No. 18-1323

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., et al.,

Petitioners,

v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), this Court held that a state law requiring physicians who perform abortions to have admitting privileges at a local hospital was unconstitutional because it imposed an undue burden on women seeking abortions. The U.S. Court of Appeals for the Fifth Circuit upheld an admitting-privileges law in Louisiana that is identical to the one this Court struck down. This brief addresses the following issue:

Whether the Fifth Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court's binding precedent in *Whole Woman's Health*.

PARTIES TO THE PROCEEDINGS

Petitioners are June Medical Services L.L.C., a clinic that does business as Hope Medical Group, and two Louisiana physicians identified in the proceedings below by the pseudonyms Dr. John Doe 1 and Dr. John Doe 2. Hope has no parent company, and no publicly held company owns 10 percent or more of its stock.

Respondent is Dr. Rebekah Gee in her official capacity as Secretary of the Louisiana Department of Health.

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BRIEF FOR PETITIONERS

Petitioners June Medical Services L.L.C., Dr. John Doe 1, and Dr. John Doe 2 (collectively referred to as "Hope") respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 905 F.3d 787 (5th Cir. 2018) and reprinted at Pet. App. 1a-103a. The court of appeals' order denying rehearing en banc is reported at 913 F.3d 573 (5th Cir. 2019) and reprinted at Pet. App. 104a-31a. The district court's opinion declaring Louisiana's admitting-privileges law unconstitutional and permanently enjoining the statute and its implementing regulations is reported at 250 F. Supp. 3d 27 (M.D. La. 2017) and reprinted at Pet. App. 132a-279a.

JURISDICTION

The court of appeals issued its decision on September 26, 2018 and denied rehearing on January 18, 2019. Pet. App. 1a, 104a-05a. The petition for a writ of certiorari was filed on April 17, 2019, and the petition was granted on October 4, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

This case involves the Fourteenth Amendment to the U.S. Constitution; Louisiana Revised Statute § 40:1061.10 ("Act 620"); and Act 620's implementing regulations. Relevant portions of these provisions are reproduced at Pet. App. 285a-90a.

INTRODUCTION

A properly functioning legal system depends on certain basic operating principles. One is the maxim that legal holdings of higher courts are binding on lower courts. Another is that a trial court's factual findings govern on appeal unless clearly erroneous. Mundane as these rules may sound, and easy though they may be to slight for short-term advantage, courts do so at their peril. If the fundamental rules of the road are not honored in our most contentious cases, then the public and political branches may cease respecting the courts as true guardians of the rule of law.

This case poses a serious threat to these precepts. Just two years after this Court held in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), that Texas's law requiring abortion providers to have admitting privileges at local hospitals violated the Fourteenth Amendment, a divided panel of the Fifth Circuit deemed Louisiana's identical law constitutional. The panel majority declared it was "of course bound by" *Whole Woman's Health*, and it claimed it rejected the district court's findings that the cases are factually indistinguishable only after a "[c]areful review of the record." Pet. App. 2a, 31a.

But the substance of the panel's opinion belies these assertions. In reality, the panel simply refused to accept the holding of *Whole Woman's Health*, and it trampled the district court's expertise and meticulous explication of the record.

This Court should reverse.

STATEMENT OF THE CASE

A. Admitting-Privileges Laws And *Whole Woman's Health*

1. Beginning in 2012, several states, including Texas, passed laws requiring abortion providers to obtain admitting privileges at local hospitals. The laws were promptly challenged, and district courts around the country uniformly determined that these laws are medically unnecessary and do not advance women's health or safety. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953, 972-80 (W.D. Wis. 2015); *see also, e.g.*, *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1364-76 (M.D. Ala. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 901 (W.D. Tex. 2013); *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 420-21, 424 (S.D. Miss. 2013). The Seventh Circuit agreed with this consensus, holding that Wisconsin's admitting-privileges law imposed an undue burden on a woman's right to abortion. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016).

In October 2013, however, the Fifth Circuit stayed the injunction against Texas's law, H.B.2,[1] allowing the law to go into effect. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 409 (5th Cir. 2013). Numerous Texas clinics closed overnight, and all told about 20 clinics were ultimately shuttered statewide. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301, 2312 (2016). The Fifth Circuit later upheld Texas's law on the merits. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595-96 (5th Cir. 2014).

The Fifth Circuit upheld H.B.2 again the following year in *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015). In so doing, the Fifth Circuit expressly departed from the Seventh Circuit's analysis of Wisconsin's admitting-privileges law and made clear that it "disagree[d]" with any approach that considers whether an abortion restriction "actually further[s]" a legitimate interest in evaluating its constitutionality. *Id.* at 586, 587 n.33.

2. This Court granted certiorari in *Whole Woman's Health* to resolve the circuit split. It then reversed the Fifth Circuit, holding that Texas's admitting-privileges law was facially unconstitutional. 136 S. Ct. at 2310-14, 2318-20.

a. The Court first held that the Fifth Circuit applied the wrong standard. The Court explained that the Fifth Circuit's articulation of the undue burden

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[1] H.B.2 contained several abortion restrictions. References to H.B.2 in this brief are specific to the law's admitting-privileges requirement, unless otherwise indicated.

test wrongly implied that "legislatures, and not courts, must resolve questions of medical uncertainty." *Id.* at 2310. To safeguard the constitutional right of women to have access to abortion, the Court made clear that federal courts must assess the evidence presented in judicial proceedings and "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2309-10. Further, to be constitutional, a law's benefits must be "sufficient to justify [its] burdens." *Id.* at 2300.

b. The Court then analyzed H.B.2's benefits. Relying heavily on the district court's findings—which were based, in turn, on general medical evidence and studies conducted across the United States—the Court agreed that the admitting-privileges requirement provides "no . . . health-related benefit" to women. *Id.* at 2311. In particular, the Court credited the district court's findings that:

- "[T]he incidence of [abortion] complications requiring hospital admission was 0.23%." *Id.*
- In the rare event of a serious complication requiring hospitalization, "it is extremely unlikely" that a patient will experience the complication at the clinic, as most such complications occur in the days after the abortion once the patient has returned home. *Id.* Such a delay is common for surgical abortions and "expected for medical abortions" because a medical abortion almost always occurs after the patient has left the clinic. *Id.* In these circumstances, the patient will likely seek "medical attention at the hospital nearest her home." *Id.*

- If a complication requiring hospitalization does occur at the clinic, the "quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges." *Id.*

The Court also rejected the State's contention that H.B.2 protects women's health by requiring abortion providers "to be credentialed" by their peers, "thereby protecting patients from less than qualified providers." *Cole*, 790 F.3d at 579. The Court held that an "admitting-privileges requirement does not serve any *relevant* credentialing function," given the "undisputed general fact" that hospitals often deny physicians admitting privileges for reasons that "have nothing to do with" their competency or "ability" to perform abortions. *Whole Woman's Health*, 136 S. Ct. at 2312-13 (emphasis added). For example, the Court highlighted that many hospitals condition privileges on admitting a certain number of patients per year. *Id.* at 2312. Yet, doctors who perform abortions are "unlikely" to meet these requirements because "abortions are so safe." *Id.* And they also cannot satisfy "other common prerequisites" to admitting privileges that "have nothing to do with" their "ability to perform" outpatient abortion procedures, such as clinical-data requirements, residency requirements, requirements that an applicant accept a faculty appointment, and other discretionary factors unrelated to competency. *Id.*

c. Turning to H.B.2's burdens, the Court determined that the admitting-privileges requirement imposed numerous obstacles "in the path of a woman's choice." *Id.* (internal quotation marks and citation omitted). The Court observed that the number of

Texas clinics "dropped in half," "from about 40 to about 20," and that "H.B. 2 in fact led to the clinic closures." *Id.* at 2313. Patients of the remaining clinics faced numerous burdens, including longer travel distances, "fewer doctors, longer waiting times, and increased crowding." *Id.* at 2312-13.

d. The Court concluded that, "viewed in light of the virtual absence of any health benefit," the district court had correctly determined that H.B.2's admitting-privileges requirement imposed an undue burden on women's right to access abortion and was thus unconstitutional. *Id.*

B. Aftermath Of *Whole Woman's Health*

After the opinion in *Whole Woman's Health* issued, this Court treated the decision as resolving the constitutionality of all admitting-privileges laws. The Court had held petitions for certiorari pending its resolution of *Whole Woman's Health* in cases enjoining Wisconsin's and Mississippi's admitting-privileges requirements. Had the Court understood *Whole Woman's Health* simply to establish a legal framework for assessing the constitutionality of such laws on a state-by-state basis, it presumably would have granted, vacated, and remanded those petitions in light of *Whole Woman's Health*. The Court instead denied certiorari in both cases, allowing the injunctions to stand. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016) (No. 15-1200); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016) (No. 14-997).

