No. ___________

In the Supreme Court of the United States

JUNE MEDICAL SERVICES LLC d/b/a Hope Medical Group for Women, on behalf of its patients, physicians, and staff; BOSSIER CITY MEDICAL SUITE, on behalf of its patients, physicians, and staff; CHOICE, INC., OF TEXAS d/b/a Causeway Medical Clinic, on behalf of its patients, physicians, and staff; JOHN DOE 1, M.D.; and JOHN DOE 2, M.D.,

Applicants,

v.

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

Respondent.

EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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To the HONORABLE CLARENCE THOMAS, Associate Justice of the Supreme Court of the United States, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

INTRODUCTION

The Fifth Circuit has stayed a preliminary injunction that precludes enforcement against Applicants of a Louisiana law requiring physicians that perform abortions to have active admitting privileges at a local hospital. The stay is having an immediate, ongoing, and devastating impact on the availability of abortion services in Louisiana. The law had been preliminarily enjoined as applied to Applicants (clinics that provided abortion services) and their doctors and staff, by the District Court for the Middle District of Louisiana. The injunction was based on evidence showing that after spending approximately a year attempting to obtain admitting privileges to satisfy the law, most physicians providing abortion in Louisiana were unable to obtain such privileges. Because of the Fifth Circuit's stay order, which was based on a demonstrably wrong application of the undue burden standard, all but two doctors in the state have been forced to stop providing abortions and turn away women with scheduled appointments, and one of those will shortly be forced to cease, absent relief from this Court. Louisiana will then be left with only one physician providing abortions.

Because one physician cannot possibly provide all abortions in Louisiana, if the stay entered by the Fifth Circuit is not vacated, women's ability to exercise their constitutional right to obtain an abortion will be lost, and their lives will be permanently and profoundly altered. In addition, absent relief from this Court,

Louisiana will see a continued increase in later-term abortions and in women turning to dangerous and illegal methods of abortion. If the stay is not vacated, the clinics forced to close during the appeals process will likely never reopen, even though ultimately prevailing in the appeal.

In *Whole Woman's Health v. Hellerstedt*, this Court blocked the Fifth Circuit's decision staying as-applied relief under the undue burden standard against a similar Texas admitting privileges law, and then granted certiorari to the plaintiffs challenging the law after the Fifth Circuit ruled against them on the merits. One of the questions on which the Court granted certiorari was whether the Fifth Circuit had incorrectly applied the undue burden standard. Despite the fact that this Court is poised to hear merits arguments in *Whole Woman's Health* in less than a week, the Fifth Circuit has issued an emergency stay that will drastically curtail access to legal abortion in Louisiana under the same analysis that it applied in that case and that is being presently being reviewed by this Court.

To protect the rights and the health of women who will seek abortions in Louisiana during the pendency of this appeal and this Court's final decision in *Whole Woman's Health*, and to ensure that the Court will be able to grant meaningful relief if it ultimately reviews this case, the stay entered by the Fifth Circuit should be vacated. Additionally, the Court should enter interim relief lifting the stay temporarily, to restore the status quo while the Court has an opportunity to review and decide this application.

BACKGROUND

A. The Challenged Requirement

Applicants challenge the portion of Louisiana Act 620 that requires every doctor who provides abortions at a clinic to "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." Act 620 § (A)(2)(a) (codified at La. Rev. Stat. § 40:1061.10(A)(2)(a)) (the "admitting privileges requirement"). "Active admitting privileges" means that "the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient." *Ibid.*

Applicants include three Louisiana abortion clinics: June Medical Services LLC, d/b/a Hope Medical Group for Women ("Hope"), Bossier City Medical Suite ("Bossier"), and Choice, Inc., of Texas, d/b/a Causeway Medical Clinic ("Causeway" or "Choice"), each suing on behalf of its physicians, staff, and patients; and two individual physicians who provide abortions, each suing on his own behalf and on behalf of his patients.[1]

B. Summary of the Proceedings Below

The district court entered a temporary restraining order ("TRO") barring enforcement of the Act the day before it was to take effect on September 1, 2014.

[1] Applicants Choice, Inc., of Texas and Bossier City Medical Suite are wholly owned subsidiaries of Martin, Martin & Richards, Inc. Applicant June Medical Services has no parent corporation nor any stock owned by a publicly held company.

June Medical Services LLC et al. v. Caldwell, 2014 WL 4296679 (M.D. La. Aug. 31, 2015). The TRO was extended twice, each time with the parties' consent. App., *infra*, 193a; App., *infra*, 176a-177a. It applied to all abortion providers in the state, whether or not litigants. *See* App., *infra*, 187a-189a (affirming TRO's application to all Louisiana abortion clinics that were then before the district court and noting Respondent's consent); App., *infra*, 180a-181a (affirming TRO's ongoing application to all abortion providers, including those who voluntarily dismissed themselves from the litigation).

After a six-day evidentiary hearing held in June 2015, App., *infra*, 53a, the district court made extensive findings of fact and conclusions of law, declared the Act unconstitutional, and issued an as-applied preliminary injunction blocking its enforcement "against the following persons: Doctor John Doe 1; Doctor John Doe 2; June Medical Services, LLC, d/b/a Hope Medical Group for Women, and its physicians and staff; Bossier City Medical Suite, as well as its physicians and staff; Choice, Inc. of Texas, d/b/a Causeway Medical Clinic, and its physicians and staff, including Doctor John Doe 4; and any and all others encompassed by the Parties' stipulations." App., *infra*, 46a-47a; *see* App., *infra*, 48a-159a.[2] Unlike the TRO, the preliminary injunction did not apply to other abortion providers in the state. App., *infra*, 46a-47a, 55a, 159a. Indeed, the district court expressly stated in its opinion that "[a]n order enjoining enforcement of Act 620 against parties other than

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[2] This decision was codified and clarified in a Judgment issued February 10, 2016. App., *infra*, 46a-47a.

Plaintiffs herein would be overly broad." App., *infra*, 159a n.69 (citing *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 459 (5th Cir. 2014)).

The district court's opinion provided an extensive analysis of the efforts made by Louisiana's abortion providers to obtain admitting privileges, App., *infra*, 100a-122a, and found that the physicians' inability to obtain privileges was "not related to their competence." App., *infra*, 124a. The court held that Applicants had shown a substantial likelihood of succeeding on their claim that the Act would prevent large numbers of women seeking abortion care in Louisiana from obtaining it; that these women would therefore be forced to forgo obtaining a legal abortion altogether or would turn to dangerous or illegal methods; and that even women able to obtain legal abortions would face unreasonable delays and added health risks. App., *infra*, 128a-132a. The court concluded as a matter of law that the Act would have the effect of placing an undue burden on women seeking abortion in Louisiana, including Applicants' patients. App., *infra*, 148a. It determined that Applicants had also met their burden with regard to the other three preliminary injunction factors. App., *infra*, 156a-158a.

