06/supreme-court-abortion-trump/613642/ [perma.cc/P82V-PEXM]; *see* Dan Mangan, *supra* note 3 (suggesting that Donald Trump's purpose in nominating Supreme Court Justices during his presidency was to lead to the future overturning of *Roe*).

114. *Russo,* 140 S. Ct. at 2113; *see* La. Stat. Ann. § 40:1061.10(A)(2)(a) (West 2020) (requiring that all abortion providers on the date that abortion is performed have acting admitting privileges at a hospital that is located within thirty miles of the place where the abortion is taking place).

115. La. Stat. Ann. § 40:1061.10(A)(2)(a) (West 2020).

116. *Hellerstedt*, 136 S. Ct. 2292; *see* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2020) (demonstrating how the Texas regulation the Court struck down three years previous is almost identical to the admitting privileges requirement that Louisiana is attempting to establish in their statute).

the admitting privileges requirement to offer any significant health benefits, but instead found they would continue to make it impossible for providers to gain privileges because "hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency."[117] The court also found that the enforcement of Act 620 would leave Louisiana with only one abortion provider and clinic to serve the needs of all Louisiana women looking to exercise their rights.[118] The district court found that Act 620 created an undue burden on women seeking to exercise their right to choose and permanently enjoined the enforcement of Act 620.[119]

In contrast, the Fifth Circuit found in favor of the state of Louisiana, finding that requiring admitting privileges would not burden access to abortion in the state.[120] The Fifth Circuit stated that the district court overlooked that the facts were different from *Hellerstedt*.[121] The Fifth Circuit found that there was only one provider and clinic which would be forced to quit providing abortion services, and a substantial amount of Louisiana would not be affected.[122] Additionally, it found that Act 620 created an important credentialing function that would ensure and check the competency of all abortion providers.[123] Therefore, the Fifth Circuit concluded that the benefits of Act 620 outweighed the burdens on Louisiana women looking to exercise their rights and, ultimately, dismissed the action.[124]

The plaintiff abortion providers, June Medical Services, appealed and the Supreme Court granted certiorari.[125] Justice Breyer, writing for the majority of the Court, used the undue burden

117. June Med. Serv. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 46-7 (M.D. La., 2017) (finding that hospitals may deny the required privileges based on reasons that have nothing to do with the states' interest in protecting maternal and women's health, such as the provider's expected use of the hospital and admitting privileges, the provider's location of living and abortion practice, and a hospital's moral mission against abortion).

118. *See id.* at 80 (finding that a substantial number of Louisiana women will be denied access to an abortion because a single physician cannot meet the demand of performing 10,000 abortions per year).

119. *See id.* at 87 (demonstrating that the Louisiana statute will result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, and leaving only one physician providing abortions to the entire State of Louisiana).

120. June Med. Serv. L.L.C. v. Gee, 905 F.3d 787, 811 (5th Cir. 2018).

121. *Gee*, 905 F.3d at 791 (stipulating that, compared to the facts surrounding the Texas law in *Hellerstedt*, the Louisiana Act would only prevent one abortion provider from offering services, and therefore it would not burden access to abortion in the state).

122. *Id.*

123. *Id.* at 805.

124. *Id.*

125. *Russo*, 140 S. Ct. at 2132.

standard developed in *Casey*[126] to weigh the law's "asserted benefits against the burdens" it imposed on Louisiana women.[127] The Court decided that the admitting privileges requirement imposed a substantial obstacle for Louisiana women looking to exercise their right to an abortion, finding that the burdens heavily outweighed the benefits.[128] The abortion right was overall protected in *Russo*, but four of the justices, Justices Thomas, Alito, Gorsuch, and Kavanaugh, dissented to the majority opinion, including the concurring justice, Chief Justice Roberts.[129] The dissents and concurring opinion opened up more criticism, skepticism, and uncertainty for future legal decisions on this controversial issue. Because the Court once again could not unanimously agree that a burdensome state regulation was unconstitutional, the abortion right was left vulnerable to the attacks of conservative legislatures looking to overturn the abortion right.[130] This decision can be regarded as a win for the pro-choice movement, but the Court left the abortion right with the same uncertain legal future as *Roe*.

III. JUNE MEDICAL SERVICES L.L.C. V. RUSSO: THE COURT'S ANALYSIS

In June 2020, the Supreme Court finally analyzed the Texas abortion law, and the findings will be discussed in this section.[131] In terms of procedure, five months after the Texas admitting privileges requirement examined in *Hellerstedt* closed half of Texas's abortion clinics, the State of Louisiana attempted to enforce Act 620.[132] The

126. *Casey*, 505 U.S. at 876.

127. *Russo*, 140 S. Ct. at 2112 (quoting *Hellerstedt*, 136 S. Ct. at 2310).

128. *Russo*, 140 S. Ct. at 2127 (finding that the minimal health benefits imposed by the statute were heavily outweighed by the significant closures of almost all abortion clinics in the state bringing about substantial burdening effects on Louisiana women looking to access their decisional abortion right).

129. *Id.* at 2133 (Roberts, C.J., concurring); *id*. at 2142 (Thomas, J., dissenting); *id*. at 2153 (Alito, J., dissenting); *id.* at 2171(Gorsuch, J., dissenting); *id*. at 2181 (Kavanaugh, J., dissenting).

130. *See* Caroline Kitchener, *State legislatures got redder in 2020. It's a 'dire reality' for abortion rights, advocates say*, LILY (Feb. 2, 2021), www.thelily.com/state-legislatures-got-redder-in-2020-its-a-dire-reality-for-abortion-rights-advocates-say/ [perma.cc/Y328-UQY4] (detailing how a majority of states now have anti-abortion majorities within their legislatures, including in South Carolina where the legislature developed a bill that bans abortions once a provider can detect a fetal heartbeat); *see* Ellman, *supra* note 17 (stipulating that the *June Medical Services L.L.C. v. Russo* Court maintained "a status quo in which hundreds of abortion restrictions remain in place across the country").

131. *Russo*, 140 S. Ct. 2103 (2020).

132. La. Stat. Ann. § 40:1061.10(A)(2)(a) (West 2020) (requiring that all abortion providers on the date that abortion is performed have acting admitting privileges at a hospital that is located within thirty miles of the place where the abortion is taking place).

respondent State argued that Act 620 was a valid regulation under Tenth Amendment police powers because of its purpose to protect women's health and safety.[133] Five abortion clinics and four abortion providers brought suit against the State of Louisiana to block the enforcement of Louisiana's Act 620 because it imposed an undue burden on women's right to an abortion.[134]

The plaintiffs asked the district court for a preliminary injunction to prevent Act 620 and its penalties from taking effect.[135] The court granted the motion and banned the state from imposing the penalties on the plaintiff providers and clinics, while directing the plaintiffs to attempt to seek privileges and to update the court on their progress.[136] A few months later, the court met for a six-day bench trial to hear the testimony of the individual plaintiff physicians and clinics on their progress of attempting to obtain admitting privileges.[137] The district court declared Act 620 unconstitutional, finding that the law offered no significant health benefits and the admitting privileges requirement made it impossible for abortion providers to obtain these privileges, all of which in effect placed a substantial obstacle in the way of a Louisiana woman seeking an abortion.[138] The Fifth Circuit reversed the district court decision, agreeing with the application of the court's undue burden standard, but finding the factual determinations clearly erroneous.[139]

A majority of the Supreme Court, consisting of the plurality and concurrence written by the Chief Justice found in favor of the plaintiff abortion providers and clinics and struck down the Louisiana law as imposing an undue burden on abortion access in Louisiana.[140] But this decision was met with much dissent by Justices Thomas, Alito, Gorsuch, and Kavanaugh, making this case's outcome controversial.[141]

Part A of this analysis will analyze Justice Breyer's plurality opinion finding that Act 620 imposed a substantial obstacle on access to abortion and is unconstitutional. Part B will analyze Chief Justice Robert's concurrence also finding that Act 620 is unconstitutional. Part C will analyze the dissenting opinions

133. *Kliebert*, 158 F. Supp. 3d at 505.

134. *Russo*, 140 S. Ct. at 2113.

135. *Kliebert*, 158 F. Supp. 3d at 486.

136. *Id.* at 536.

137. *Id.* at 517 (informing that there were no material changes in status of any of the six abortion providers applications or in their attempts to obtain admitting privileges at hospitals throughout Louisiana).

138. *Kliebert*, 250 F. Supp. 3d at 87.

139. *Gee*, 905 F. Supp. 3d at 815.

140. *Russo*, 140 S. Ct. at 2132.

141. *Id.* at 2142-53 (Thomas, J., dissenting); *id.* at 2153-71 (Alito, J., dissenting); *id.* at 2171-82 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

arguing that Act 620 should have been upheld because it does not constitute an undue burden under the *Casey* undue burden standard.

A. Plurality Opinion: Act 620 Imposes an Undue Burden

The Supreme Court granted certiorari and Justice Breyer, joined by Justices Kagan, Ginsburg, and Sotomayor, wrote the plurality opinion reversing the Fifth Circuit and finding in favor of the plaintiff abortion providers.[142] The two issues before the Court were whether the plaintiff abortion providers and clinics had standing to bring the action and whether the Fifth Circuit's decision to uphold Act 620 and the admitting privileges requirement conflicted with the Court's binding precedent in *Hellerstedt*.[143] First, this section will analyze the plaintiff abortion providers standing. Second, this section will analyze the Court's decision to overturn the Fifth Circuit because (1) it burdened abortion providers by forcing them to stop providing abortion services, and (2) Act 620 conferred no benefits and did nothing to further the state's purported interests in maternal health and safety.

1. Whether the Plaintiff Abortion Provider's Lacked Standing

The state raised its argument that the plaintiff abortion providers and clinics lacked standing to challenge Act 620 for the first time in its cross-petition for certiorari.[144] The plaintiff abortion providers brought this action to challenge Act 620 with the purpose of protecting their patients' rights on the grounds that the Act diminished their right to undergo an abortion.[145] The state argued that a party cannot "rest his claim to relief on the legal rights or interests of third-parties."[146] During the district court proceedings, the state clearly articulated that "there is no question that the physicians had standing to contest the law," and that the Fifth Circuit has upheld abortion provider third-party standing for a

142. *Russo,* 140 S. Ct. at 2132.

143. *Id.* at 2117, 2120-21.

144. Reply Brief for Respondent/Cross Petitioner at 23, June Med. Serv. L.L.C. v. Russo, 2020 WL 996893 (2020), (Nos. 18-1323, 18-1460); *Russo*, 140 S. Ct. at 2117-18.

145. Reply Brief for Respondent/Cross Petitioner at 23, June Med. Serv. L.L.C. v. Russo, 2020 WL 996893 (2020), (Nos. 18-1323, 18-1460)*; Kliebert*, 250 F. Supp. 3d at 87.

146. *Kliebert*, 250 F. Supp. 3d at 87 (quoting Kowalski v. Tesmer, 543 U.S. 125, 129 (2004)) (concluding attorneys lacked third-party standing to conduct an action on behalf of hypothetical future clients).

challenge to an admitting privileges law identical to the one in issue in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*.[147]

When the state brought the lack of standing argument to light for the first time in its cross-petition, it argued that the binding Fifth Circuit precedent on third-party standing for abortion providers in *Abbott* resolved the question only in Texas and not in Louisiana for the providers in this case.[148] The Court did not find the state's argument persuasive that the *Abbott* conclusion of Texas abortion provider third-party standing did not also apply to the Louisiana providers.[149] Overall, the Court decided that the state's allowance of standing in the district court proceedings barred the consideration of it and evidenced its waiver of the standing requirements.[150] The Court also relied on past precedent evidencing that abortion providers could invoke the rights of their current or future patients in challenges to abortion regulations.[151] The plaintiff abortion providers were challenging Act 620 because it directly affected their conduct and actions as abortion providers.[152] Because the abortion providers and clinics in this case faced penalties and potential loss of license if they practiced without admitting privileges, the Court found that because the "threatened imposition of governmental sanctions" existed, their claims and assertion of their own rights were not abstract.[153] The Court also stated that because of the providers' personal rights being injured

147. DHH Defendants' Opposition to Plaintiffs' Application for Temp. Restraining Order & for Protective Order at 43-44, June Med. Serv. L.L.C. v. Gee, 2019 WL 6839847 (2019) (No. 14-cv-525-JWD-RLB); Planned Parenthood of Greater Texas Surgical Health Serv. v. Abbott, 748 F.3d 583, 597-600 (5th Cir. 2014).

148. Reply Brief for Respondent/Cross Petitioner at 23, June Med. Serv. L.L.C. v. Russo, 2020 WL 996893 (2020), (No. 18-1323, 18-1460).

149. *Russo*, 140 S. Ct. at 2118.

