No.

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2,

Applicants,

v.

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

Respondent.

On Application to Stay the Mandate of the
United States Court of Appeals for the Fifth Circuit

EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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January 25, 2019

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To the HONORABLE SAMUEL A. ALITO, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Less than two years after this Court struck down a Texas law requiring physicians who provide abortion services to have admitting privileges at a local hospital, a divided 2-1 panel of the Fifth Circuit has upheld a Louisiana law that the state itself acknowledged is *identical* to the law this Court declared unconstitutional. *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018). The Fifth Circuit panel majority's decision is in direct conflict with this Court's ruling in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*").

Just as in *WWH*, the district court in this case determined—based upon an extensive evidentiary record—that the state's admitting privileges requirement will drastically reduce abortion access throughout the state while providing ***no benefit*** to women's health or safety. ROA.4174-289. Yet, in defiance of *WWH*, the Fifth Circuit panel majority upheld the law.

Earlier today, a single judge of the Fifth Circuit summarily denied a motion by Plaintiffs-Appellees to stay the mandate pending a petition for certiorari. Absent emergency relief from this Court, the mandate will issue in ***seven days***; Louisiana's admitting privileges law will take effect; and clinics throughout the state will be forced to close—leaving women seeking safe and legal abortions in Louisiana with nowhere to go. On behalf of all women of reproductive age in Louisiana, Plaintiffs-Appellees respectfully and urgently request that this Court stay the Fifth Circuit's mandate before February 4, 2019, when it is scheduled to be released.

Multiple judges on the Fifth Circuit vehemently objected to the panel majority's decision. Judge Patrick Higginbotham, the dissenting member of the Fifth Circuit panel, catalogued in his dissenting opinion the numerous ways in which the panel majority violated *WWH* while purporting to apply its holding. Judge Higginbotham urged that the decision "ought not stand." Judge James L. Dennis and Judge Stephen A. Higginson lodged dissents from the Fifth Circuit's narrow vote to deny rehearing en banc. In his "strenuous" dissent, Judge Dennis observed that the panel majority's decision is in "clear conflict" with *WWH* and criticized his judicial colleagues for relying on "strength in numbers rather than sound legal principles in order to reach their desired result." Judge Higginson wrote separately to underscore that Louisiana's admitting privileges law is "equivalent in structure, purpose, and effect to the Texas law invalidated" in *WWH*. In Judge Higginson's view, *none* of the Justices of the Supreme Court who decided *WWH* would endorse the panel majority's decision, including the Justices who were in dissent.

The Fifth Circuit panel majority's extraordinary decision warrants interim relief from this Court. The panel majority did not disturb the district court's factual finding that the law provides no health or safety benefit to women; it upheld the law despite that finding. As a result, Louisiana is poised to deny women their constitutional right to access safe and legal abortion with an admitting privileges requirement that every judge in the proceedings below—the district court, the panel majority, and the dissenters—agrees is medically unnecessary.

The panel majority's decision also reopens a conflict in the lower courts that *WWH* resolved. Following *WWH*, this Court denied petitions for certiorari in two cases concerning nearly-identical admitting privileges requirements arising from Wisconsin and Mississippi. Denial of certiorari in the Wisconsin case let stand a permanent injunction against that state's admitting privileges law.[1] Denial of certiorari in the Mississippi case let stand a preliminary injunction against that state's admitting privileges law,[2] which was permanently blocked once the district court applied *WWH* on remand. Another court post-*WWH* blocked enforcement of an admitting privileges law in Oklahoma.[3] And several states—including Alabama[4] and Tennessee[5]—conceded after *WWH* that their admitting privileges laws were unconstitutional and ceased enforcing or defending them.[6] This national uniformity has been completely upended by the panel majority's decision.

Enforcement of Louisiana's admitting privileges law will have disastrous consequences for women in the state. The district court determined that Louisiana's admitting privileges requirement would leave only ***one physician*** providing abortions in the entire state and that ***all-but-one clinic*** that provides abortion care would be forced to close. ROA.4270-74. One doctor at one clinic cannot possibly meet

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[1] *Schimel v. Planned Parenthood of Wis., Inc.*, 136 S. Ct. 2545 (2016).
[2] *Currier v. Jackson Women's Health Org.*, 136 S. Ct. 2536 (2016).
[3] *Burns v. Cline*, 387 P.3d 348 (Okla. 2016).
[4] Mot. to Dismiss Appeal at 1, *Planned Parenthood Se., Inc. v. Strange*, No. 16-11867 (11th Cir. July 15, 2016).
[5] Joint Mot. to Enter Partial J. on Consent at 4, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 14, 2017).
[6] A lawsuit challenging Missouri's admitting privileges law is ongoing. *See Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018) (vacating and remanding preliminary injunction order due to insufficient fact-finding by the district court).

the needs of approximately 10,000 women who seek abortion services in Louisiana each year. In fact, the district court found that "a substantial number of Louisiana women" will be "unable to obtain an abortion in this state" altogether. ROA.4271. Some of these women will attempt self-managed abortions, seek out unlicensed or unsafe abortions, or be compelled to carry an unwanted pregnancy to term. ROA.4274, 4285. Meanwhile, those women who are still able to access abortion care will face longer delays, increased travel, and a host of other burdens—all of which will push women to seek abortions at later gestational ages and increase the risk of adverse consequences. ROA.4276-78.