On February 10, 2016, Respondent sought a stay pending appeal in the district court, which was denied in an extensive thirty-page opinion addressing each of her contentions. App., *infra*, 16a-45a. Respondent then sought an "emergency" stay from the Court of Appeals for the Fifth Circuit, requesting a decision within ten days. On February 24, 2016, the Court of Appeals granted the stay. App., *infra*, 1a-15a. In treating the motion for a stay as an "emergency," the Fifth Circuit

disregarded the fact that Respondent chose not to seek the interlocutory appellate relief that was available to her during the year-and-a-half pendency of the present litigation until this month, has repeatedly assented to ongoing injunctive relief *pendent lite*, and has established a policy of non-enforcement of the Act during the case, *see* La. Admin. Code tit. 46, § 4423.

C. The District Court's Findings That the Act Will Severely Curtail Access to Abortion in Louisiana and Therefore Create an Undue Burden on Women's Access to Abortion

The district court found that if enforcement of the Act is permitted, the state of Louisiana will be left with a single abortion provider. App., *infra*, 128a. That lone doctor, working in one clinic, cannot meet the need for approximately 10,000 abortions in Louisiana each year, a need that was previously met by six physicians in five clinics across the state. App., *infra*, 128a-129a. As a result, many women will be unable to exercise their constitutionally protected right to choose abortion at all, and others will face unreasonable delays and therefore increased risks of complications, or will turn to self-performed, unlicensed, or unsafe abortions. App., *infra*, 132a.

1. Louisiana abortion providers

At the time of the hearing, substantially all abortions in Louisiana were performed by five abortion facilities—Applicants Hope, Bossier and Causeway, and non-litigants Delta Clinic ("Delta") of Baton Rouge and Women's Health Care Center ("Women's") in New Orleans—with a total of six doctors—Applicants Does 1

and 2 and non-litigants Does 3-6.[3] App., *infra*, 64a, 67a. Only two doctors had "active admitting privileges" required by the Act. Doe 3 had long maintained admitting privileges in connection with his obstetrics practice, which is his principal employment. App., *infra*, 117a. Doe 5 was able to secure privileges in New Orleans, but not in Baton Rouge, where he is the sole provider at the Delta clinic. App., *infra*, 119a-120a. The evidence showed the following:

Clinic	Abortions / Yr.	Doctors, Status of "Active Admitting Privileges"	% of Clinic's Abortions Performed by Each Doctor
Hope[4] (Shreveport)	"In excess of 3,000"	Doe 1 (no privileges) Doe 3 (privileges)	Approx. 71% Approx. 29%
Bossier[5] (Bossier City)	550	Doe 2 (no privileges)	100%
Causeway[6] (Metairie)	Approx. 1800	Doe 4 (no privileges) Doe 2 (no privileges)	Approx. 75% Approx. 25%
Women's[7] (New Orleans)	Approx. 2375	Doe 5 (privileges in New Orleans) Doe 6 (no privileges)	Approx. 40% Approx. 60%
Delta[8] (Baton Rouge)	Approx. 2000	Doe 5 (no privileges in Baton Rouge)	100%

Doe 2 obtained "limited" privileges at Tulane hospital near one of his two abortion practices, Causeway, which allowed him to admit patients but required

[3] Pursuant to two protective orders issued by the district court in this case, App., *infra*, 190a-192a, 195a-199a, Louisiana physicians providing abortions are referred to using pseudonyms and male pronouns.

[4] App., *infra*, 64a-65a; App., *infra*, 285a.

[5] App., *infra*, 65a, 69a.

[6] App., *infra*, 66a, 68a. The January 26 preliminary injunction, applied "as to the Plaintiffs," App., *infra*, 159a, cast doubt on whether the Act would be enforceable against Doe 4, who is not a litigant. Accordingly, the parties negotiated a stipulation as to him, App., *infra*, 171a-172a, which the district court so-ordered on February 5, App., *infra*, 170a. By then, Causeway had ceased to be able to keep its doors open. It last offered abortions (performed by Doe 2) on January 30, and subsequently suspended operations. A notice of closure was published February 12.

[7] App., *infra*, 33a, 66a.

[8] App., *infra*, 33a, 67a.

him to turn over their care immediately to a member of the hospital's staff and precluded him from providing any care to those patients. App., *infra*, 109a. The district court determined that this limitation prevented him from "provid[ing] diagnostic and surgical services," as required under the Act's definition of "active" admitting privileges. App., *infra*, 114a-115a. The court concluded that "Doe 2 does not have active admitting privileges within the meaning of Act 620." App., *infra*, 116a.

Respondent's predecessor as Secretary of the Louisiana Department of Health and Hospitals, Kathy Kliebert, submitted an affidavit on the eve of trial arguing that she interpreted the Act to the contrary. The district court refused to credit her interpretation, finding that it "is contradicted by [the Act's] plain language," which "expressly and unambiguously" defines "active admitting privileges" to require more than Doe 2's Tulane privileges allow. App., *infra*, 114a. The district court emphatically stated: "[A]s Defendant's own expert testified and as the statute's plain meaning makes clear, the Secretary's interpretation flies in the face of the law's basic text. The words are clear [and] their meaning patent * * * ." App., *infra*, 115a.

As a result of the Act, Does 1, 2, 4, and 6 will not be able to provide abortion services in Louisiana at all, App., *infra*, 126a-127a, and Doe 5 will be able to provide abortions at Women's only, not at Delta, where he provides most of his abortions, App., *infra*, 128a. Doe 3, the last abortion provider in northern Louisiana and hundreds of miles from any other, will stop providing abortions because of a well-

founded fear of being targeted by persons seeking to eliminate abortion from northern Louisiana through violence and intimidation. App., *infra*, 117a, 126a-127a. Doe 3 is also likely to be without a clinic to perform abortions if Act 620 is enforced. That is because Doe 3 provides proportionately very few of the abortions performed at Hope, App., *infra*, 64a-65a, and Hope's primary provider, Doe 1, will not be able to provide any abortions if the Act is enforced. App., *infra*, 126a. As a result, Hope is unlikely to remain viable as a going concern. As the district court found, "the loss of Doe 1 on Hope would be * * * 'devastating' to its operations and viability." App., *infra*, 129a.[9] Thus, if the stay is not lifted, the state will be left with only one abortion provider, Doe 5, offering abortion care at only one clinic, Women's, in New Orleans. App., *infra*, 128a.

2. Louisiana's one remaining abortion provider cannot meet the demonstrated need of women seeking abortion in the State

The district court found that allowing the Act to take effect would reduce the capacity of Louisiana's abortion providers well below the level required to serve the number of women seeking abortion services in the state. App., *infra*, 128a ("If Act 620 were to be enforced * * * Louisiana would be left with one provider and one clinic. * * * [T]his would result in a substantial number of Louisiana women being denied access to an abortion in this state."). Given that he performed fewer than 3,000 abortions in 2013 (primarily at the clinic where he does not have privileges), "as a logistical matter," Doe 5 cannot serve all 10,000 women seeking an abortion in

[9] During the pendency of proceedings on this Application, Doe 3 is continuing to perform abortions, as he does when Doe 1 is on vacation, App., *infra*, 288a, keeping Hope open in the short term. He will cease to perform abortions if this Application is denied, for the foregoing reasons.

