No. 18-_____

In the United States Court of Appeals for the Fifth Circuit

JUNE MEDICAL SERVICES, LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; and DR. JOHN DOE 1 and DR. JOHN DOE 3, on behalf of themselves and their patients,

Plaintiffs – Respondents

v.

REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health; and JAMES E. STEWART, SR., in his official capacity as District Attorney for Caddo Parish,

Defendants – Petitioners

On Appeal from the U.S. District Court, Middle District of Louisiana
No. 17-cv-404-BAJ-RLB

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

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CERTIFICATE OF INTERESTED PERSONS

No. 18-_____, *June Medical Servs., LLC, et al. v. Rebekah Gee, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
CURRENT PLAINTIFFS 1. June Medical Services, LLC d/b/a Hope Medical Group for Women Dr. John Doe 1; Dr. John Doe 3 (physicians at plaintiff clinic)	**CURRENT COUNSEL** 1. DEBEVOISE & PLIMPTON LLP; Shannon Rose Selden; Amanda M. Bartlett; Anna Moody; Holly S. Wintermute 2. RITTENBERG, SAMUEL & PHILLIPS LLC; Charles M. Samuel, III CENTER FOR REPRODUCTIVE RIGHTS; Caroline Sacerdote; Jenny Ma
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Defendants	Defendants' Counsel
1. Rebekah Gee, Secretary of the Louisiana Department of Health 2. James E. Stewart, Sr., District Attorney for Caddo Parish	**CURRENT COUNSEL** 1. Jeff Landry, Louisiana Attorney General; Elizabeth B. Murrill, Solicitor General; LOUISIANA DEPARTMENT OF JUSTICE 2. SCHAERR | DUNCAN LLP; Stephen S. Schwartz **FORMER COUNSEL** SCHAERR | DUNCAN LLP; S. Kyle Duncan

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INTRODUCTION

Plaintiffs — a Louisiana abortion clinic and two of its doctors — have challenged the entire structure of Louisiana's rules for licensing and health regulation of abortion clinics. Instead of challenging particular laws or administrative acts, however, Plaintiffs have challenged the *cumulative* effect of Louisiana's regulatory system. In doing so, Plaintiffs have not even *identified* all the laws and administrative acts that they find objectionable. By their own count, more than a thousand regulatory requirements are at issue. And Plaintiffs are quite candid that their end-goal is not just elimination of particular abortion laws now in effect. Rather, they seek decades of judicial supervision directing exactly how Louisiana *should* regulate abortion — a process that Plaintiffs explicitly analogize to judicially-managed school desegregation.

Plaintiffs' challenge violates a panoply of rules, including the constitutional standard for review of abortion laws, pleading requirements, due process protections, and the limits of Article III jurisdiction. The district court denied Defendants' motion to dismiss, but certified the Order denying dismissal for interlocutory appeal.

The district court was wrong to allow Plaintiffs' claim to proceed, but right to authorize this Court's immediate review. This Court should grant interlocutory appeal and reverse.

JURISDICTIONAL STATEMENT

Plaintiffs pleaded that the district court has subject-matter jurisdiction over this constitutional challenge to Louisiana statutes, regulations, and administrative acts under 28 U.S.C. §§ 1331, 1343(a)(3). *See* Doc. 1 at 4, ¶ 10. Defendants moved to dismiss for, *inter alia*, lack of Article III jurisdiction.

The district court issued a Ruling and Order which denied in part and granted in part Defendants' motion to dismiss on March 30, 2018. *See* Tab A ("Order"). The district court certified the Order under 28 U.S.C. § 1292(b) on May 15, 2018. *See* Tab B. This Petition for Interlocutory Appeal is timely because it is filed within 10 days of the district court's certification. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a)(3).