Moreover, as demonstrated by the devastating impact on clinics in Texas, where the state's admitting privileges requirement permanently closed almost half of the clinics, *see WWH*, 136 S. Ct. at 2312, clinics in Louisiana that are forced to close are unlikely to ever reopen. Most clinics lack the financial resources to survive a suspension of their operations. Some clinics may lose their licenses to operate if they are not actively providing services. La. Admin. Code tit. 48, § 4525. And physicians and staff at these clinics will need to seek out other employment, if not relocate to other states. Consequently, without a stay of the Fifth Circuit's mandate, any relief ultimately awarded by this Court could come too late and access to safe and legal abortion, for all practical purposes, could already be extinct in Louisiana.

This is not the first time this Court has needed to stay a Fifth Circuit mandate in this case. Early in the proceedings, the district court granted Plaintiffs' request for a preliminary injunction, barring Louisiana from enforcing its admitting

privileges law. Louisiana took an interlocutory appeal, and the Fifth Circuit granted Louisiana's request for an emergency stay of the preliminary injunction order—enabling the admitting privileges law to become enforceable and effectively suspending most abortion services in the state. Nine days later, however, this Court granted Plaintiffs' emergency request to recall and stay the Fifth Circuit's mandate.[7]

Interim relief is warranted now for the same reasons that this Court granted it before. Allowing Louisiana's admitting privileges requirement to go into effect will cripple abortion access in the state. By contrast, Louisiana will suffer no harm from a stay of the mandate. Louisiana's admitting privileges requirement has been enjoined since its enactment in 2014, and even the Fifth Circuit panel majority acknowledged that the law is not necessary to ensure women's health or safety. No harm could conceivably result from maintaining women's access to abortion in Louisiana while Plaintiffs petition for certiorari.

OPINIONS BELOW

The opinion of the district court is reported at *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017), but citations in this petition are to the copy of the opinion in the Record On Appeal ("ROA"). The Fifth Circuit panel majority's opinion (Smith, J.) is reported at *June Med. Servs.*, 905 F.3d at 787-815 ("Opinion"). The

[7] This Court twice intervened in *WWH* to preserve the status quo as well. There, the Fifth Circuit granted Texas the extraordinary relief of a stay pending appeal of the district court's preliminary injunction which would have allowed Texas to enforce the requirement that abortion facilities meet the standards for ambulatory surgical centers ("ASCs"). This Court intervened to vacate the stay in large part. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (Mem.) (2014). This Court again intervened to preserve the status quo by staying the mandate after the Fifth Circuit's final judgment upholding the Texas ASC requirement on the merits. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (Mem.) (2015).

dissenting opinion by Judge Higginbotham is reported at *June Med. Servs.*, 905 F.3d at 816-35 ("Dissent *I*"). The denial of the petition for rehearing en banc is available at *June Med. Servs. LLC v. Gee*, No. 17-30397, 2019 WL 272176 (5th Cir. Jan. 18, 2019), along with the dissenting opinions of Judge Dennis ("Dissent *II*") and Judge Higginson ("Dissent *III*").

JURISDICTION

The Fifth Circuit issued its opinion on September 26, 2018. Petitioners filed with the Fifth Circuit a petition for rehearing en banc, which temporarily stayed issuance of the mandate. That petition was denied on January 18, 2019. On January 25, 2019, petitioners filed a request with the Fifth Circuit to stay its mandate pending certiorari review by this Court, which again temporarily stayed issuance of the mandate. That request was denied the same day it was filed. Absent a stay by this Court, the mandate will issue on February 4, 2019.

This Court has jurisdiction to recall and enter a stay of the Fifth Circuit's judgment pending review on a writ of certiorari. *See* 28 U.S.C. §§ 1254(1), 2101(f).

STATEMENT OF THE CASE

A. Factual and Statutory Background

Louisiana's admitting privileges law ("Act 620") requires a physician to hold "active admitting privileges" at a hospital within 30 miles of the facility where abortion care is provided. La. Rev. Stat. § 40:1061.10(A)(2)(a). "Active admitting privileges" means the physician is a member of the hospital's medical staff, with the ability to admit patients and provide diagnostic and surgical services. *Id.* Violations

are punishable by imprisonment, fines, and civil liability. *Id.* §§ 40:1061.10(A)(2)(c), 40:1061.29.

Plaintiffs-Appellees are two physicians (Drs. Doe 1 and 2)[8] and a clinic (Hope Medical Group for Women in Shreveport) that challenged Act 620 on behalf of themselves and their patients. Only three other physicians (Drs. Doe 3, 5, and 6) and two clinics (Delta Clinic of Baton Rouge, Inc. and Women's Health Care Center, Inc. in New Orleans) were providing abortion services in Louisiana when the record below closed.[9] Defendant-Appellant is the Louisiana official responsible for Act 620.

The record before this Court in *WWH* made the impact of admitting privileges requirements abundantly clear. Texas's admitting privileges law ("HB 2") was enacted on July 18, 2013 and went into effect on November 1, 2013 when the Fifth Circuit stayed the district court's order enjoining the law. "Eight abortion clinics closed in the months leading up to [HB 2's] effective date." *WWH*, 136 S. Ct. at 2312. "Eleven more closed on [November 1,] the day the admitting-privileges requirement took effect." *Id.* As a result, the total number of clinics in Texas providing abortions "dropped in half, from about 40 to about 20." *Id.* The majority of clinics that closed on account of HB 2 in 2013 never reopened, even after this Court declared the statute unconstitutional statewide in 2016.[10]

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[8] The district court shielded the identities of these physicians for their protection.
[9] One abortion provider (Dr. Doe 4) retired after the filing of this lawsuit, and two clinics (Bossier City Medical Suite and Causeway Medical Clinic in Metairie) closed.
[10] David Yaffe-Bellany, *Five years after Wendy Davis filibuster, Texas abortion providers struggle to reopen clinics*, Texas Tribune (June 25, 2018, 12:00 AM), https://www.texastribune.org/2018/06/25/five-years-after-wendy-davis-filibuster-abortion-clinics ("Only three [out of 27] shuttered clinics have managed to reopen in the wake of the Supreme Court decision.").