Louisiana each year. App., *infra*, 129a. As the district court explained, it is "the Court's duty to predict the realistic effect of Act 620 * * * [and not] * * * to presume that a party will choose to make the exceptional into the typical * * * or to somehow force a person to abandon their every other professional effort just so as to manufacture a better number." App., *infra*, 34a.

Thus, the district court found that with only one physician practicing in one location, even "putting aside the issue of the distance which would need to be traveled by women in north Louisiana, approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana." App., *infra*, 129a.

3. Act 620 will prevent women from obtaining abortions and will expose women who do obtain abortion to unreasonable risks and delays

With a single provider remaining, women seeking abortion in Louisiana will be prevented in great numbers from "reaching an abortion clinic with sufficient capacity to perform their abortions." App., *infra*, 157a; *accord* App., *infra*, 130a, 148a. Many of those women will be forced to forgo abortion altogether and carry an unwanted pregnancy to term, against their will. *See* App., *infra*, 129a-130a, 157a. Other women will turn to "self-performed, unlicensed and unsafe abortions." App., *infra*, 132a. These may be far riskier than legal abortion. App., *infra*, 226a.

Even those women who are still able to obtain an appointment with the State's sole remaining doctor will face "unreasonable and dangerous delays in scheduling abortion procedures," due to the long wait time that will ensue when all women seeking abortion in the State must turn to a single physician. App., *infra*,

157a; *accord* App., *infra*, 132a. This will "caus[e] a higher risk of complications," App., *infra*, 132a, and push many women into the second trimester. Additionally, women outside New Orleans will have to face "the burdens associated with increased travel distances," which in many cases will increase delays still further. App., *infra*, 157a.

The district court also considered alternative scenarios. The district court considered what would occur assuming: (1) Doe 3 continued to perform abortions at Hope, despite his testimony that he would cease to do so if the Act were enforced; and (2) Doe 2 continued to perform abortions at Causeway, although he lacks "active admitting privileges."[10] Even under these scenarios, the district court found that approximately 55% and 45%, respectively, of women seeking abortion in Louisiana would be left "without the ability to get one" due to the Act. App., *infra*, 129a-130a; *see also* App., *infra*, 31a ("[T]he evidence showed" that "two facilities with half their normal staff of physicians" "could not" "serve the entire state."). The court also found that Doe 3 could not expand his abortion care practice due to the demands of his obstetrics practice. App., *infra*, 126a.

[10] As noted *supra* at 7-8, Doe 2 can no longer provide abortions at Causeway, so the latter scenario is impossible at the moment. It is important to note that this does not affect the undue burden analysis underlying the as-applied, preliminary injunction. The injunction is necessary to prevent the capacity of the state's abortion providers from falling well below the level of need, which will occur if the Act takes effect, leaving Doe 5 as the state's only provider. Doe 2's inability to work at Causeway does not change the fact that Doe 5 will be the state's only provider if the Act takes effect.

4. Act 620 provides no medical benefit

The district court also found that "[t]he medical benefits which would flow from Act 620 are minimal," in addition to which, they "are outweighed by the burdens which would flow from this legislation." App., *infra*, 100a.

a. Act 620 will not make abortions safer

The district court found that approximately 10,000 women obtain abortions in Louisiana annually. App. *infra*, 63a. It further found that "[l]egal abortions in Louisiana are very safe procedures with very few complications." App. *infra*, 99a.

The purported benefits of Act 620 include "credentialing" and "continuity of care" in the event of a hospital transfer. App. *infra*, 95a, 115a-116a. But the Act will not actually provide any of its purported benefits. "Credentialing" refers to review of a doctor's credentials and competency by the hospital where he or she is seeking privileges. App., *infra*, 72a. But the district court found that most Louisiana abortion providers will not have their qualifications reviewed by a hospital, for a variety of reasons, including discrimination for which there is no remedy. App., *infra*, 83a, 92a. "[A] hospital, if it chooses to, may discriminate against any abortion provider with no consequence under Louisiana law." App., *infra*, 80a. Likewise, "continuity of care" in the event of a hospital transfer is already addressed by existing Louisiana law, which requires abortion clinics to maintain policies, for the "immediate transfer to a hospital of patients * * * requiring emergency medical care," and which are subject to annual review by Respondent as part of licensing renewal proceedings. La. Admin. Code tit. 48, pt. 1 § 4423(B)(3)(c).

b. Act 620 is inconsistent with medical standards

The medical community opposes admitting privileges laws like Act 620 because they have no medical justification. The American College of Obstetricians and Gynecologists (ACOG) opposes admitting privileges laws because they "do nothing to protect the health of women." App., *infra*, 273a; *see also* App., *infra*, 240a. ACOG and the American Medical Association, writing together with other groups of medical professionals, have stated to this Court that there is "no medical basis" for admitting privileges laws, and that they are "are inconsistent with prevailing medical practice." *See* Brief for Amici Curiae American College of Obstetricians and Gynecologists, et al, *Whole Woman's Health v. Cole*, No. 15-274, at 20 (Jan. 2016).

5. The legal context of Act 620

The district court found "the effect of Act 620 is * * * significantly different from admitting privileges requirements in states" without Louisiana's unique legal context. App., *infra*, 92a. Of particular relevance, Louisiana has a law prohibiting discrimination against individuals refusing to perform abortions, but not against those who perform abortions, and hospitals are expressly permitted by state law to refuse to "accommodate the performance of any abortion in said facility or under its auspices." La. Rev. Stat. § 40:1061.2-4 (formerly cited as La. Rev. Stat. § 40:1299.33); App., *infra*, 92a; *see also* App., *infra*, 80a (hospitals may legally discriminate against "any abortion provider with no consequence under Louisiana law"); App., *infra*, 114a (relying on the testimony of Dr. Robert Marier, "Defendant's expert witness, a physician who helped draft Act 620"). The district court found "an

abundance of evidence * * * demonstrating that hospitals can and do deny privileges for reasons directly related to a physician's status as an abortion provider." App., *infra*, 78a-82a. Indeed, the Governor of Louisiana recently stated in an amicus brief filed in the *Whole Woman's Health* case that "[o]ne of the first steps taken by doctors in the 1970s who wished to drive away their colleagues who performed abortions was to deny them hospital privileges." Brief for Amici Curiae Governors of Texas, et al. at 20, *Whole Woman's Health v. Cole*, No. 15-274 (Feb. 2016).

Furthermore, Louisiana, unlike other states, such as Texas, also lacks a provision of law requiring hospitals to act on a doctor's privileges application within a certain amount of time. App., *infra*, 75a (citing Tex. Health & Safety Code § 241.101 and *Abbott II*, 748 F.3d at 600). Thus, "a hospital can effectively deny a doctor's application of privileges by never acting on it." *Ibid.* The district found concluded that *all* of the Louisiana physicians seeking privileges after the Act had had applications "de facto denied" in this way. App., *infra*, 103a-104a, 107a-108a, 118a, 120a, 122a.[11]

The district court concluded that Act 620 was modeled after laws which had the result of closing abortion clinics in other states, but that it would have a greater impact in Louisiana's legal context, and thus a "purpose of the bill is to make it

[11] Under Louisiana law, the legislature is presumed to know that physicians seeking admitting privileges under the Act will have no legal recourse if their application is never acted on, or if it is denied for discriminatory reasons. *See Theriot v. Midland Risk Ins. Co.*, 694 So. 2d 184, 186 (La. 1997) ("Laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject.").

more difficult for abortion providers to legally provide abortions and therefore restrict a woman's right to an abortion." App., *infra*, 92a, 95a, 97a, 99a.

