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 and Hospitals,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Three things beg correction after Louisiana's attempts at misdirection.

First, this Court should confront the challenge to the rule of law posed by the decision below. The notion that a law identical to the one this Court just invalidated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), can be distinguished on its "facts" should not be allowed to stand without this Court's review.

Second, this case is not even factually distinguishable from *Whole Woman's Health*. The district court's well-supported factual findings leave no doubt that Act 620 is "equivalent in structure, purpose, and effect to the Texas law" that the Court struck down. App. 130a.

Third, there are no vehicle impediments to reversal.

I. THIS COURT SHOULD NOT ALLOW THE FIFTH CIRCUIT'S DECISION TO STAND UNREVIEWED

Consistent with its general practice, this Court granted certiorari in *Whole Woman's Health* to resolve a split in authority on the constitutionality of admitting privileges requirements. The Fifth Circuit had upheld such a requirement, but the Seventh Circuit had struck one down. Pet. 22 n.10. Reversing the Fifth Circuit, the Court held that the Texas law, H.B.2, was unconstitutional. *Whole Woman's Health*, 136 S. Ct. at 2318. Louisiana does not dispute that Act 620 is *identical* to H.B.2 but argues

that the Fifth Circuit was "faithful" to *Whole Woman's Health* because the panel majority "scrutinized" the record and uncovered facts purportedly unique to Louisiana. BIO 17-18.

This contention is baseless. The grounds on which the Court declared Texas's law unconstitutional were hardly unique to one state. The Court held that H.B.2's burdens were "undue" because there is a "virtual absence of any health benefit" conferred to abortion patients by admitting privileges. *Whole Woman's Health*, 136 S. Ct. at 2313. The Court also expressly found that H.B.2's lack of health benefits, far from a Texas novelty, was consistent with the findings of *other* courts that had "considered the health benefits of *other* States' similar admitting-privileges laws." *Id.* at 2312 (emphasis added). And, in particular, the Court rested its conclusion that admitting privileges do "not serve any relevant credentialing function" on the "general fact," confirmed by leading medical groups as amicus curiae, that hospitals in the United States condition admitting privileges on "common prerequisites" having nothing to do with physicians' competency. *Id.* at 2312-13. Nothing Louisiana says can change the reality that these determinations apply within its borders just as in Texas.

Indeed, this Court has confronted challenges to its authority shrouded in factual distinctions before. *See* Pet. 33 n.16. Perhaps the best recent example is *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam). There, the Montana Supreme Court addressed a state law identical to the one invalidated two years earlier in *Citizens United*

v. Federal Election Commission, 558 U.S. 310 (2010). Declaring that "*Citizens United* was a case decided upon its facts," the Montana Supreme Court applied the same constitutional test this Court had applied but upheld the state law based on purportedly "critical" differences between the justification for the law in that state and the degree of "regulatory burden" it imposed. *W. Tradition P'ship, Inc. v. Attorney Gen.*, 271 P.3d 1, 5, 7 (Mont. 2011). This Court summarily reversed in a single paragraph. *See Am. Tradition P'ship*, 567 U.S. at 516-17; *see also Moore v. Texas*, 139 S. Ct. 666, 671 (2019) (per curiam) (granting summary reversal because lower court's factual analysis of defendant's intellectual disability conflicted with this Court's prior determinations regarding prevailing "clinical practice").

A similar disposition would be appropriate here. Louisiana's purported factual differences are illusory and legally irrelevant. But at the very least the Fifth Circuit's decision must be reviewed one way or another.

Multiple states conceded after *Whole Woman's Health* that their admitting privileges laws were unconstitutional, and when states refused to do so, lower courts followed the Court's decision and struck those laws down. Pet. 22 nn.10-11. Yet if this Court were to deny certiorari here, state legislatures would be emboldened to enact (or reenact) identical admitting privileges laws, and Attorney Generals in those states might well feel duty-bound to defend such laws based on "local facts." Far better to head off such disarray at the pass and discourage further recalcitrance.

Louisiana's argument that, if certiorari is granted, the Court should "overrule[]" *Whole Woman's Health*, BIO 39, only confirms that the Fifth Circuit's ruling cannot stand under a straightforward application of precedent. Entertaining such a request, when nothing has changed in the three years since *Whole Woman's Health*, could only encourage similar attempts by lower courts to foist issues upon this Court by circumventing precedent with factual hair-splitting.