Act 620 was modeled after the Texas law struck down in *WWH*. The law was first proposed in the Louisiana legislature on February 25, 2014, just four months after the Texas law took effect on November 1, 2013. It is "equivalent in structure, purpose, and effect to the Texas law." Dissent *III* at *8. In fact, the district court found that Act 620's legislative sponsor proposed the law only after witnessing its "tremendous success in closing abortion clinics and restricting abortion access in Texas." ROA.4224. The express intent behind the law was to "restrict abortion rather than further women's health and safety." Dissent *II* at *2. Louisiana enacted Act 620 on June 12, 2014.

B. Procedural History

On August 31, 2014, the district court entered a TRO barring enforcement of Act 620. ROA.467-85. The parties extended the TRO on consent. ROA.525-27, 1417-18. At the close of discovery, the district court held a six-day trial where it received live testimony from 12 fact and expert witnesses, testimony from additional witnesses by declarations and depositions, and over 240 exhibits. ROA.6171-7504. The district court preliminarily enjoined Act 620 on January 26, 2016. ROA.3748-859.

Louisiana appealed the preliminary injunction order and moved to stay the injunction on an emergency basis. Louisiana acknowledged in its stay motion that Act 620 is "identical" to the Texas law challenged in *WWH*, which was already before this Court on a petition for certiorari. Emergency Mot. Appellant Stay Pending Appeal, *June Med. Servs., L.L.C. v. Gee*, 814 F.3d 319 (5th Cir. 2016) (No. 16-30116).

On February 24, 2016, the Fifth Circuit granted the stay, ROA.3942-57, enabling Act 620 to go into effect.

Enforcement of Act 620 threw abortion services in Louisiana into chaos. The only clinic in the Baton Rouge area was shuttered. Jessica Williams & Andrea Gallo, *Baton Rouge's Delta Clinic no longer performing abortions because of new Louisiana law, will refer women to New Orleans location*, The Advocate (Mar. 3, 2016, 4:31 AM), https://www.theadvocate.com/baton_rouge/news/article_095953ee-c57b-5859-9551-bb353bd882c0.html. Physicians in New Orleans were overwhelmed. Campbell Robertson, *Appeals Court Upholds Law Restricting Louisiana Abortion Doctors*, N.Y. Times (Feb. 25, 2016), https://www.nytimes.com/2016/02/26/us/appeals-court-upholds-law-restricting-louisiana-abortion-doctors.html (quoting clinic director, "I know for a fact that we're not going to be able to see everybody"). And the lone clinic in Shreveport issued a public plea that it "may not be able to hang on for very long." *Id.*

Nine days later, this Court granted Plaintiffs' emergency application to vacate the Fifth Circuit's stay order. *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (mem.) (2016). Abortion services in Louisiana resumed.

This Court intervened to preserve the status quo in Louisiana around the same time it granted certiorari to review Texas's admitting privileges law on the merits. Indeed, after this Court granted certiorari in *WWH*, Louisiana requested that the Fifth Circuit postpone its review of the district court's preliminary injunction order

in this case pending the outcome of *WWH*. The Fifth Circuit granted that request. ROA.3962-63.

On June 27, 2016, this Court declared Texas's admitting privileges law unconstitutional. *WWH*, 136 S. Ct. 2292. The Fifth Circuit then remanded this case to the district court for further fact-finding in light of this Court's *WWH* ruling. ROA.4080-81. On April 26, 2017, the district court declared Act 620 unconstitutional in a 116-page opinion supported by extensive factual findings, and a permanent injunction was entered against the law. ROA.4174-289.

The district court found that Act 620 does "little or nothing for women's health" and does "not serve 'any relevant [physician] credentialing function.'" ROA.4278, 4283. Meanwhile, the district court determined that Act 620 would "cripple women's ability to have an abortion" because Louisiana "would be left with one provider and one clinic" to serve approximately 10,000 women in need of abortion services in the state each year. ROA.4285, 4270.

The district court also made credibility determinations. Louisiana proffered two experts in support of Act 620's purported benefits, but the district court found they lacked "credibility and reliability" or were "bias[ed]." ROA.4232-34. By contrast, the district court found that the Doe physicians and their experts, including an expert on hospital admitting privileges, were "well-qualified" and "credible." ROA.4244, 4248, 4259, 4260, 4261, 4263, 4231-32.

In addition, the district court closely scrutinized each of the Doe physicians' efforts to obtain admitting privileges. ROA.4244-65. The district court determined

that, despite the byzantine application processes maintained by Louisiana hospitals, the doctors made "good faith efforts to comply with Act 620." ROA.4244, 4248, 4261, 4262, 4266.

Of the six Doe physicians, four physicians (Does 1, 2, 4, and 6) were ultimately unable to secure privileges, because their applications were denied (or never acted upon) for reasons unrelated to their competence or qualifications. ROA.4244, 4248-49, 4251, 4259, 4261, 4263-64.