150. *Id.*; *see* Reply Brief for Respondent/Cross Petitioner at 23, June Med. Serv. L.L.C. v. Russo, 2020 WL 996893 (2020), (Nos. 18-1323, 18-1460); *Russo*, 140 S. Ct. at 2117-18 (evidencing that the state did not raise the lack of standing claim until five years after it argued that the plaintiff abortion providers and clinics had the requisite standing to assert the rights of their patients).

151. *Russo*, 140 S. Ct. at 2118; *see e.g.* Hellerstedt, 136 S. Ct. at 2314 (evidencing the Supreme Court allowing abortion providers to bring suit on behalf of their patients); Gonzales v. Carhart, 550 U.S. 124, 133 (2007) (four physicians brought action challenging a Nebraska abortion ban); *Casey*, 505 U.S. at 845 (abortion clinics and physicians brought action challenging amendments to the Pennsylvania abortion statute); *Doe*, 410 U.S. at 188-89 (ruling that the physician appellants had standing to sue, and the issue over whether they had standing was unnecessary).

152. *Russo*, 140 S. Ct. at 2119.

153. *Id.*; *see* Craig v. Boren, 429 U.S. 190, 195 (1976) (showing that where a storeowner would face significant economic harm and governmental sanctions if he did not heed the statutory regulation on alcohol sales, he met the threshold requirements of a case or controversy and had adequate standing to challenge the regulation).

or potentially affected by Act 620, the providers had an incentive to "resist efforts" restricting their services by acting as advocates for third-party patients.[154] Also, because the admitting privileges requirement was a direct regulation of the providers' conduct, they were in a better position than their patients to bring suit.[155]

The dissents of Justices Alito and Gorsuch suggested that the lack of standing in this case was different because providers were challenging a law enacted to protect the patients whose rights they were attempting to assert.[156] The plurality found this argument irrelevant because this is an ordinary feature in precedent where third-party standing was satisfied.[157] This case was also not the first time third-party standing had been addressed in the abortion context.[158] In conclusion, the Court found that the state ultimately waived the third-party standing issue, and even if it did not, precedent supported that the abortion providers and clinics had adequate standing to assert their own and their patients' rights against Act 620.[159]

2. The Fifth Circuit Should be Reversed and Act 620 is Unconstitutional

The second issue in front of the Court was whether the Fifth Circuit was wrong in its decision on Act 620's effects on Louisiana women looking to exercise their right to choose.[160] Justice Breyer relied on the standard set forth in *Casey* and *Hellerstedt* declaring that "a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its

154. *Russo*, 140 S. Ct. at 2119.

155. *Id.*; *see* Singleton v. Wulff, 428 U.S. 106, 117 (1976) (evidencing that abortion providers are "uniquely qualified" to challenge a state's regulation on abortion and burdening of a woman's decision to exercise her right to choose).

156. *Russo*, 140 S. Ct. at 2166-67 (Alito, J., dissenting); *id.* at 2174 (Gorsuch, J., dissenting).

157. *Id.* at 2119; *Craig*, 429 U.S. at 199-200.

158. *Russo*, 140 S. Ct. at 2120; *Hellerstedt*, 136 S. Ct. at 2311 (plaintiff abortion providers and clinics brought suit against the state of Texas for an admitting privileges requirement that was enacted for the purpose of patient safety had third-party standing); *Doe*, 410 U.S. at 195 (plaintiff abortion providers who challenged a state regulation requiring a hospital accreditation requirement for the benefit of ensuring patient safety and provider competence had standing).

159. *Russo*, 140 S. Ct. at 2120; *see* Reply Brief for Respondent/Cross Petitioner at 23, June Med. Serv. L.L.C. v. Russo, 2020 WL 996893 (U.S. 2020), (Nos. 18-1323, 18-1460) (waiving the standing issue and clearly stating that the abortion providers had standing to sue on behalf of their patients); *Russo*, 140 S. Ct. at 2117-18 (evidencing the state waiving the standing issue and clearly articulating that the plaintiff abortion providers had third-party standing in this case).

160. *Russo*, 140 S. Ct. at 2120-21.

legitimate ends" and "unnecessary health regulations impose an unconstitutional undue burden if they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[161] Justice Breyer emphasized that a court must "consider the burdens a law imposes on abortion access together with the benefits those laws confer" and that legislative factfinding must be reviewed under a deferential standard.[162] Justice Breyer then explained that the Court found in *Hellerstedt* that the district court appropriately applied these standards, much like the district court in this case.[163]

Justice Breyer then addressed the Fifth Circuit's disagreement with the factual findings of the district court.[164] He stated that the district court findings of fact "whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[165] He recited that an appellate court does not decide factual issues de novo, but where the district court's findings are plausible the court of appeals "may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[166] "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."[167]

The Justice then addressed the dissenter's suggestion that a less deferential standard should be applied because Act 620 was enjoined before it was enforced and that the claims were premature.[168] He disagreed with the dissenters stating that there

161. *Hellerstedt*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877-78).

162. *Hellerstedt*, 136 S. Ct. at 2324; *id.* at 2310 (quoting *Gonzales*, 550 U.S. at 165).

163. *Russo*, 140 S. Ct. at 2120 (stating that the district courts in *Hellerstedt* and here "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony" then "weighed the asserted benefits of the law against the burdens it imposed on abortion access").

164. *Id.* (explaining that the Court of Appeals disagreed with the District Court, not so much in respect to the legal standards that were set forth, but because it did not agree with the factual findings on which the District Court relied in assessing both the burdens that Act 620 imposes and the health-related benefits it might bring).

165. *Id.* at 2121 (quoting Fed. Rule Civ. Proc. 52(a)(6).).

166. *Russo*, 140 S. Ct. at 2121 (quoting Anderson v. Bessemer City, 470 U.S. 564, 573-73 (1985)).

167. *Russo*, 140 S. Ct. at 2121 (quoting Cooper v. Harris, 137 S. Ct. 1455, 1465 (2017)).

168. *Russo*, 140 S. Ct. at 2121; *see id.* at 2158-59 (Alito, J., dissenting) (arguing that because Act 620 was enjoined before it was put into effect, the district court's fact finding should not be owed so much deference); *id.* at 2176-78 (Gorsuch J., dissenting) (suggesting a more deferential standard should be applied for the appellate court to review the factual findings of the district court *de novo* because the admitting privileges requirement was enjoined before the

was no authority suggesting that appellate scrutiny of factual determinations varies with the timing of a plaintiff's lawsuit or a trial court's decision.[169] He further argued that the plaintiffs' claims were not premature because Act 620's sanctions were suspended, but the physicians were still required to attempt efforts at obtaining admitting privileges.[170] Justice Breyer expressed his view that the district court based its findings on "real-world evidence, not speculative guesswork," and there was no basis for departing from the normal standard applying to findings of fact.[171] Justice Breyer agreed with the district court's ultimate conclusion that "even if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden."[172]

B. The District Court's Substantial Obstacle Determination

Justice Breyer then considered the district court's finding that the enforcement of Act 620 would "result in a drastic reduction in the number and geographic distribution of abortion providers."[173] He began by first considering the findings on Act 620's effects on abortion providers and followed with the act's impact on abortion access for Louisiana women.[174]

1. Act 620's Effect on Louisiana Abortion Providers

Justice Breyer commenced by stating that the Court in *Hellerstedt* found that the plaintiff abortion providers satisfied their burden of proving that the admitting privileges law caused the closure of clinics through the direct testimony of physicians who testified that they were unable to obtain these privileges.[175] The Court decided, based on submissions of amici in the medical profession, that because abortions are so safe, the providers would be unlikely to obtain or maintain these privileges in which many hospitals conditioned on the physicians admitting a certain number

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act went into effect).

169. *Id.* at 2121.

170. *Id.*; *see id.* at 2114 (signifying that because Act 620 was not fully enjoined, the plaintiff abortion providers were still required by the Court to obtain the admitting privileges Act 620 required).

171. *Id.* at 2121.

172. *Id.* (quoting *Kliebert*, 250 F. Supp. 3d at 88).

173. *Russo*, 140 S. Ct. at 2122 (quoting *Kliebert*, 250 F. Supp. 3d at 87-88).

174. *Russo*, 140 S. Ct. at 2122; *see id.* at 2115-16 (finding that Does 1, 2 and 6 would be prevented from providing abortions if the act was enforced, and that it would prevent Doe 5 from working in his Baton Rouge clinic, only allowing him to work in the New Orleans clinic).

175. *Id.*; *Hellerstedt*, 136 S. Ct. at 2313.

of patients per year.[176] This included the fact that many hospitals had common prerequisites to obtaining these privileges that had nothing to do with physician competency.[177] The *Hellerstedt* Court found that the admitting privileges requirement had a substantial effect of causing the closure of many Texas clinics.[178]

Justice Breyer found the evidence in this case stronger than in *Hellerstedt* and suggested that the Act would have a drastic effect on Louisiana abortion providers.[179] Here, the district court supervised the efforts of Does 1, 2, 5, and 6 for over a year and a half in attempting, and failing, to acquire the admitting privileges.[180] The court also heard direct evidence that some of the physicians' applications for privileges were denied for reasons unrelated to their competency.[181] He argued that this evidence showed that unless the abortion providers also maintained OB/GYN practices, Louisiana providers were unlikely to have in-hospital experience to meet the preconditions for obtaining privileges.[182]

Justice Breyer argued that the evidence also showed that even if the providers could initially obtain the privileges, they would be unable to maintain them for failing to use them.[183] He believed that the experience of Doe 6 was dispositive.[184] Doe 6 was a board-certified OB/GYN with fifty years' experience. Doe 6 provided only medically necessary abortions, and of the thousands of women he had served over the ten years prior to the district court's decision, only two patients required admission to the hospital.[185] Based on these facts, Justice Breyer argued that this safety record would

176. *Hellerstedt*, 136 S. Ct. at 2312 (stating the likely effect of such requirements was that abortion providers "would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit," including "for example, requirements that doctors have "treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors").

177. *Id.*

178. *Id.* at 2313.

179. *Russo*, 140 S. Ct. at 2122.

180. *Kliebert*, 250 F. Supp. 3d at 77-78.

181. *Id.* at 68-70, 76-77; *see* Brief for Medical Staff Professionals as Amici Curiae at 11-30. June Med. Serv. L.L.C. v. Russo (2020). No. 18-1323, No. 18-1460 (showing the direct testimony and evidence that Louisiana hospitals commonly deny applications for admitting privileges for reasons unrelated to competency).

182. *Russo*, 140 S. Ct. at 2123 (relying on evidence such as Doe 2, who is a board-certified OB/GYN with forty years' experience, testified that he had not done any in-hospital work in ten years and only two patients within the last five years had to be admitted to the hospital, and as a result was unable to comply with one hospital's conditions for admitting privileges).

183. *Id.*

184. *Id.*

185. *Id.*

"make it impossible to maintain privileges at any of the many Louisiana hospitals that require newly appointed physicians to undergo a process of 'focused professional practice evaluation,' in which they are observed by hospital staff as they perform in-hospital procedures."[186] And it would also disqualify Doe 6 from maintaining privileges at hospitals that require a minimum number of patient admissions.[187]

Justice Breyer further argued that there was evidence that suggested that opposition to abortion played a large role in some hospitals' choice to deny privileges.[188] Some hospitals expressly barred anyone with privileges from performing abortions while some other hospitals were averse to granting privileges to abortion providers "as a matter of discretion."[189] Some hospitals had preconditions that abortion providers could not satisfy because of the opposition they faced in Louisiana, such as a requirement that a provider name a covering physician to serve as a backup if there was a patient admitted and the provider was unavailable.[190] The district court concluded, "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician."[191] Justice Breyer, relying on *Hellerstedt*, concluded that the experience of the individual abortion providers here in failing to obtain the privileges due to reasons unrelated to their competency supported the district court's finding that Act 620's admitting privileges requirement "serve[d] no relevant credentialing function."[192]

Justice Breyer addressed Justices Alito's and Gorsuch's contention that there was a possibility that new doctors could replace the physicians.[193] He argued that the record supported the

186. *Id.*

187. *Id.*

188. *Id;* see generally Katelyn Newman, *Louisiana Nears 90 Anti-Abortion Laws, Report Shows*, U.S. NEWS (Feb. 12, 2020), www.usnews.com/news/best-states/articles/2020-02-12/louisiana-has-almost-90-anti-abortion-laws-since-roe-v-wade-report-shows (indicating that opposition to abortion in Louisiana is known).

189. *Russo*, 140 S. Ct. at 2123-24 (relying on Doe 2's testimony "that he was told not to bother asking for admitting privileges at University Health in Shreveport because of his abortion work" and Doe 1's testimony that he "was told that his abortion work was an impediment to his application.").