Shortly thereafter, Alabama and Tennessee conceded in pending cases that their admitting-privileges laws were unconstitutional. *See* Mot. to Dismiss Appeal 1, *Planned Parenthood Se., Inc. v. Strange*, No. 16-11867 (11th Cir. July 15, 2016) ("Because Alabama's law is identical in all relevant respects to the law at issue in *Whole Woman's Health*, there is now no good faith argument that the law is constitutional under controlling precedent."); Joint Mot. to Enter Partial J. on Consent 4, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 13, 2017). And while a few other states, such as Oklahoma, did not concede their similar laws were unconstitutional, courts promptly blocked those laws on the basis of *Whole Woman's Health*. *See Burns v. Cline*, 387 P.3d 348 (Okla. 2016); *Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828 (S.D. Miss. 2018). *But see Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 758 (8th Cir. 2018) (vacating preliminary injunction of local admitting-privileges requirement and remanding for district court to "consider the evidence in the record" and weigh benefits against burdens (alteration and quotation marks omitted)).

C. Louisiana's Act 620

1. In early 2014, just months after H.B.2 shuttered clinics in Texas, the Louisiana legislature began considering an admitting-privileges requirement just like Texas's law. Pet. App. 189a.

Shortly before Act 620's passage, the leader of an anti-abortion advocacy group sent the Act's legislative sponsor an article touting H.B.2's "tremendous success in closing abortion clinics and restricting

abortion access in Texas." Pet. App. 195a. The leader explained that Act 620 "follows this model." *Id.* In hearings on the bill, witnesses reiterated to legislators that Act 620 would shutter facilities in Louisiana, just as H.B.2 had done in Texas. *See* ROA 11275 (testimony that Act 620 would "close health care facilities"); ROA 11246 (testimony stressing that H.B.2 had resulted in "the closure of half of the clinics in Texas" and that Act 620 was "pretty much the same bill").

2. By its own account, Louisiana not only "modeled" its admitting-privileges law on H.B.2, but the laws' admitting-privileges requirements are materially "identical." JA 45; *see also, e.g.*, Pet. App. 296a (characterizing H.B.2's admitting-privileges requirement as "identical to Louisiana's"); Resp't's Opp. to Emergency App. to Vacate Stay of Prelim. Inj. Pending Appeal 7, *June Med. Servs. LLC v. Gee* (No. 15A880) (referring to "identical privileges law in Texas"). Like H.B.2, Act 620 requires a physician to hold "active admitting privileges" at a hospital within 30 miles of the facility where an abortion is provided. Pet. App. 286a-87a. "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.* 287a. Violations of Act 620 are punishable by imprisonment, fines, license revocation, and civil liability. La. Rev. Stat. §§ 40:1061.10(A)(2)(c), 40:1061.29; *see also* La. Admin. Code tit. 48, pt. I, §§ 4401, 4415(B), 4417(A).

D. District Court Proceedings

1. Six physicians (identified by pseudonyms as Does 1 through 6) performed abortions in Louisiana in September 2014 when Act 620 was scheduled to take effect. Pet. App. 160a-65a. Each Doe physician without admitting privileges applied to one or more hospitals prior to the law's effective date.

2. While those applications were pending, in August 2014, Hope, Doe 1, and Doe 2 filed this lawsuit asserting that Act 620 was unconstitutional because it unduly burdened their patients' access to pre-viability abortion and violated their own due process rights under the Fourteenth Amendment. JA 24. The district court entered a temporary restraining order the day before the law's effective date. *June Med. Servs., LLC v. Caldwell*, No. 3:14-cv-525, 2014 WL 4296679 (M.D. La. Aug. 31, 2014).

The temporary restraining order did not enjoin Act 620; it simply enjoined the State from enforcing any penalties while the physicians sought privileges. *Id.* at *10; *see also Abbott*, 748 F.3d at 600 (holding that Texas's admitting-privileges law could not be enforced against a physician who had a pending application for privileges). The district court required the physicians to continue to seek privileges as the case progressed, *Caldwell*, 2014 WL 4296679, at *10, as well as to provide regular status updates on those applications, Pet. App. 160a n.20.

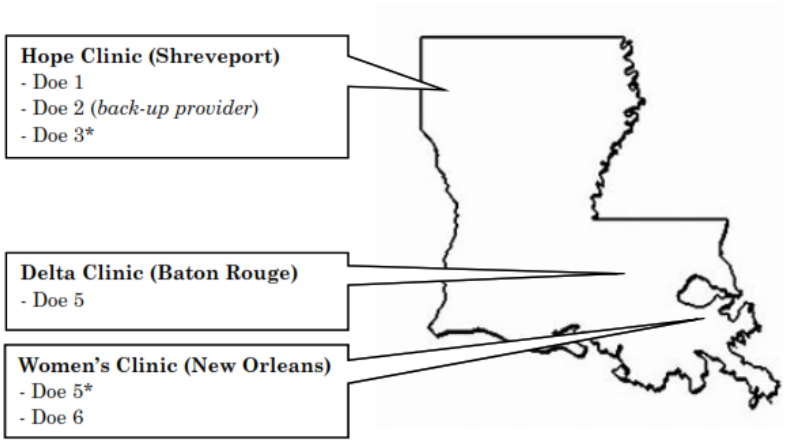
3. In June 2015, the district court held a 6-day bench trial on Hope's preliminary injunction motion, with 20 witnesses (including 12 live) and hundreds of exhibits. Pet. App. 140a-42a & n.3. In Louisiana's

own words, the lawsuit presented "the same undue burden challenge" that was simultaneously being litigated in *Whole Woman's Health*. JA 43. The district court granted a preliminary injunction in early 2016. Pet. App. 151a.

After this Court decided *Whole Woman's Health* in June 2016, the parties agreed that the district court could proceed to final judgment based largely on the evidence presented at the earlier hearing. Pet. App. 152a. By that time, one physician (Doe 4) had retired, *id.* 146a, leaving five physicians performing abortions at three clinics, *id.* 156a-60a. Only two of those five physicians had admitting privileges that qualified under Act 620: Doe 3 had privileges near Hope clinic in Shreveport, and Doe 5 had privileges near Women's clinic in New Orleans (but not Delta clinic in Baton Rouge, where he also worked).

LOUISIANA ABORTION CLINICS AND PROVIDERS

(*) indicates physicians with Act 620 qualifying admitting privileges



- Doe 4 (*retired 2016*)

In a 116-page opinion tracking *Whole Woman's Health*'s benefit-versus-burden analysis, the district court held Act 620 unconstitutional and permanently enjoined the law. Pet. App. 132a-279a.

The court first determined, based on factual findings tracking those in *Whole Woman's Health*, that Act 620's "admitting privileges requirement . . . provides no significant health benefits to women." Pet. App. 270a n.8 (alteration in original); *see also id.* 166a-82a, 201a-20a. The district court likewise found—again as in *Whole Woman's Health*—that admitting privileges "do not serve 'any relevant credentialing function.'" *Id.* 272a (quoting *Whole Woman's Health*, 136 S. Ct. at 2313). The court explained that the Louisiana State Board of Medical Examiners ("LSBME") already "ensures physician competency through licensing and discipline," *id.*, and the record in the case demonstrated that admitting privileges can be denied for reasons other than competency, *see id.* 171a-73a. In fact, the district court found that each doctor who sought privileges made "good faith efforts" to comply with Act 620—notwithstanding the "Kafka"-esque processes required by Louisiana hospitals—and was denied (or de facto denied) for reasons unrelated to his competency. *Id.* 222a.

Turning to the burdens side of the ledger, the district court held that Louisiana's admitting-privileges requirement would "cripple women's ability to have an abortion in Louisiana." Pet. App. 274a.

Much like H.B.2's effect in Texas, the district court found that two of Louisiana's three abortion clinics (Hope and Delta) would close. Pet. App. 254a.