D. The Fifth Circuit's Rationale for Staying the Preliminary Injunction

As of the date of the district court's opinion, the Act had never been enforced, and the status quo had remained that physicians providing abortions in Louisiana were not required to have active admitting privileges. Twice during the proceedings below, Respondent had agreed to extend the TRO blocking enforcement of the law. App., *infra*, 178a-189a. And Respondent waited nearly three weeks after the preliminary injunction issued to seek relief from the Fifth Circuit. App., *infra*, 162a-163a. Despite Respondent's delays, she filed an "emergency motion" for a stay. Eight days later, on February 24, 2016, a motions panel of the Fifth Circuit granted the stay, allowing immediate enforcement of the Act. App., *infra*, 1a-15a.

The Fifth Circuit held that Respondent was likely to prevail on the merits. App., *infra*, 5a-14a. Notwithstanding that the district court granted only as-applied relief, expressly limiting the scope of the injunction to Applicants and their physicians and staff, App., *infra*, 46a-47a, 159a & n.69, the Fifth Circuit required Applicants to meet the standard for a facial challenge. App., *infra*, 7a-8a & n.9, 13a & n.15.[12] The court therefore assessed whether Applicants had established that the Act would operate as a substantial obstacle to a woman's choice to undergo an abortion in a "large fraction" of the cases in which the Act is relevant, App., *infra*,

[12] To be sure, as the Fifth Circuit observed, Applicants sought a preliminary injunction precluding enforcement of the Act in all of its applications—i.e., facial relief. App., *infra*, 7a n.7. But the district court did not award the requested facial relief. App., *infra*, 46a-47a, 159a & n.4.

8a, and concluded that Applicants were unlikely to prevail, even though the evidence established that, at a minimum, enforcement of the Act would prevent 45% of women seeking abortions in Louisiana from obtaining one. App., *infra*, 130a.

In ruling against Applicants on the large-fraction test, the court reweighed the evidence (without holding that any of the district court's findings of fact, which were well supported by evidence, App. *infra*, 123a-128a, were clearly erroneous), and ultimately disagreed with the district court's determinations of which physicians would be prevented from providing abortions by the Act. App., *infra*, 11a. The Fifth Circuit disagreed with the district court's well-reasoned finding that Doe 3 would close his practice if, due to enforcement of the Act, he is the last provider in the area. *Ibid.* And it rejected the district court's conclusion that Doe 2's limited privileges do not satisfy the Act, even though the Fifth Circuit expressed no disagreement with the district court's legal interpretation of "active admitting privileges" under Louisiana Law. App., *infra*, 11a-12a. On this basis, the court of appeals then rejected the district court's findings about the impact of the law under scenarios in which Does 2 and 3 did not have privileges. App., *infra*, 10a-11a.

The Fifth Circuit also gave no weight to the district court's finding that "if only Does 2, 3, and 5 continue to practice, 45% of women seeking an abortion may lack access," arguing that even assuming it were correct, it would still be insufficient to support the district court's injunction. App., *infra*, 12a. Rather, the Fifth Circuit found that, were all three doctors to remain practicing, "well more

than 90% of Louisiana women will live within 150 miles of two operating clinics." App., *infra*, 12a. The court thus concluded that, regardless of the number of women no longer able to access abortion, the Act does not present an undue burden, solely on account of geography. *Ibid.* (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 415 (5th Cir. 2013) ("*Abbott I*"); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583, 597-98 (5th Cir. 2014) ("*Abbott II*")).

Finally, in a footnote, the Fifth Circuit observed that this Court is presently considering the admitting privileges requirement in *Whole Woman's Health v. Hellerstedt*, No. 15-274. App., *infra*, 13a n.16. The court of appeals tried to distinguish *Whole Woman's Health*, stating that the "questions presented in that case involve the proper role in *Casey*'s undue burden test of the state's *interest and purpose* in promoting health," issues that the Fifth Circuit said "are not implicated here." *Ibid.* (emphasis added). But the court of appeals failed to acknowledge that also at issue in *Whole Woman's Health* is whether that law imposes an undue burden because it has the *effect* of creating a substantial obstacle to a woman's right to access an abortion. Brief for Petitioners at 15-25, *Whole Woman's Health v. Cole*, No. 15-274 (Dec. 28, 2015). That is the very same basis on which the district court issued the as-applied preliminary injunction here. App., *infra*, 148a-153a.

ARGUMENT

"[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals,

may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia J., concurring); *id.* at 508 (Breyer, J., dissenting). Where a district court's decision "is reasoned," "presents novel and important issues," and "is supported by considerations that may be persuasive to the Court of Appeals or to this Court," an order staying that decision may be vacated even if the merits present a "close" question. *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1331-32 (1980) (Powell, J., in chambers).

Vacating the stay is warranted here. It is beyond dispute that the Act creates an undue burden for many women in Louisiana who will seek access to an abortion. As the district court found (and even the Court of Appeals' improper revision of those findings confirmed), thousands of women will be totally denied access to legal abortion services in Louisiana if the Act is enforced. If that is not an undue burden under *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992), then nothing can be. Moreover, as the district court correctly found, the admitting privileges requirement does not serve a valid medical purpose and in fact *harms* women's health by forcing women to delay abortions or to turn to illegal methods, thus increasing health risks. The Fifth Circuit erroneously disregarded

the district court's findings and gave no weight to its credibility determinations. As a result, women are being irreparably harmed in Louisiana every day the stay remains in effect. That stay should be lifted.

I. This Court Should Vacate the Stay to Preserve the Status Quo, as it Did in *Whole Woman's Health*

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until final judgment. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The status quo is "the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Here, the status quo was that safe, legal abortion services were available to women in Louisiana, provided by Applicants' physicians and those at two other clinics. In issuing a preliminary injunction, the district court appropriately awarded relief to maintain that status quo. App., *infra*, 18a ("[P]recedent compels the preservation of the status quo * * * ."); App., *infra*, 157a ("A preliminary injunction will preserve the status quo, and permit the clinics and physicians to continue to provide safe, needed abortion care to their patients.").

The Fifth Circuit's stay has fundamentally altered the status quo, and absent relief from this Court, the harms imposed by the Act will be irreversible. The Act will prevent all but one physician who is currently providing abortion services in Louisiana (including all of Applicant physicians) from continuing to do so, resulting in the closure of all but one of Louisiana's clinics (including Applicant clinics), none of which can survive if shuttered for months or years while litigation continues until a final decision on the merits. Louisiana law provides that abortion clinic licenses

expire annually, La. Admin. Code tit. 48, pt. I, § 4403(D); that "a license shall be immediately null and void if an outpatient abortion facility ceases to operate," *id.* § 4413(B); and that "[o]nce an outpatient abortion facility has ceased doing business, the facility shall not provide services until it has obtained a new initial license," *id.* § 4413(G). Absent this Court's lifting of the stay, Applicant clinics will lose their licenses and shut down, irretrievably altering the status quo.