STATEMENT OF THE ISSUES

The district court certified "the threshold question [of] whether Plaintiffs' key claim is colorable." Tab B at 3. That question includes the

following issues addressed in Defendants' motion for interlocutory appeal and in this Petition:[1]

1. Can Plaintiffs challenge the cumulative effects of Louisiana statutes, regulations, and administrative acts related to licensing of outpatient abortion facilities without challenging them individually?
2. Can Plaintiffs challenge the cumulative effects of Louisiana statutes, regulations, and administrative acts without specifically identifying them or pleading their standing to challenge them individually?

RELIEF SOUGHT

Petitioners ask this Court to grant interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to reverse the district court's denial of Defendants' motion to dismiss Count I of Plaintiffs' Complaint.

[1] Defendants reserve their right to contest other aspects of the Order embedded within the controlling question on interlocutory appeal, should this Court accept review. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996) (holding that "the courts of appeals [can] exercise jurisdiction over any question that is included within the [certified] order that contains the controlling question of law identified by the district court"). Those questions may include whether federal courts should abstain from jurisdiction over Count I under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *see* Doc. 22-1 at 10–13; Tab A at 13–15.

STATEMENT OF FACTS

A. Plaintiffs' Cumulative Effects Claim

Plaintiffs' Complaint consists of three counts. Only one of those counts — Count I — is at issue in this Petition.[2]

Louisiana requires that outpatient abortion facilities (or "abortion clinics") obtain licenses from the Louisiana Department of Health ("LDH"). *See* La. R.S. § 40:2175.4(A). Licensing those clinics is the responsibility of LDH, which has authority to "promulgate and publish rules, regulations, and licensing standards to provide for the health, safety, and welfare of women in outpatient abortion facilities and for the safe operation of such facilities." La. R.S. § 40:2175.5; *see also* La. Admin. Code tit. 48, ch. 44 (LDH regulations on abortion facility licensing).

Count I of Plaintiffs' Complaint purports to present an as-applied challenge against Louisiana's Outpatient Abortion Facility Licensing Law ("OAFLL") and several Louisiana health statutes (which Plaintiffs tendentiously call the "Sham Health Statutes") based on their alleged cumulative effects. Doc. 1 at 50, ¶ 221; *see* Doc. 32 at 8 (claiming "the

[2] Count II, which has been dismissed, alleges that Louisiana deprives abortion clinics of their procedural due process rights. Doc. 1 at 51–52, ¶¶ 224–26. Count III, which remains pending, alleges that Louisiana's system of unannounced inspections of abortion clinics violates the Fourth Amendment. *Id.* at 52, ¶¶ 227–28.

Complaint states an as-applied challenge to OAFLL"). Plaintiffs allege that each implementing regulation, licensing decision, and enforcement action by LDH pursuant to OAFLL and the health statutes constitutes a unique application of Louisiana laws. Doc. 1 at 50, ¶ 221 (alleging that OAFLL and the health statutes are unconstitutional "as applied and enforced by LDH through its implementing regulations and enforcement practices"). Plaintiffs claim that OAFLL's applications include "dozens" of regulations and "thousands" of requirements, *id.* at 15, ¶ 56; *id.* at 6, ¶ 23, plus an unknown number of licensing and enforcement acts.

Plaintiffs do not claim that any given statute, regulation, or government action unduly burdens abortion by itself. Plaintiffs' challenge is instead premised on the combined effects of *many* applications of *all* the statutes. According to Plaintiffs, the allegedly unconstitutional consequence of those applications is that the overall gestalt of Louisiana regulation is insufficiently hospitable to their activities. *Id.* at 21, ¶ 89 (objecting to the "unpredictable regulatory environment"); *id.* at 49, ¶ 214 (alleging that Louisiana provides "a hostile and unwelcoming regulatory environment").