190. *Id.* at 2124 (relying on Does 3 and 5's experience in failing to obtain admitting privileges at three hospitals because he could not find a covering physician willing to be associated with an abortion provider).

191. *Kliebert*, 250 F. Supp. 3d at 49; *cf. Hellerstedt*, 136 S. Ct. at 2313 (evidencing testimony of Texas abortion providers who faced similar challenges in obtaining privileges because there were no doctors willing to cover for them due to opposition to abortion in Texas).

192. *Russo*, 140 S. Ct. at 2124; *Kliebert*, 250 F. Supp. 3d at 87 (quoting *Hellerstedt*, 136 S. Ct. at 2313).

193. Russo, 140 S. Ct. at 2158-59 (Alito, J., dissenting); *id.* at 2176-77 (Gorsuch, J., dissenting).

district court's findings that "the same reasons that Does 1, 2, 4, 5, and 6 have had difficulties getting active admitting privileges, reasons unrelated to their competence . . . it is unlikely that the [a]ffected clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges."[194] Therefore, Justice Breyer reasoned that the district court's findings that Act 620 would drastically affect Louisiana abortion providers were correct and that the providers acted in good faith in their efforts to comply with the act.[195]

The Court concluded that the Fifth Circuit's finding that the providers acted in bad faith when failing to obtain admitting privileges was erroneous because it used the wrong standard of review.[196] The law required the Fifth Circuit to review the district court's findings under the clear-error standard.[197] Justice Breyer believed that the district court's decision was not erroneous and "[w]hen the record is examined in light of the appropriately deferential standard, it is apparent that it contain[ed] nothing that mandates a finding that the District Court's conclusion was clearly erroneous."[198] There were no facts or evidence that indicated that the physicians acted in bad faith.[199] Relying on *Hellerstedt*, Justice Breyer found that the testimony and efforts of the physicians met the burden of proving that Act 620 had a burdensome effect on the Louisiana abortion providers, much like the statute in *Hellerstedt* had on the Texas physicians.[200]

2. Act 620's Impact on Abortion Access

Justice Breyer then introduced the district court's findings that Act 620 would place substantial obstacles in the way of women seeking to exercise their rights to an abortion in Louisiana.[201] He began by emphasizing the significance of the geographic distribution of the Louisiana providers and clinics.[202] At the time of the district court's decision, there were three abortion clinics and six abortion providers in the state.[203] But if Act 620 was to be

194. *Russo*, 140 S. Ct. at 2128; *Kliebert*, 250 F. Supp. 3d at 82.
195. *Russo*, 140 S. Ct. at 2122-28.
196. *Id.* at 2124; *Gee*, 905 F. 3d at 807.
197. *Id.*
198. *Id.* (quoting *Anderson*, 470 U.S. at 577).
199. Russo, 140 S. Ct. at 2125-28.
200. *Id.*; *Hellerstedt*, 136 S. Ct. at 2313.
201. Russo, 140 S. Ct. at 2130.
202. *Id.* at 2128-29; *see Kliebert*, 250 F. Supp. 3d at 40-41, 80-81 (evidencing Figures 1 and 2 displaying the geographical distribution of Louisiana abortion providers and clinics at the time of the district court's decision and the projected distribution of abortion clinics and providers following the enforcement of Act 620).
203. *See Kliebert*, 250 F. Supp. 3d at 40-1 (representing Figure 1 and the

enforced, the district court concluded that Does 1, 2, and 6 would be eliminated due to their inability to obtain admitting privileges.[204] This elimination would leave Louisiana with one clinic and provider (Doe 5) to serve the 10,000 women who annually seek to exercise their right to an abortion in the state.[205] The district court also found that Doe 5 would only be able to absorb, at most, thirty percent of the demand for abortion in the state, and because Doe 5 does not perform abortions beyond eighteen weeks, pregnant women between eighteen weeks and the state legal limit of twenty weeks would have little or no way to exercise their constitutional right to an abortion.[206]

Justice Breyer agreed that Act 620 would force burdens on abortion access in the state and cause "longer waiting times and increased crowding."[207] He thought the district court's finding that the closure of the clinics would impact Louisiana with many burdens on the access to abortions was reasonable.[208] The burdens found by the district court included an increased risk that a woman would experience complications from the procedure[209] and increased driving distances for women living far from the last remaining clinic.[210] In conclusion, Justice Breyer relied on the factual similarities of the Texas law in question in *Hellerstedt* to find that Louisiana's Act 620 would place a substantial obstacle in the way of women seeking access to abortion in Louisiana.

Next, Justice Breyer addressed the asserted benefits that the state suggested Act 620 conferred.[211] The district court found the act to have "no significant health-related problem that the new law helped to cure."[212] Justice Breyer argued that this finding was not

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distribution of clinics and providers offering abortion services in Louisiana prior to the enforcement of Act 620); *see id.* at 79 (evidencing the district court's finding that Doe 3 would stop performing abortions if he was the last provider in northern Louisiana).

204. *Kliebert*, 250 F. Supp. 3d at 80-1 (illustrating that if Act 620 was enforced, Louisiana would have been left with at most two clinics and two abortion providers to perform abortion services for the whole state).

205. *Id.* at 80-1, 87-8 (relying on the fact that Doe 3 would likely quit providing abortion services because of his testimony that he would stop if he was the only provider left in Northern Louisiana, leaving only Doe 5 to provide abortion services in the entire State of Louisiana).

206. *Id.*

207. *Russo*, 140 S. Ct. at 2129-30 (quoting *Hellerstedt*, 136 S. Ct. at 2313) (suggesting that the closure of clinics in Texas caused many burdens to impact and impede a Texas women's access to their right to an abortion).

208. *Russo*, 140 S. Ct. at 2129-30.

209. *Kliebert*, 250 F. Supp. 3d at 82.

210. *Id.* at 88 (finding that "many women will have to travel much longer distances to reach the few providers who will continue to provide abortions, and that travel will impose severe burdens, which will fall most heavily on low-income women"); La. Stat. Ann. § 40:1061.10(D).

211. *Russo*, 140 S. Ct. at 2130.

212. *Kliebert*, 250 F. Supp. 3d at 86 (quoting *Hellerstedt*, 136 S. Ct. at 2311)

clearly erroneous for two reasons.[213] The first reason was that the record supported the district court's conclusion that the admitting privileges requirement served no "relevant credentialing function."[214] He contended that the evidence proved that hospitals can, and did, deny admitting privileges for reasons unrelated to a physician's competency.[215] The district court found that while competency is one factor in the decision to grant admitting privileges, "hospitals primarily focus upon a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions."[216] Additionally, there was nothing in the record that indicated that the background review for admitting privileges added anything significant to the review that the State Board of Medical Examiners already maintained for abortion providers.[217]

The second reason the district court's findings were not erroneous was that it found that the law did "not conform to prevailing medical standards and [would] not improve the safety of abortion in Louisiana."[218] Much like *Hellerstedt*, the evidence and testimony suggested that the law conferred no actual health benefit for the abortion patients and did not further the states' interest in women's health or safety.[219] The Justice argued that the state introduced no evidence suggesting that patients were better off when their physicians possessed admitting privileges or that the privileges would help even one woman receive better treatment.[220] It was concluded that Act 620's admitting privileges requirement conferred no health benefits for abortion patients, and based on the standard set forth in *Casey* and *Hellerstedt*, the act was therefore unconstitutional.[221]

(finding that Act 620 "[d]oes [n]ot [p]rotect [w]omen's [h]ealth, provides no significant health benefits, and makes no improvement to women's health compared to prior law").

213. *Russo*, 140 S. Ct. at 2131.

214. *Kliebert*, 250 F.Supp.3d at 87 (quoting *Hellerstedt*, 136 S. Ct. at 2313).

215. *Russo*, 140 S. Ct. at 2131 (finding additionally that Act 620's requirement that abortion providers obtain admitting privileges at a hospital within thirty miles from the place they perform abortions "further constrains providers for reasons that bear no relationship to competence").

216. *Kliebert*, 250 F.Supp.3d at 46.

217. *Id.* at 87.

218. *Id.* at 64.

219. *Russo*, 140 S. Ct. at 2131-32.

220. *Id.* at 2132; *Kliebert*, 250 F.Supp.3d at 64.

221. *Russo,* 140 S. Ct. at 2133; *see Hellerstedt*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877-78) (evidencing the standard set forth in *Casey* and *Hellerstedt* that "a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends" and that "unnecessary health regulations impose an unconstitutional undue burden if they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion").

In sum, the plurality concluded that the district court's findings on the burdens and benefits conferred by Act 620 had ample evidentiary support and were not clearly erroneous.[222] Overall, the plurality held that the Court must uphold the district court's finding that Louisiana's Act 620 imposed an undue burden on a woman's right to choose in violation of the constitution.[223] Justice Breyer contended that this case was nearly identical to *Hellerstedt* and that it was necessary to reach the same conclusion that Act 620 was unconstitutional.[224] The Fifth Circuit's decision was erroneous and Act 620 placed an undue burden on a Louisiana woman's right to an abortion.[225]

C. Chief Justice Roberts's Concurrence

Chief Justice Roberts wrote a concurrence,[226] but he only found in favor of the abortion providers and clinics based on stare decisis.[227] He stated that because the Louisiana law imposed a "burden on access to abortion just as severe as that imposed by the Texas law" in *Hellerstedt*, Act 620 could not stand under the Court's precedent.[228] Chief Justice Roberts inquired that the *Hellerstedt* undue burden standard used in this case was not correct.[229] He did not agree that *Casey* suggested that it is a court's job to weigh the benefits with the burdens of abortion regulation.[230] Instead, Chief Justice Roberts suggested that *Casey* focused on the "existence of a substantial obstacle" which is what judges should analyze instead.[231] The benefits of regulation should "not be placed on a scale opposite the law's burdens," but instead should be considered in the assessment of the state's interest and the means the state took to meet that goal.[232] He argued that the only place in *Casey* where a balancing test was suggested was in Justice Steven's

222. *Russo*, 140 S. Ct. at 2133.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 2133-34 (Roberts, C. J., concurring).
227. *Id.* at 2134 (stating "the legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike."); Ian Millhiser, *Why conservative Chief Justice Roberts just struck down an anti-abortion law*, VOX (June 29, 2020), www.vox.com/2020/6/29/21306895/supreme-court-abortion-chief-justice-john-roberts-stephen-breyer-june-medical-russo [perma.cc/UGR7-TPBJ] (suggesting that the Chief Justice did not uphold the abortion right, but rather indicated to future litigants how to destroy it).
228. *Russo*, 140 S. Ct. at 2134.
229. *Id.* at 2135-36.
230. *Id.* at 2136 (citing *Gonzales*, 550 U.S. at 163) (stating that *Casey* clearly suggested that states and legislatures have discretion to pass regulations "in areas where there is medical and scientific uncertainty").
231. *Russo*, 140 S. Ct. at 2136.
232. *Id.* at 2138 (relying on *Casey*, 505 U.S. at 878).

partial dissent, which "did not win the day."[233] Chief Justice Roberts believed that because both *Hellerstedt* and the plurality in this case stated that they were using the undue burden standard from *Casey,* the Court should have respected the standard and assessed solely for a substantial obstacle before striking the regulations, therefore suggesting that the plurality used the wrong test altogether.[234] His concurrence concluded that the plurality was wrong in considering the benefits in their analysis of whether the regulation was constitutional.[235]

Next, the Chief Justice declared that Act 620 was nearly identical to the Texas law in *Hellerstedt*.[236] Prior to the enactment of Act 620 and the Texas law in *Hellerstedt*, both Texas and Louisiana were required to either have a transfer agreement or admitting privileges with a hospital.[237] And both, notwithstanding the prior laws, eliminated the option for a transfer agreement for abortion providers.[238] In Texas, the new law had the effect of drastically reducing the number and distribution of abortion providers.[239] Similarly, in Louisiana, if the new law would have been enforced, Louisiana would have been left with one clinic to serve the whole state.[240] Chief Justice Roberts identified more similarities between *Hellerstedt* and *Russo*, such as the enforcement of both the Texas and Louisiana laws causing there to be fewer doctors, "longer waiting times, and increased crowding."[241] He also agreed that in both cases, common conditions for obtaining admitting privileges that had nothing to do with physician competency made obtaining these privileges increasingly difficult.[242] Taking these similarities into consideration, he stated

233. *Id.; see generally Casey*, 505 U.S. at 916-20.

234. *Russo*, 140 S. Ct. at 2139.

235. *Id.* (stating that in neither this case, *Hellerstedt*, nor *Casey* was there reason to consider a regulation's benefits).

236. *Id.*

237. 25 TEX. ADMIN. CODE § 139.56(a) (2009); 48 LA. ADMIN. CODE § 4407(A)(3) (2003), 29 La. Reg. 706-707 (2003) (examining how both Texas and Louisiana already had laws in place that allowed for either a transfer agreement or an admitting privilege requirement).

238. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (West 2022); LA. REV. STAT. § 40:1061.10(A)(2)(a) (2022) (comparing the two new attempted Texas and Louisiana laws that no longer allowed for abortion providers to have either a transfer agreement nor an admitting privileges requirement).

239. *Lakey*, 46 F. Supp. 3d at 681.

240. *Gee*, 250 F. 3d at 87 (demonstrating that at the time of the district court proceedings, there were three clinics and five providers, but if the new law was enacted, the number of clinics would be "reduced to one, or at most two," and the number of physicians would be reduced to "one, or at most two").

241. *Hellerstedt,* 136 S. Ct. at 2313; *Gee*, 250 F. 3d at 81.

242. *See Hellerstedt*, 136 S. Ct. at 2313-14 (providing those common requisites included residency, clinical data requirements, and sometimes conditioned privileges on reaching a certain number of hospital admissions per year); *see also Gee*, 250 F. 3d at 46 (showing that in Louisiana competency is

that he believed the factual findings of the district court could not be disturbed because there was no clear error.[243] Based upon the similarities, the Chief Justice reiterated the fact that stare decisis forced him and the Court into following *Hellerstedt*,[244] but also emphasized that he did not agree with the *Hellerstedt* holding.[245]

D. Dissenting Opinions: Act 620 Does Not Impose an Undue Burden

This section will address the main issues brought forth by the dissenting justices. First, this section will explain the dissenter's opinion that the plaintiff abortion providers here lacked standing to assert the rights of their patients. Next, the dissenters argued that Act 620 was constitutional because it furthered the state's interests in maternal health and safety. Then, the dissenters asserted that the plurality applied the wrong standard of review to this case. Further, this section will address the argument that *stare decisis* is inappropriate in this case. Finally, this section will address the dissenters' opinion that the plurality wrongly granted deference to the district court's findings of fact which they thought were clearly erroneous.

1. Issue of Plaintiff Abortion Provider's Standing

A majority of the dissenting justices argued that the plaintiff abortion providers lacked standing to assert their rights in this case.[246] Justice Thomas argued that the abortion providers lacked standing because parties should not be able to bring suit to assert the rights of third-parties.[247] Instead, he believed that no established Court precedent allowed third-party standing and, therefore, the abortion providers should have never been able to bring suit.[248] Justice Thomas contended that a substantive due process right to an abortion is an inherently personal and private right belonging wholly to the women making the decisional choice to undergo an abortion and not the providers or clinics providing the abortion services.[249] Therefore, the plaintiff abortion providers

only one factor hospitals consider and that they can deny privileges or deny consideration of a physician's application for reasons that have nothing to do with competency).

243. *Russo*, 140 S. Ct. at 2141. (Roberts, C. J., concurring).

244. *Id.* at 2142.

245. *Id.* at 2133.

246. *Id.* at 2142 (Thomas, J., dissenting); *id.* at 2165 (Alito, J., dissenting); *id.* at 2173 (Gorsuch J., dissenting).

247. *Id.* at 2142 (Thomas, J., dissenting).

248. *Id.* at 2143.

249. *Id.*

and clinics could not establish a personal legal injury through the rights of their patients.[250] According to the justice, the only injuries the abortion providers and clinics could argue here is the possibility of criminal sanctions that would demonstrate only real world damages and no legal injury,[251]and they therefore lacked standing.[252]

Justice Alito also agreed that the abortion providers here lacked standing.[253] He argued that there was a substantial conflict of interest between the abortion providers who had a financial interest in circumventing Act 620's admitting privileges requirement while the patients seeking abortions had an interest in the protection of their health and safety, therefore barring standing.[254] He asserted that when abortion regulations were enacted to protect the health and safety of patients, a provider or clinic should not be able to invoke the rights of the women, but rather only rely on their own rights.[255]

Further, Justice Alito argued against standing using a test that required a plaintiff to demonstrate (1) closeness to the third-party, and (2) a hindrance to the third-party's ability to bring suit.[256] Neither of the prongs was met under his analysis because (1) a woman who obtains an abortion did not develop a close relationship with the provider performing the procedure but instead their relationship was brief and limited,[257] and (2) there was nothing hindering women from bringing suit in these cases, such as using pseudonyms or other precautions to avoid revealing their identity and the mootness exception of capable-of-repetition-yet-evading-review.[258] Because this case involved abortion providers and clinics

250. *Id.*

251. *Id.* at 2149; *see generally* Parker v. Griswold, 17 Conn. 288, 302-03 (1846) (demonstrating that an actual legal injury, a wrong done to a person, or a violation of a right, has to be done in order for the Article III standard of a case or controversy to be met).

252. *Russo*, 140 S. Ct. at 2149 (Thomas, J., dissenting).

253. *Id.* at 2165 (Alito, J., dissenting).

254. *Id.* at 2166.

255. *Id.* at 2166-67; *see* Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 9, 15 n. 7 (2004) (signifying that a father and daughter had a conflict of interest that prevented third-party standing when the father asserted his daughter's right not to hear others recite the words "under God" because the Court held that the interests of the father and the child were not the same. Justice Alito relies on this to show that third-party standing cannot be asserted when there is a conflict of interest).

256. *Russo*, 140 S. Ct. at 2166-67; *Kowalski*, 543 U.S. at 129-30.

257. *Russo*, 140 S. Ct. at 2168 (relying on the facts that in Louisiana a woman may meet her physician the day before her abortion procedure, or even the day of the procedure, the meeting consists of the provider informing the woman what they will do, answering any questions and informing the woman about the progress of the procedure, and in addition, the procedure usually only takes a few minutes).

258. *Id.* at 2168-69 (citing *Roe*, 410 U.S. at 125) (justifying pregnancy as a

attempting to assert the rights of their patients against a law enacted for their protection creating a conflict of interest, Justice Alito contended that the factors in this case weighed against adhering to precedent and in favor of overruling.[259] Justice Alito stated that the plurality's decision here and the Court's decision in *Hellerstedt* allowing third-party standing to abortion providers when a conflict of interest is present twisted the law.[260]

Justice Gorsuch's dissent argued that none of the justices could even attempt to suggest the prerequisites of standing were satisfied here[261] because the providers in this case only attempted to assert the rights of an "undefined, unnamed, indeed unknown, group of women who they hope will be their patients in the future."[262] He argued that third-party standing only had been upheld in a narrow set of cases where the "plaintiff's interests are aligned with those of a particular right holder that the litigation will proceed in much the same way as if the right-holder herself were present" which he does not find in this case.[263] He disagreed with the plurality's argument that abortion providers had third-party standing to assert the rights of their patients because there was a hindrance in the way of women bringing suit, satisfying the second prong of the test.[264] Rather, Justice Gorsuch argued that there were multiple cases where women have challenged abortion regulations themselves, indicating no proof of a need for abortion provider third-party standing.[265] He asserted that this case was no different and the plaintiffs had not carried their burden of proving hindrance.[266] Likewise, the plaintiffs' could not claim they had a close relationship with the women whose rights they asserted.[267] Rather, Justice Gorsuch argued that the abortion providers didn't even know the potential patients and normally, "the fact that the

condition in which is never considered moot).

259. *Russo*, 140 S. Ct. at 2170-71 (suggesting that the Chief Justice's adherence to precedent and decision to strike down the Louisiana law as unconstitutional was erroneous because third-party standing has not been met in this case by the providers).

260. *Id.* at 2171.

261. *Russo*, 140 S. Ct. at 2173 (Gorsuch J., dissenting) (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)) (demonstrating that to satisfy the standing requirements, a plaintiff must assert an injury to their own legal interests and not the rights of a third-party not before the court).

262. *Russo*, 140 S. Ct. at 2173-74 (suggesting that the plaintiffs' assertion that Act 620 would violate their patients' rights is abstract and hypothetical because they don't actually assert the rights of a known and identifiable woman, or group of women).

263. *Id.* at 2174.

264. *Id.*

265. *Id.*

266. *Id.* (writing "[t]he truth is transparent: The plaintiffs hardly try to carry their burden of showing a hindrance because they can't").

267. *Id.*

plaintiffs do not even know who those women are would be enough to preclude third-party standing."[268]

Justice Gorsuch also asserted that the plurality was wrong in believing the state waived the standing issue because they confused three legal principles.[269] First, he asserted that the state's admission to circuit precedent allowing the plaintiffs standing[270] reflected, at worst, "a forfeiture of, or a failure to pursue," an argument challenging standing, but not a waiver of the argument or interest in the issue.[271] Finally, he concluded that this Court "has held that even truly forfeited or waived arguments may be entertained when structural concerns or third-party rights are at issue[,]" and these conditions are both present in this case.[272] In conclusion, the majority of the dissenting justices believed the abortion providers and clinics lacked standing to assert their patients' rights against a state abortion regulation designed to further health and safety.[273]

2. The Dissenting Justices Asserted that Act 620 Served its Purpose in Promoting the State's Interests in Protecting Maternal Health and Safety and Preserving the Potentiality of Life

The dissenting justices were all in agreement that Act 620 should not have been struck down as unconstitutional.[274] Justice Thomas argued that the plurality and Chief Justice Roberts were wrong because the "right to abortion is a creation that should be undone."[275] He stated that the Constitutional right to privacy found in *Griswold v. Connecticut*,[276] which was utilized in creating the

268. *Id.* (citing *Kowalski*, 543 U.S. at 131) (holding that a hypothetical attorney-client relationship does not satisfy third-party standing); Diamond v. Charles, 476 U.S. 54, 66 (1986) (concluding that a pediatrician lacked standing to advocate for a state abortion regulation because the fetuses were going to potentially be his future clients)).

269. *Russo*, 140 S. Ct. at 2174-75.

270. *See* Reply Brief for Respondent/Cross Petitioner, *supra* note 159 (evidencing the state's request for the district court to forgo the standing issue to avoid delaying the judgment on the merits of the plaintiff's temporary restraining order motion).

271. *Russo*, 140 S. Ct. at 1275 (Gorsuch, J., dissenting).

272. *Id.* (citing Freytag v. Commissioner, 501 U.S. 868, 878-80 (1991)).

273. *Russo*, 140 S. Ct. at 2173; *id.* at 2149 (Thomas, J., dissenting); *id.* at 2165 (Alito, J., dissenting).

274. *Id.* at 2142 (Thomas, J., dissenting); *id.* at 2153 (Alito, J., dissenting); *id.* at 2171 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

275. *Russo*, 140 S. Ct. at 2149 (Thomas, J., dissenting) (arguing that the implied fundamental right to abortion is not written in the Constitution and is grounded in the "legal fiction" of substantive due process).

276. *Griswold*, 381 U.S. 479, 484-85 (1965) (finding a constitutional implied fundamental right of privacy found within the penumbras of the First, Third, Fourth, Fifth and Ninth Amendments).

right to an abortion in *Roe*, was baseless, mystifying, and should not be recognized.[277] Justice Thomas asserted that the most important reason that *Roe* was wrongly decided was that there was nothing in the text of the Constitution to suggest that a woman's right to an abortion is protected by the Fourteenth Amendment.[278] Relying on historical tradition, the Justice argued that the right to an abortion was not within the intent of the framers when ratifying the Fourteenth Amendment, and therefore could not be a recognized liberty interest deserving of protection.[279] Ultimately, Justice Thomas did not believe there should be a recognized implied fundamental right to choose and, therefore, the Court lacked authority to strike down Act 620.[280]

Additionally, Justice Alito argued that the plurality's finding was erroneous because Act 620 conferred benefits that furthered the state's purported interests.[281] He argued that the admitting privileges requirement aimed to protect and preserve maternal health and safety, and conferred necessary benefits on women looking to exercise their right to choose.[282] He asserted that the rigorous investigative approach hospitals took in granting privileges helped to ensure provider competency.[283] He argued that hospitals' approach went far beyond the review done by the Board of Medical Examiners and helped to ensure a high degree of competence from abortion providers, effectively furthering the state's interests.[284] Justice Alito provided examples from the record evidencing that some clinics had extremely lenient review processes to show that this higher standard of competence review was necessary to protect maternal health and safety.[285] Due to this

277. *Russo*, 140 S. Ct. at 2149 (Thomas, J., dissenting).

278. *Id.*

279. *See Id.* at 2151 (arguing that the abortion right does not deserve 14th Amendment protection relying on evidence such as that a majority of states and territories at the time of the ratification of the Fourteenth Amendment had laws that limited and nearly banned abortion and the fact that it took the Court over a century to recognize the right to an abortion).

280. *Id.* at 2149 (explaining the Court lacked the authority to strike down Louisiana's law because it was a valid exercise of the state's Tenth Amendment police powers to regulate abortion, in which there should be no implied fundamental right to).

281. *Id.* at 2154-55 (Alito, J., dissenting).