This would occur even as this Court is scheduled to hear argument in *Whole Woman's Health* in less than a week. *Whole Woman's Health* concerns the Fifth Circuit's application of the undue burden standard to a nearly-identical admitting privileges requirement—the very one that the Act was modeled on. Like this case, *Whole Woman's Health* also involves an injunction issued on the basis of a record, developed after the law's effective date, which demonstrates doctors' inability to obtain privileges and quantifies the resulting harms to women. The Fifth Circuit was wrong to dismiss the issues in *Whole Woman's Health* as "not implicated here." App., *infra*, 13a n.16. Not only are the issues implicated, they are the same.[13] The questions on which this Court granted *certiorari* will control the outcome of this case: whether a court errs in applying the undue burden standard by (1) "refusing

[13] Other federal courts have appropriately recognized that this Court's grant of certiorari in *Whole Woman's Health* warranted pausing litigation turning on the undue burden standard before issuing new orders that could disturb the status quo. *E.g.*, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, ECF No. 45 (M.D. Tenn., Dec. 17, 2015) ("[T]he United States Supreme Court, in *Whole Woman's Health* * * * may address how the lower courts should apply the undue burden standard in * * * *Casey* * * * to abortion restrictions, including those at issue in this case[.] * * * [T]he standards if addressed by the Supreme Court in *Whole Woman's Health* may be critical for developing and evaluating the relevant evidence in this case; and * * * goals of judicial economy and avoidance of unnecessary litigation weigh heavily in favor of a stay pending the Supreme Court's decision in *Whole Woman's Health*."); *Planned Parenthood Cincinnati Region v. Strickland*, No. 1:04-cv-00493-SJD (S.D. Ohio, Oct. 1, 2015) (minute entry "stay[ing] this case pending a decision from the United States Supreme Court on petition for certiorari in the case of Whole Women's [sic] Health v Cole").

to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health," and (2) "concluding that this standard permits [a State] to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health—or any other valid interest." Petition for a Writ of Certiorari at I, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (Sept. 2015).[14]

Moreover, in *Whole Woman's Health*, this Court twice intervened to preserve the status quo. There, as here, the Fifth Circuit granted Texas the extraordinary relief of a stay pending appeal of the district court's as-applied injunction precluding enforcement of Texas's admitting privileges requirement, and this Court intervened to vacate the stay in large part. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014). The Court again intervened to preserve the status quo by staying the mandate after the Fifth Circuit's final judgment upholding the Texas law. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015). The Court should do the same in this case. The Fifth Circuit's order, precipitously allowing a nearly identical law again to take effect during pending litigation, while stating "no guidance can be

[14] For this reason, this case also satisfies the Court's requirement that the Court is likely to grant *certiorari* to review the court of appeals' final disposition of this case. *See W. Airlines*, 480 U.S. at 1305. The Court's grant of *certiorari* in *Hellerstedt* demonstrates, at a minimum, that the overlapping issues presented in this case are worthy of this Court's review. If the Fifth Circuit were to reverse the grant of the preliminary injunction in this case before this Court's decision in *Hellerstedt*, it would be appropriate in this case for this Court to grant the petition, vacate the Fifth Circuit's decision, and remand. To the extent that the Fifth Circuit rules after the decision in *Hellerstedt* issues but does not correctly apply that decision, Supreme Court review in this case would be warranted.

gleaned from the Supreme Court's" two earlier interventions, App., *infra*, 14a n.18, should not be allowed to stand.

II. The Fifth Circuit Erred in Concluding That Respondent Is Likely to Succeed on the Merits of Her Appeal

The Fifth Circuit applied the undue burden standard in a manner that radically departs from this Court's precedents, rendering it a hollow protection for the liberty interest recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *See* 505 U.S. at 851-52. The Act violates the undue burden standard because it drastically reduces women's access to legal abortion services and fails to further the State's asserted interest in women's health. The Fifth Circuit held that the burden the Act imposes is not undue, even though it prevents thousands of women in Louisiana from accessing abortion and provides no offsetting health benefit for abortion patients. This cannot be reconciled with *Casey*.

A. The Undue Burden Standard

A law imposes an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (joint opinion of O'Connor, Kennedy, Souter, JJ.). "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Ibid.* However, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Ibid.*

The Fifth Circuit stayed the district court's decision providing as-applied relief under *Casey's* effects prong. To withstand review under that prong, the restriction must advance the State's interest to an extent sufficient to warrant the obstacles it imposes on women seeking abortion. *Id.* at 875 ("[T]he right recognized by *Roe* is a right 'to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added))).[15]

B. The Fifth Circuit Erred in Applying the Large-Fraction Test

The Fifth Circuit improperly applied *Casey*'s "large fraction" test, which is a test for facial relief, to the district court's award of an as-applied preliminary injunction.[16] *C.f.* 505 U.S. at 895; *accord Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). The Fifth Circuit justified this by observing (correctly) that Applicants seek facial relief. But Applicants have not obtained the facial relief they seek. The scope of appellate review is over an "[i]nterlocutory *order*[] of the district court[]," 28 U.S.C. 1292(a) (emphasis added), and not over a party's *claim*. *See also id.* § 2106 (the scope of appellate review is over "any judgment, decree, or order of a court lawfully brought before it for review); 16 Charles A. Wright et al., Fed. Prac. & Proc. Juris. § 3921.1 (3d ed.). It is axiomatic that a party cannot compel a court to tailor

[15] Applicants have also asserted that the Act is invalid under *Casey*'s purpose prong. The district court found it was not at the preliminary injunction stage, App., *infra*, 139a-142a, and that determination is not currently on appeal.

[16] The Fifth Circuit is aware that this test applies only for facial relief and not for an as-applied injunction. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 594 (5th Cir. 2015) (affirming as-applied injunctive relief after finding plaintiffs did not meet large fraction test in facial challenge); *Currier*, 760 F.3d at 458 (granting preliminary injunctive relief "as applied" to plaintiff under *Casey*'s undue burden standard and not applying large fraction test); *see also* App., *infra*, 5a-6a & n.8 (discussing application of large fraction test in *Abbott* but not *Currier*).

relief to its claim rather than the remedy the court determines that the party actually merits. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) ("the distinction between facial and as-applied challenges * * * goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint") citing *United States v. Nat'l Treasury Emps.*, 513 U.S. 454, 477-78 (1995) (contrasting "a facial challenge" with "a narrower remedy"))); *see also City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2458 (2015) (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting) ("[T]he effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it. * * * I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is.").