Two physicians obtained privileges. Doe 3 holds privileges in connection with his separate OB/GYN practice, ROA.4259-60, but even so, the district court determined that Act 620 would prevent Doe 3 from performing abortions. The district court found that, once Act 620 is enforced, Doe 3 would be the last abortion provider left in northern Louisiana. ROA.4197, 4200. Doe 3 "credibly testified" that he would stop performing abortions in that circumstance, because he has a well-founded fear, based on his own past personal experience as well as the experience of other providers, of being targeted by anti-abortion forces for violence or harassment. ROA.4260, 4267-68.

Doe 5 secured admitting privileges in New Orleans after Act 620 was enacted, ROA.4262, but the district court found that Doe 5 "cannot possibly meet the level of services needed in the state." ROA.4270. Moreover, because Doe 5 does not provide abortions after 17 weeks from a woman's last menstrual period, Act 620 would leave "no physician in Louisiana providing abortions between 17 weeks and 21 weeks, six days gestation." ROA.4275. As a result, women seeking abortion in Louisiana after

17 weeks would be completely barred, and all other women "w[ould] face substantial obstacles in exercising their constitutional right to choose abortion due to the dramatic reduction in abortion services." ROA.4285.

On September 26, 2018, a divided panel of the Fifth Circuit set aside nearly all the district court's factual findings and declared Act 620 constitutional. Judge Higginbotham dissented, concluding that the panel majority "fail[ed] to meaningfully apply" *WWH* and violated this Court's repeated admonition that "appellate judges are not the triers of fact." Dissent *I* at 816. "It is apparent," according to Judge Higginbotham, that the very subject of abortion "[over]shadow[ed] the role of settled judicial rules," and the panel majority's ruling "ought not stand." *Id.* at 816, 835.

Plaintiffs filed with the Fifth Circuit a petition for rehearing en banc, which was denied on January 18, 2019. *June Med. Servs.*, 2019 WL 272176. Six active judges voted to rehear the appeal en banc, and Judge Dennis and Judge Higginson filed dissents from the denial of rehearing.

Judge Dennis observed in dissent that "[t]he panel majority opinion is in clear conflict with the Supreme Court's decision in [*WWH*]," and that the panel majority "egregious[ly] and pervasive[ly]" disregarded the trial court's factual findings by "impermissibly review[ing] the evidence de novo." Dissent *II* at *1, *5, *4. Moreover, in refusing to grant rehearing en banc, Judge Dennis found that "[a] majority of the [Fifth Circuit] repeat[ed] [the panel majority's] mistake, apparently content to rely on strength in numbers rather than sound legal principles in order to reach their desired result in this specific case." *Id.* at *1. The panel majority's decision not only

"creates bad law," but also "runs directly contrary to the Supreme Court's jurisprudence." *Id.* at *5.

In a separate dissenting opinion, Judge Higginson observed that "any Justice of the Supreme Court who decided [*WWH*]" would likely disagree with the panel's majority's decision. Dissent *III* at *8. This includes the dissenters in *WWH* who, notwithstanding their disagreements with the majority opinion, recognized that the "refusal to apply well-established law in a neutral way is indefensible" and ultimately will "undermine public confidence" in courts. *Id.* at *8 (citing *WWH*, 136 S. Ct. at 2331 (Alito, J., dissenting)).

Plaintiffs requested that the Fifth Circuit stay its mandate pending a petition for certiorari, which a single judge of the Fifth Circuit denied on January 25, 2019.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in this case.

I. There Is a Reasonable Probability that this Court Will Grant Certiorari and Reverse the Judgment Below

In *WWH*, this Court held that Texas's admitting privileges law was unconstitutional, because it conferred no benefit to women's health that could justify its burdens on abortion access. 136 S. Ct. at 2310-14. Act 620 is identical to that

unconstitutional law. In fact, the district court found that "Act 620 was modeled after the Texas admitting privileges requirement, and it functions in the same manner, imposing significant obstacles to abortion access with no countervailing benefits." ROA.4286. The Fifth Circuit panel majority's decision to uphold Act 620 in defiance of *WWH* begs for correction.

A. *WWH* Held that Admitting Privileges Requirements that Provide No Benefit to Women's Health Are Unduly Burdensome

WWH held that the constitutionality of abortion restrictions enacted in the name of women's health or safety are assessed under an "undue burden" test in which the actual "existence or nonexistence of medical benefits" is paramount. 136 S. Ct. at 2309.

Act 620 provides no benefits to women's health. As the district court found, "abortions in Louisiana are very safe procedures with very few complications." ROA.4230. "Serious complications requiring transfer directly from [an abortion] clinic to a hospital are extremely rare." ROA.4236. And in those "extremely rare" circumstances, existing Louisiana laws—which require clinics to have transfer agreements with physicians who can admit patients to a hospital—adequately protect women's health and safety. ROA.4242.

The district court's factual findings regarding Act 620's lack of health or safety benefits mirrored the factual findings regarding HB 2 in *WWH*. 136 S. Ct. at 2311. Moreover, the Fifth Circuit panel majority did not disturb the district court's findings that Act 620 "will not improve the safety of abortion in Louisiana," or that the law "is an inapt remedy for a problem that does not exist." ROA.4240. To the contrary, the

majority acknowledged that although "Act 620 is *premised* on the state's interest in protecting maternal health," Opinion at 791 (emphasis added), Louisiana failed to identify "any instance" where a woman seeking an abortion experienced a "worse result" because her physician "did not possess admitting privileges," *id.* at 806 n.56.

This conclusion should have doomed Act 620 under *WWH*. As discussed *infra* Section I.D, the Fifth Circuit panel majority devoted most of its opinion to reversing the district court's factual findings regarding the burdens of Act 620. However, even according to the majority's revamped findings, Act 620 could burden 30% of Louisiana women seeking abortions and eliminate the primary provider of abortion services in northern Louisiana (Doe 1). Opinion at 814; *see also* ROA.4194. *WWH* recognized that such burdens are clearly "undue" when, as here, the law confers no health or safety benefit at all.