"If Act 620 were to be enforced, three of the five doctors"—Does 1, 2, and 6—"would not meet the admitting privileges requirement." *Id.*; *see also* JA 704, 1315 (Doe 1); JA 377, 1318-19 (Doe 2); JA 1311 (Doe 6). Doe 5 would not meet the requirement in Baton Rouge but would in New Orleans. Pet. App. 244a-45a, 253a-55a. And Doe 3, despite having privileges in Shreveport, would stop performing abortions because Hope would not be a "viab[le]" going concern once Doe 1 (who provided over 70% of its abortion services) could no longer work there. *Id.* 156a, 256a. All told, only one provider (Doe 5) at one clinic (Women's) would remain, to provide services for the approximately 10,000 women per year seeking abortions. *Id.* 255a-56a.

LOUISIANA ABORTION CLINICS AND PROVIDERS

abortion access post-Act 620 as found by the district court

Just as in *Whole Woman's Health*, the district court found that "fewer physicians" meant women will encounter "longer waiting times for appointments" and "increased crowding" and "will have to

travel much longer distances"—burdens "which will fall most heavily on low-income women." Pet. App. 258a, 274a. That would lead to "delays in care, causing a higher risk of complications, as well as a likely increase in self-performed, unlicensed and unsafe abortions." *Id.* 260a.

E. Appellate Proceedings

1. a. A divided panel of the Fifth Circuit reversed, asserting that differences between "facts and geography" in Louisiana and Texas dictated a different outcome than in *Whole Woman's Health*. Pet. App. 2a, 31a. In Louisiana, the court of appeals declared, "no woman would be *unduly* burdened and thus unconstitutionally burdened by" an admitting-privileges law. *Id.* 53a.

The Fifth Circuit agreed that there was no evidence in the record that Act 620 would actually improve health outcomes for Louisiana women. Pet. App. 38a n.56. The court of appeals nonetheless claimed that Act 620 provided a "minimal benefit." *Id.* 34a. According to the panel majority, the law would help ensure that physicians have adequate credentials. *Id.* 35a-36a. The Fifth Circuit also stated that Act 620 operated to bring the standards for abortion providers into conformity with the requirements applied to ambulatory surgical centers. *Id.* 37a.

As for Act 620's burdens, the Fifth Circuit did not disturb the district court's findings that *at most* only two providers, Does 3 and 5, could lawfully provide abortion care if Act 620 went into effect—and Doe 5 only at one of the clinics where he worked (Women's).

Pet. App. 47a. But the Fifth Circuit held that, except for Doe 1, the reduction in providers could not be attributed to the Act. Discarding the district court's explicit findings that each of the physicians made good faith efforts to obtain privileges, the Fifth Circuit concluded that the other physicians did not pursue admitting privileges with sufficient vigor, and their lack of effort was an "intervening cause" that broke the chain of causation between Act 620 and any subsequent decrease in abortion access. *Id.* 49a. The Fifth Circuit also discounted Doe 3's trial testimony that, even if Hope could hang on for some time without Doe 1, he would stop providing abortions out of concern for his safety if Act 620 took effect—characterizing Doe 3's representation as merely a "personal choice." *Id.* 48a. Finally, the Fifth Circuit opined that the burdens associated with the loss of Doe 1 would not be "substantial," assuming that Does 2 and 3 would work hundreds of additional hours per year to make up for his loss. *Id.* 46a, 51a-53a.

Having found for itself that Act 620 would impose only "insubstantial burdens," the Fifth Circuit declared that it need not balance the law's benefits and burdens. According to the Fifth Circuit, its burdens analysis alone rendered the law constitutional. Pet. App. 60a.

b. Judge Higginbotham dissented. He catalogued numerous ways in which the panel "fail[ed] to meaningfully apply" *Whole Woman's Health*. Pet. App. 60a. He deemed it "beyond strange" that the panel majority violated the cardinal rule that "appellate judges are not the triers of fact." *Id.* 61a, 67a. And he showed that the panel majority's application of the

undue burden test suffers from precisely the same errors for which "[t]he Supreme Court has previously admonished [the Fifth Circuit]." *Id.* 95a.

2. Six other judges unsuccessfully urged rehearing the case en banc. Judge Dennis explained that a "straightforward" application of *Whole Woman's Health* "leads to one possible result": Because Act 620 "has no medical benefit" and "will restrict access to abortion," it is "surely" unconstitutional. Pet. App. 119a. Judge Dennis also criticized the panel majority for its "egregious and pervasive" disregard for the proper role of appellate judges by "impermissibly review[ing] the evidence de novo." *Id.* 115a, 120a.

Judge Higginson wrote separately to reiterate that Act 620 is "equivalent in structure, purpose, and effect to the Texas law invalidated in *Whole Woman's Health*." Pet. App. 130a. Even if the panel were correct that Act 620 would not impose as severe a burden in Louisiana as H.B.2 imposed in Texas, he would still have concluded that "Supreme Court law" renders Act 620 unconstitutional because it provides at most "minimal benefits." *Id.* 131a.

3. This Court granted Hope's emergency application to stay the Fifth Circuit's mandate and later granted certiorari.

SUMMARY OF THE ARGUMENT

I. *Whole Woman's Health* controls this case.

A. Adherence to this Court's precedent is a touchstone of our judicial system. It promotes stability and public confidence in the rule of law, denying lower courts license to construe this Court's decisions in an overly crabbed manner. As particularly relevant here, when the Court invalidates a law or government practice, finding that it furthers no valid state interest based on facts common across jurisdictions, that decision casts a pall over other materially identical laws.

That is what happened in *Whole Woman's Health*. The Court concluded that Texas's law provided no health or safety benefits based not on Texas-specific facts, but instead on peer-reviewed studies, expert testimony about generally applicable facts, and other information about how admitting privileges work on a national rather than state-wide basis. And while the Court's determination that the Texas law imposed an undue burden on women's access to abortion was based in part on evidence of abortion clinic closures in Texas, the Court gave no indication that the result would be different in other jurisdictions. Rather, the Court identified numerous reasons why conditioning outpatient abortion care on hospital admitting privileges disqualifies competent providers and burdens abortion access.

B. Louisiana's admitting-privileges law is materially indistinguishable from the Texas law the Court invalidated in *Whole Woman's Health*.

1. After an extensive review of the record, the district court concluded that both the Louisiana law's benefits and its burdens are no different from those of the Texas law at issue in *Whole Woman's Health*.

As with the Texas law, Act 620 confers no health or safety benefit beyond existing law. Abortion in Louisiana, the district court found, is extremely safe, and there is no example of any instance in which admitting privileges would have avoided a negative health outcome or resulted in better treatment. The district court further found that Act 620, again like the Texas law, served no credentialing function. Louisiana assures physician competence through other means. And abortion providers in Louisiana are often denied privileges for reasons unrelated to their competency.

The district court also found that the burdens of Act 620 were, if anything, greater than those of the Texas law in *Whole Woman's Health*. The court determined that, while the Texas law resulted in closure of about half of that state's clinics, Act 620 would result in the closure of two of Louisiana's three clinics, with only one physician left to provide abortion care in the whole state. And the burden on Louisiana women was magnified, the court found, because, for various reasons, women in Louisiana already face especially high barriers to obtaining abortion care.

2. The Fifth Circuit erred in substituting its own factfinding for the district court's. A court of appeals may not disregard a trial court's findings of fact unless the findings are implausible in light of the entire record. That standard is not remotely satisfied here.

In particular, the court of appeals concluded for two reasons that Act 620 had "minimal" benefits. First, disagreeing with the district court, the Fifth Circuit asserted that Act 620 serves a "credentialing" function. This assertion defies not only the record but also logic. Admitting privileges are designed to verify a physician's competence to perform *in*patient procedures—not outpatient procedures like abortion. Indeed, the Fifth Circuit identified no evidence that the physicians here who have been denied admitting privileges were denied for competence reasons. Second, the court of appeals claimed that Act 620 would conform the standards for abortion clinics to those of ambulatory surgical centers. But Texas made exactly the same argument in *Whole Woman's Health*, and this Court nevertheless held that the Texas law there provided no benefit at all.