The district court was well within its authority to grant a narrower injunction than that which Applicants sought, and it is only that as-applied injunction that the court of appeals has jurisdiction to review. The district court has "preliminarily enjoined [Respondent] from enforcing LA. R.S. § 40:1299.35.2 *et seq.* against [Applicants]." App., *infra*, 46a. Thus, Applicants' facial challenge is not before the Fifth Circuit in Respondent's appeal, and the large-fraction test is not relevant at this point. It was error for the Fifth Circuit to apply the wrong legal standard. *United States v. Lanier*, 520 U.S. 259, 272 (1997) (vacating judgment and remanding the case for application of the proper standard). That error is even more

glaring here, where the Fifth Circuit, acting on an emergency basis, overturned the longstanding status quo, with the result being that all but one physician in Louisiana will stop providing abortions, preventing most women in the state from obtaining them.

C. The Fifth Circuit Erroneously Disregarded the District Court's Factual Findings in Concluding that the Act Would Not Have the Effect of Creating an Undue Burden

The Fifth Circuit's only rationale for concluding that Respondent is likely to succeed on the merits is that Applicants "have failed to establish an undue burden on women seeking abortions." App., *infra*, 8a. But there can be little doubt of the dramatic, unconstitutional impact of the Act on the ability of women in Louisiana to access abortion services. The district court found that if the Act were to take effect, Applicants would cease providing abortion services, as would every other physician, save one, who currently provides abortions in Louisiana. App., *infra*, 128a. Thus, all women seeking abortions in Louisiana would have to seek abortion care from a single doctor, at the State's only remaining clinic. *Ibid*. Unable to more than triple his current workload, that doctor would be forced to turn most of them away. App., *infra*, 128a-129a. Preventing a woman from legally obtaining an abortion before viability is an undue burden. *Casey*, 505 U.S. at 846, 878. That the Act would do so for 70% of women seeking abortion in Louisiana is an unprecedented imposition on women's right to access abortion, and completely irreconcilable with *Casey*.

The Fifth Circuit usurped the role of the district court by failing to accord any deference at all to its findings of fact. *Contra* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, * * * 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.") These findings of fact, based in large part on determinations regarding the credibility of witnesses, are entitled to substantial deference on appeal. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); Fed. R. Civ. P. 52(a)(6). But the court of appeals gave no weight to the district court's findings and credibility determinations. As a result, the Fifth Circuit's opinion is replete with factual errors. For example, the Fifth Circuit stated: "[N]either Doe 5 nor the clinic in which he works testified as to his capacity. The district court reached Doe 5's capacity based on the testimony of Doe 3." App., *infra*, 9a n.11. In fact, Doe 5 *did* testify (by designation¸ App., *infra*, 7 n.5), and the district court *did* rely directly on Doe 5, not Doe 3, for its findings about his capacity, *e.g.,* App., *infra* 129a (citing Doe 5's sworn declaration *see* App., *infra*, 200a-207a). Likewise, the Fifth Circuit's complaint that the district court engaged in "*sua sponte* calculations" is mistaken, because the underlying facts are all in the record, and both parties asked the court in their trial briefs to do just what it did: divide the number of women burdened by the number of women seeking care.[17] *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (deference is owed to the fact finder when findings rest on "inferences from other facts"). The district court's familiarity—and the court of appeals' unfamiliarity—with the record is a key reason why the latter should not

[17] Indeed, this kind of simple arithmetic is *exactly* what the Fifth Circuit did itself in *Cole*. 790 F.3d at 589 ("[u]sing the district court's finding that there were approximately 5.4 million women of reproductive age in Texas, * * * the following percentages and fractions are derived: (1) 7.4% or 1/13 of women of reproductive age faced travel distances of 150 miles or more after the admitting privileges requirement went into effect; and (2) 16.7% or 1/6 of women of reproductive age would face travel distances of 150 miles or more after both requirements went into effect.").

substitute its judgment for the former. *See Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988) (appellate court should defer to district court for questions of fact and mixed questions of law and fact because "the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon.").

In acting as a factfinder, the Fifth Circuit weighed the evidence on its own and disregarded the district court's factual findings, without determining that any of them were clearly erroneous. For example, the Fifth Circuit disregarded the district court's finding that 70% of women would be denied abortions under the Act, or at a minimum (even assuming Does 2 and 3 will continue to provide services), at least "45% of women seeking an abortion may lack access." App., *infra*, 12a. Instead, the court decided that "well more than 90% of Louisiana women will live within 150 miles" of a clinic. *Ibid.* Yet, even while disregarding the district court's factual findings, the Fifth Circuit was forced to acknowledge that thousands of women will be completely deprived of their rights to access abortion services, as even under Respondent's version of the facts, "9.7% of Louisiana women seeking an abortion may lack access under the Act." App., *infra*, 13a.[18]

In concluding that this total deprivation of access to abortion for these women does not constitute an undue burden, the Fifth Circuit completely ignored the balance this Court struck in *Casey*, *Gonzales*, 550 U.S. at 146, which allows states to advance their "legitimate interest[s]" in regulating abortion while preserving "the

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[18] This would amount to nearly 1,000 women a year in Louisiana who are denied abortions.

woman's right to make the ultimate decision," *Casey*, 505 U.S. at 875-77. Preventing women from obtaining abortions fails to preserve the right that *Casey* protects. It is more than a *substantial* obstacle, it is a *total* obstacle. As to those women whose ability "to make the ultimate decision" is lost—whether they are "as few [sic] as 9.7% of women seeking abortion," or 70% (the actual percentage found by the district court), or 45% (the minimum, alternate percentage found by the district court)—the Act clearly imposes an undue burden.[19] Thus, the district court's entry of as-applied relief in order to prevent those women from facing the loss of their right was proper. The Fifth Circuit's decision to stay the injunction is wrong in light of *Casey*'s holding unconstitutional a law that imposed that same obstacle on less than 1% of women. 505 U.S. at 894.

Moreover, the Fifth Circuit's "number and location" requirement, App., *infra*, 12a-13a, sets up a hurdle that no litigant could ever satisfy. No expert witness could provide the location of every woman who in the future will become pregnant, seek an abortion, and be turned away. Applicants have shown there will be

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[19] This effect also distinguishes the present case from the Fifth Circuit's grant of a stay in *Abbott I*, where the Fifth Circuit determined that there was not evidence in the record showing that women would be unable to obtain abortions. *Abbott I*, 734 F.3d at 415; *see also Abbott II*, 748 F.3d at 598 ("[t]here is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas."). The burdens found undue by the district court in *Abbott I* focused on the effects of increased travel distances and not, as here, around a total lack of access. And, in any event, the injunction appealed in *Abbot* was a facial injunction, and thus the plaintiffs did need to satisfy the large-fraction test on appeal. Thus, the Fifth Circuit's complaint that Applicants "fail to grapple with this court's prior precedent upholding similar admitting-privileges requirements against facial challenges," App., *infra*, 13a, is inapposite because the relief on appeal here is not facial and the large fraction test does not apply.

thousands of such women each year.[20] Without rendering *Casey* meaningless, that is enough to satisfy the undue burden test.