Count I thus is not a typical as-applied challenge. Parties bringing as-applied challenges generally plead "discrete and well-defined instances" where enforcement of a statute has been or would be unconstitutional, allowing a court to evaluate constitutionality in the context of "a discrete case." *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007). Plaintiffs, in contrast, have expressly *declined* to identify each regulation or administrative act that they find objectionable.[3] Rather, Plaintiffs' as-applied challenge is based on general categories and descriptions, such as Plaintiffs' allegation that Louisiana abortion clinics are subject to "well over a thousand requirements" under OAFLL — only a fraction of which are mentioned in the Complaint. Doc. 1 at 6, ¶ 23; *id.* at 15, ¶ 56.

Plaintiffs plainly do not (and cannot) object individually to *all* the regulations and administrative acts that Count I covers. By its terms, Count I sweeps in, *e.g.*, a regulation requiring use of sterile instruments (La. Admin. Code § 48:4447), and a health statute provision requiring that pre-abortion consultations disclose "[t]he medical risks associated

[3] *See* Doc. 1 at 21, ¶ 88 ("The examples of LDH's use of the rulemaking procedure to burden abortion are not intended to be exhaustive as described herein; there are many other examples that are not specifically discussed in this Complaint.") (citation omitted); *id.* at 32, ¶ 142 (similar).

with carrying [a] child to term" (La. R.S. § 40:1061.17(B)(3)(a)(v)). Count I also covers provisions that Plaintiffs have not pleaded standing to challenge: Plaintiffs expressly object to "the new-clinic licensing rule, which … applies to clinics that move to a new location or change hands," Doc. 1 at 41, ¶ 177, but they do not allege that the Plaintiff clinic has any such plans.

Plaintiffs have never claimed that they specifically object to all applications of OAFLL and the health statutes covered by the plain terms of their Complaint. Likewise, Plaintiffs have never argued that their Complaint includes facts sufficient to support individual claims against each regulation and act that Count I covers — again, Plaintiffs repeatedly admit that it does not even identify all of them. *See* Doc. 1 at 21, ¶ 88; *id.* at 32, ¶ 142. All of this appears to be undisputed.

Defendants have repeatedly requested that Plaintiffs clarify the scope of their claims, but Plaintiffs have declined to do so. In one conference, Defendants asked whether Plaintiffs intend to pursue claims as to the regulation requiring sterile instruments. Plaintiffs' counsel declined to state that the regulation is outside the scope of Plaintiffs' claims or intended discovery. *See* Docs. 65-2; 72.

Later, Defendants served two interrogatories asking Plaintiffs to identify which statutes, regulations and government actions they consider to be at issue in Count I. Tab C. Plaintiffs objected to both as "premature contention interrogator[ies]." Tab D at 4–5. Plaintiffs further objected to identifying challenged government actions on the ground that it would be "unduly burdensome" for Plaintiffs to "identify *each* Agency Act that contributes to an unconstitutional undue burden on abortion." *Id.* at 5.

Plaintiffs referred Defendants to certain requirements and acts mentioned in their Complaint. *Id.* at 4–5. They cited the statutes they identified in their Complaint, plus the entire title of the Louisiana Administrative Code covering abortion facilities — *including* the regulation requiring sterile instruments, among many others. *Id.* at 4–5. Plaintiffs stated that their responses are "non-exhaustive" and that they would "reserve the right" to identify additional statutes, regulations, and acts "after the close of discovery." *Id.* at 5.

B. Plaintiffs' Requests for Discovery and Relief

Although the scope of Plaintiffs' real objections to individual statutes, regulations, and agency acts *must* be narrower (by an unknown

amount) than the literal breadth of Count I, Plaintiffs' plans for the case are as expansive as can be imagined.

While Defendants' motion to dismiss was pending, Plaintiffs issued their First Set of Requests for Production. *See* Doc. 65-3.[4] Request No. 1 seeks "[a]ny and all Documents … and Communications regarding the development, drafting, or amendment of any OAFLL Regulations, including documents and communications reviewed or relied upon in the development or enactment of each provision of the OAFLL Regulations." *Id.* at 9. Plaintiffs define "OAFLL Regulations" as "any regulations promulgated by LDH pursuant to OAFLL," *id.* at 4 — which can only refer to the "1000+" current abortion clinic licensing requirements that Plaintiffs' Complaint challenges, *see* Doc. 32 at 6; Doc. 1 at 6, ¶ 23, plus expired or repealed regulations no longer in force. The time frame extends back to January 1, 2010. Doc. 65-3 at 8. Plaintiffs, in other words, request the entire administrative record for every issuance and amendment of more than a thousand regulatory requirements going back eight years.