Judge Higginbotham made precisely this point in dissent, finding that the panel majority failed "to meaningfully apply the undue burden test" articulated by this Court in *WWH*. Dissent *I* at 816. Indeed, in light of *WWH*, Judge Higginbotham concluded that it is impossible to "see how a statute with no medical benefit that is likely to restrict access to abortion can be considered anything but 'undue.'"[11] *Id.* at 829.

[11] Judge Higginbotham further found that Act 620 was enacted for "an invidious purpose." Dissent *I* at 834. The district court found the same. ROA.4230. As such, the panel's decision also ignores the "purpose prong" of the undue burden standard. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (laws can have neither the effect, nor the purpose, of placing a substantial obstacle in the path of a person seeking abortion).

The panel majority paradoxically defied *WWH* while purporting to apply the "undue burden" test articulated in that case. But as Judge Dennis demonstrated in his dissenting opinion, the panel majority's version of the undue burden test is "erroneous and distorted." Dissent *II* at *1. Rather than balance "the burdens a law imposes on abortion access *together with the benefits* those laws confer," as *WWH* instructs, the panel majority held that a law's benefits need not be weighed against its burdens unless the burdens, when considered in isolation, impose a substantial obstacle to abortion. *Id.* at *5 (citing *WWH,* 136 S. Ct. at 2309). This formulation of the undue burden test "runs directly contrary" to *WWH*, and it effectively "reintroduces" the test that the Fifth Circuit applied before *WWH*, which "the Supreme Court rejected." *Id.*

The panel majority's decision "eviscerates" *WWH* by upholding an admitting privileges requirement that, like the Texas law struck down in *WWH*, has "no medical benefit and will restrict access to abortion." *Id.* A grant of certiorari and reversal are reasonably probable for this reason alone.[12]

B. *WWH* Held that Admitting Privileges Serve No Relevant Physician Credentialing Function

Despite the absence of any health benefit, the Fifth Circuit panel majority upheld Act 620 because the statute purportedly serves a physician "credentialing function." Opinion at 806. The majority granted that this benefit is "not huge," but

[12] Other courts have followed *WWH* and found that medically unnecessary admitting privileges laws impose an undue burden on abortion access. *See* cases cited *supra* p. 3. In departing from these precedents, the Fifth Circuit panel majority's decision reopened a split between lower courts, which only increases the likelihood that certiorari will be granted.

it found that the existence of a credentialing benefit, however "minimal," distinguishes this case from *WWH*. *Id.* at 806-07. This was blatant error. In fact, the state's interest in credentialing was presented in *WWH*, and this Court held that Texas's admitting privileges requirement "does not serve ***any*** relevant credentialing function." 136 St. Ct. at 2313 (emphasis added).

The rule cannot be different here. In *WWH*, this Court determined that admitting privileges serve no relevant credentialing function based upon factual findings by the district court, as well as information supplied by amici, demonstrating how admitting privileges are administered at hospitals throughout the country. *Id.* at 2312-13. This Court recognized that hospitals' decisions to grant or deny privileges commonly turn on factors that have "nothing to do with" credentials, such as whether the physician admitted "a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors." *Id.* at 2312.

Unsurprisingly, given the nationwide data this Court considered in *WWH*, the facts in Louisiana are the same. The district court found that Louisiana hospitals frequently deny privileges for "myriad reasons unrelated to competency," and as such, admitting privileges in Louisiana also "do not serve 'any relevant credentialing function.'" ROA.4206, 4283. In fact, the physician Plaintiffs in this case were unable to obtain admitting privileges at different hospitals, all for reasons unrelated to their competency. *See*, *e.g.*, ROA.4245 (citing no current need for a satellite physician as reason for denying privileges to Doe 1); ROA.4250-51, 4264 (citing the lack of prior

hospital admissions as reason Does 2 and 6 could not obtain privileges); ROA.4261-62 (citing no backup physician as reason Does 4 and 5 could not obtain privileges).

If anything, physician credentialing is *less* correlated to the granting of admitting privileges in Louisiana than Texas. Texas law forbids hospitals from withholding admitting privileges from otherwise qualified physicians because they provide abortions. Tex. Occ. Code § 103.002(b). Louisiana law does not. Consequently, the district court found that Louisiana "hospitals can and do deny privileges for reasons directly related to a physician's status as an abortion provider," regardless of that physician's credentials. ROA.4208; *see also*, *e.g.*, *id.* (Doe 1 prevented from applying for privileges because of objections from staff about his practice as an abortion provider), 4249-50 (same for Doe 2).

The Fifth Circuit panel majority's holding was premised on its apparent assumption that credentialing *necessarily* confers a benefit to women's health. Opinion at 805-06. In *WWH*, however, this Court held that courts cannot merely *assume* that abortion restrictions benefit women's health. 136 S. Ct. at 2309-10. Rather, because constitutional rights are at stake, courts may only credit actual benefits that are proven by "evidence in the record." *Id.* at 2310. Here, the Fifth Circuit panel majority cited—and the record contained—*no evidence* that the credentialing function, if any, served by admitting privileges actually confers a benefit to Louisiana women's health.[13]

[13] The panel majority cited testimony from one of the Doe physicians that he does not perform criminal background checks on doctors applying for positions at his clinic. Opinion at 799. This does not demonstrate that admitting privileges confer a benefit because, as Judge Higginbotham

Judge Dennis highlighted this error in his dissent. As he observed, the panel majority "fail[ed] to explain how further credentialing advances Louisiana's interest in protecting maternal health," and the evidence before the district court proved it does not. Dissent *II* at *7. In fact, "it strains credulity that a state seeking to ensure" that physicians are adequately credentialed "would turn to the ill-fitting, indirect approach of hospital admitting privileges." *Id.* And the law's requirement that a physician obtain privileges *within 30 miles* of his clinic "makes little sense if the true goal is to use admitting privileges" merely to verify a physician's "competency." *Id.*

The Fifth Circuit panel majority's principal basis for distinguishing *WWH* is completely illusory. A grant of certiorari and reversal are reasonably probable for this reason as well.

