No. 18-1323

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,
Petitioners,

v.

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER FEDERAL JUDGES AND DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae served as federal judges or senior officials in the United States Department of Justice.[1] As former judges and Justice Department officials, the amici curiae have a strong interest in upholding the rule of law. The amici curiae do not submit this brief to advocate in support of the correctness of this Court's cases recognizing a constitutional right to abortion and defining the scope of that right. Rather, they submit this brief to emphasize the principle that lower courts must adhere to the decisions of this Court. That principle is a fundamental aspect of our constitutional system, and is essential to maintaining the rule of law.

SUMMARY OF ARGUMENT

Lower federal courts and state courts are bound by the decisions of this Court. That requirement is a fundamental component of the rule of law. Absent such a requirement, this Court could not effectively maintain uniformity in the law and consistency of judicial decision. Given the central importance of this principle, the Court has not hesitated to take action when a lower court disregards a decision of this Court.

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[1] The amici are listed in the Appendix to this brief. *See* App., *infra*, 1a. Pursuant to Rule 37.6, the amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties were timely notified that amici intended to file this brief and have consented to its filing.

The court of appeals' decision in this case fails to adhere to this Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Louisiana statute at issue in this case is materially identical to the Texas statute held unconstitutional in *Whole Woman's Health*, and the district court's findings of fact closely track those of the district court in *Whole Woman's Health*. The court of appeals nevertheless upheld the constitutionality of the Louisiana statute. In so doing, the court of appeals "repeat[ed] [the] mistakes" for which it was "admonished" by this Court in *Whole Woman's Health*. Pet. App. 95a (Higginbotham, J., dissenting). The court of appeals also failed to respect the district court's primary role in making findings of fact and weighing the evidence.

When a lower court disregards a decision of this Court, the Court has acted to uphold the rule of law by summarily reversing the lower court's decision. Summary reversal is warranted in this case to correct the court of appeals' failure to adhere to this Court's recent decision in *Whole Woman's Health*.

ARGUMENT

I. Adherence to this Court's Decisions Is a Fundamental Component of the Rule of Law.

Lower courts are bound by the decisions of this Court. That fundamental principle is essential to establishing and maintaining the rule of law. Justice Joseph Story provided a classic statement of the principle and the reasons for it:

> Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges.

1 Joseph Story, *Commentaries on the Constitution of the United States* § 377 (1st ed. 1833).

As Justice Story noted, this principle predates the Constitution. William Blackstone warned that failure to adhere to precedent would allow the "scale of justice" to "waver with every new judge's opinion," and risk subordinating legal principles to each individual judge's "private sentiments." 1 William Blackstone, *Commentaries* *68-69. Similarly, Alexander Hamilton observed that "all nations have found it necessary to establish one court paramount to the rest . . . to settle and declare in the last resort, a uniform rule of civil justice" and thereby "avoid the confusion . . . from the

contradictory decisions of a number of independent judicatories." *The Federalist* No. 22.

This Court has long recognized that requiring lower courts to adhere to Supreme Court decisions is essential to achieving uniformity and predictability in the law. In *Martin v. Hunter's Lessee*, the Court emphasized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." 14 U.S. 304, 347-48 (1816). The Court observed that "[t]he constitution of the United States was designed for the common and equal benefit of all the people of the United States" and "[t]he judicial power was granted for the same benign and salutary purposes." *Id.* at 348. In *Cohens v. Virginia*, the Court observed that "[t]hirteen independent Courts . . . of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." 19 U.S. 264, 415-16 (1821) (quoting *The Federalist* No. 80 (Alexander Hamilton)). As the Court later noted, "it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them." *Ableman v. Booth*, 62 U.S. 506, 518-19 (1858).

Although it is now firmly established that this Court's decisions are binding and must be followed, that has not always been so. In the early Republic, the Court operated in the shadow of potential disregard of its orders. Chief Justice Marshall's opinions in formative cases such as *Marbury v. Madison*, 5 U.S. 137 (1803), and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), can be understood as having been written in a way that allowed the Court to assert its constitutional role without affording the President an opportunity to defy the Court's orders. *See, e.g.,* Joseph Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500, 514 (1969).