[4] Discovery in this case was stayed pending resolution of Defendants' motion to dismiss. *See* Doc. 55. It has since reopened. *See* Doc. 70.

Request No. 6 is notable too: It covers "[a]ny and all Documents containing reports, summaries, or statistics related to LDH inspections, issuances of notices of violation or statements of deficiency, Licensure Actions, or any other penalty imposed by LDH on Health Care Facilities." Doc. 65-3 at 9. Plaintiffs' definition of "Health Care Facilities" incorporates the statutory definition of that term in the Louisiana Administrative Code. *Id.* at 3. The regulations, in turn, provide a non-exclusive list of 28 types of facility including not only abortion clinics, but hospitals, adult day health cares, substance abuse treatment facilities, and many others. La. Admin. Code § 48:4603. Plaintiffs define "Licensure Action" to mean "the suspension, revocation, non-renewal, or placement on probation of a Health Care Facility's license." Doc. 65-3 at 4. Plaintiffs' Request No. 6 thus covers every document reporting on every inspection of every licensed health care facility in the State — plus every document on every violation of every regulatory requirement applicable to any such facility in the State — also for the last eight years.

The scope of relief that Plaintiffs request is notable as well. Defendants' motion to dismiss Count I urged that granting Plaintiffs relief would inevitably "plac[e] the State legislature under continuing

judicial oversight for purposes of reviewing abortion regulations," leading to "ongoing oversight of State legislative activities" by federal courts. Doc. 22-1 at 5. When Plaintiffs opposed, they confirmed that that is *precisely* what they have in mind. In justifying their intended relief, Plaintiffs analogize this litigation to the school desegregation cases, where the Supreme Court's injunction that district courts "retain jurisdiction" led to a more than quarter century of judicial supervision of Louisiana school systems. *See* Doc. 32 at 10 & n.5 (citing *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 300–01 (1955); *Davis v. East Baton Rouge Parish Sch. Bd.*, 514 F. Supp. 869, 871, 874–82 (M.D. La. 1981)). Plaintiffs consider that the "paradigmatic" example of what they want, namely, "tailored injunctions requiring government agencies to take specific steps over a specified time to bring their policies and practices in line with the Constitution." Doc. 32 at 10.

C. District Court Proceedings

Defendants moved to dismiss the Complaint, Doc. 22, and the district court heard argument. The district court issued its decision denying the motion to dismiss Count I on March 30, 2018. Tab A.

The district court first held — relying principally on the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) — that Plaintiffs can challenge the cumulative effects of categories of regulations and administrative acts without challenging laws and acts individually. *Id.* at 8–10.

Turning to Plaintiffs' failure to identify those regulations and acts, the district court acknowledged that "Plaintiffs do not allege that every exercise of rulemaking authority under OAFLL has resulted in an undue burden[.]" *Id.* at 12. Although the court acknowledged that its conclusion was not "straightforward," *id.* at 11, it nonetheless held that because "OAFLL is the fountainhead from which the State's restrictions on Clinic Plaintiff flows," Plaintiffs should not "be forced to specify each and every regulation challenged[.]" *Id.* Thus, according to the court, Plaintiffs have adequately pleaded their as-applied challenge without identifying which regulations they object to and which they do not: "[T]he Court concludes that Clinic Plaintiff has adequately pleaded its claim pursuant to Rule 8's requirement for 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.*