282. *Id.*

283. *Id.* at 2155 (citing *Gee*, 905 F.3d at 805) (finding that "hospitals verify an applicant's surgical ability, training, education, experience, practice record, and criminal history").

284. *Russo*, 140 S. Ct. at 2156.

285. *Id.* (such as Doe 3 testifying that they were the only person reviewing applications at the clinic and they never ran a background check, not even criminal records; a President of two abortion clinics testifying that he does not judge a provider's license, as long as they have a license he claims it is not up to him to determine if they are capable of providing services; and Doe 4 who testified that when he was hired he had to produce his license but didn't have

evidentiary support, Justice Alito argued that the admitting privileges requirement of Act 620 had significant health and safety benefits and served the state's legitimate interests.[286]

Justice Gorsuch also argued that Act 620 was constitutional because the state found that requiring abortion providers to obtain admitting privileges would protect women's health and safety.[287] Because this Court ordinarily reviewed the factual findings of a legislature with deference,[288] he asserted that the plurality was wrong in declaring that the law had no health benefits while giving no deference to the facts that led the legislature to believe otherwise. [289] He contended that the Court should have taken into account the legislature's own factfinding on the benefits conferred by Act 620 in its decision, but because the Court gave it no deference, Act 620 should not have been struck down.[290]

The Justice then stated that the plurality's assessment of Act 620's effects on women's access to abortion was erroneous because they did not follow the standard that in order to "obtain a prospective injunction like the one approved today, a plaintiff must show that irreparable injury was not just possible, but likely."[291] He claimed that the abortion providers alleged that the enforcement of the law would significantly harm Louisiana women by making access to abortion difficult.[292] But he argued that it could not be enough that the law would force any specific physician or clinic to quit practicing abortion services, but rather they would have to show that a significant number of facilities would have closed so that the demand for abortion services in Louisiana could not have been met.[293] Justice Gorsuch asserted that the plurality carelessly accepted the district court's assumptions that Act 620 would have forced physicians to quit providing abortion services in Louisiana.[294]

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to go through any credentialing review).

286. *Id.* at 2157 (citing *Gonzales*, 505 U.S. at 163) (stating that when confronted with a dispute about the benefits of a law, the Court has afforded legislatures "wide discretion in assessing whether a regulation serves a legitimate medical need and is medically reasonable even in the face of medical and scientific uncertainty").

287. *Russo*, 140 S. Ct. at 2172 (Gorsuch, J., dissenting).

288. *Id.* (citing *Gonzales*, 550 U.S. 165-66).

289. *Russo*, 140 S. Ct. at 2171-72 (Gorsuch, J., dissenting).

290. *Id.* at 2173.

291. *Id.*at 2176.

292. *Id.*

293. *Id.*

294. *Id.* at 2177 (arguing that the plurality was erroneous in their acceptance of the district court's assumptions that if Act 620 was enforced hospitals would not change its rules to permit abortion providers access to privileges, clinics would not relocate to a distance within thirty miles of a hospital, doctors with admitting privileges would not start performing abortions to meet the demand and that the demand would not persuade an out of state abortion provider to relocate to Louisiana).

He believed there to be a possibility that Louisiana hospitals would have amended their admitting privileges requirements in order to accommodate abortion providers due to Act 620, which would have lessened the burden on women's access to abortion.[295]

Finally, Justice Kavanaugh dissented because he believed there needed to be additional fact-finding to properly evaluate Act 620.[296] He agreed with Justice Alito that there needed to be more evidence that the three main doctors in the record could not obtain admitting privileges and that any of the three abortion clinics in the state would have been forced to close due to the admitting privileges requirement.[297] Justice Kavanaugh expressed that the Court should have remanded the case for a new trial using the appropriate legal standards, effectively opining that he could not decide upon the constitutionality of Act 6[298]20 at that time.[299] A majority of the dissenting justices argued that Act 620 was constitutional because the admitting privileges requirement did serve the state's purpose in protecting maternal health and safety and, therefore, should have been found constitutional.

3. The Plurality Applied the Wrong Standard of Review and, Therefore, Wrongly Decided June Medical Services L.L.C v. Russo

Justices Alito, Gorsuch, and Kavanaugh argued that the plurality relied on the wrong legal standard for the abortion context when striking down Act 620. Justice Alito argued that the plaintiff abortion providers and clinics believed the Court should have used the standard from *Hellerstedt* which involved a balancing test.[300]

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295. *Id.*

296. *Id.* at 2182 (Kavanaugh, J., dissenting) (evidencing his belief that the factual record is not sufficient at this stage of plaintiff abortion providers and clinics facial, pre-enforcement challenge to adequately demonstrate that Does 2, 5, and 6 cannot obtain admitting privileges to comply with Act 620 or that the law would actually cause the closure of the Louisiana abortion clinics).

297. *Id; see generally* Isaac Chotiner, *What John Robert's Surprise Abortion-Rights Ruling Means For The Future Of Roe v. Wade*, NEW YORKER (June 29, 2020), www.newyorker.com/news/q-and-a/what-john-robertss-surprise-abortion-rights-ruling-means-for-the-future-of-roe-v-wade [perma.cc/RNN7-W5LL] (suggesting that Justice Kavanaugh wanted to see additional facts to suggest that the Louisiana facts and circumstances were different from Hellerstedt).

298. *Id*. at 2153-54 (Alito, J. dissenting); *id*. at 2179 (Gorsuch J., dissenting); *id*. at 2182 (Kavanaugh, J., dissenting).

299. *Russo*, 140 S. Ct. at 2182 (alluding to his disagreement with the plurality opinion over their use of the *Hellerstedt* standard which he terms the "cost-benefit" standard).

300. *See id.* at 2153-54 (Alito, J., dissenting) (stating that the plurality "eschews the Constitutional test set out in *Casey*, instead using the erroneous standard used in *Hellerstedt*."); Transcript of Oral Argument at 18, June Med. Serv. L.L.C. v. Russo, 140 S. Ct. (2020) (No. 18-1323, 18-1460).

But, relying on *Casey*, Justice Alito stated that when an abortion law had no negative impact on women, then there was no reason for the law to face greater scrutiny than a different health or safety regulation.[301] The test the abortion providers and clinics were advocating for was rejected in *Casey* and should also have been rejected here.[302] Justice Alito also opined that the Court misinterpreted *Casey* in *Hellerstedt* and used the wrong undue burden standard for abortion contexts, meaning the *Hellerstedt* decision should be overruled, and that the plurality relied on an erroneous standard.[303]

Similarly, Justice Gorsuch argued the plurality erroneously applied a balancing test derived from *Hellerstedt* to find that Act 620 imposed an undue burden on women's right to abortion access.[304] He asserted that the plurality's balancing test did not provide "judicially discoverable and manageable standards" that the Court could use to resolve these questions and, therefore, was inappropriate.[305] He contended that the plurality's balancing test offered no guidance in resolving cases where there was no clear resolution, but instead allowed a judge to determine the fate of a state law based on the balance of benefits and burdens which were disproportionate.[306] Justice Gorsuch stated that the plurality's use of their balancing test left lower courts with no "administrable legal rule to follow, a neutral principle, something outside themselves to guide their decision" and therefore could not be used.[307] Finally, Justice Kavanaugh also argued that the wrong standard was being applied by the plurality in evaluating the constitutionality of the state abortion regulation.[308] He asserted that there needed to be additional fact-finding to properly evaluate Act 620 and that the Court should have remanded the case for a new trial using the appropriate legal standards.[309] In conclusion, according to these dissenting justices, the plurality's decision could not be upheld

301. *Russo*, 140 S. Ct. at 2153-54 (Alito, J., dissenting) (citing *Casey*, 505 U.S. at 884-85); *see generally* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("But when a party saddled with such restrictions challenges them as a violation of due process, our cases call for the restrictions to be sustained if 'it might be thought that the particular legislative measure was a rational way" to serve a valid interest.").

302. *Russo*, 140 S. Ct. at 2154.

303. *Id.*

304. *Id.* at 2179 (Gorsuch J., dissenting).

305. *See id.* at 2179-180 (stating that the Court has to avoid standardless decision making, and that legal tests used by lower courts should be replicable and predictable and comparing the plurality's test to a "hunters stew: Throw in anything that looks interesting, stir, and season to taste").

306. *Id.* at 2180.

307. *Id.* (quoting Planned Parenthood of Ind. & Ky. v. Box, 949 F.3d 997, 999 (CA7 2019) (Easterbrook, J., concurring in denial of rehearing en banc).

308. *Russo*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting).

309. *Id.*

because they were erroneous in applying the *Hellerstedt* balancing standard.

4. Adherence to Stare Decisis in this Case was Inappropriate Because the Facts Were Not Similar or Identical to Whole Women's Health v. Hellerstedt

Justice Thomas claimed that the plurality's and the concurrence's adherence to the legal doctrine of stare decisis did not comport with the Court's duty to faithfully interpret the meaning of the Constitution.[310] He believed that because *Roe* and its descending cases were premised on the wrong interpretation of the Constitution, those cases should not have had any control.[311] Justice Thomas disagreed with Chief Justice Roberts's decision to adhere to the *Hellerstedt* decision and instead believed that the continued adherence to the Court's abortion precedent was unjustified.[312] Further, he argued that because not even five justices in this case could agree on the right interpretation of the precedent evidenced that the Court's abortion jurisprudence could not be trusted or preserved.[313] He emphasized stare decisis' purpose of maintaining a "principled and intelligent development of the law" to argue that the Court's abortion jurisprudence is incompatible with this purpose.[314] He finally contended that the plurality had recognized the implied fundamental right of privacy in *Griswold* and abortion in *Roe* based on a tendency to exceed constitutional authority through the use of erroneous precedent rather than stare decisis. [315]

Next, Justice Alito argued that the doctrine of stare decisis was wrongly used by the plurality and Chief Justice.[316] He asserted that *Russo* was entirely different from *Hellerstedt*.[317] He argued that just because the Texas and Louisiana laws were largely the same, it did not mean that the admitting privileges requirements would have had the same effects on abortion access in Louisiana.[318] He used the fact that in *Hellerstedt* the abortion providers brought suit after the enactment of the statute was already in place and had already burdened the providers and abortion access to differentiate this

310. *Id.* at 2151 (Thomas, J., dissenting).

311. *Id.* (referring to cases such as *Casey*, *Hellerstedt*, *Gonzales,* and *Griswold* where implied fundamental rights that cannot be found written in the Constitution have been found).

312. *See id.* at 2151-52 (stating that *Roe* cannot be continuously adhered to when not even one justice today will defend it).

313. *Id.* at 2152.

314. *Id.*

315. *Id.* (arguing that *Roe* and its progeny should be overruled).

316. *Id.* at 2157 (Alito, J., dissenting).

317. *Id.*

318. *Id.* at 1258.

case.[319] Because the abortion providers brought suit before the enactment of Act 620 had even taken place, he contended that *Hellerstedt* did not control and stare decisis should not have been adhered to.[320]

Justice Gorsuch similarly argued that strict adherence to stare decisis in this case was inappropriate, but only argued so against Chief Justice Roberts's concurrence.[321] He relied on two reasons for why the Chief Justice's adherence to stare decisis was not proper for this case.[322] First, the facts in this case did not identically match those of *Hellerstedt*.[323] Second, he argued that the Chief Justice's alternative holding was nowhere within the Court's *Hellerstedt* decision.[324] Rather, Justice Gorsuch contended that *Hellerstedt* "insisted that the substantial obstacle test 'requires that courts consider the burdens a law imposes on abortion access together with the benefits th[e] la[w] confer[s].'"[325] Because the Chief Justice's ruling did not fit the actual conclusion of *Hellerstedt*, he did not use stare decisis to "demand allegiance to a non-existent ruling inconsistent with the approach actually taken by the Court."[326] Further, Justice Gorsuch argued that litigants start on a clean slate and while a previous case's legal rules could create precedent binding in the current dispute, earlier "fact-bound" decisions typically "provide only minimal help when other courts consider" later cases with different factual "circumstances."[327] He asserted that in this case this rule was ignored and instead the plurality treated *Hellerstedt*'s determinations about the Texas law burdening access to abortion in Texas as if they applied to Louisiana as well.[328] He contended that the plurality wrongly treated *Hellerstedt*'s conclusions about the Texas law as "universal principles of law, medicine or economics true in all places and at all times."[329]

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319. *Id.*

320. *Id.*

321. *Id.* at 2180 (Gorsuch, J., dissenting).

322. *Id.* 2180-81.

323. *Id.* at 2181.

324. *See id.* ("[a]t no point did the Court hold that the burdens imposed by the Texas law alone—divorced from any consideration of the law's benefits—could suffice to establish a substantial obstacle").