C. *WWH* Rejected the Panel's Causation and Large Fraction Standards

The Fifth Circuit panel majority also violated *WWH* in its analysis of Act 620's burdens. Specifically, in making the case that Act 620's burdens are less drastic than the district court found, the majority adopted several legal standards that this Court rejected in *WWH*.

First, the Fifth Circuit panel majority applied a causation standard that *WWH* found wholly inappropriate. Based upon its (improper) de novo review of the evidence, the panel majority concluded that several of the Doe physicians will be forced to stop providing abortion services not because of Act 620, but because of their

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explained in his dissenting opinion, there has never been any suggestion that the physicians in Louisiana who provide abortions have been convicted of any crimes. Dissent *I* at 818-19.

own lack of "good-faith effort" in applying for privileges. Opinion at 807-10. This purported lack of effort, in the panel's view, was an "intervening cause" that breaks the chain of causation between Act 620 and its burdens on abortion access.[14] *Id.* at 811.

WWH rejected this causation standard. In *WWH*, Texas similarly sought to minimize the burdens caused by its admitting privileges requirement by showing that Texas clinics closed for reasons other than physicians' lack of admitting privileges, despite the district court's factual conclusions to the contrary. Specifically, Texas asserted that "[t]o the extent that clinics closed" for "any reason unrelated to [admitting privileges], the corresponding burden on abortion access" had a separate or intervening cause and "may not be factored into the [undue burden] analysis." *WWH*, 136 S. Ct. at 2346 (Alito, J., dissenting).

This Court disagreed. According to *WWH*, it was self-evident that Texas's admitting privileges requirement would cause a reduction in access to abortion, because clinics closed right before and after the law went into effect. 136 S. Ct. at 2313 (majority opinion). This temporal connection was sufficient proof that Texas's admitting privileges requirement was the but-for cause of the clinics' closures. *Id.* According to *WWH*, "other evidence" of separate or intervening factors that could have contributed to individual clinics' decisions to close "does not provide sufficient ground to disturb" a finding of causation. *Id.*

[14] In fact, the district court found that the Doe physicians made extensive, good faith efforts to obtain privileges and reasonably targeted their efforts at hospitals where they were most likely to obtain privileges. ROA.4244, 4248, 4261, 4262, 4266. Even so, in the wake of Act 620, privileges were denied by all hospitals, save one that extended privileges to Doe 5.

Likewise here, the district court made the commonsense determination that Act 620 would cause a reduction in abortion access because it would require clinics where physicians lack privileges to close. ROA.4268-73. That is, in fact, precisely what happened when Act 620 briefly went into effect for nine days between the time the Fifth Circuit stayed the district court's preliminary injunction order and this Court restored the injunction. *See supra* p. 9. Moreover, the panel majority's speculation that all but one of the physicians "likely" could have obtained privileges, if only they had tried harder, Opinion at 810, flies in the face of the district court's contrary factual findings and this Court's legal determination in *WWH* that speculation cannot override women's constitutional rights. 136 S. Ct. at 2313.

The panel majority acknowledged that Plaintiffs in this case were held to a higher level of causation than this Court applied in *WWH*, but it justified this heightened standard by noting that Louisiana's comparatively small number of abortion providers allowed the court to dig deeper in to the facts. Judge Dennis rightly observed that this justification is "wrong" as a matter of law. Dissent *II* at *7. Just "because Louisiana had fewer abortion facilities and doctors to start with than Texas," Judge Dennis noted, does not entitle a court to "impose a more demanding, individualized standard of proof than the Supreme Court did in *WWH*." *Id.*

Moreover, by fixating on the purported lack of diligence of doctors in seeking admitting privileges, Judge Dennis recognized that the panel majority "obscure[d] the real question at issue here: Whether Act 620 would cause doctors to lose their ability to perform abortions at certain clinics, thereby leading those clinics to close."

Id. Causation in this straightforward sense is clearly met because doctors in Louisiana "would not have been faced with navigating" the obstacle course necessary to obtain admitting privileges "but for Act 620's medically benefitless requirement." *Id.*

Second, the panel majority improperly dismissed the loss of abortion access resulting from Doe 3's cessation of abortion services as his "personal choice," not the result of Act 620. Opinion at 811. As discussed above, Doe 3 has admitting privileges, but he will stop providing abortions once Act 620 renders him the last provider in northern Louisiana, because he has legitimate safety concerns. ROA.4260, 4267-68.

WWH credited similar concerns. Specifically, *WWH* credited evidence that Texas's admitting privileges requirement would force certain clinics to close because they would likely be unable to locate physicians with privileges willing to perform abortions "due to . . . the hostility that abortion providers face." 136 S. Ct. at 2312. *WWH* did not dismiss the burdens on such clinics, or their patients, as merely the consequence of physicians' "personal choices" not to subject themselves to such hostility. That the Fifth Circuit panel majority did so directly conflicts with *WWH*.