The Fifth Circuit also concluded that any burden imposed by Act 620 was, in contrast to the Texas law, not "substantial." Pet. App. 2a. That conclusion, too, simply ignored the district court's meticulous, record-based analysis. To take just one example, the Fifth Circuit concluded that the inability of physicians other than Doe 1 to obtain admitting privileges was not caused by Act 620, but by the physicians' failure to try hard enough. But that conclusion is contrary to this Court's analysis in *Whole Woman's Health*, which found causation based on the fact that many Texas clinics closed when the law went into effect (and more would close had it continued in effect)—exactly the same as the evidence here. In any event, the district court's factfinding (and the record on which that factfinding was based) makes clear that

physicians who were unable to obtain admitting privileges made good faith efforts to do so. Indeed, the district court monitored the physicians' efforts to obtain privileges for a year and a half before reaching that conclusion.

II. Even if the Fifth Circuit were correct that Act 620 imposes burdens that are less severe than the Texas law imposed, Act 620 would still be unconstitutional.

A. The undue burden test requires courts to balance a woman's liberty interest in determining whether to carry her pregnancy to full term against the state's legitimate regulatory interests. It follows that when a law serves *no* health or safety benefit, any burden imposed by the law is by definition undue. And here, Act 620 fails that maxim. Just like the Texas law in *Whole Woman's Health*, Act 620 provides no benefit at all. At the same time, it indisputably imposes at least some burden on Louisiana women's right to pre-viability abortion.

B. Act 620 would still be unconstitutional were the Fifth Circuit somehow correct that Act 620—in contrast to Texas's H.B.2—provided "minimal" benefits. Even a minimal benefit here would not outweigh the burdens Act 620 would impose. Yet the Fifth Circuit refused to balance Act 620's burdens and benefits once it determined for itself that the law's burdens alone would not be "substantial." Pet. App. 31a. This legal holding is wrong. *Whole Woman's Health* insisted that courts adjudicating challenges to abortion regulations must always "consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." 136 S. Ct. at 2309 (emphasis

added). Any other test, permitting laws to stand when their burdens outweigh their benefits, would effectively strip a woman's right to abortion of its status as a fundamental right.

ARGUMENT

I. *WHOLE WOMAN'S HEALTH* CONTROLS THIS CASE.

A. When, As In *Whole Woman's Health*, This Court Declares A Law Unconstitutional, Materially Indistinguishable Laws Are Invalid As Well.

1. *Declaring A Law Unconstitutional Is Different From Resolving A Purely Fact-Based Dispute.*

"Adherence to precedent is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). Such fidelity "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *Stare decisis* thus functions as "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). The doctrine not

only constrains this Court but also "discourag[es] adventurous second-guessing by widely dispersed subaltern judges." Bryan A. Garner, Neil M. Gorsuch, Brett M. Kavanaugh, et al., The Law of Judicial Precedent 30 (2016).

One reason *stare decisis* is "both wise and necessary," *id.*, is that this is a Court of limited resources. After sufficient percolation, this Court's typical practice is to select a single test case among many to resolve the legality of a given type of law or governmental practice. *See, e.g.*, *Florence v. Bd. of Chosen Freeholders of Burlington Cty.*, 132 S. Ct. 1510 (2012) (local laws permitting strip searches in jails); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011) (state laws banning violent video games). When this Court invalidates a law because it restricts constitutional rights while failing (for reasons that are common across jurisdictions) adequately to further a valid state interest, that decision casts a pall over the constitutionality of all equivalent laws.

The Montana sequel to *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)—*American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012)—is exemplary. In *Citizens United*, the Court held that a federal law restricting independent corporate political expenditures violated the First Amendment. The Court based its decision on broadly applicable facts, including the value of political speech in a democracy and the ill fit between the government's asserted rationales and the restrictions imposed. *See Citizens United*, 558 U.S. at 339-40, 352-53. Two years later, the Montana Supreme Court addressed a state law that likewise prohibited

independent corporate expenditures on behalf of political candidates. Declaring that "*Citizens United* was a case decided upon its facts," the Montana Supreme Court upheld Montana's law based on purportedly "critical" local distinctions, including Montana's special history of corruption and the slight "regulatory burden" it imposed. *W. Tradition P'ship, Inc. v. Atty. Gen.*, 271 P.3d 1, 5-7 (Mont. 2011). This Court summarily reversed in a single paragraph, declaring that Montana's arguments "fail[ed] to meaningfully distinguish" *Citizens United*. *Am. Tradition P'ship*, 567 U.S. at 516-17.

Another illustration cements the point. In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12 (1986), the Court struck down a California law allowing magistrates to close preliminary criminal hearings, holding that these hearings were "sufficiently like a trial" that the First Amendment required public access. Seven years later, the Puerto Rico Supreme Court considered a rule likewise allowing closed preliminary hearings—a rule "similar in form and function" to (and indeed, based on) the California law the Court invalidated in *Press-Enterprise*. *See El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 148-51 (1993). The Puerto Rico Supreme Court upheld the Puerto Rico rule, stressing the "unique history and traditions of the Commonwealth" and Puerto Rico's "small size and dense population." *Id.* at 149. This Court summarily reversed, holding that "[t]he decision below is irreconcilable with *Press-Enterprise*." *Id.*

2. Whole Woman's Health *Invalidated Texas's Admitting-Privileges Law For Reasons That Extend Beyond Texas.*

Like the Montana Supreme Court in *American Partnership* and the Puerto Rico Supreme Court in *El Vocero de Puerto Rico*, the Fifth Circuit viewed *Whole Woman's Health* as turning purely on Texas's particular "facts and geography." Pet. App. 31a. This was error. This Court invalidated Texas's admitting-privileges requirement based in large part on nationally applicable facts about how those requirements operate. The decision thus has *stare decisis* effect beyond the borders of Texas.

In particular, the Court's finding in *Whole Woman's Health* that local admitting-privileges requirements have no health or safety benefits for women who obtain an abortion did not depend on facts unique to Texas. To the contrary, the Court's analysis centered on "peer-reviewed studies" and "expert testimony" about generally established medical facts, and information supplied by medical organizations and professionals with firsthand expertise in how admitting privileges work at hospitals nationally. *Whole Woman's Health*, 136 S. Ct. at 2311-12.

Take *Whole Woman's Health*'s endorsement of the district court's finding that the Texas law was a solution in search of a problem. *Id.* at 2311. The Court upheld this finding after relying on data from across the country demonstrating that abortion has a very low incidence of complications requiring hospitalization. *Id.* The Court discussed "at least five peer-reviewed studies on abortion complications in the first trimester[] showing that the highest rate of major

complications—including those complications requiring hospital admission—was less than one-quarter of 1%." *Id.* The Court also cited "[f]igures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200)." *Id.* Additionally, the Court noted the universal fact that complications are most likely to occur after the patient has left the clinic, when she should seek care at the hospital closest to her home. *Id.* This general data made the law a very poor fit for helping women obtain better hospital treatment for any abortion complications. *Id.*

To be sure, the Court concluded that H.B.2 imposed an undue burden on abortion access by weighing "the virtual absence of any health benefit" against the clinic closures that H.B.2 "brought about" in Texas. *Id.* at 2313. But nothing in the Court's opinion suggests that, given the failure of admitting privileges to further women's health and safety, the Court expected this balance would be reversed in another state. On the contrary, the Court relied in part on "general undisputed fact[s]" "to explain why the new requirement led to the closure of clinics." *Id.* at 2312. "In a word," doctors in Texas (as elsewhere) "would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit." *Id.* Doctors also would be precluded from providing abortions for reasons "that have nothing to do with [the] ability to perform medical procedures." *Id.*

B. Louisiana's Admitting-Privileges Law Is Materially Indistinguishable From The Texas Law In *Whole Woman's Health*.

There is every reason in this case for the Court to demand fidelity to its three-year-old decision in *Whole Woman's Health*. The district court supervised the compilation of a voluminous record and made detailed findings that there are no meaningful distinctions between this case and *Whole Woman's Health*. A majority of the Fifth Circuit panel set aside those findings. But in doing so, it transgressed fundamental principles concerning the rule of law and appellate review.

1. *The District Court Found That The Facts Of This Case Are Materially Indistinguishable From* Whole Woman's Health.

a. In *Whole Woman's Health*, this Court found no evidence that H.B.2 advanced women's health or safety in any way. 136 S. Ct. at 2311. The Court credited the district court's findings that "abortion in Texas was extremely safe with particularly low rates of serious complications" before H.B.2 and that Texas was unable to present "a single instance in which the new requirement would have helped even one woman obtain better treatment." *Id.*

Similarly, the district court here—citing expert testimony, an array of other record evidence, and "broad consensus"—found that, "in the decades before [] Act [620]'s passage, abortion in Louisiana" was "extremely safe." Pet. App. 218a-19a, 271a & n.54. The court also noted that "[s]erious complications requiring transfer directly from the clinic to a hospital

are extremely rare" in Louisiana. *Id.* 210a; *accord Whole Woman's Health*, 136 S. Ct. at 2311. Further, there was no evidence in the record "that complications from abortion were being treated improperly, nor any evidence that any negative outcomes could have been avoided if the abortion provider had admitting privileges at a local hospital." Pet. App. 271a.