The Fifth Circuit's observation about distance to clinics is also irrelevant. *Casey* does not create a constitutional rule about what distance to a clinic is too far; it protects women's rights to make deeply personal decisions. Those rights are meaningless when a woman lives close to an abortion clinic that cannot serve her. The district court's injunction was based entirely (and properly) on evidence that one physician (or, alternatively, one full-time plus two part-time physicians) could not serve all women seeking abortion in Louisiana.

Furthermore, due to the Act's dramatic reduction in the availability of abortion services, it would bring about "a likely increase in self-performed, unlicensed and unsafe abortions," and even women able to obtain a legal abortion from the state's lone remaining doctor would face "delays in care, causing a higher risk of complications." App., *infra*, 132a. These effects also constitute undue burdens. *See Stenberg v. Carhart*, 530 U.S. 914, 931 (2000) ("[A] State cannot subject women's health to significant risks * * * ."); *accord Gonzales*, 550 U.S. at 161. Yet the Fifth Circuit completely ignored these facts.

Under a proper application of the *Casey* standard, the Fifth Circuit was demonstrably wrong in concluding that Respondent was likely to succeed on appeal.

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[20] And, as already noted, the Fifth Circuit's complaint that this figure was not provided by an expert is directly contradictory to its own "*sua sponte*" use of arithmetic in determining that Texas's ASC requirement was not an undue burden in *Cole*. 790 F.3d at 588.

Applicants established that the Act's effects are unconstitutional and that as-applied relief was warranted.

D. The Act's Burdens Are Unjustified in Light of Its Lack of a Health Benefit

Casey requires a court to inquire into whether the State's interest is "reasonably served" by an abortion restriction. *Casey*, 505 U.S. at 885. Because the right to choose abortion is a protected liberty, a court may not rest on rational speculation or defer to unsupported assertions when making that determination. *Id.* at 855 ("*Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence."); *cf. Gonzales*, 550 U.S. at 166 ("Uncritical deference to Congress' factual findings * * * is inappropriate."); *City of Akron v. Akron Ctr. For Reprod. Health, Inc.,* 426 U.S. 416, 465 (1983) (O'Connor, J., dissenting) ("This does not mean that in determining whether a regulation imposes an 'undue burden' on the *Roe* right that we defer to the judgments made by state legislatures.").

Thus, this Court has never upheld a law that limits the availability of abortion services without first confirming that it actually furthers a valid state interest. *E.g., Gonzales*, 550 U.S. at 158 ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives."); *Akron*, 462 U.S. at 434 ("The existence of a compelling state interest in health * * * is only the

beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest.").

The district court here found that "[t]he medical benefits which would flow from Act 620 are minimal and are outweighed by the burdens which would flow from this legislation." App., *infra*, 100a. The court further found that the Act's "effect on restricted access to abortion doctors and clinics would result in delays in care, causing a higher risk of complications, as well as a likely increase in self-performed, unlicensed and unsafe abortions." App., *infra*, 132a.[21]

Although it determined that any minimal medical benefits are outweighed by the burdens created by Act 620, the court did not hold the Act an undue burden for that reason, as it determined that Circuit precedent foreclosed both an inquiry into whether an abortion restriction actually furthers its stated purpose and whether the burden it imposes is justified by an equally important benefit. App.,

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[21] Indeed, every other district court in the nation that has held a trial or evidentiary hearing regarding the constitutionality of an admitting-privileges requirement has also found no medical benefit. *Planned Parenthood of Wis. Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 966-79 (W.D. Wis.); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1363-77 (M.D. Ala. 2014); *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013). Additionally, the district court here found that the state's experts on the issue of the Act's purported medical benefits lacked credibility and experience, App., *infra*, 98a-99a & n.39. The same conclusion has also been reached by every other district court in the nation that has heard live expert testimony in support of an admitting-privileges requirement. *Van Hollen*, 94 F. Supp. 3d at 967 n.16; *Lakey*, 46 F. Supp. 3d at 680 n.3; *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1386-88, 1394 (M.D. Ala. 2014).

infra, 146a & n. 67 (citing *Abbott II*, 748 F.3d at 599-600; *Currier*, 760 F.3d at 454; *Lakey*, 769 F.3d at 293); *see also* App., *infra*, 60a ("under binding Fifth Circuit jurisprudence, the admitting privileges requirement of Act 620 is rationally related to a legitimate State interest"), App., *infra*, 148a ("The rule in the Fifth Circuit * * * [is that t]he Court is not permitted to weigh the benefits of the law against its burdens.").[22]

The Fifth Circuit's improper application of the rational basis test to the undue burden analysis, and its foreclosure of any inquiry into whether the burden it imposes is, in fact, undue, are both issues currently before this Court on certiorari. Brief for Petitioners at 44-52, *Whole Woman's Health v. Cole*, No. 15-274 (Dec. 28, 2015). Every other Circuit and state high court in the country, when confronted with the question, has held that a court must examine the extent to which a law actually promotes women's health in determining whether the burdens it imposes on abortion access are undue. As the Seventh Circuit recently held, "[t]o determine whether the burden imposed by the statute is 'undue' (excessive), the court must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (internal

[22] The Fifth Circuit's assertion that Applicants "do not challenge" this holding, App., *infra*, 8a, *accord* App., *infra*, 13a n.16, fails to mention that it was compelled by binding Circuit precedent, and thus would be futile to challenge before a motions panel. *See, e.g.*, *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001) ("one panel of this Court may not overrule another"). Moreover, Applicants may still assert this as an alternative ground for affirmance in the pending appeal.

quotation marks omitted); *accord Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) ("whether a law is an "[u]nnecessary health regulation[ ]" as that term is used in *Casey* "depends on whether and how well it serves the state's interest") (emphasis omitted) (first alteration in original), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015) ("Like the Seventh and Ninth Circuits, we believe the 'unnecessary health regulations' language used in *Casey* requires us to weigh the strength of the state's justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman's right to terminate a pregnancy is to promote the health of the woman."); *Strange*, 33 F. Supp. 3d at 1337 ("[T]he court must determine whether, examining the regulation in its real-world context, the obstacle is more significant than is warranted by the State's justifications for the regulation.").[23]

The Fifth Circuit's precedents are wrong to ignore the fact that a law's "minimal" benefits are greatly outweighed by its extravagant burdens. Under the Act, most women seeking abortions will be denied them altogether – which is a direct assault on their privacy, autonomy, personal dignity, and power to shape

[23] The Fifth Circuit itself apparently formerly adhered to this view of *Casey*. *See Barnes v. Mississippi*, 992 F.2d 1335, 1339 (5th Cir. 1993) ("[A] regulation that places a burden on the exercise of the [abortion] right is constitutional unless the burden is 'undue.' * * * As long as *Casey* remains authoritative, the constitutionality of an abortion regulation thus turns on an examination of the importance of the state's interest in the regulation and the severity of the burden that regulation imposes on the woman's right to seek an abortion.").

their own destiny. *Casey*, 505 U.S. at 851-52. Additionally, many of those women will be forced to endure the pain and health risks of pregnancy and childbirth against their will. *Supra* at 10; *see also Casey*, 505 U.S. at 852. As legal abortion becomes impossible to obtain in Louisiana, women are likely to be forced into illegal abortion, with its attendant risks. App., *infra*, 132a. And the delays in abortion access faced by those who are still able to obtain abortion impose heavy health and other burdens. *Ibid.* The countervailing benefit to women is immeasurably low. Such burdens are quintessentially "'undue' in the sense of disproportionate or gratuitous." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013). The Fifth Circuit's refusal to inquire whether the Act actually furthers its purpose, and in a manner justifying its burden, is nothing more than the application of rational basis review, which this Court rejected in *Casey*. *See* 505 U.S. at 966 (Rehnquist, J., dissenting) ("States may regulate abortion procedures in ways rationally related to a legitimate state interest.") citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955))).