Third, the panel majority held that Act 620 does not burden a sufficiently "large fraction" of women to justify facial relief by employing several alternative mathematical equations. Opinion at 813-15. *WWH* eschewed this formulaic approach. 136 S. Ct. at 2320. As Judge Higginbotham observed in his dissent, this Court used the term "large fraction" solely "to focus [lower courts'] constitutional inquiry on the relevant population" of women burdened by the law. Dissent *I* at 832

n.52. This Court *did not* "engage in elaborate calculations of numerators and denominators" in *Casey*, the seminal case on the large fraction test, or in *WWH*. *Id.* The Fifth Circuit panel majority's reliance on such calculations was entirely "improper." *Id.* at 832.

Fourth, one of the panel majority's equations yielded a burden on 0% of women seeking abortion. Opinion at 815. Judge Dennis explained in his dissent that this equation was legally "defective" because it was premised on the panel majority's legally incorrect understanding of what constitute an undue burden under *WWH*. Dissent *II* at *8. The second of the panel majority's equations yielded a burden on 30% of women. Opinion at 814. But insofar as the majority's opinion could be read to suggest that 30% of women seeking abortions is not a "large fraction," this too violates *WWH*. In fact, *WWH* invalidated Texas's admitting privileges law and granted facial relief, notwithstanding the Fifth Circuit's determination that the law would burden approximately 7% of women of reproductive age. *Whole Woman's Health v. Cole*, 790 F.3d 563, 588 (5th Cir. 2015), *rev'd sub nom. WWH*, 136 S. Ct. 2292.[15]

D. The Fifth Circuit Panel Majority's Decision Violates Binding Precedents Beyond *WWH*

Certiorari review and reversal by this Court are additionally warranted and probable because the Fifth Circuit panel majority violated this Court's precedents

[15] The panel majority's application of the large fraction test also violates this Court's decision in *Casey*. *Casey* facially invalidated a spousal-notification law that burdened women who did not wish to notify their spouses for fear of retribution. 505 U.S. 833. There, this Court held that the large fraction test was met even though only 1% of women seeking abortions could be burdened. *Id.* at 894.

recognizing that courts of appeals generally "may not reverse" a district court's factual findings, especially where those "findings are based on determinations regarding the credibility of witnesses." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985). Judge Higginbotham's dissent identified this as the panel majority's most "fundamental misstep." Dissent *I* at 833. Judge Dennis's dissent described the panel majority's "retrial of the facts" on appeal as both "egregious and pervasive." Dissent *II* at *5-*6.

A full accounting of the factual findings by the district court that the Fifth Circuit panel majority summarily overturned could fill an entire brief, but Judge Higginbotham's and Judge Dennis's dissents highlighted the most blatant and consequential examples. For instance:

- The district court found that Act 620 "do[es] not serve a relevant credentialing function." ROA.4283.
    - The majority found the opposite. Opinion at 806; *see also* Dissent *II* at *6.
- The district court found that Louisiana's expert on Act 620's benefits "suffered from his paucity of [relevant] knowledge or experience" and the weight of his testimony was "diminished by his bias." ROA.4234.
    - The majority credited this expert's testimony. Opinion at 805; *see also* Dissent *II* at *6 n.12.
- The district court found that hospitals deny admitting privileges for "myriad reasons," including the fact that a physician has not treated a sufficient "number of patients . . . in the hospital in the recent past." ROA.4206, 4263.

    - The majority found that "[f]ew Louisiana hospitals make that demand."[16] Opinion at 791.

- The district court found that all the Doe physicians attempted in "good faith" to comply with Act 620 by making numerous inquiries and filing applications for privileges. ROA.4266-69.

    - The majority found bad faith on the part of all but one of the doctors.[17] Opinion at 810; *see also* Dissent *II* at *6.

- The district court found that if Act 620 were enforced, "Louisiana would be left with one provider and one clinic." ROA.4270.

    - The majority found that "no clinics" will close. Opinion at 810.

- The district court found that "[a]ll women seeking an abortion in Louisiana" will face obstacles under Act 620 "due to the dramatic reduction in the number of providers and the overall capacity for services." ROA.4274.

    - The majority found that "no woman" in Louisiana would be unduly burdened. Opinion at 813.

Such extensive fact-finding seems less like the work of an appeals court reviewing facts for clear error than that of one striving "to reach their desired result." Dissent *II* at *1. Moreover, by refusing to credit the district court's well-supported factual findings, the panel majority violated one of the cardinal rules regarding the proper role of appellate judging.

[16] The panel majority did not identify the source for this finding but noted that the record contained bylaws for several Louisiana hospitals. Opinion at 807-08. The district court found, however, that hospital bylaws do not fully reflect "how privileges applications are handled in actual practice." ROA.4206.

[17] Judge Higginbotham took particular umbrage at the panel's findings of bad faith, because Louisiana did not challenge on appeal *any* of the district court's factual findings concerning the Does' good faith efforts to comply with Act 620. Dissent *I* at 819-20. Despite that clear waiver, the panel majority reversed the district court's findings on its own accord in yet another departure from appellate procedure.

II. Enforcement of Louisiana's Admitting Privileges Law Will Inflict Irreparable Injury to Women Seeking Abortion Services

If the mandate is not stayed and Louisiana is allowed to enforce Act 620, access to abortion in Louisiana will be all but eliminated, and women of reproductive age throughout Louisiana will be irreparably harmed.