Just as in Texas, the district court also found that the record was devoid of any instance in which the admitting-privileges requirement would have helped even one woman obtain better treatment. Pet. App. 215a. All of Louisiana's clinics have extremely low complication rates. *Id.* 212a-14a. For instance, Hope clinic, "which serves in excess of 3,000 patients per year, had only four patients who required transfer to a hospital for treatment" in "the last 23 years." *Id.* 212a. Moreover, "[i]n each instance, regardless of whether the physician had admitting privileges, the patient received appropriate care." *Id.*

As far as any alleged credentialing benefit, *Whole Woman's Health* credited the district court's finding that Texas physicians who provide abortions had in fact been denied admitting privileges for reasons unrelated to their qualifications and competence. 136 S. Ct. at 2312-13 (citing experience of Dr. Lynn as one example). This finding supported the Court's conclusion that Texas's law did "not serve any *relevant* credentialing function." *Id.* at 2313 (emphasis added). The Court further rejected Texas's arguments that (i) admitting-privileges requirements weeded out unqualified providers, (ii) Texas clinic hiring practices could not be trusted because clinics had a "conflict of interest," and (iii) there was no alternative method to

admitting privileges to assure physician competency. *See* Br. of Resp'ts 33, *Whole Woman's Health*, 136 S. Ct. 2292 (citing trial testimony of Dr. James Anderson).

Just like Texas's H.B.2, the district court found that Act 620 "do[es] not serve 'any relevant credentialing function.'" Pet. App. 272a (quoting *Whole Woman's Health*, 136 S. Ct. at 2313). As an initial matter, the court found that all of the Doe physicians were qualified—noting, for example, that all are board-certified OB/GYNs or family medicine physicians with a decade or more of experience. *See, e.g.*, *id.* 160a-65a, 244a, 249a. Further, although competency is "a factor" that hospitals consider, *id.* 171a, the district court determined—exactly as did the Court in *Whole Woman's Health*—that hospitals "may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency," *id.* 172a. The district court also credited an array of evidence that the Does, in particular, were repeatedly denied admitting privileges for reasons unrelated to their competency as outpatient providers, including bias against abortion providers. *Id.* 220a-51a.

Finally, the Court in *Whole Woman's Health* concluded that H.B.2 did not provide a benefit beyond preexisting law in *any* way, 136 S. Ct. at 2311, and the district court here reached the same conclusion about Act 620. Before the Act, Louisiana (like Texas) required that physicians at an abortion clinic either have admitting privileges or a transfer agreement with a physician who had such privileges at a local hospital. *See id.* at 2310; 25 Tex. Admin. Code

§ 139.56(a)(1); former La. Admin. Code tit. 48, pt. I, § 4407(A)(3), available at 29 La. Reg. 706-07 (May 20, 2003). More generally, as in Texas, Louisiana law regulated abortion clinics and their physicians in numerous respects. LSBME "ensures physician competency," Pet. App. 272a, by, for example, conducting criminal background checks and licensing physicians to "ensure" that providers are "competent," *see* JA 802-03 (Louisiana's expert); *see also* JA 1355-56 (LSBME's 30(b)(6) witness). Abortion clinics also are subject to health-related standards and inspections. *See, e.g.*, Pet. App. 194a.

In short, the district court concluded that the admitting-privileges law would "not improve the safety of abortion in Louisiana" and would be an "inapt remedy for a problem that does not exist." Pet. App. 215a.

b. The district court here made findings showing that Act 620's burdens would, if anything, be more severe than the Texas law in *Whole Woman's Health* imposed. While the Court found that the Texas law led to the closure of about half of the state's clinics, *see Whole Woman's Health*, 136 S. Ct. at 2312, the district court found Act 620 would force two of Louisiana's three abortion clinics to close, leaving only one physician in the state who could provide care, Pet. App. 273a-74a. Consequently, 70% of women who currently obtain abortions in Louisiana would no longer be able to do so. *Id.* 256a.

The district court also found that the Act would impose burdens on women beyond clinic closures, including longer wait times and greater driving distances, which would lead to delay in obtaining abortions and therefore a higher risk of complications, as

well as increased risk of self-performed, or unsafe abortions. Pet. App. 258a, 274a. *Compare, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2313 (relying on increased distances of 150 to 200 miles); *with* Pet. App. 262a (citing increased distance of 320 miles for some Louisiana women).

What is more, the district court noted several ways in which Louisiana women were *less* able than Texas women to overcome barriers to abortion access. Those included that Louisiana is the third poorest state in the country, and likely has a disproportionately higher percentage of women seeking abortion care who are living in poverty. Pet. App. 261a. Additionally, 75% of women seeking abortion in Louisiana—higher than the national average—already have at least one child, meaning a greater proportion would struggle to make childcare arrangements while juggling long-distance travel for medical services. *Id.* 261a-62a. And, unlike in Texas, where women living more than 100 miles from an abortion clinic are excused from the state's otherwise mandatory two-trip law, Louisiana law has no such exception; it requires all women to make at least two trips to a provider before they can obtain an abortion, regardless of how far they have to travel. *Id.* 262a-63a. *Compare* Tex. Health & Safety Code § 141.012(a)(4); *with* La. Rev. Stat. § 40.1061.17(B)(3) (imposing 24-hour mandatory delay which necessitates two trips to clinic).[2]

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[2] In 2016, Louisiana passed Act 97, which extended the 24-hour mandatory-delay period to 72 hours. *See* 2016 La. Sess. Law Serv. Act 97 (H.B.386) (codified at La. Rev. Stat.

2. *The Fifth Circuit Had No Warrant To Reject The District Court's Findings.*

As this Court repeatedly has emphasized, an "appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction [or] resolve the ambiguities differently.'" *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857-58 (1982) (quoting *United States v. Real Estate Bds.*, 339 U.S. 485, 495 (1950)). This rule promotes "the public interest in . . . stability and judicial economy . . . by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts." Advisory Comm. Notes to Fed. R. Civ. P. 52; *see also* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 764-71, 778-82 (1957).

Accordingly, a district court's factual findings must govern on appeal so long as they are "plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). All the more so with respect to "determinations of credibility and demeanor," which "lie peculiarly within a trial judge's province." *Davis v. Ayala*, 135 S. Ct. 2187, 2201 (2015) (quotation marks omitted). And appellate review is "even more deferential" still where, as here, the trial court's findings comport with the findings of "multiple" other courts (including this Court) in similar cases. *Glossip v. Gross*, 135 S. Ct.

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§ 40:1061.17(B)(3)). This increase in mandatory delay, however, is not currently being enforced.

2726, 2740 (2015); *see also supra* at 3, 8 (citing several other courts making or accepting similar findings).

The Fifth Circuit majority nevertheless took a decidedly different view of the record than the district judge who presided over trial and the multiple other courts that have assessed the constitutionality of admitting-privileges laws. It found that Act 620 actually confers a benefit—though a "minimal" one. Pet. App. 39a. The majority also believed—contrary to the district court's assessment—that Hope "failed to establish a causal connection" between Act 620 and many of the burdens the district court identified. *Id.* 40a.

The Fifth Circuit erred on both sides of the ledger. There is far more than "adequate legal and factual support" in the record for the district court's conclusions. *Whole Woman's Health*, 136 S. Ct. at 2311. The Fifth Circuit lacked the authority to reject the district court's factual findings.

a. The Fifth Circuit Erred In Finding That Act 620 Confers Benefits.

The Fifth Circuit *agreed* with the district court that Louisiana "did not provide any instance in which a worse result occurred because the patient's abortion doctor did not possess admitting privileges." Pet. App. 38a-39a n.56. The Fifth Circuit nonetheless theorized that Act 620 is beneficial—albeit "minimal[ly]"—because it supposedly (i) performs a relevant credentialing function, and (ii) conforms standards for abortion providers to those for ambulatory

surgical centers ("ASCs"). *Id.* 35a-39a. Both theories contradict record evidence.