Over many decades, the Court repeatedly has reaffirmed that its decisions are authoritative and must be followed. For example, after this Court decided *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Arkansas legislature adopted state constitutional amendments and statutes "designed to perpetuate . . . the system of racial segregation," and based on "the premise that they [were] not bound by [the] holding in *Brown*." *Cooper v. Aaron*, 358 U.S. 1, 4, 9-12 (1958). This Court responded by reaffirming that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land." *Id.* at 18. To emphasize that fundamental principle, all nine members of the Court individually signed the Court's opinion in *Cooper*. *See id.* at 4.

This Court's unremitting efforts to ensure compliance with its decisions have succeeded. This can be seen simply by citing some of the decisions of this

Court that have been followed despite strong objections from the Executive Branch, including *Boumediene v. Bush*, 553 U.S. 723 (2008); *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974); and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

It is particularly important that lower federal courts consistently adhere to this Court's decisions. If "inferior" federal courts, U.S. Const. art. III, § 1, were free to disregard those decisions, this Court's function of promoting uniformity and consistency of judicial decision would be fatally compromised. The importance of that function is reflected in this Court's certiorari criteria. *See* Sup. Ct. R. 10(a)-(b). The need for uniformity also animated Congress's decision to expand the Court's certiorari jurisdiction in the 1925 "Judges' Bill," which was premised, in part, on the understanding that this Court should devote its energy and attention to "matters of large public concern," such as "preserv[ing] uniformity of decision among the intermediate courts of appeal." *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 452-53 (1959) (Frankfurter, J., dissenting) (quoting H.R. Rep. No. 1075, 68th Cong., 2d Sess. 2 (1925) and Statement of Chief Justice Taft, Hearings before the Committee on the Judiciary of the House of Representatives on H.R. Rep. No. 10479, 67th Cong., 2d Sess. 2 (1922)); *see also Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.) (certiorari jurisdiction over Circuit Courts of Appeals is designed to "secure uniformity of decision" and elevate "cases involving questions of importance which it is in the public interest to have decided by this Court").

Given the importance of these principles, the Court has not hesitated to act when a lower court disregards a decision of this Court. For example, in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), this Court summarily reversed a lower court for failing to follow the Court's recent decision in *Rummel v. Estelle*, 445 U.S. 263 (1980). The Court observed that "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress." *Hutto*, 454 U.S. at 374-75. The Court added: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Id.* at 375.

Hutto v. Davis is not an isolated example. This Court has summarily reversed numerous lower court decisions that have failed to adhere to decisions of this Court, including *Brown v. Board of Education*,[2] *Gideon v. Wainwright*, 372 U.S. 335 (1963),[3] *Miller v. California*, 413 U.S. 15 (1973),[4] *Citizens United v.*

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[2] *See Johnson v. Virginia,* 373 U.S. 61, 62 (1963) (per curiam); *Pennsylvania v. Bd. of Directors of City Trs. of City of Phila.,* 353 U.S. 230, 231 (1957) (per curiam); *State of Fla. ex rel. Hawkins v. Bd. of Control,* 350 U.S. 413, 414 (1956) (per curiam).

[3] *See McConnell v. Rhay*, 393 U.S. 2, 4 (1968) (per curiam); *Greer v. Beto*, 384 U.S. 269 (1966) (per curiam); *Doughty v. Maxwell*, 376 U.S. 202 (1964) (per curiam).

[4] S*ee Bucolo v. Florida*, 421 U.S. 927 (1975) (per curiam); *Bucolo v. Adkins*, 424 U.S. 641, 643–44 (1976) (per curiam).

Federal Election Commission, 558 U.S., 310 (2010),[5] and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).[6] *See also infra* pp. 17-18 & note 8 (citing additional examples).

Indeed, the principle that lower courts are bound to follow this Court's decisions is so fundamental that lower courts are required to adhere to this Court's decisions even when they appear to have been implicitly overruled by subsequent decisions of this Court. *See Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) ("[I]f the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (summarily reversing an Oklahoma Supreme Court's decision that relied on a conclusion that this Court had implicitly overruled *Booth v. Maryland*, 482 U.S. 496 (1987)); *State Oil v. Khan*, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying [*stare decisis*] despite disagreement with [this Court's decision in] *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."). *Cf. Spector Motor Serv. v. Walker*, 139 F.2d 809, 823 (2d Cir. 1943) (L. Hand, dissenting) ("Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine

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[5] *See Am. Tradition P'ship v. Bullock*, 567 U.S. 516, 516-17 (2012) (per curiam).