Enforcement of Act 620 would leave "no physician" in Louisiana to care for women who need "abortions between 17 weeks and 21 weeks, six days gestation"—effectively imposing a pre-viability ban on abortion after 17 weeks. ROA.4275. For women at earlier stages of pregnancy, Act 620 could leave just one physician at one clinic providing abortion services. ROA.4270. Since one doctor cannot possibly meet the demands of all women who seek abortions in Louisiana, some women could be completely denied the choice to terminate a pregnancy and forced to carry the pregnancy to term.

This Court has described the choice to terminate a pregnancy as one of "the most intimate and personal choices a person may make in a lifetime"; a choice "central to personal dignity and autonomy"; and a "liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. Depriving women of this constitutionally protected choice constitutes profound and irreparable harm. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (threatened violation of pregnant women's constitutional right to privacy "mandates a finding of irreparable injury"); *see also Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1310-11 (1994) (Souter, J., in chambers) (deprivation of the right to choose abortion "if proven, would qualify as 'irreparable injury,' and support the issuance of a stay"). Moreover,

as the district court found, foreclosing access to safe and legal abortion will force some women to resort to other options for ending a pregnancy—all of which can carry significant risks of complications and adverse outcomes. ROA.4239-40.

Even women who are able to access abortion will suffer as a result of Act 620. As the district court found, a significant reduction in the number of providers will mean that "women who can access an abortion clinic will face lengthy delays" in securing appointments. ROA.4277. Women who can get an appointment will also "face irreparable harms from the burdens associated with increased travel distances and costs in reaching an abortion clinic." ROA.4287. The district court recognized that these hardships would fall disproportionately on poor women and women in rural areas. ROA.4275-78. Judge Dennis did so as well. *See* Dissent *II* at *8 ("These burdens will not doubt be untenable for the high number of women in poverty who seek abortions in Louisiana, who . . . are no less entitled than other women to this constitutionally protected healthcare right.").

Such burdens are no mere inconvenience. Although abortions are very safe procedures, the risks to women increase with the gestational age of pregnancy. ROA.4237. Diminished access to abortion care, therefore, will push women seeking abortions "to later gestational ages with associated increased risks." ROA.4277. In fact, some women will be delayed to the point where a one-day abortion procedure is no longer possible, requiring a more complex two-day procedure that carries greater expense and increased health risks. ROA.4277. And all women are "less likely to get . . . individualized attention, serious conversation, and emotional support" at an

"overtaxed" clinic struggling to absorb all patients from around the state. ROA.4277-78.

Clinics and physicians also will be irreparably harmed. Clinics that lack physicians with admitting privileges will be forced to close, just as they did in Texas in 2013 when HB 2 went into effect, and just as they did in Louisiana in 2016 when Act 620 went into effect for nine days before this Court intervened and restored the district court's preliminary injunction.

Moreover, as *WWH* revealed, clinics that are forced to close in most cases will never reopen. Of the clinics in Texas that closed on account of HB 2, only a few managed to reopen after the law was declared unconstitutional and permanently enjoined. *See supra* note 10 ("Only three [out of 27] shuttered clinics have managed to reopen in the wake of the Supreme Court decision."); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting) ("The longer a given facility remains closed, the less likely it is ever to reopen even if the admitting privileges requirement is ultimately held unconstitutional.").

There are many reasons for this. Most clinics lack the financial resources to shoulder the loss of income and disruption of a prolonged shutdown. Some may have to forfeit their licenses to the state. La. Admin. Code tit. 48, § 4525. And the uncertainty of whether clinics will reopen will prompt an untold number of physicians and staff to seek out other employment, if not relocate to other states. Such threats to a clinic's very existence are irreparable harm. *See Atwood Turnkey Drilling, Inc.*

v. Petroleo Brasileiro, S.A., 875 F.2d 1174, 1179 (5th Cir. 1989) (collecting cases recognizing that irreparable harm occurs "where the potential economic loss is so great as to threaten" a business's "existence"); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795-96 (7th Cir. 2013) ("[I]f forced to comply with the statute, only later to be vindicated when a final judgment is entered, the plaintiffs will incur in the interim the disruption of the services that the abortion clinics provide . . . [and] their doctors' practices will be shut down completely . . . .").

III. The Balance of Equities Weighs in Plaintiffs' Favor

The harm that would befall Plaintiffs and their patients if the Fifth Circuit's mandate issues outweighs the harm to Louisiana from having to delay enforcement of Act 620 pending final disposition of the case by this Court. The district court found that Act 620 serves no health or safety benefit, ROA.4282-84, and the Fifth Circuit found that the law, at most, serves a "minimal" benefit related to physician credentialing, Opinion at 806-07. Even accepting the Fifth Circuit's erroneous conclusion regarding physician credentialing, Louisiana will suffer no harm as a result of not enforcing a law with such a "minimal" benefit, especially since the law has been enjoined for most of its existence. Louisiana also has no interest in enforcing a law that is clearly unconstitutional in light of this Court's precedent. *See Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) ("In our earlier opinion in this case, we made clear that . . . ' "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." "), *aff'd*, 542 U.S. 656 (2004).

On the other hand, the health, rights, and dignity of thousands of Louisiana women hang in the balance, along with the fate of the state's three remaining clinics.

CONCLUSION

A stay of the mandate is essential to protect Plaintiffs, their patients, and all women of reproductive age in Louisiana from irreparable harm while Plaintiffs seek certiorari. Without interim relief, access to safe and legal abortion in Louisiana could be decimated before this Court has an opportunity to consider Plaintiffs' petition for certiorari and correct the Fifth Circuit's extraordinary decision to uphold a law identical to one this Court has already struck down.

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Respectfully submitted,

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