The district court did not hold that Plaintiffs had pleaded sufficient facts to support justiciable challenges against each regulation or administrative act within the scope of Count I. The district court instead indicated that Defendants' concerns would be better addressed "at a later stage, if need be, by narrowing the issues at the summary judgment stage of the case or by more narrowly tailoring any remedy." *Id.* at 12–13 n.5.[5]

Defendants moved the district court to certify its order for interlocutory appeal, Doc. 65, and Plaintiffs opposed, Doc. 69. On May 15, 2018, the district court granted the motion. Tab B. The district court reasoned that Plaintiffs' claims involved "a difficult issue of first impression that requires the interpretation of recent Supreme Court precedent without the benefit of clarification from the United States Court of Appeals for the Fifth Circuit." *Id.* at 3. Defendants, meanwhile, "raise a threshold question concerning whether Plaintiffs' key claim is colorable." *Id.* The district court therefore held that the standard for certification under 28 U.S.C. § 1292(b) is met. *Id.*

[5] The district court granted Defendants' motion to dismiss as to Count II and denied it as to Count III. Tab A at 15–18.

REASONS WHY THE APPEAL SHOULD BE ALLOWED

A district court may certify an order for interlocutory appeal under 28 U.S.C. § 1292(b) upon (1) finding a controlling question of law subject to a substantial ground for difference of opinion, and (2) finding that immediate appeal may advance termination of the litigation. *Id.*; *see Rico v. Flores*, 481 F.3d 234, 238 (5th Cir. 2007). When it does so, this Court may, "in its discretion, permit an appeal to be taken[.]" 28 U.S.C. § 1292(b). The district court properly certified its Order, and this Court should exercise its discretion to accept an interlocutory appeal.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE ORDER INVOLVES CONTROLLING LEGAL QUESTIONS OVER WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

The most obvious issues within the controlling question identified by the Order are two-fold: (1) whether Plaintiffs' as-applied "cumulative-effects" challenge to Louisiana's system of abortion regulation states a valid claim, and (2), even if it does, whether Plaintiffs pleadings satisfy due process or the requirements of Article III. The answer to both of these questions is "no" — which should bring the vast bulk of this case to a halt. The district court's Order nevertheless provides Plaintiffs with a "yes." The district court has correctly acknowledged that the legal question of

Count I's permissibility is both controlling and subject to substantial ground for difference of opinion. The first two prongs of the test for interlocutory appeal are therefore satisfied.

A. The Fifth Circuit should review whether Plaintiffs' "cumulative-effects" challenge states a claim.

Count I is a novelty, and one in serious conflict with decades of Supreme Court authority. For more than 25 years, abortion laws have been evaluated for whether they place an "undue burden" on the decision to obtain an abortion before viability. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); *Gonzales*, 550 U.S. at 146. The Supreme Court applies the undue burden analysis to statutes one at a time, not wholesale or cumulatively. *See Casey*, 505 U.S. 833 (holding some challenged provisions imposed undue burdens while others did not); *Hellerstedt*, 136 S. Ct. 2292 (holding two challenged provisions separately imposed undue burdens).

The Court has even done so over dissent: In *Ohio v. Akron Center for Reproductive Health*, the dissent criticized the majority for "consider[ing] each provision in a piecemeal fashion, never acknowledging or assessing the 'degree of burden that the entire regime

of abortion regulations places' on the minor [seeking an abortion]." 497 U.S. 502, 527 (1990) (Blackmun, J., dissenting). Needless to say, it is the majority's approach that controls. *See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385 (5th Cir. 1998) (explaining that a court's "analysis … provides the basis for the court's holding").

There is no other way to review abortion laws. Abortion is governed by a wide variety of regulations motivated by many different State interests: to protect patient health and safety, to safeguard the integrity of the medical profession, to promote respect for unborn life, and to ensure that when women consider the "grave" abortion decision, they do so with knowledge of all the facts. *See Gonzales*, 550 U.S. at 159. Applying the Supreme Court's undue burden analysis to such different laws in a single cumulative challenge is a hopeless endeavor.