[6] *See Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam).

which may be in the womb of time, but whose birth is distant . . . .").

In sum, the decisions of this Court are authoritative, and must be followed by the lower courts even if judges on those courts strongly disagree with them. That principle is both central to our constitutional system and essential to maintaining the rule of law.

II. The Court of Appeals' Decision Undermines the Rule of Law By Failing to Follow This Court's Recent Decision in *Whole Woman's Health*.

The court of appeals' decision in this case undermines the rule of law by failing to adhere to this Court's recent decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In addition, the court of appeals' decision destabilizes the rule of law by failing to respect the district court's primary role in weighing the evidence and making findings of fact.

In *Whole Woman's Health*, this Court considered a provision of Texas House Bill 2 ("H.B. 2"), that required a physician performing or inducing an abortion to have active admitting privileges at a hospital located not further than 30 miles from the location at which the abortion is performed or induced. The Court held that this requirement constituted an undue burden on access to abortion, and thus violated the Constitution. 136 S. Ct. at 2300. The Court determined that the district court had applied the correct legal standard by considering the evidence in the record, including expert testimony, and then weighing the asserted benefits of the state law against

the burdens it imposed. *Id.* at 2310. The Court further held that the record contained adequate factual and legal support for the district court's conclusion that H.B. 2 imposed an undue burden on a woman's right to choose. *Id.* at 2311.

The Court concluded that there was a "virtual absence of any health benefit to women" from the Texas admitting privileges law. *Id.* at 2313. In reaching that conclusion, the Court relied on the district court's factual finding, based on record evidence showing extremely low rates of serious complications before H.B. 2 was enacted, that there was "no significant health-related problem for the new law to cure." *Id.* at 2298. In addition, the State's evidence did not show that H.B. 2 advanced the state's interest in protecting women's health when compared to the pre-H.B. 2 law, which required providers to have a "working arrangement" with doctors who had admitting privileges. *Id.* at 2311-12.

This Court further concluded that H.B. 2 placed a substantial obstacle in the path of women seeking an abortion because the dramatic drop in the number of clinics in Texas led to fewer doctors performing abortions, longer waiting times, increased crowding, and increased driving distances. *Id.* at 2312-13.

The Court expressly rejected Texas's argument that H.B. 2 did not impose a substantial obstacle because the women affected by the law were not a "large fraction" of Texas woman of reproductive age. *Id.* at 2320. The Court explained that in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,

505 U.S. 833 (1992), the "large fraction" language referred to "'a large fraction of cases in which [the provision at issue] is *relevant*,' a class narrower than 'all women,' 'pregnant women,' or even 'the class of women seeking abortions identified by the State.'" 136 S. Ct. at 2320 (emphasis added by the Court in *Whole Woman's Health*) (quoting *Casey*, 505 U.S. at 894-95). The Court concluded: "Here, as in *Casey*, the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895).

As the district court and the dissenting court of appeals judges explained, this case parallels *Whole Woman's Health* in every relevant respect. First, Louisiana Act 620, La. Rev. Stat. § 40:1061.10, is "equivalent in structure, purpose, and effect to the Texas law." Pet. App. 130a. The text of Louisiana Act 620 is materially identical to the relevant provision of Texas's H.B. 2: Both statutes require a physician performing an abortion to have "active admitting privileges" at a hospital within 30 miles of the facility where an abortion is performed or induced. Pet. App. 112a. Indeed, Louisiana Act 620 was modeled on H.B.2. Pet. App. 194a-196a.

Second, as in *Whole Woman's Health*, the district court found that the state law "provides no benefits to women and is an inapt remedy for a problem that does not exist." Pet. App. 215a. In Louisiana, as in Texas, legal abortions "are very safe procedures with very few complications." Pet. App. 203. The court found

that requiring abortion providers to have active admitting privileges at a nearby hospital "will not improve the safety of abortion in Louisiana." Pet. App. 215a. As in *Whole Woman's Health*, there is no evidence that the admitting privileges requirement "would have helped even one woman obtain better treatment." Pet. App. 215a. The district court found that admitting privileges "do not serve 'any relevant credentialing function'" in Louisiana. Pet. App. 272a (quoting *Whole Woman's Health*, 136 S. Ct. at 2313). Louisiana hospitals regularly deny admitting privileges for reasons other than a provider's competence at performing outpatient procedures. *See* Pet. App. 172a. Reasons for denial include the physician's expected usage of the hospital, the number of expected admissions, and the hospital's business plan. *See id.* Moreover, Louisiana hospitals – unlike Texas hospitals – can and do deny admitting privileges based on a physician's status as an abortion provider. *See* Pet. App. 174a.