II. *WHOLE WOMAN'S HEALTH* IS NOT DISTINGUISHABLE

The Court held in *Whole Woman's Health* that admitting privileges laws do not confer medical benefits sufficient to justify their burdens on women's abortion access. 136 S. Ct. at 2311-13, 2318. Louisiana's attempts to tell a different story in its state and to recalibrate the undue burden framework fail at every turn.

A. Act 620 Confers No Medical Benefits and Serves No Relevant Credentialing Function

Louisiana would have the Court believe that Act 620 was a response to Louisiana abortion providers' poor safety records and credentialing procedures. BIO 9-12. The district court's well-supported factual findings directly refute Louisiana's assertions:

- Louisiana asserts that Act 620 addressed "serious safety concerns relating to the lack of any meaningful credentialing review of doctors who provide abortions in Louisiana." BIO 9. But the district court found that "in

the decades before the Act's passage, abortion in Louisiana [was] extremely safe." App. 218a-19a. And rather than rely on hospitals' idiosyncratic credentialing processes, the district court found that "Louisiana['s] State Board of Medical Examiners ensures physician competency through licensing and discipline." App. 272a.

- Louisiana suggests that Act 620 was prompted by "serious regulatory violations" by abortion clinics. BIO 10-11. But the district court rejected Louisiana's attempts to tarnish clinics' excellent safety records with trumped-up regulatory infractions having nothing to do with admitting privileges. *See* App. 208a-15a. In fact, the district court found that of the thousands of patients Hope has treated over 23 years, "only four" required transfer to a hospital, and all received appropriate care "regardless of whether the physician had admitting privileges." App. 212a.

- Louisiana persists in arguing that admitting privileges "help women who suffer complications from surgical abortions." BIO 12. Yet the district court (and the Fifth Circuit) found that Louisiana could not point to "any instance" where a woman seeking an abortion would have obtained better care if her physician held admitting privileges. App. 215a, 38a-39a.

Louisiana cannot pretend as though no trial occurred. Rather, in this Court, the district court's fac-

tual findings "must govern" when they are plausible in light of the record. *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017). Here, the district court's factual findings are beyond plausible—they are virtually identical to the findings credited by this Court in *Whole Woman's Health*.

Despite the district court's determination that Act 620 "is an inapt remedy for a problem that does not exist," App. 215a, Louisiana urges the Court to accept the Fifth Circuit's conclusion that Act 620 serves a credentialing benefit. That conclusion directly conflicts with *Whole Woman's Health*, 136 S. Ct. at 2311-13, and hinges on two distinct errors: the Fifth Circuit (1) improperly reversed the district court's finding that Louisiana hospitals require abortion providers to satisfy patient minimums that they cannot meet, and (2) completely ignored the district court's findings regarding "myriad" other requirements—equally unrelated to competency—that prevent most abortion providers from obtaining (and maintaining) admitting privileges. App. 172a; *see also* Pet. 24.

Louisiana offers no defense of the Fifth Circuit's errors. Rather, Louisiana goes even a step further and asserts that the record contained "no competent" or "non-hearsay" evidence at all regarding the reasons that Louisiana hospitals deny physicians privileges. BIO 14. This is demonstrably incorrect. *See, e.g.*, App. 172a-76a; ROA. 6293, 6338-40, 7029-30, 7431-34, 9917-18, 9920. Though Louisiana raised hearsay objections to certain of this evidence, the state's baseless evidentiary objections were over-

ruled at trial. *See, e.g.,* App. 175a n.29, 183a, 221a, 246a.

More importantly, the Fifth Circuit committed overriding error by assuming, without evidence, that more credentialing necessarily leads to improved health and safety. Pet. 25. Louisiana asserts that the "record amply supports the Fifth Circuit's view" but glaringly cites no evidence. BIO 25. In fact, Louisiana concedes that whether admitting privileges will improve any "specific health outcomes" is "uncertain." BIO 24. But *Whole Woman's Health* held that laws that burden women's rights to abortion must be justified by demonstrable benefits, not uncertain ones. 136 S. Ct. at 2310-12. The Fifth Circuit's decision upholding Act 620 absent proof that admitting privileges actually further the state's interest in health or safety directly conflicts with *Whole Woman's Health*.