On the contrary, the cumulative challenge Plaintiffs seek to bring is fundamentally a *political* inquiry. It calls on a court not to judge the particular consequences of challenged statutes, but to evaluate the overall permissibility of the totality of a State's regulatory regime (including its administrative and enforcement decisions, *see* Doc. 1 at 50, ¶ 221) based on whatever combination of statutes and regulations a

plaintiff might choose to identify. State lawmakers and regulators cannot be expected to work knowing that each new or amended law jeopardizes the whole regulatory edifice. Nor is that kind of supervision consistent with the role of Article III courts.

The district court nonetheless permitted Plaintiffs' challenge to proceed, relying principally on the Supreme Court's recent decision enjoining Texas abortion laws in *Hellerstedt*. *See* Tab A at 8. But *Hellerstedt* does not support the lower court's conclusion. The district court correctly acknowledged, at a minimum, that its reliance on *Hellerstedt* entails "a difficult issue of first impression that requires the interpretation of recent Supreme Court precedent without the benefit of clarification from the United States Court of Appeals for the Fifth Circuit." Tab B at 3.

Hellerstedt invalidated two statutory changes enacted in a single bill — a requirement that doctors providing abortions obtain hospital admitting privileges, and a requirement making abortion clinics subject to a broader set of standards applicable to ambulatory surgical centers. Tab A at 8. The district court relied on the fact that the *Hellerstedt* majority refused to "invalidate ... only those specific surgical-center

regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations." 136 S. Ct. at 2319; Tab A at 8.

The district court overlooked that the *Hellerstedt* Court did so only after holding that two amendments were *facially* unconstitutional. 136 S. Ct. at 2319 (holding that the Court need not "proceed in piecemeal fashion when we have found the statutory provisions at issue facially unconstitutional"). It therefore stands for the proposition that a court need not sever and preserve potentially constitutional applications of a facially unconstitutional statute. That has no relevance here, where Plaintiffs have expressly waived any claim that the statutes they challenge are facially unconstitutional. *See* Doc. 1 at 14, ¶ 51; Doc. 32 at 8.

Insofar as anything else in *Hellerstedt* could be construed to permit Plaintiffs' approach, Tab A at 8–9, nothing in *Hellerstedt* purported to overrule prior decisions requiring that challenges to abortion laws be adjudicated individually (let alone the pleading and jurisdictional standards discussed below). Lower courts are therefore obligated to harmonize *Hellerstedt* with existing Supreme Court cases, *see Rodriguez*

de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989), under which a pure cumulative-effect challenge is untenable.

The district court also relied on the fact that when *individual* abortion laws are challenged, their effects — like the effects of challenged laws in any other field — should be evaluated based on the background of existing law. Tab A at 9 (explaining that "Courts should consider abortion regulations in connection with the larger regulatory scheme"). But that uncontroversial point cannot relieve Plaintiffs of the fundamental obligation to challenge individual laws in the first place.

The permissibility of Plaintiffs' cumulative-effects challenge is part of the controlling question in this case. *See* Tab B at 3. If this Court reversed, Count I would necessarily be dismissed and all that would remain is Count III, a narrow and distinct Fourth Amendment claim regarding administrative searches of abortion clinics for licensing purposes. That makes the certified question "controlling." *See Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963) (issue is "controlling" where, if petitioners are correct, "the Constitution forbids the further prosecution of the case").

The issue also satisfies the second prong of the Section 1292(b) test. This Court exercises its discretion to hear interlocutory appeals over controlling questions "about which reasonable jurists can … debate." *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 399 (5th Cir. 2010) (en banc). The district court made clear that this is just such a case: The questions Defendants raise involve "a difficult issue of first impression" that this Court has not yet clarified. *See* Tab B at 3.[6] The district court's holding that *Hellerstedt* liberated Plaintiffs from the basic requirement of challenging specific, individual acts and regulations when they bring an as-applied claim thus deserves review.