325. *Id.* (quoting *Hellerstedt*, 136 S. Ct. at 2309) (representing Gorsuch's opinion that the Chief Justices proposed undue burden standard for abortion cases is wrong and that the correct standard considers both the benefits and the burdens, but there is no balancing test applied to determine whether a law imposes an undue burden).

326. *Russo*, 140 S. Ct. at 2181.

327. *Id.* at 2178 (citing Buford v. United States, 532 U.S. 59, 65-66 (2001)).

328. *See Russo*, 140 S. Ct. at 2178 (suggesting that instead of the litigants here starting with a clean slate, the plurality instead suggests that if the same exact effects the Texas statute had on abortion access in 2016 would have the same effects in Louisiana in 2020 because the statutes are practically identical).

329. *Id.*

5. The District Court Findings were Clearly Erroneous

The final issue of debate amongst the dissenting justices was that the plurality granted too much deference to the district court whose factual findings were clearly erroneous.[330] First, Justice Alito argued that the plurality and Chief Justice overlooked the "flawed legal standard on which the district court's findings depends, and they ignored the gross deficiencies of the evidence in the record."[331] Act 620 was enjoined from going into effect and the district court predicted what the effects on abortion access would have been and concluded that none of the abortion providers in the state would be replaced if Act 620's requirements forced them to leave the practice of abortion.[332]

Justice Alito stated that the findings of the district court relied on a flawed test, the good faith test.[333] He claimed that the providers "had everything to lose and nothing to gain by obtaining privileges" and instead the court should have focused on whether the providers' efforts to obtain the privileges would have been the same if they knew their ability to perform abortions was at stake.[334] Further, the justice argues that not only did the district court use the wrong test, but the evidence failed to show that the doctors made great efforts to obtain the admitting privileges.[335] According to Justice Alito, the evidence did not show that the doctors attempted with the requisite effort to obtain admitting privileges and that Act 620 would not have driven these providers out of practice, finding that the district court's findings on the effects of the acts could not stand.[336] He concluded by arguing that the case should be remanded for a new trial because the Court did not require the doctors to prove the requisite effort in obtaining hospital admitting privileges.[337]

Justice Gorsuch also agreed that supplying deference to the

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330. *Id.* at 2158 (Alito, J., dissenting); *id.* at 2179 (Gorsuch, J., dissenting); *id.* at 2152-53 (Thomas, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

331. *Russo*, 140 S. Ct. at 2158 (Alito, J., dissenting) (citing *Kliebert*, 250 F. Supp. 3d at 87) (finding the Louisiana law would have a substantial negative effect on access to abortion).

332. *See Kliebert*, 250 F. Supp. 3d at 82 (suggesting Justice Alito's disagreement with the district court over this issue; he believes that abortion providers who would be forced out of business would be replaced by other providers who could obtain the admitting privileges).

333. *Russo*, 140 S. Ct. at 2159 (Alito, J., dissenting); *Kliebert*, 250 F. Supp. 3d at 82.

334. *Id.* at 2159-60.

335. *Id.* at 2160 (relying on evidence such as Doe 2 "half-heartedly" applying for privileges and declining to apply for privileges at a hospital where he previously had privileges and where Doe 3 maintained privileges with the excuse of the hospital being a "catholic hospital").

336. *Id.*

337. *Id.*

district court's findings of fact and decision in this case was clearly erroneous.[338] He asserted that the Court should review the case de novo.[339] He disagreed with the plurality's deference to the district court's findings of Act 620's benefits and the determination that the benefits were so minimal that the burdens were undue.[340] Justice Gorsuch argued that because the plurality wrongly declined to apply the Court's normal standard of de novo review and instead applied the clear error standard, the decision proceeded on an erroneous premise and was therefore amiss.[341]

Further, Justice Thomas argued that Act 620 was constitutional because the implied fundamental right to an abortion found in *Roe* had no basis or support and needed to be overruled.[342] Justice Alito asserted that the Court used the abortion right like a "bulldozer to flatten legal rules that stand in the way."[343] He reached the conclusion that the plurality and the Chief Justice brushed aside rules and took short cuts to come to the conclusion that Act 620 imposed an undue burden on Louisiana women's access to abortion.[344] The Justice stated that this Court had a duty to resist straying from the neutral principles governing judicial review, but the plurality's opinion proved that the Court was unwilling to do so.[345] Justice Gorsuch believed the decision of this case was a sign that the Court had lost its way.[346] And, finally, Justice Kavanaugh asserted that there needed to be more factfinding done in order to declare whether the Act was constitutional or not, indicating his belief that the plurality's decision in striking it down was premature.[347] In conclusion, all of the dissenting justices were in agreement that the plurality's decision to strike down Act 620 as unconstitutional was erroneous and misleading.

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338. *Id.* at 2179 (Gorsuch, J., dissenting) (citing Ornelas v. United States, 517 U.S. 690, 697 (1996)) (asserting that it would "be inconsistent with the idea of a unitary system of law for the Supreme Court to defer to lower court legal holdings").

339. *Russo*, 140 S. Ct. at 2179 (Gorsuch J., dissenting).

340. *See id.* (disagreeing with the plurality for reviewing for clear error not only the district court's findings about how the law will affect abortion access, but also the lower court's judgment that the law's effects impose a "substantial obstacle").

341. *Id.* ("By declining to apply our normal *de novo* standard of review to questions of law like these, today's decision proceeds on the remarkable premise that, even if the district court was wrong on the law, a duly enacted statute must fall because the lower court wasn't *clearly* wrong").

342. *Id.* at 2152-53 (Thomas, J., dissenting).

343. *Id.* at 2153 (Alito, J., dissenting).

344. *Id.* at 2181-82 (Gorsuch, J., dissenting).

345. *Id.* at 2182.

346. *Id.*

347. *Id.* at 2182 (Kavanaugh, J., dissenting).

IV. DEPARTING FROM THE STATUS QUO IN THE ABORTION CONTEXT IS NECESSARY TO PROMOTE THE RIGHTS AND INTERESTS OF WOMEN IN THIS COUNTRY

Russo is regarded as a win for the pro-choice movement and proponents of abortion in general,[348] but was it really a win? This case essentially informed states that if they were to change the wording of abortion regulations to make them different from Act 620, the Court will likely uphold them.[349] And because the Court did not address Louisiana's disfavor and hostility towards abortion, a state legislature's ability, and deference to regulate abortion with the main purpose of restricting it remains unchecked. Additionally, because this case was practically factually identical to *Hellerstedt*, this case should have never been reviewed by the Court in the first place. This decision was correct in striking down Act 620, but it did nothing to further the abortion right nor protect it.

This personal analysis will first address how the Court avoided analyzing specific evidence found by the district court indicating that Act 620 was created with the purpose of blocking access to abortion. Second, this section will address Louisiana's disfavor and hostility towards abortion rights. Further, this section will explain how the male dominated legislative branch within the federal and state governments have a negative impact on abortion rights. Finally, this section will address the discriminatory effects that abortion regulations have on women in this country and how the bipartisan polarization of the issue has completely overshadowed the fight for women's rights and equality in the abortion context.

A. Act 620 was Enacted with the Purpose of Blocking Access to Abortion

The *Russo* Court reached the right decision in striking down Louisiana's Act 620 as unconstitutional.[350] But the Court never analyzed the Louisiana Legislature's purpose and intent in the creation of Act 620. The district court found that the Louisiana Legislature created Act 620 with the partial purpose of restricting

348. Nancy Northup, *STATEMENT: Supreme Court Rules in favor of Abortion Providers in June Medical Services v. Russo*, CTR. FOR REPROD. RIGHTS (June 29, 2020), www.reproductiverights.org/press-room/statement-supreme-court-rules-favor-abortion-providers-june-medical-services-v-russo [perma.cc/YTB2-9MWN].

349. *See* Millhiser, *supra* note 228 (suggesting that the Chief Justice's adherence to stare decisis and striking down the abortion regulation did more to indicate to those in opposition of abortion how to destroy the right in future litigation).

350. *Id.* at 2132.

access to abortion.[351] The Court never addressed the facts evidencing the Louisiana Legislature's disfavor towards abortion or the hostile climate against abortion in the state. The Court was correct in concluding that Act 620 was unconstitutional, but it could have done more to protect a woman's right to choose through analyzing the true purpose of Act 620. Chief Justice Roberts's concurrence effectively raises a flag indicating to state legislatures that if they were to enact abortion regulations different from Act 620, he would find in favor of the states.[352] If the Court had done more to emphasize the evidence indicating Louisiana's improper purpose of enacting Act 620, it would have helped prevent future state regulations made with the purpose of restricting access to abortion. But instead, the Court's avoidance in analyzing the true purpose behind Act 620 undermines and threatens the abortion right completely. This holding aids in the anti-abortion agenda rather than protecting a woman's right to choose.

B. Louisiana's Hostile Attitude and Climate Towards Abortion

There should have been more emphasis on the Louisiana Legislature's disfavor towards abortion in the Court's analysis of this case. A state legislature may not enact a regulation with the purpose of restricting access to abortion.[353] Here, the Court found that Act 620's admitting privileges requirement served no valid medical or safety purpose, but instead, that it was enacted with the purpose of restricting access to abortions.[354] Yet, the Court never analyzed the district court's findings of fact regarding the true purpose of Louisiana's enactment of Act 620. If the Court was to include this analysis, it could have effectively helped to protect and preserve the *Roe* ruling and the future of the abortion right. Because the Court did not do so, the future of the abortion right does not look bright.

The Louisiana Legislature has a codified statement laying out its legislative intent clearly expressing its disfavor and opposition

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351. *Kliebert*, 250 F. Supp. 3d at 54-56, 87; La. Stat. Ann. § 40:1061.8; *see also* State v. Aguillard, 567 So. 2d 674 (La. App. 5th Cir. 1990), *writ denied*, 571 So. 2d 631 (La. 1990) (finding that the Louisiana legislature expressed its disdain and disfavor for abortion with its La. Stat. Ann. § 40:1061.8 provision).

352. *See generally Russo*, 140 S. Ct. at 2141-42 (Roberts, C.J., concurring) (finding Act 620 unconstitutional only due to its similarity to the Texas statute in *Hellerstedt*, suggesting that if a state was to enact a statute different from Act 620, he would uphold it as constitutional).

353. *See Casey*, 505 U.S. at 877 (stating that regulation with the purpose of restricting and burdening access to abortion is improper because "the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it").

354. *Russo*, 140 S. Ct. at 2131-32.

towards abortion.[355] Louisiana has also enacted a "trigger ban," which will completely prohibit abortions if *Roe* is ever overturned.[356] Further, the district court found that Act 620 was modeled after similar laws which had the effect of closing abortion clinics in other states.[357] The Louisiana Legislature further expressed that Act 620 would build upon the work done "to make Louisiana the most pro-life state in the nation."[358] The Court should have examined the legislature's purpose behind the creation of Act 620.[359]

There is evidence to demonstrate how hostile Louisiana is towards abortion providers, clinics, and abortion in general.[360] Additionally, there is also evidence to demonstrate that Louisiana's hostility towards abortion will likely lead to the closure of clinics within the state and forced retirement by providers performing abortion services all together.[361] Additionally, in the 2020 election, Louisiana voters approved an amendment to the state's constitution which added language that offers no protection for a woman's right to an abortion and would prevent state courts from finding state abortion regulations unconstitutional should *Roe* be overturned.[362]

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355. *See* La. Stat. Ann. § 40:1061.8 (showing the legislative history of the creation of the act that represented the Louisiana legislatures intent to restrict access to abortion); *see also* State v. Aguillard, 567 So. 2d 674, 676-77 (La. App. 5th Cir. 1990), *writ denied*, 571 So. 2d 631 (La. 1990) (finding that the Louisiana legislature expressed its disdain and disfavor for abortion with its La. Stat. Ann. § 40:1061.8 provision and indicated that if Roe was to be overturned their former policy prohibiting abortion in any and all contexts would be enforced).

356. La. Stat. Ann. § 40:1061.

357. *Kliebert*, 250 F. Supp. 3d at 55-56.

358. LouisianaRightToLife, *Governor Jindal Press Conference on 2014 Pro-Life Legislation,* YOUTUBE (Mar. 7, 2014) www.youtube.com/watch?v=7q7yL4V_DDk&feature=youtu.be [perma.cc/RH8W-ZHNQ] (recording of Louisiana Governor Bobby Jindal stating that the admitting privileges requirement of Act 620 will further the state's intent to be the most pro-life state in the country); *see also* Memorandum of Law in Support of Plaintiffs' Application for Temporary Restraining Order and Motion for Preliminary Injunction at 19-20, June Med. Serv., L.L.C. v. Caldwell, 2014 WL 4296679 (2014) (No. 3:14-cv-525), 2014 WL 12923494 (showing testimony and evidence presented to the district court indicating that Act 620's true purpose was to impede access to abortion).