Credentialing. The Fifth Circuit concluded that, "unlike in [*Whole Woman's Health*], the record here indicates that the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." Pet. App. 38a-39a. But credentialing *was* addressed in *Whole Woman's Health*, and this Court rejected those arguments. *See supra* at 6. The Court noted that admitting privileges are ill-suited to assess the competency of outpatient abortion providers. *See Whole Woman's Health*, 136 S. Ct. at 2312.

In any event, the record here flatly contradicts the notion that Act 620 could somehow "promote[] the wellbeing of women" through credentialing. Hospitals' credentialing processes are designed to verify physicians' competency to provide *inpatient* hospital care, not *outpatient* procedures. *See, e.g.*, JA 1044-45, 1435-36, 1447-57. What is more, if credentialing were really the point of Act 620, the 30-mile limitation in the law would "make[] little sense." Pet. App. 127a; *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 797 (7th Cir. 2013) (ostensible credentialing "benefit does not require that the hospital . . . be within a 30-mile radius of the clinic").

The Fifth Circuit nevertheless cited two specific concerns regarding the vetting of physicians done by clinics that it supposed vetting by hospitals might address. Both concerns are unfounded.

First, the Fifth Circuit cited testimony from Doe 3 that he does not perform criminal background checks on doctors who apply to his clinic. Pet. App. 22a, 35a-36a. But that makes no difference, since all physicians in Louisiana must be licensed by LSBME, *id.* 272a, and that agency already conducts rigorous background checks (including for criminal records) as part of the licensure process, *see supra* at 12, 29. Thus, the district court observed that LSBME already adequately "ensures physician competency through licensing and discipline." Pet. App. 272a.[3]

Second, the Fifth Circuit expressed fears over the fact that a radiologist and an ophthalmologist might perform abortions absent the admitting-privileges requirement. Pet. App. 22a, 36a n.53. But these fears are medically unwarranted and legally baseless in any event. Before Act 620, Louisiana law already barred physicians other than OB/GYNs and family

[3] Pursuant to Louisiana's Physician's Medical Practice Act, LSBME is charged with protecting patients from the "unprofessional, improper, unauthorized, and unqualified practice of medicine." La. Rev. Stat. § 37:1261. LSBME fulfills that mission by verifying a physician's qualifications and competency prior to issuing a medical license. *Id.* § 37:1272. Moreover, if a physician fails "to practice within the scope" of his "education, training, and experience," LSBME may "suspend," "revoke," or "impose . . . restrictions on" that physician's license. *Id.* § 37:1285(13). As Dr. Robert Marier, Louisiana's expert in physician credentialing (and the former head of LSBME (JA 802)), testified, LSBME "ensure[s] that patients receive high quality medical care" and that "providers are competent." JA 820-21. If a physician is performing procedures that he is not "qualified" or lacks the "training and experience to provide," Dr. Marier testified that LSBME has the authority and responsibility to act. JA 845-46.

medicine doctors from performing abortions. *See* 2013 La. Sess. Law Serv. Act 259 (S.B.90) (codified at La. Rev. Stat. § 40:1061.10(A)(1)).

Conformity. The Fifth Circuit also suggested that Act 620 improved existing law because it conformed standards for abortion facilities and ASCs in Louisiana, and that this "benefit" was not presented in *Whole Woman's Health*. Pet. App. 37a-38a. That contention is equally flawed.

To start, Texas defended H.B.2 on conformity grounds, claiming through its expert that "hospital credentialing" is "mandated in other areas of elective surgical procedures" and that H.B.2 merely ensured that "abortion-providing physicians are held to the same standards as other physicians." Joint App. 883-84, *Whole Woman's Health*, 136 S. Ct. 2292. Texas also advanced all the "reasons" that the Fifth Circuit attributed to conformity in defense of H.B.2, including "continuity of care," "evaluating physician competency," "reducing miscommunications between doctors," and "preventing patient abandonment." Br. of Resp'ts 32-33, *Whole Woman's Health*, 136 S. Ct. 2292. But the Court in *Whole Woman's Health* was not moved by that argument, and in fact rejected the premise that abortion facilities must be regulated like ASCs. 136 S. Ct. at 2315.

Besides, Act 620 does *not* make regulation of abortion more consistent with regulation of other procedures in Louisiana. Louisiana does not condition physicians' ability to perform any outpatient procedures, except abortion, on obtaining admitting privileges. For example, although Act 620 requires doctors who perform only medication abortions to obtain

local admitting privileges, Louisiana law imposes no such requirement on other doctors who prescribe only medication. Nor does Louisiana require physicians performing procedures similar to or less safe than abortion—such as colonoscopy, hernia repair, and dilation and curettage—to obtain admitting privileges. Pet. App. 208a-09a; *see, e.g.*, La. Admin. Code tit. 46, § 7309(A)(2)(a)(ii) (physician performing office-based surgery need not possess staff privileges if he "completed residency training in a specialty that encompasses the procedure performed in an office-based surgery setting"). This is because Louisiana law generally regulates outpatient surgery based on the type of anesthesia used, not based on the type of procedure performed.[4] And at the time of Act 620's passage, abortion providers in Louisiana were already "in conformity" with the state's requirements for outpatient facilities offering at most moderate anesthesia. *See supra* at 34-35 (even before Act 620's passage, Louisiana law required abortion providers to have completed OB/GYN or family medicine residency). In other words, Act 620 does not "correct[] [a] regulatory

[4] *See generally* La. Admin. Code tit. 46, § 7301 et seq. (office-based surgery regulations); La. Admin. Code tit. 48, § 4401 et seq. (abortion facility regulations); La. Admin. Code tit. 48, § 4501 et seq. (ASC regulations). ASCs in Louisiana are allowed to offer general anesthesia, and thus are subject to more stringent regulations. *See* La. Admin. Code tit. 46, § 7307. Abortion facilities in Louisiana do not use general anesthesia and many abortions in the first trimester do not involve a procedure at all and are completed with only medication. Pet. App. 210a-11a. Thus, of the various facility schemes in effect in Louisiana, the ASC scheme is not an apt comparator.

gap," BIO 5, but creates a mismatch between abortion-related and other regulations.

b. The Fifth Circuit Erred In Opining That Act 620 Would Not Burden Abortion Access.

As to Act 620's burdens, the Fifth Circuit found that no clinics in Louisiana would close and that Act 620 would not unduly burden even one woman. Pet. App. 50a, 53a. Finding no "substantial" burdens, the Fifth Circuit claimed that *Whole Woman's Health* does not control and that balancing Act 620's burdens and benefits was unnecessary. But the Fifth Circuit was able to arrive at that conclusion only by ignoring the district court's factual findings, which were not clearly erroneous. In particular, the Fifth Circuit offered three separate reasons for why Act 620's burdens would be insubstantial. Each is legally and factually wrong.

Ability to obtain admitting privileges in Louisiana. According to the Fifth Circuit, "[a]lmost all" Texas hospitals condition privileges on providers' ability to admit a minimum number of patients per year, while "[f]ew" Louisiana hospitals do. Pet. App. 2a; *see also id.* 41a-42a. Indeed, because patient-minimum requirements are supposedly "less prevalent" in Louisiana, *id.* 42a, the Fifth Circuit found that admitting privileges are not "overly burdensome" there, *id.* 47a, and that abortion providers could surely get them, if only they put in the effort, *id*. 40a-41a.

This betrays a fundamental misunderstanding of the record both in *Whole Woman's Health* and here. In *Whole Woman's Health*, the Court did not find that

almost all Texas hospitals impose rigid patient minimums. It sufficed that hospitals "often" impose such requirements. *Whole Woman's Health*, 136 S. Ct. at 2312 (quotation marks omitted). Moreover, while some Texas hospitals imposed express patient-minimum requirements, many more *impliedly* imposed the same requirement via other rules and responsibilities that only physicians who regularly admit patients could meet. *See* Br. for Med. Staff Prof'ls as *Amici Curiae* 21-22, 31-33, *Whole Woman's Health*, 136 S. Ct. 2292 (reviewing Texas bylaws admitted into evidence).