The district court also determined, based on extensive factual findings, that Louisiana Law 620 places a substantial obstacle in the path of a woman seeking an abortion. The district court found that the law would cause two of the state's three abortion clinics to close and leave only a single physician performing abortions in Louisiana. *See* Pet. App. 273a. The court found that "[a] single remaining physician . . . cannot possibly meet the level of services needed" by the approximately 10,000 women who seek abortions in Louisiana each year. Pet. App. 255a. The district court further found that the reduction in the number of clinics and physicians would lead to "longer waiting

times for appointments, increased crowding and increased associated health risks," in addition to a need to "travel much longer distances." Pet. App. 258a, 274a. In addition, the court found that the Louisiana law, if implemented, would leave "no physician in Louisiana providing abortions between 17 weeks and 21 weeks, six days gestation," which is the legal limit on abortions in Louisiana. Pet. App. 260a.

The court of appeals purported to follow this Court's decision in *Whole Woman's Health*, but it failed to do so in several ways. First, the court of appeals held that the Louisiana Act 620 does not place an undue burden on a woman's abortion rights because the statute provides some "minimal" benefits and does not place a substantial obstacle in the path of a woman's choice. Pet. App. 39a, 59a. This Court rejected that approach in *Whole Woman's Health*. *See* 136 S. Ct. at 2300 (concluding that the Texas admitting privileges law did not "confer[ ] medical benefits sufficient to justify the burdens upon access that [it] imposes"). As the dissenting court of appeals judges explained, the panel's decision "repeats th[e] mistake" of "setting forth a test that fails to truly balance an abortion restriction's benefits against its burdens." Pet. App. 119a (Dennis, J., dissenting from the denial of rehearing en banc); *see also id.* at 95a (Higginbotham, J., dissenting) (panel majority's decision "repeats [the] mistake[]" for which this Court "admonished" the court of appeals in *Whole Woman's Health*).

Second, the court of appeals applied a heightened causation standard that attributed most of the harm to women to physicians' lack of diligence in seeking

admitting privileges. As the dissenting judges explained, the court of appeals' approach is inconsistent with this Court's decision in *Whole Woman's Health*, which concluded that causation was satisfied by evidence that Texas clinics where physicians lacked admitting privileges closed immediately before and after the Texas law went into effect. *See* 136 S. Ct. at 2313; Pet. App. 124a (court of appeals applied a "more demanding, individualized standard of proof" than this Court applied in *Whole Woman's Health*).

Third, the court of appeals disregarded this Court's conclusion in *Whole Woman's Health* that its reference to a "large fraction" of women focuses on "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895). As the dissenting court of appeals judges explained, "[f]or those actually restricted" by Louisiana Act 620, "there is no question that the obstacle will be substantial." Pet. App. 98a (noting that over 5,000 women seeking abortions will be unable to obtain one within the state, and no woman seeking to exercise her right to seek an abortion after 16 weeks will be able to do so in Louisiana).[7]

In addition to failing to follow this Court's decision in *Whole Woman's Health*, the court of appeals failed to respect the district court's role in finding facts and

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[7] As Judge Higginson noted, even under the court of appeals' own fact-finding, Louisiana Act 620 "reduces Louisiana's capacity to provide abortions by 21%," which is "enough to abrogate the Act under Supreme Court law, both longstanding and recent." Pet. App. 131a (Higginson, J., dissenting from the denial of rehearing en banc).

weighing the evidence. Based on the evidence presented at a six-day bench trial, the district court found that each physician made good faith efforts to obtain admitting privileges. *See* Pet. App. 249a. The district court found that all five physicians attempted to obtain admitting privileges at a hospital within 30 miles of the clinic where they perform abortions; all five made formal applications to at least one hospital; and three of the five filed multiple applications. *See id.* Respondent did not challenge these factual findings on appeal. *See* Pet. App. 68a-69a. Yet the court of appeals re-examined the evidence, made its own findings of fact, and rejected several of the district court's findings as clearly erroneous. In so doing, the court of appeals disregarded the basic division of labor between trial courts and appellate courts and "fail[ed] to faithfully apply the well-established 'clear error' standard of review to the district court's factual findings." Pet. App. 120a.