359. *See generally* Elizabeth Nash, *State Abortion Landscape: From Hostile to Supportive*, GUTTMACHER INST. (Aug. 29, 2019), www.guttmacher.org/article/2019/08/state-abortion-policy-landscape-hostile-supportive [perma.cc/9QS3-VG8F] (evidencing that twenty-nine states demonstrate hostility to abortion and forty-million women of reproductive age live in these states demonstrating hostility).

360. *Kliebert*, 250 F. Supp. 3d at 51, 82 (showing that the Louisiana climate towards abortion is hostile evidenced by harassment and violence towards abortion providers and interference in providing abortion services by anti-abortion activists resulting in fearful providers not being able to continue providing abortion services and access to Louisiana women).

361. *Id*.

362. *Par Guide to the 2020 Constitutional Amendments*, PUB. AFFAIRS RES. COUNCIL (Sept. 2020), www.parlouisiana.org/wp-

It is also true that Louisiana has enacted eighty-nine abortion regulations since *Roe*, more than any other state in the nation.[363] This further indicates that the purpose behind Act 620 and other Louisiana abortion regulations is not about maternal health and safety, but rather about the state's opposition to abortion in general.[364] These examples of Louisiana laws, statements, and its hostile climate towards abortion evidence the disfavor the Louisiana Legislature has towards abortion. The evidence seems to imply that Louisiana is more interested in protecting the rights of the unborn child than it is in protecting the right of women in choosing to undergo an abortion.[365]

Through an investigation and analysis of the true purpose behind the enactment of Act 620, and all abortion regulations, the Court could help promote the representation of women's interests such as abortion, but instead, it avoided and failed to do so. What is necessary is more transparency. The district court decided that the evidence described above was enough to suggest that the Louisiana Legislature's true intent behind Act 620 was to block abortion access in the state and, was therefore, unreasonable.[366] So why was this evidence not also reiterated and emphasized by the Court? If the Court would have emphasized the evidence supporting that Act 620 was unreasonable due to the Louisiana Legislature's intent to impede access to abortion rather than protect maternal health, state legislatures would have been notified that they can no longer create legislation restricting the abortion right solely due to their own disfavor towards abortion. Louisiana is not the only state with a hostile history towards abortion.[367] This indicates that if the Court

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content/uploads/2020/09/PAR_ConstAmend2020FINAL.pdf [perma.cc/3WQK-J6V9]; *see* Caroline Kelly, *Louisiana voters approve amendment limiting abortion protections, according to CNN projections*, CNN (Nov. 4, 2020), www.cnn.com/2020/11/04/politics/election-abortion-ballot-measures-louisiana-colorado/index.html [perma.cc/J4SC-HQ56] (demonstrating that Louisiana voters voted in favor of the amendment to add language expressly denying protection to abortion rights).

363. *See* Elizabeth Nash, *Louisiana Has Passed 89 Abortion Restrictions Since Roe: It's About Control, Not Health*, GUTTMACHER INST. (Feb. 11, 2020), www.guttmacher.org/article/2020/02/louisiana-has-passed-89-abortion-restrictions-roe-its-about-control-not-health [perma.cc/2QRR-NFCG] (evidencing that Louisiana has attempted to restrict access to abortion through the implementation of state regulations more than any other state across the nation and evidencing that their true intention is not to promote patient's health but to restrict access to abortion services and stigmatize the procedure all-together).

364. *Id.*

365. *Kliebert*, 250 F. Supp. 3d at 56.

366. *Id.*

367. *See* Andrea Michelson, *How the states with the best access to abortion services compare to the worst*, INSIDER (Dec. 8, 2020), www.insider.com/us-states-with-best-access-to-abortion-compared-to-worst-2020-12 [perma.cc/3KDW-T8E3] (demonstrating that other states are just as, or even

would have emphasized the volatile hostility within Louisiana and its legislature in creating and enacting Act 620, then the abortion right could have been better insulated from other restrictive abortion laws created by other conservative states.

Here, the Court avoided examining Louisiana's true purpose in enacting Act 620, even though the district court found facts suggesting it was due to disfavor towards abortion.[368] This avoidance does nothing to provide support and protection to the woman's right to choose. The Court should have struck down Act 620 based on the improper purpose behind its enactment. The Court could have included the district court's findings that the legislature enacted Act 620 solely based on its disfavor towards abortion. This would promote transparency and stop legislatures from restricting the abortion right merely because they disfavor abortions. More protection was due to women in this country and the Court here did not deliver. A woman's right to choose should be given priority over a state's disfavor and hostility towards the practice.

C. Male-Dominated Legislatures: Impeding Women's Rights on an Issue Solely Affecting Women

It is no surprise that state legislatures are male dominated.[369] This majority gives males more of a say over a woman's right to an abortion than women.[370] This is a significant problem, and the Court has added to it by not analyzing the true purpose behind Louisiana's enactment of Act 620. If male dominated state legislatures get to continue to regulate abortions, it does not seem like too much to ask for there to be a thorough check on these decisions and regulations. Many argue that abortion is an issue that should be left to the democratic majority to decide,[371] but how

more, hostile towards abortion than Louisiana, such as Alabama, Arkansas, and Kentucky).

368. *See generally* LousianaRightToLife, *supra* note 358 (demonstrating that Louisiana's governor held a press conference declaring the creation of Act 620 and the legislature's purpose in remaining a pro-life state).

369. *See* Kelly Mena, *Study Finds State Legislatures are Dominated by White Men*, CNN (July 8, 2020), www.cnn.com/2020/07/08/politics/state-legislature-diversity-study-2020/index.html [perma.cc/XT5Z-N8WS] (evidencing that males make up seventy-one percent of current state legislatures).

370. *See generally* Erin Durkin & Max Benwell, *These 25 Republicans – All White Men – just voted to ban abortion in Alabama*, GUARDIAN (May 14, 2019), www.theguardian.com/us-news/2019/may/14/alabama-abortion-ban-white-men-republicans [perma.cc/8AQ9-F4FD] (explaining that, in 2019, the male-dominated Alabama State Senate passed the most restrictive abortion law in the United States making abortion a crime at any stage of pregnancy).

371. Marjorie Dannenfelser, *Modernize U.S. abortion law - and return abortion policy to the democratic process*, SCOTUSBLOG (Nov. 29, 2021), www.scotusblog.com/2021/11/modernize-u-s-abortion-law-and-return-abortion-

representative is the democratic majority for the female population? Women make up half the population in the United States, but still, only make up less than thirty percent of seats in Congress.[372] In 2019, women only made up approximately fifteen percent of Louisiana's State Legislature, placing them on the bottom of the list compared to other state legislatures.[373] This is proof that democratic majorities and state legislatures are not fully representative of women and their interests, including their interest in the right to abortion.

In states with more significant representation of women in the state legislature, legislation has been enacted to provide support and protection for the abortion right.[374] This indicates that male dominated legislatures are not effectively, adequately, or appropriately representing the views, needs, and rights of female citizens in many states across the country.

Males cannot get pregnant and, therefore, do not face the difficult decision of having to choose whether to terminate a pregnancy. So why are abortion restrictions left in the hands of legislatures made up of a majority of male members? There is no way a male dominate state legislature can ever make an appropriate and representative regulation on abortion because of their inability to face this issue themselves. The bodily integrity and autonomy of males are not affected by abortion restrictions, and therefore, there is no way for male legislators to truly know what abortion entails.

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policy-to-the-democratic-process/ [perma.cc/UR2U-2KCG].

372. *See generally* Jessica Flores, *Women are making gains towards 'equal representation' in Congress: They'll represent about 25% of all seats in 2021*, USA TODAY (Nov. 5, 2020), www.usatoday.com/story/news/politics/elections/2020/11/05/us-congress-record-number-women-2020-election/6181741002/ [perma.cc/7BCA-L5MW] (indicating that even though women are increasing their representation within Congress, they still only represent around 25% of the seats, leaving Congress to be male dominated).

373. *Women in State Legislatures 2019*, CTR. FOR AM. WOMEN & POLITICS, www.cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2019 [perma.cc/7BTL-WDUM] (last visited Dec. 30, 2021). Louisiana ranked forty-seventh out of all fifty states in representation of women in their state legislature. *Id.*

374. See *State Legislatures Gender 2015*, NAT'L CONF. OF STATE LEGIS. (2015), www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Gender.pdf [perma.cc/3HA8-E6DF] (evidencing that Louisiana had a lower percentage of women represented in their state legislatures as opposed to states like Illinois, Maine, and Vermont who have taken steps to protect the abortion right); *see also* Kaia Hubbard, *A Guide To Abortion Laws by State*, U.S. NEWS WORLD REP. (Sept. 1, 2021), www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state (highlighting which states have notoriously tried to block and impede he abortion right like Louisiana, Alabama, and Missouri, while others have acted in ways to protect it, like Illinois, Maine, and Vermont).

In 2018, Maine elected the largest number of women into their state legislature.[375] Due to these newly elected female legislators, the Maine Legislature eventually passed two new abortion laws that "ma[de] it easier for women to afford and find abortion care in the rural state."[376] Comparatively, in 2019, the Alabama State Legislature passed an abortion ban that only gave three women a voice on the vote.[377] The abortion ban declared that "providing an abortion to a 12-year-old girl who was raped by her father is a more serious crime [than] raping a 12-year-old girl."[378] This comparison shows how the presence of women on state legislators can significantly affect how abortion is perceived and how a legislative body will address abortion issues. If more women were given a voice on the Alabama abortion ban, it may have never been passed or at least more compassion and empathy would have been shown in the creation of the regulation. With more compassion and empathy, a woman's bodily integrity and autonomy will be better insulated, respected, and recognized through abortion legislation and will better serve the interests in preserving and promoting women's health and safety.

In 2019, the United States also saw a wide array of protests against tough state abortion bans.[379] These large protests both in Poland and the United States, including in Louisiana,[380] indicate that regulations on abortion need to be changed and women's basic human rights can no longer be taken away due to stigmatization, disfavor, and the unwarranted intrusion by male-dominated

375. Patty Wight, *Newly Blue, Maine Expands Access to Abortion*, NPR (July 2, 2019), www.npr.org/sections/health-shots/2019/07/02/737046658/newly-blue-maine-expands-access-to-abortion [perma.cc/4G8B-5PLF].

376. *See id.* (expressing that the two new Maine abortion laws "will be the single most important event since *Roe v. Wade* in the [S]tate of Maine").

377. Meagan Flynn, *'A typical male answer': Only 3 women had a voice in Alabama Senate as 25 men passed abortion ban*, WASH. POST (May 15, 2019), www.washingtonpost.com/nation/2019/05/15/typical-male-answer-only-women-had-voice-alabama-senate-men-passed-abortion-ban/ [perma.cc/L4HS-62UM].

378. Eric Levitz, *The GOP's Assault on Abortion Rights is Tyranny of the Minority*, INTELLIGENCER (May 16, 2019), nymag.com/intelligencer/2019/05/alabama-abortion-ban-heartbeat-law-rape-incest-polls-republicans.html [perma.cc/52MA-BTDF].

379. *In pictures: Protests across US against abortion bans*, BBC NEWS (May 22, 2019), www.bbc.com/news/world-us-canada-48361312 [perma.cc/3YF9-ZMSQ].

380. *See* Maria Clark, *Abortion rights supporters protest Louisiana's push to further restrict abortion access*, NOLA.COM (May 22, 2019), www.nola.com/news/article_87cdd6a2-4d41-5141-a8a0-25c35523a5cc.html [perma.cc/A6GT-QWQR] (demonstrating that there were even large protests of hundreds of people within Louisiana who were protesting Louisiana's actions towards restricting abortion access, further indicating that the Louisiana male-dominated legislature did not represent all Louisianan citizens views on the abortion right).

legislatures. It is time women's rights are taken into consideration and given a sense of significance and priority, and for their voices, needs, and views to be adequately represented in state and federal legislatures.

Throughout history, the criminalization and abolition of abortion have been used as a tool of control over female citizens' bodies.[381] But a woman is not an object. One's choice to exercise her right to an abortion should not be something that can be manipulated, controlled, or dominated by others who have no idea what it's like to be in her situation. A woman's fundamental right to choose deserves the Court's utmost prioritization, analysis, and protection. And the Court should be scrutinizing the actions of state legislatures to emphasize that women and their bodies are not things that can or should be under the control of governmental bodies. There needs to be an increase of female voices within state legislatures in the abortion context so that a woman's bodily integrity and autonomy will no longer be denied. The judicial branch also needs to have a larger presence in the making of abortion regulations to ensure that women are treated equally and fairly.