Contrary to the Fifth Circuit's supposition, the bylaws in the record here confirm that Louisiana hospitals are identical to their Texas counterparts. Nearly all of Louisiana's relevant hospitals have explicit or implicit patient-minimum requirements.[5] In fact, implicit patient-minimum requirements were the reason Does 1 and 2 had privileges applications de-

[5] Patient-minimum requirements often take the form of clinical-data requirements (which require physicians to provide data regarding patients they have admitted to the hospital) or clinical-review or proctoring requirements (which require physicians to be evaluated based upon admitted patients). *See* Br. for Med. Staff Prof'ls as *Amici Curiae* 21-22, 31-33, *Whole Woman's Health*, 136 S. Ct. 2292. Such requirements are ubiquitous in Louisiana hospital bylaws. *See, e.g.*, ROA 9853, 10490, 10679 (clinical-data requirements); ROA 9191-92, 9253, 9269, 9281, 9373, 9376-77, 9390-91, 9493-94, 9633, 9672, 9685-89, 10309-11, 10417, 10421-22, 10436, 10495-98, 10610, 10647 (clinical-review or proctoring requirements); ROA 11634, 12135-37, 12142, 12597, 12613, 12818-21, 12824-26 (bylaws reflecting one or more of the same).

nied. Pet. App. 224a-25a, 227a-29a. And Doe 6 relinquished his admitting privileges after leaving his OB/GYN practice in 2005 because of an inability to meet hospitals' patient minimums. *Id.* 246a.

Moreover, the Fifth Circuit ignored (without explanation) the other obstacles to obtaining admitting privileges the district court identified. The district court acknowledged that hospital bylaws in Louisiana do not fully reflect "how privileges applications are handled in actual practice." Pet. App. 172a. And, patient minimums aside, Louisiana hospitals' privileging processes create "hardships and obstacles for abortion providers" beyond patient minimums. *Id.* 180a. Those obstacles range from home or office proximity requirements that cannot be met by abortion providers who travel significant distances to hostility on the part of hospital staff. *Id.* 172a-80a (cataloguing "myriad" reasons unrelated to competency that abortion providers are denied privileges).

Burdens beyond those on Doe 1's patients. The Fifth Circuit acknowledged that Act 620 will be responsible for Doe 1's inability to continue providing abortions, but found that Does 2, 5, and 6 failed to obtain admitting privileges not because of the Act but because they did not pursue those privileges with sufficient vigor. Pet. App. 46a, 48a-49a. This reasoning cannot be squared with *Whole Woman's Health* or the district court's factual findings that all these physicians were denied privileges despite their good faith efforts. *Id.* 181a, 249a-51a.

Whole Woman's Health did not require proof of each individual abortion provider's efforts to obtain privileges. Rather, the Court found that H.B.2

caused the physicians' inability to continue providing abortions based on "direct testimony" from medical providers and "plausible inferences to be drawn from the timing of the clinic closures." *Whole Woman's Health*, 136 S. Ct. at 2313. Evidence of causation here is materially identical. Each abortion provider in Louisiana without privileges and the administrator of his clinic provided direct testimony that Act 620 would require them to cease abortion care.[6] Moreover, when Act 620 was in effect for nine days in February 2016, it halted most abortions in Louisiana. Pet. 6-7 nn.5-7. That could not have been surprising—an identical law had already shuttered clinics in Texas, and legislators considering Act 620 were repeatedly informed that the same thing would happen in Louisiana. *See supra* at 4, 6-9.

In any event, the testimony of Louisiana's abortion providers makes clear that Act 620 would cause the clinic closures. And, unlike the potential superseding causes that were at play in Texas (e.g., cuts in funding and restrictions on abortion providers that had no relationship to H.B.2, *see Whole Woman's Health*, 136 S. Ct. at 2345 & n.18 (Alito, J., dissenting)), Louisiana abortion providers' efforts to obtain admitting privileges and comply with Act 620 are directly and inextricably linked to Act 620's prohibitions. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (defendant absolved of responsibility for consequences only where "the injury was actually

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[6] *See* JA 741 (Doe 1); JA 377, 398, 418-19 (Doe 2); JA 263-64, 1322 (Doe 3); JA 1136 (Doe 5); JA 1311 (Doe 6); JA 118, 1143-44 (Hope administrator); JA 1129-31 (Women's and Delta administrator).

brought about by a later cause of independent origin that was not foreseeable" (quotation marks omitted)).

Moreover, even if each individual provider's efforts to obtain admitting privileges were relevant, the Fifth Circuit had no basis to reverse the district court's factual finding that Does 2, 5, and 6 engaged in good faith efforts. Pet. App. 46a; *see also id.* 225a-26a, 244a-45a, 249a (district court's finding). These doctors sought privileges at ten hospitals and submitted applications to eight. *Id.* 225a-29a, 244a, 246a-47a; JA 54. They did not apply to every hospital within 30 miles of their clinics, but the district court here found good faith in the physicians' decisions to concentrate on specific hospitals. Pet. App. 173a, 225a-26a, 244a-45a, 247a, 249a, 254a, 259a-60a. Doe 2 focused on hospitals where he thought he had the best chance, excluding hospitals where he knew no one on staff who could vouch for him. JA 405-06, 452-55. Does 5 and 6 similarly prioritized hospitals because filing applications that are unlikely to be granted carries significant professional risks. JA 1134-35 (Doe 5); JA 1310-11 (Doe 6).[7]

The Fifth Circuit's claim that the physicians should have done more ignores that the district court

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[7] It makes sense that physicians would seek admitting privileges only where they believed they had the best chance to obtain them. Non-administrative denials of admitting privileges are considered a stain on physicians' records. Physicians are required to disclose denials on future applications for privileges, and denials are entered into a national practitioner database that is posted online. *See* U.S. Dep't of Health & Human Servs., *National Practitioner Data Bank*, https://www.npdb.hrsa.gov/ (last visited Nov. 23, 2019).

directly oversaw the physicians' applications for a year and a half and decided to proceed to final judgment only after hospitals gave the abortion providers the runaround during that whole period. Pet. App. 160a n.20; *see id.* 220a-48a. Indeed, the district court's finding that all the physicians made good faith efforts to obtain privileges was so well-supported that the State did not even challenge it on appeal. *See id.* 68a-69a (Higginbotham, J., dissenting).

For example, Doe 2 was faulted by the Fifth Circuit for not applying to two hospitals, Pet. App. 43a, but Doe 1 was rebuffed by these same hospitals for reasons that would equally apply to Doe 2, *id.* 222a-24a. Doe 5 was faulted for not finding a covering physician at three hospitals, *id.* 45a-46a, but all three hospitals have other requirements in their bylaws that he could never meet.[8] And Doe 6 supposedly should have applied to more hospitals, Pet. App. 46a, even though Louisiana's own expert conceded that physicians like Doe 6 who exclusively provide medication abortions are "probably not" able to get privileges at any hospital, JA 884.

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[8] Women's Hospital, for instance, requires physicians to maintain a nearby office or residence, ROA 10414, and comply with patient minimums, ROA 10416-17, 10436, 10443. Baton Rouge General Hospital requires the physician to be located near the hospital, ROA 10592-93, have a covering physician, ROA 10637, and comply with patient minimums, ROA 10610, 10647. Lane Regional Medical Center requires physicians to be located near the hospital or find a covering physician. ROA 10659-61. Doe 5 testified that he could not comply with these residency and patient-minimum requirements. *See* JA 1134-36.

The Fifth Circuit likewise erred in concluding that the loss of Doe 3 cannot be attributed to the law. Pet. App. 48a. The Fifth Circuit ignored the district court's finding that the loss of Doe 1, who performed the vast majority of abortion services at Hope, would "devastat[e]" Hope's financial "viability," which would leave Doe 3 without a clinic. *Id.* 256a. And even if Hope could hang on for some time, the district court also found that Doe 3 "credibly" testified that Act 620 would cause him to cease performing abortions because it would leave him as the last abortion provider in his region, and thus expose his family to increased harassment and threats of violence. *Id.* 241a-42a; *see also* JA 263-65. The Fifth Circuit's decision dismissing such concerns as Doe 3's "personal choice," Pet. App. 48a, is foreclosed by *Whole Woman's Health*. This Court held there that H.B.2 imposed burdens resulting from the combined effect of the admitting-privileges requirement and the "hostility that abortion providers face" on physicians' decisions. *Whole Woman's Health*, 136 S. Ct. at 2312 (quotation marks omitted).