As this Court has explained, "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); *see also Salve Regina College v. Russell*, 499 U.S. 225, 231-33 (1991); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 122-23 & n.18 (1969). Consequently, "[i]f the district court's account of the evidence is plausible in light of the record . . . the court of appeals may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74. This standard applies with particular force to determinations concerning the

credibility of witnesses. *See id.* at 575 (a trial judge's finding, internally consistent and "based on . . . the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story . . . not contradicted by extrinsic evidence[,]" "can virtually never be clear error."); *see also Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015) (applying *Anderson* in case that turned on conflicting expert testimony).

A court of appeals' failure to respect the fact-finding role of the district court is grounds for reversal. *See Ryburn v. Huff*, 565 U.S. 469, 475-77 (2012) (per curiam) (summarily reversing court of appeals decision that "changed th[e] findings [of the District Court] in several key respects" and then analyzed the events in way that was "entirely unrealistic"); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982) (reversing court of appeals decision that "reject[ed] the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court"); *Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) (reversing because the court of appeals found its own facts).

Here, the court of appeals not only failed to follow this Court's decision in *Whole Woman's Health*, but also infringed on the fact-finding role of the district court in this case. The court of appeals' decision undermines the rule of law, and so warrants action by this Court.

III. The Court Should Consider Summary Reversal.

When a lower court disregards a decision of this Court, this Court frequently has acted to uphold and reinforce the rule of law by summarily reversing the lower court's decision. Several examples of such summary reversals are cited above, at pp. 7-8 and notes 2-6. Other examples, drawn from this Court's recent decisions, include the following:

- In *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam), the Court summarily reversed a lower court decision finding a prisoner not to be intellectually disabled. The Court observed that the lower court's decision "rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court." *Id.* at 672.

- In *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam), the Court summarily vacated a decision holding that stun guns were not protected by the Second Amendment, noting the lower court's analysis "contradicts this Court's precedent." *Id.* at 1028.

- In *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (per curiam), the Court summarily reversed an Alabama court's decision refusing to grant full faith and credit to a Georgia court's judgment regarding adoption, because the Alabama court's "analysis is not

consistent with this Court's controlling precedent." *Id.* at 1021.

- In *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam), the Court summarily reversed a decision denying post-conviction relief. The Court's opinion observes that the "Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law" and "improperly evaluated the materiality of each piece of evidence in isolation." *Id.* at 1007.

The Court has summarily reversed in other cases as well.[8] As these cases demonstrate, the Court regularly employs summary reversals when a lower court has improperly disregarded an opinion of this Court.

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[8] *See, e.g., Maryland v. Kulbiciki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing a decision that applied the Court's ineffective assistance of counsel "standard in name only"); *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (per curiam) (summarily reversing a decision in a qualified immunity case "because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents"); *Marmet Health Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (summarily reversing a decision that "misread[] and disregard[ed] the precedents of this Court" regarding the Federal Arbitration Act); *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (summarily reversing a decision because it employed a method of analysis the Supreme Court had corrected in a recent decision, and overstepped the limits of its authority by reweighing evidence and engaging in factfinding); *Ryburn*, 565 U.S. at 475-77 (summarily reversing the court of appeals for having "rested [its decision] on an account of the facts that differed markedly from the District Court's," and for using a "method of analyzing the string of events that … was entirely unrealistic … look[ing] at each separate event in isolation," and ignoring the "alarming picture.").

Indeed, "[m]any of the Court's summary reversals appear to be designed to ensure that lower courts follow Supreme Court precedents." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1, 31 (2015). Summary reversal is warranted in this case to correct the court of appeals' failure to adhere to this Court's recent decision in *Whole Woman's Health*.

CONCLUSION

The Court should grant the petition for a writ of certiorari, and may wish to consider summary reversal.

Respectfully submitted,

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APPENDIX

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