D. Politicization of the Abortion Right has Created a Constructed Controversy that has Effectively Led to the Discrimination of Women and the Denial of Their Bodily Integrity and Autonomy

Abortion has become a highly controversial issue in this country, but it is also an implied fundamental right that should be preserved and protected.[382] Each year many women will decide whether to exercise this right.[383] By analyzing the true purpose state legislatures have in enacting abortion regulations, the Court will be making sure maternal health and patient safety are the only state interests involved. A Woman's reasons for choosing to undergo an abortion cannot be looked at as second best or as an afterthought. It is time that the Court steps in and chooses women's rights first when they are being burdened based on state legislatures' disfavor

381. Laurie Penny, *The Criminalization of Women's Bodies Is All About Conservative Male Power*, NEW REPUBLIC (May 17, 2019), www.newrepublic.com/article/153942/criminalization-womens-bodies-conservative-male-power [perma.cc/SGJ9-DT6L].

382. *Roe*, 410 U.S. at 153 (stating that the implied fundamental right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

383. *See Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), www.guttmacher.org/fact-sheet/induced-abortion-united-states [perma.cc/K22W-Y4PZ] (demonstrating that approximately 862,320 abortions were performed in the United States in 2017).

towards the abortion right. It is not necessary for the abortion right to be absolute, but women deserve to be treated as if their rights, interests, and concerns matter.

The late Ruth Bader Ginsburg was correct in her proposal that *Roe* would have done more to promote the abortion right and women's rights if the Court adverted to equal protection considerations rather than due process considerations.[384] By creating a right to privacy in the abortion context, the Court granted women "expensive, limited, and easily revocable guest privileges at the exclusive men's club called the Constitution."[385] And through the granting of this abortion right in *Roe*,[386] it seems nothing more than additional controversy, divided lines, and the continued governance and coercion over women's rights and bodily integrity has ensued.[387] As long as the issue over whether abortion should be legally accessible to women in this country remains a heavily divided debate, women will continue to be discriminated against.[388]

The divided abortion debate has wrongly become a battle of the left vs. the right that has overshadowed women's rights altogether.[389] This highly polarized political debate has turned abortion rights into political theatre.[390] The abortion issue is no

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384. Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985).

385. Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 139 (1991).

386. *Roe*, 410 U.S. at 153.

387. *See* Chloe Atkins, *'A crisis moment:' States, advocates brace for new fight over abortion rights*, NBC (Jan. 11, 2021), www.nbcnews.com/politics/politics-news/crisis-moment-states-advocates-brace-new-fight-over-abortion-rights-n1253665 [perma.cc/36KF-XDRV] (portraying that the states and the Supreme Court are both divided on the abortion issue in this country); *see* Ellman, *supra* note 17 (indicating that a woman's right to an abortion has been under attack in recent times by state legislatures looking to put an end to abortion access, therefore continuing state governance over woman's bodily integrity).

388. *See* Butler, *supra* note 385 (expressing her view that "[t]o participate on either side of the debate on the present terms is to be a party to sexual harassment of women and denial of their right to bodily integrity").

389. *See* Anna North, *How abortion became a partisan issue in America*, VOX (Apr. 10, 2019), www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans [perma.cc/45WK-AC5F] (evincing the history and background of how the abortion issue has become a debate of the liberal left vs. the conservative right); *See generally* Jessica Mendoza, *Is our political divide, at heart, really all about abortion?*, CHRISTIAN SCI. MONITOR (Apr. 9, 2019), www.csmonitor.com/USA/Politics/2019/0409/Is-our-political-divide-at-heart-really-all-about-abortion [perma.cc/QS8T-XNMB] (signifying that abortion has such high political impact which has turned the focus over its legality into a tool used by political parties to gain votes and support for governmental control and political office).

390. *See* Mendoza, *supra* note 389 (suggesting that the real purpose and reasons behind the polarized debate over the legality and accessibility of abortion in this country is for politicians to gain votes and support for their

longer considered a medical issue that should be analyzed to protect a woman's safety and health.[391] Rather, it has become part of a political agenda. This political agenda has even made its way into the judiciary where abortion is used as a litmus test for the appointments of Supreme Court justices and lower court judges.[392] With the issue of abortion becoming a political tool, it is evident that women's rights, well-being, and equality have been put on the backburner once again.[393] Globally, people have differing opinions surrounding the issue of abortion,[394] but only in the United States do these differing opinions on abortion play a central role in politics.[395] While American women patiently wait for the government and the courts to decide if abortion can be legal and accessible, politicians and legislators are busy burdening, overshadowing, and denominating the issue to one of political fervor that has nothing to do with women, or their rights, at all.

Because abortion has been heavily regulated and governed by state legislatures, the government may be viewed as denying women their bodily integrity and autonomy, without any concerns for women's health.[396] Because of this bipartisan debate, abortion in this country is not a medical or bodily autonomy issue, but rather a moral, religious, and political one.[397] This cannot stand. Courts have consistently recognized and respected the concept of bodily integrity[398] and, therefore, an American woman's bodily integrity in

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political careers and elections).

391. *Id.*

392. *See* Albert Hunt, *Both parties irrationally make abortion a litmus test*, HILL (June 12, 2019), www.thehill.com/opinion/campaign/448114-both-parties-irrationally-make-abortion-a-litmus-test [perma.cc/3UGW-GFZJ] (evidencing that both the liberal left and the conservative right have made the abortion issue a political litmus test: "You must be pro-choice to advance as a Democrat, pro-life to be a top Republican"); *see also* Mangan, *supra* note 3 (illustrating how Donald Trump was using abortion as a litmus test to appoint Supreme Court justices who would work to overturn *Roe*).

393. Julia Gillard, *A Global Story: Women's suffrage, forgotten history, and a way forward*, BROOKINGS INST. (Sept. 2020), www.brookings.edu/essay/a-global-story/ [perma.cc/VB23-5JQS].

394. Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, HEALTH & HUMAN RIGHTS 13-27 (2017).

395. *See* Ziad Munson, *Abortion Politics*, POLITY PRESS 5 (2018) (evincing how America has treated the issue of abortion differently than other countries around the world and have actually made it a central issue within their political system).

396. *See generally* Ellman, *supra* note 17 (suggesting that because abortion has become the increased target of heavy regulation by many state legislatures, individuals may believe that the government is impeding on a woman's fundamental right to privacy rather than working to protect it).

397. Lori Friedman, *US Abortion Politics: How Did We Get Here and Where Are We Headed?*, LEHIGH NEWS (June 3, 2019), www.lehigh.edu/news/us-abortion-politics-how-did-we-get-here-and-where-are-we-headed [perma.cc/K5R6-5KMP].

398. *See* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (finding that

the abortion context deserves respect and recognition.

There is no question that pregnancy causes a "deep intrusion into a woman's body," and when a state restricts access to abortion, the state is effectively forcing a woman to endure pregnancy against her own will.[399] By enforcing regulations that govern how and when women are supposed to make decisions regarding their own bodies, women are being labeled as second-class citizens and being discriminated against. It's interesting that a woman can decide independently when she should engage in sexual relations or when to ultimately get pregnant but cannot independently decide when an abortion is in her own best interest. In order to promote the interests, health, and rights of women in this country, the Court needs to recognize abortion as being a sex-discrimination issue that is owed protection under the Equal Protection clause of the Constitution.[400] The Court must confront the question of "how the United States Constitution must respond when women are discriminated against as women."[401] It is safe to say that laws protecting an individual's bodily integrity have not been created or applied equally to women and men.[402] Because the Court is continuously maintaining the status quo by not recognizing abortion as a bodily integrity and autonomy issue, abortion will remain a polarizing political tool used to gain voters and supporters rather than a tool to protect the rights of women. Using the equal protection clause to analyze abortion restrictions would better protect the health, safety, and bodily integrity and autonomy of women in this country. The Court needs to do more but, unfortunately, the Court did the opposite in *Russo*.

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bodily integrity is of the utmost importance and was deserving of protection and that women should be protected from bodily intrusions); *see also* Pratt v. Davis, 118 Ill. App. 161, 166 (1906) ("[T]he free citizen's first and greatest right, which underlies all others–the right to the inviolability of his [sic] person, in other words, his right to himself–is the subject of universal acquiescence").

399. *See* Christyne L. Neff, *Woman, Womb and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 350 (1991) (emphasizing the effects of state regulations on abortion and how they effectively require a woman to endure pregnancy and all the "pain, illness, and risk of injury which pregnancy involves–against her will").

400. U.S. CONST. amend. XIV §1; *see* Ginsburg, *supra* note 384 (indicating that if the *Roe* Court considered the issue of abortion within sex discrimination and equal protection matters, a woman's right to abortion access would be better protected).

401. *See* Butler, *supra* note 385 (suggesting that approaching the abortion issue from the Equal Protection clause would do more to help protect the abortion right and women's rights in general).

402. *See* Neff, *supra* note 399 (illustrating how state regulations effectively deny pregnant women of their own bodily integrity and autonomy, therefore indicating that state laws over bodily integrity are not equal amongst men and women in this country).

V. CONCLUSION: THE ABORTION RIGHT IS SAFE… FOR NOW

In 1964, a young woman named Gerri Santoro died while receiving an illegal "back-alley" abortion in Connecticut.[403] Before *Roe v. Wade*, approximately one million women per year in the United States resorted to illegal abortions, and out of those one million, five thousand died annually.[404] Just because abortion is banned does not mean women are going to stop seeking it. Therefore, abortion regulations need to stop being highly restrictive, and instead need to promote access to abortion that is safe, healthy, and effective. There is no reason more lives need to be lost to the performance of illegal abortions by untrained individuals. There was a lot to be learned from the death of Gerri Santoro, and evidentially, there still is.

The increase in highly restrictive abortion regulations in recent years seems to signify a change in the intent behind abortion regulations from pro-life to pro-birth.[405] If women's rights are not recognized and their bodily integrity and autonomy are not respected, there is no way women can be considered equal. There is no question that abortion is a practice that has been stigmatized for centuries in this country. But this stigmatization must come to an end. Women can no longer be viewed as second-class citizens, giving others a say and control over their bodies. State legislatures need to change the approach to abortion issues by including more women in their decisions and a level of compassion, empathy, and respect towards pregnant women. But with the continuing enactment of regulations that block abortion access and the continuing usage of abortion for political gain, it does not seem like this change will ever be a reality.[406] It is true that some states in recent years have taken steps to protect the abortion right, but there are still too many

403. Amanda Arnold, *How a Harrowing Photo of One Woman's Death Became an Iconic Pro-Choice Symbol*, VICE (Oct. 26, 2016), www.vice.com/en/article/evgdpw/how-a-harrowing-photo-of-one-womans-death-became-an-iconic-pro-choice-symbol [perma.cc/SYV7-VRCE].

404. *Id.*

405. *See generally* Peter W. Marty, *Anti-abortion legislators need a dose of compassion*, CHRISTIAN CENTURY (June 3, 2019), www.christiancentury.org/article/publisher/anti-abortion-legislators-need-dose-compassion [perma.cc/NU6Y-Z9Y2] (examining the recent trend of increasing "draconian" style abortion laws that seem to protect the birth of a fetus over the protection of the life of a pregnant woman).

406. *See generally* Elizabeth Nash et. al., *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back*, GUTTMACHER INST. (Dec. 2019), www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back [perma.cc/82AG-LZ85] (demonstrating that many states in the United States in 2019 implemented a wave of twenty-five new abortion regulations that had the effect of blocking access to abortion).

states who are looking to impede access to abortion.[407] The world and times are changing, and so needs the perception and stigma against abortion.

It is time women have full basic human rights that cannot be changed, controlled, or taken away by the government. The Court needs to take a stand and protect these basic human rights, including the right to an abortion, through a strict analysis of state regulations that impede on abortion rights. *Russo* did not expand abortion rights. It merely stuck with the status quo and delayed the seemingly inevitable overturning of *Roe*. With the creation of a conservative majority on the Court, the overturning of *Roe* is no longer a fantasy. It is real. Women are close to losing their implied fundamental right to an abortion, and with it their autonomy and control over their own bodies. The Court now has the potential to substantially undermine, and possibly overturn, *Roe* and a woman's fundamental right to choose.[408] If this isn't unsettling, then I don't know what is. The Russo Court may have upheld the abortion right, but it in no way increased its protection. Rather, the Court stuck with the status quo instead of going the extra mile to cushion a woman's right to choose.

407. *Id.* (evidencing that in 2019, U.S. state policies blocking abortion access outweighed policies to protect the right, but the gap is closing with thirty-six regulations that protect abortion being enacted).

408. David Leonhardt & Ian Prasad Philbrick, *Abortion at the Court*, N.Y. TIMES (Dec. 2, 2021), www.nytimes.com/2021/12/02/briefing/supreme-court-abortion-case-mississippi.html [perma.cc/A4BY-SCAU] (suggesting that the Court is leaning towards undermining the right to choose set in *Roe* in the most recent abortion case of *Jackson*).