Effect on Doe 1's patients. The Fifth Circuit acknowledged that Act 620 *did* cause Doe 1's inability to continue as an abortion provider, which means that there would be 2,100 abortion patients per year (Doe 1's annual average) that he could no longer serve. Pet. App. 50a-51a. But the Fifth Circuit found that this would not burden Doe 1's patients because (i) Does 2, 5, and 6 in fact will be granted privileges that they do not have, *id.* 42a-43a, 45a-47a, (ii) Doe 3 will continue to provide abortions because Doe 2 would be in Doe 3's region so Doe 3 would no longer

have security concerns, *id.* 47a-48a, 51a-53a, and (iii) Does 2 and 3 together will care for all of Doe 1's patients, *id.* 51a-53a.

Even assuming, contrary to the district court's express factfinding and the physicians' own lived experience, *see supra* at 12-13, 29-30, 41-45, that the first and second steps in the Fifth Circuit's hypothetical world were plausible, the third—that Doe 2 and Doe 3 would take up all of Doe 1's patients—is both legally erroneous and factually absurd. As the Court in *Whole Woman's Health* expressly held, "medical professionals are not fungible commodities." 136 S. Ct. at 2318. Courts thus cannot assume that physicians who are not shut down by a state could or would simply work more to make up for others who are.

The facts here show why. The Fifth Circuit assumes that Does 2 and 3 will take on more patients and work 50 weeks per year. Pet. App. 51a & n.62, 52a. Yet Doe 2 has merely an agreement with Hope to provide back-up care when its primary physicians are unavailable, *id.* 161a, 225a, and there is no record evidence to support that at this later stage in his career he would accept a position as a primary physician, *id.* 51a-52a. And Doe 3 testified that, even if he were willing, he cannot care for more abortion patients because he is already working about 70-80 hours per week. *Id.* 78a n.23, 88a n.33, 94a n.45. If he increases his work at Hope, Doe 3 would need to scale back his OB/GYN practice, which ironically could cause him to lose the admitting privileges he

would need to continue performing abortions. *Id.* 78a.[9]

II. ACT 620 IS UNCONSTITUTIONAL EVEN ASSUMING THE BURDENS HERE ARE LESS THAN IN *WHOLE WOMAN'S HEALTH*.

Even if the Court disagreed with the district court's factfinding and believed that the burdens Act 620 would impose would be less extreme than in *Whole Woman's Health*, Act 620 still could not stand. Under any fair reading of the record, Act 620 would impose at least some meaningful burdens on women seeking abortions. At the same time, the Act would have no (or, at most, negligible) benefits. The "undue burden" standard thus requires invalidation of the Act.

A. A Law That Burdens The Right To Abortion With No Offsetting Benefit Violates The Undue Burden Test.

1. The undue burden test is designed to "str[ike] a balance," *Gonzales v. Carhart*, 550 U.S. 124, 146

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[9] The Fifth Circuit also concluded that Act 620 would not unduly burden a large fraction of Louisiana women. Pet. App. 53a. But were it not for the Fifth Circuit's errors, the district court's conclusion that all women in Louisiana would be burdened—either because they are among the 70% of women who would no longer have access to abortion, or because they would face delays, greater travel distances, and longer wait times—would have been indisputably correct, *id.* 255a-58a, and indistinguishable from the large-fraction determination in *Whole Woman's Health*, 136 S. Ct. at 2320. Even if the Fifth Circuit's burdens analysis were correct, its "large fraction" analysis would still be wrong. *See* Pet. App. 98a-99a (Higginbotham, J., dissenting).

(2007), between a "woman's liberty to determine whether to carry her pregnancy to full term," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992), and legitimate regulatory interests. As this Court explained in *Casey*, a woman's choice to terminate a pre-viability pregnancy—one of "the most intimate and personal choices a person may make in a lifetime"—is "central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. For this reason, a "woman's right to terminate her pregnancy before viability . . . is a rule of law and a component of liberty" that courts "cannot renounce." *Id.* at 871. On the other hand, this Court has recognized that there are legitimate government interests in regulating abortion, including "protecting the health of the woman" who seeks an abortion. *Id.* at 846; *see Roe v. Wade*, 410 U.S. 113, 150 (1973).

Given this "balance," abortion restrictions must bring about benefits *sufficient* to outweigh the burdens they impose. *Whole Woman's Health*, 136 S. Ct. at 2310. As the Court noted in *Whole Woman's Health*, this framework is the essence of *Casey*. *Id.* at 2309. *Casey* invalidated a spousal-notification requirement because its burdens outweighed its benefits. At the same time, the Court upheld a parental-consent requirement because it concluded that its benefits outweighed its burdens. *Compare Casey*, 505 U.S. at 887-98 (opinion of the Court) (performing balancing with respect to a spousal-notification provision); *with id.* at 899-901 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (same balancing with respect

to a parental-consent provision). And like *Casey* before it, *Whole Woman's Health* insisted that courts adjudicating challenges to abortion regulations must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309; *see also id.* at 2310 (district court "applied the correct legal standard" when it "weighed the asserted benefits against the burdens").

2. In light of the reality that admitting-privileges laws confer *no* health or safety benefit, *see supra* at 5-6, 12, 24-29, 32-37, the burdens Act 620 imposes are necessarily undue. The Fourteenth Amendment protects the right of a woman to obtain an abortion, requiring non-deferential judicial review of regulations that implicate that "constitutionally protected personal liberty." *Whole Woman's Health*, 136 S. Ct. at 2309. And when a state law burdens the exercise of an individual constitutional right without conferring any countervailing benefit, upholding the law would be inconsistent with the very existence of the right.

The canonical case of *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), is instructive. There, the state required citizens to pay a $1.50 "poll tax" to exercise the right to vote. The tax was paltry—imposing barely more than a *de minimis* burden on the vast majority of voters. And states have good reason, and wide latitude, to regulate the electoral process. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The *Harper* Court nevertheless invalidated the poll tax because it conferred no legitimate benefit. "[F]ee paying" had "no relation to voting qualifications," so the right to vote could not be "so burdened or conditioned." 383 U.S. at 670.

The principle that constitutional interests cannot be burdened for no good reason is probably obvious enough that it requires little additional elaboration. But *Chandler v. Miller*, 520 U.S. 305 (1997), affords one more example. There, the Court considered a Georgia law requiring candidates for political office to take a urinalysis drug test within thirty days of elections. The Court acknowledged that a urinalysis is a "relatively noninvasive" procedure, inflicting a modest burden on Fourth Amendment interests. *Id.* at 318. But because there was "[n]othing in the record" showing that the health and safety threats the state advanced were "real and not simply hypothetical," the law was unconstitutional. *Id.* at 319. Where "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* at 323.

The same logic applies here. Because Act 620 provides no benefits, it unduly burdens a woman's Fourteenth Amendment right to pre-viability abortion.

B. Even If Act 620 Conferred A Minimal Benefit, The Law Would Still Be Unconstitutional.

The Fifth Circuit, of course, refused to accept the reality and this Court's precedent dictating that Act 620 would not confer any genuine health or safety benefit. In the Fifth Circuit's view, the admitting-privileges requirement "promotes the wellbeing of women seeking abortion" to a "minimal" degree. Pet. App. 39a. Yet the Fifth Circuit refused to balance the benefits against the burdens on the ground that, in

its view, the burdens alone were not "substantial." *Id.* 31a.

That refusal contravened the law. The "undue burden" standard "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," *Whole Woman's Health*, 136 S. Ct. at 2309, and "weigh[] the asserted benefits against the burdens," *id.* at 2310. There is no exception for laws that impose unjustified burdens, at least when those burdens are more than *de minimis*. Indeed, the plain meaning of an "undue burden" is a burden that outweighs its benefits. *See* "Undue," Black's Law Dictionary (11th ed. 2019) ("Excessive or unwarranted <undue burden> <undue influence>.").

No other conception of the undue burden test is reconcilable with this Court's precedent. The Court has repeatedly upheld the right to pre-viability abortion as a fundamental constitutional right, subject to more than "rational basis" review. *Whole Woman's Health*, 136 S. Ct. at 2309-10; *see also, e.g.*, *Casey*, 505 U.S. at 846-53; *Roe*, 410 U.S. at 153-54. And when heightened scrutiny applies, any impingement on the constitutional right at issue that outweighs any countervailing benefit is impermissible.

Such is the case here. Under any fair assessment of the facts, Act 620 imposes burdens on abortion access that are more than minimal. On the other hand, the Act's benefit, even in the Fifth Circuit's skewed view, is at most a minimal credentialing benefit. Such a negligible governmental interest is not enough under these circumstances to justify imping-

ing a right that is truly "central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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