B. The Fifth Circuit should review whether Plaintiffs can state a claim as to the cumulative effects of government acts that they have not identified or challenged with well-pleaded facts.

Even if Plaintiffs could challenge the cumulative effects of myriad acts and regulations instead of challenging them individually, the

[6] Indeed, the district court's *own* holdings on this question are in tension with each other. In related litigation before the same district judge, the lower court held that a cumulative-effects claim should be limited to statutes that plaintiffs have adequately challenged individually. *See* Nov. 16, 2017 Order, *June Medical Servs., Inc. v. Gee* at 37, 3:16-cv-444 (M.D. La.). That cannot be reconciled with a holding that Plaintiffs can bring a cumulative challenge *without* well-pleaded claims against particular laws.

cumulative-effects theory in Count I presents a still more fundamental problem.

The bedrock of federal jurisdiction is that a case cannot proceed to discovery unless plaintiffs give the intended defendants fair notice of specific claims that an Article III court has jurisdiction to adjudicate. *See*, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to satisfy Rule 8, complaint must give "fair notice of what [plaintiffs'] claim is and the grounds upon which it rests"); *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue[.]"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."). The importance of factual and legal specificity is not lessened, but *heightened* where a Plaintiff brings an as-applied challenge, which is supposed to allege "discrete and well-defined instances" of unconstitutionality. *Gonzales*, 550 U.S. at 167–68.

Plaintiffs have never argued that their Complaint notifies Defendants of which regulations and administrative acts are at issue in Count I, let alone that it pleads facts sufficient to establish their standing to challenge each of them. The Complaint is self-evidently devoid of those details, and Plaintiffs have refused to supply them ever since. Plaintiffs thus have staked Count I on the theory that they *do not need* to identify the real targets of their challenge or to plead supporting facts against each one.

For the same reasons described above, this confirms the existence of a controlling question with grounds for a substantial difference of opinion. *See Ex parte Tokio Marine*, 322 F.2d at 115; *Castellanos-Contreras*, 622 F.3d at 399. If — as the Constitution and federal Rules demand — Defendants are entitled to notice of which regulations, acts, and events Plaintiffs find objectionable, and to well-pleaded facts establishing Plaintiffs' standing and factual theories, then Count I must be dismissed. Defendants' position, moreover, finds support in Supreme Court cases on pleading and jurisdictional standards, *see*, *e.g.*, *Twombly*, 550 U.S. at 555; *Whitmore*, 495 U.S. at 154; *Steel Co.*, 523 U.S. at 101–02, which the Order contradicts. The Fifth Circuit should settle the

discrete question of whether a cumulative-effects claim enables Plaintiffs to bypass pleading and jurisdictional rules.

II. INTERLOCUTORY REVIEW MAY MATERIALLY ADVANCE TERMINATION OF THE CASE.

Section 1292(b) requires that a controlling question of law "*may* materially advance the ultimate termination of the litigation[.]" *Id.* (emphasis added); *see Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012). Count I, as currently pleaded, represents a colossal burden for the district court, this Court, and Defendants. Interlocutory review would eliminate the centerpiece of Plaintiffs' Complaint, substantially narrow the issues for discovery and trial, and potentially obviate further trial court proceedings that could be reversed on appeal.

Review and dismissal of Count I would advance termination of the case in three ways. *First*, it would dramatically limit discovery. Because Count I is premised on Plaintiffs' strategy of *avoiding* clarity on their objections to particular acts and regulations, much discovery is guaranteed to be entirely pointless, covering acts and regulations that Plaintiffs cannot seriously intend to challenge at trial. If the parties begin discovery now, for example, Defendants will quite literally have to

produce their files on requirements that abortion clinics use sterile instruments, and then prepare to defend those requirements at trial (including by retaining experts). Plaintiffs have confirmed that they expect nothing less. *See* Doc. 65-2; Tab D.