B. Act 620 Will Cause Undue Burdens

Louisiana does not seriously dispute that, if certiorari is denied and Act 620 goes into effect, all but one clinic in Louisiana will close, and no physician will be left in the state who provides abortions after 17 weeks gestation. Pet. 26. Louisiana instead contends that it mounted a factually stronger causation defense than Texas and doubles down on the Fifth Circuit's erroneous causation standard. The certain collapse of abortion access, in the state's view, will be "entirely the fault of Louisiana abortion doctors." BIO 2.

Whole Woman's Health cannot be distinguished based upon the nature or quality of Louisiana's cau-

sation evidence. In contrast to the *circumstantial* causation evidence that the Court deemed sufficient in *Whole Woman's Health*, the district court in this case received *direct* evidence that Act 620 will cause clinic closures. Pet. 27-29, n.15. The Court also found causation was proven in *Whole Woman's Health* despite Texas's similar attempts to attribute H.B.2's burdens to physicians who failed to obtain admitting privileges. Pet. 28 n.14. Tellingly, Louisiana provides no response at all to these points.

The Fifth Circuit's causation standard also flies in the face of well-established law on causation, which recognizes states are responsible for the foreseeable consequences of their acts, even when other causes of the plaintiff's injury intervene. Pet. 29-30. Louisiana derides this as a "novel legal theory" but does not address the numerous cases cited in the Petition that affirm this bedrock principle. BIO 27. Moreover, even Louisiana's preferred cases acknowledge that "reasonably foreseeable" is the proper causation standard, and only unforeseeable "superseding" acts will "br[eak] the chain of causation between [the state's] conduct and the violation of [the plaintiff's] constitutional rights." *Wray v. City of New York*, 490 F.3d 189, 193-95 (2d Cir. 2007).[1]

Act 620 will cause undue burdens greater than those that required invalidation of H.B.2. Louisiana does not deny that such burdens were reasonably

[1] Louisiana's cases (*see* BIO 28) all involve unforeseen events and factors not present here such as qualified immunity.

foreseeable in 2014 when the state enacted Act 620 based upon H.B.2's "success" in closing Texas clinics one year earlier. App. 195a. The Fifth Circuit's decision to blame physicians for the state's interference with women's constitutional rights directly conflicts with *Whole Woman's Health*.[2]

C. The Fifth Circuit Misapplied the Undue Burden Test

Louisiana does not deny that the Fifth Circuit failed to balance Act 620's burdens and benefits. According to Louisiana, however, balancing was unnecessary here in light of the Court's discussion of the purported "substantial obstacle" requirement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). BIO 29-32. But *Whole Woman's Health* clarified this aspect of *Casey*, making plain that balancing is indispensable.

Rather than a separate requirement, *Whole Woman's Health* clarified that substantial obstacle is the legal conclusion that a court draws *after* considering a law's burdens together with its benefits. 136 S. Ct. at 2309. In other words, a court must always balance the law's burdens and benefits, and when

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[2] There is no merit to Louisiana's contention that Hope "invited" the Fifth Circuit's error by proffering evidence regarding physicians' efforts to obtain admitting privileges. BIO 28. Hope proffered this evidence to demonstrate that physicians are often denied privileges for reasons unrelated to patient safety or physicians' competency. *See, e.g.,* Pls.' Proposed Findings of Fact 7-15, 34-38, ECF No. 196. Hope did not expect this evidence to be marshalled by the Fifth Circuit in support of a flawed causation ruling.

the burdens outweigh the benefits, a court draws the legal conclusion that the law imposes a substantial obstacle to women's abortion decision. *Id.* at 2309-10, 2313. This is what *Casey* meant when it described an undue burden as "shorthand" for the "conclusion" that a law imposes a substantial obstacle. 505 U.S. at 877.

The Fifth Circuit's remade undue burden test guts *Whole Woman's Health*'s holding that courts have an obligation to ensure that burdens on women's abortion rights are justified by corresponding benefits.[3]

The other aspects of the undue burden framework that Louisiana invites the Court to "clarify" were likewise unambiguously resolved in *Whole Woman's Health*:

- Louisiana asks the Court to clarify that abortion restrictions are subject to rational-basis review. BIO 36. *Whole Woman's Health* reaffirmed *Casey* and held that it is "wrong to equate the judicial review applicable to" abortion restrictions with "less strict review

[3] Hope did not "forfeit" this argument based upon references to "substantial obstacle" in its submissions below. BIO 29. Nor is Louisiana correct that "[a]t least five circuits" apply a "substantial-obstacle requirement." BIO 31. Hope's submissions and the decisions of other circuits articulate "substantial obstacle" as the legal conclusion a court reaches after conducting the undue burden balancing test. *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 827-28 (7th Cir. 2018).

applicable" to "economic legislation." 136 S. Ct. at 2309.