I. Applicants and Their Patients will Suffer Irreparable Harm if this Court Does Not Vacate the Stay

If the stay is not vacated, and Respondents are allowed to continue enforcement of the admitting privileges requirement, Applicant clinics and their patients will suffer three grave forms of irreparable harm. *See generally* App., *infra*, 157a-158a.

First, and critically, enforcement of the Act would deny most Louisiana women the choice to terminate a pregnancy altogether, depriving them of their

constitutional rights, and forcing them to carry a pregnancy to term. This Court has described the choice to terminate a pregnancy as being among "the most intimate and personal choices a person may make in a lifetime, * * * central to personal dignity and autonomy * * * [and] the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. Depriving numerous women of the liberty to make this choice constitutes profound and irreparable harm. *See Planned Parenthood of Se. Penn. v. Casey* ("*Casey II*"), 510 U.S. 1309, 1310 (1994) (Souter J., in chambers) (imposition of an undue burden on right to abortion, "if proven, would qualify as 'irreparable injury,' and support the issuance of a stay"); *see generally* Charles A. Wright et al., 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved * * * most courts hold that no further showing of irreparable injury is necessary."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Second, the drastic reduction in the number of service providers that would occur under the Act would increase health risks for those women able to obtain abortions. In the district court's words, "the severely restricted access to abortion care by a large fraction of Louisiana women caused by Act 620, and the resulting unreasonable and dangerous delays in scheduling abortion procedures, constitute irreparable harm for Louisiana women seeking abortion. Many Louisiana women will also face irreparable harms from the burdens associated with increased travel distances in reaching an abortion clinic with sufficient capacity to perform their abortions. These burdens include the risks from delays in treatment including the

increased risk of self-performed, unlicensed and unsafe abortions." App., *infra*, 157a. These health risks, once incurred, can never be undone, and thus also constitute irreparable harm.

Third, the abortion clinics forced to close as a result of enforcement of the Act would lose their licenses and, in all likelihood, permanently close. *See* App., *infra*, 128a. This too constitutes irreparable harm. *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) (irreparable harm occurs "where the potential economic loss is so great as to threaten the existence of the movant's business" and collecting cases). This will also prevent a return to the status quo even if Applicants ultimately prevail on the merits. Thus, if the stay remains in place, the availability of abortion services in Louisiana in the long run will be dramatically and permanently reduced, regardless of the final outcome of this case, or the outcome of *Whole Woman's Health*. In essence, unless the stay is vacated, the stay will irreversibly alter the status quo and effectively decide the outcome of the case for at least some of Applicants.

In issuing the stay, the Fifth Circuit followed its earlier opinion in *Abbott I* that a state's inability to enforce a law is *necessarily* irreparable harm,[24] which outweighs any harm Respondents could show and which merges with the public

[24] This rule, which has not been adopted by this Court or any other circuit, short-circuits the traditional irreparable harm inquiry, which requires a clear showing that the specific harm is real and imminent. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); 11A Fed. Prac. & Proc. Civ. § 2948.1. It improperly tips the scales in favor of the state. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (noting that while a state "may suffer an abstract form of harm whenever one of its acts is enjoined," "[t]o the extent that is true * * * it is not dispositive of the balance of harms analysis") (internal quotations and citations omitted). Moreover, with the rule in place, litigants seeking protection from unconstitutional laws will continue to need to seek relief in this Court for vacatur of stays presumptively granted in favor of the state.

interest. App., *infra*, 14a. The Fifth Circuit did not balance the weight of the harms in light of Respondent's policy of waiting to enforce the Act and to forbear seeking available relief for a year and half. App., *infra*, 162a-164a. After accepting the status quo for this extended period of time, Respondent cannot now credibly claim the emergency need for a stay, or that the harm for allowing the injunction to continue in the ordinary course is other than *de minimis*. In contrast, absent an order vacating the stay, Applicants and their patients will suffer grave irreparable harm, and it will be impossible to return to the status quo if Applicants ultimately prevail.

Moreover, unlike in *Abbott*, where the Fifth Circuit found insufficient evidence that the Act would harm women, based on a pre-enforcement record where it was unclear which physicians would ultimately be able to obtain privileges, the record here is clear. All physicians seeking privileges have had their applications denied, except for Doe 5 in New Orleans, and the Act will result in the closure of every abortion clinic in the state save Women's, with the result that 70% of women will be unable to obtain abortions. App., *infra*, 129a. Even under the alternative, counter-factual scenario of Doe 2 and 3 continuing to work, 45% of women would be unable to obtain abortions. App., *infra*, 130a. Based on this record, the district court found that large numbers of women would be unable to obtain abortions or would suffer widespread delay and concomitant health risks. The Fifth Circuit abdicated its duty to weigh the harms, which it is required to do in order to justify such an extraordinary "intrusion into the ordinary processes of administration and

judicial review." *Nken v. Holder*, 556 U.S. 418, 427, 433-34 (2009) (internal quotation marks omitted).

Immediately following the Fifth Circuit's order vacating the stay, the harmful effects of enforcement of the law have become manifest. Delta, Causeway, and Bossier are no longer providing abortion services and are turning away patients. Jessica Williams & Andrea Gallo, *Baton Rouge Clinic No Longer Performing Abortions Because of New Louisiana Law, Will Refer Women to New Orleans Location*, Baton Rouge Advocate (Feb. 25, 2016), http://theadvocate.com/news/neworleans/neworleansnews/14990099-70/baton-rouge-abortion-clinic-no-longer-terminating-pregnancies-referring-women-to-new-orleans-locatio (patients who arrived at Delta for procedures on the day the Fifth Circuit's order issued were turned away). According to the Director of Women's, one of the remaining two facilities still able to provide abortions: "At that point, I know for a fact that we're not going to be able to see everybody. *See See* Campbell Robertson, *Appeals Court Upholds Law Restricting Louisiana Abortion Doctors*, N.Y. Times (Feb. 25, 2016), http://www.nytimes.com/2016/02/26/us/appeals-court-upholds-law-restricting-louisiana-abortion-doctors.html?_r=0. And Hope, while seeing patients on a limited basis, "may not be able to hang on very long." *Ibid.* Every day the stay continues in effect, women are irreparably harmed by the Fifth Circuit's order; this number will increase each further day that the stay remains in effect.

CONCLUSION

For the reasons set forth above, Applicants respectfully request that the stay pending appeal entered by the Fifth Circuit be vacated.

Respectfully submitted,

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