Defendants, for their part, will have little choice but to follow suit. If Plaintiffs can make those requests of Defendants, Defendants are virtually obligated to request that Plaintiffs produce every document related to their *compliance* with each of the thousands of regulatory requirements Plaintiffs plead they are subject to. *See* Doc. 1 at 6, ¶ 23; Doc. 32 at 6. Months or years into the future, Plaintiffs and Defendants will have turned each other's files inside out, and largely for reasons that could have been avoided by early appellate review of whether the underlying legal claim is valid in the first place. At the very least, the case would be materially advanced if Defendants had fair notice of specific legal requirements and agency acts on which they must prepare a defense.

Second, interlocutory appeal would control the burdens of trial. At present, the parties cannot even "make a reasonable estimate of the number of days that trial will require." Doc. 62 at 7. Assuming that

Plaintiffs' trial strategy resembles their pleadings, trial will only exacerbate the due process and Article III implications of subjecting Defendants to discovery without fair notice of Plaintiffs' claims.

Defendants have raised these issues about discovery and trial with Plaintiffs and the district court. When counsel for Defendants asked Plaintiffs' counsel to describe how they envision trial being conducted, Plaintiffs' counsel declined to provide any additional clarity. *See* Doc. 65-2. The district court, for its part, has speculated that if Plaintiffs *were* to specify which parts of their Complaint they intend to try, the court would "shut down [its] docket and transfer things to other judges" while it adjudicates the alleged burdens and relationships of hundreds or thousands of regulations and events. *See* Jan. 30, 2018 Hr'g Tr. at 12:13–:14. The fact that that is even thinkable calls out for interlocutory appeal.

Third, prompt appeal would bring focus to the relief Plaintiffs seek. Plaintiffs plan this case to drag on essentially indefinitely: As noted above, they view Louisiana's abortion regulation as a modern-day Jim Crow, and this case as first step toward decades of comprehensive judicial supervision of Louisiana's abortion regulation. *See* Doc. 32 at 10 & n.5. Plaintiffs would like to see federal courts order Louisiana "to take specific

steps over a specified time to bring [its] policies and practices in line with" their preferred vision of abortion regulation. Doc. 32 at 10. Those "specific steps" presumably include injunctions directing which licensing requirements LDH may maintain, which it must abandon, how it addresses public comments on proposed rules, and infinite other matters.

Those injunctions will lead to near-constant district court litigation and innumerable appeals to this Court; indeed, if the cumulative effect of Louisiana's abortion regulations is really to be under perpetual review, then *every* change or proposed change could lead to a new appeal. If Plaintiffs have their way, the district court (and this Court, by extension) will become a *de facto* supervisory board over LDH. Whether such a role is even permissible raises serious issues of Article III jurisdiction and of federalism. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, No. 16-476, 2018 WL 2186168, at *12 (U.S. May 14, 2018) (explaining that federal government cannot commandeer State governments).

Even that is not the end of the matter. If Plaintiffs succeed in Louisiana, abortion providers will try the same tactics elsewhere — in fact, they already have in Mississippi. *See* Apr. 9, 2018 Complaint, *Jackson Women's Health Org. v. Currier* at 52, No. 3:18-cv-171 (S.D.

Miss.). A similar challenge in Texas's laws would surely not be far behind. This Court will have to review the legal validity of cumulative challenges sooner or later. The risk of inconsistent adjudications, ultra vires court action, and inappropriate burdens on State agencies calls for review *before* the district court proceeds further.

CONCLUSION

The Court should grant interlocutory review and reverse the district court's denial of Defendants' motion to dismiss Count I.

Respectfully submitted,

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I certify that on May 25, 2018, I filed the foregoing brief with the Court's CM/ECF system and delivered copies by Federal Express and e-mail to Plaintiffs' counsel of record:

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The undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 5(c)(1) because it contains **5,197** words, exclusive of parts of the brief exempted.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011, Century Schoolbook, 14-point font.

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