- Louisiana asks the Court to clarify that states are not precluded from "extending" regulations applicable to "[ASCs] to abortion clinics." BIO 36. *Whole Woman's Health* held that Texas was precluded from doing just that. 136 S. Ct. at 2318.
- Louisiana asks the Court to clarify that states are not required to justify abortion laws by demonstrating the laws' requirements confer "*sufficient*" benefits. BIO 37. *Whole Woman's Health* held such proof is essential. 136 S. Ct. at 2300.
- Louisiana asks the Court to clarify that facial invalidation of abortion restrictions requires "*all*" women to be unduly burdened. BIO 37. *Whole Woman's Health* reaffirmed the proper standard is whether a law imposes undue burdens in "a large fraction of cases." 136 S. Ct. at 2320.

In short, the undue burden test urged by Louisiana directly conflicts with the one the Court reaffirmed and applied in *Whole Woman's Health*.

III. NO VEHICLE PROBLEMS EXIST

Louisiana's procedural arguments against certiorari lack merit.

Louisiana asks the Court to deny certiorari because Hope did not supply citations to underlying evidence. BIO 32-33. But the conflicts between the decision below and *Whole Woman's Health* are ap-

parent without remining the record. All the necessary facts (and evidence supporting them) are set forth in the district court's detailed opinion.

Louisiana next raises the specter of "complex" alternative grounds for affirmance, but its grounds are frivolous. BIO 33-35. Doe 3's testimony provides no basis to find that admitting privileges in Louisiana further patients' health. BIO 33-34. True, Doe 3 testified that he has used his admitting privileges on three occasions to admit abortion patients. ROA.7660-62. But the courts below found no evidence that these patients would have received lesser care had they been admitted by another physician. App. 38a n.56.

Meanwhile, Doe 2's "courtesy privileges" at a New Orleans hospital cannot mitigate Act 620's burdens. BIO 34. New Orleans is more than 30 miles from where Doe 2 provides abortions, and Doe 2's privileges in any event do not permit him to treat patients in the hospital after admission. App. 43a n.58, 238a. No "*Erie* guess" is needed to recognize that Doe 2's limited privileges do not satisfy Act 620. BIO 34. The courts below correctly held that Louisiana cannot declare privileges satisfactory that conflict with Act 620's plain language. App. 231a-41a.

Louisiana also suggests that this case presents a different question than *Whole Woman's Health* because Act 620 merely closes a regulatory "gap" and holds abortion providers to the same requirements as other outpatient physicians. BIO 4-5. This is simply incorrect. In Louisiana, admitting privileges are *not* mandated for all outpatient physicians, including many who perform surgeries. *See* La. Ad-

min. Code, tit. 46, pt. XLV, § 7309(A)(2)(a) (specifying requirements for "office-based surgery" in lieu of admitting privileges). Although Louisiana requires admitting privileges at ambulatory surgical centers, *Whole Woman's Health* squarely held that there is no justification for presumptively regulating abortion facilities like ASCs. 136 S. Ct. at 2314-18.

Picking up on Justice Kavanaugh's dissent from the Court's stay order, Louisiana urges the Court to deny certiorari and see whether Act 620's harms materialize. BIO 35. Denial of certiorari would entrench the Fifth Circuit's error-infected decision as circuit precedent, and it would send the destabilizing message that courts of appeal may negate the precedential effect of this Court's decisions with trivial factual distinctions. It would be much easier to resolve the law's legality at this juncture, with Act 620's implementation stayed, as opposed to enabling fits and starts going forward—coupled potentially with the need to rule on more emergency motions beyond the two the Court has already had to resolve in this case.

The consequences of denying certiorari are also clear. Louisiana does not dispute that Act 620 will be *immediately* enforceable notwithstanding the state's prior "Notice" outlining a 45-day procedure by which it intends to confirm clinics' compliance with the law. Pet. 37 n.18. Enforcement of Act 620 will shutter two of Louisiana's three remaining abortion clinics overnight. App. 255a. And Texas showed that clinics that close as a result of an admitting privileges requirement almost never survive, even if the law is eventually struck down. *See* Emergency

Appl. for a Stay 7. The harms to women in Louisiana would be irreparable and lasting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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