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 *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF LOUISIANA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with nearly two million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has long been committed to protecting the right of individuals to make their own reproductive decisions, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court. The ACLU of Louisiana is a statewide affiliate of the national ACLU.

The ACLU has represented clients in constitutional challenges to laws that, like the Louisiana statute at issue here, prevent physicians from providing abortions unless they are able to obtain local-hospital admitting privileges. The ACLU's clients in Alabama included Reproductive Health Services and West Alabama Women's Center, which have for decades been the only providers of abortion services in Montgomery and Tuscaloosa, Alabama, respectively. Enforcement of an admitting-privileges requirement would have forced both clinics to close and would have left only a single clinic in the state, because the physicians at these clinics were unable to obtain admitting privileges at any local hospital. The ACLU's client in Wisconsin is Milwaukee Women's Medical Services (also known as

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or the submission of this brief.

Affiliated Medical Services, or "AMS"), one of only four abortion clinics in Wisconsin. Enforcement of the admitting-privileges requirement in Wisconsin would have forced AMS to close because its physicians—including its co-owner, Dr. Dennis Christiansen, who has been on the clinical faculty in the obstetrics and gynecology department at the University of Wisconsin Medical School in Madison—were unable to obtain admitting privileges at any hospital in Milwaukee.

SUMMARY OF ARGUMENT

Just four Terms ago, this Court invalidated a Texas statute prohibiting physicians who are unable to obtain local-hospital admitting privileges from performing abortions. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). This Court's decision reversing the Fifth Circuit emphasized the importance of district court factfinding, and the principle that an abortion restriction that fails to confer benefits sufficient to justify its burdens is constitutionally invalid. Repeating the very mistakes that compelled this Court's intervention in *Whole Woman's Health*, the Fifth Circuit in this case upheld an identical admitting-privileges statute (the "Act") by disregarding the District Court's factual determination that the statute would not only severely burden a person's ability to get an abortion, but would do so even though the statute provides, at best, minimal benefits. The decision below is irreconcilable with this Court's precedents.

Amici submit this brief to make two related points addressing why the Fifth Circuit's decision "ought not stand." *June Medical Services v. Gee*, 905 F.3d 787, 835 (5th Cir. 2018) (Higginbotham, J.,

dissenting). First, contrary to the Fifth Circuit's appellate retrial of the facts, the District Court's thorough factfinding establishes that the Act would significantly burden a person's ability to get an abortion in Louisiana because—notwithstanding the physicians' good-faith efforts—most abortion providers are ineligible for and unable to obtain qualifying privileges for reasons unrelated to clinical competency or credentials. Moreover, those findings are reinforced by the parallel factual determinations of *every* district court to have examined the effects of comparable admitting-privileges laws. In recent years, multiple federal courts have conducted bench trials and made extensive factual findings addressing the capacity of abortion providers to comply with similar admitting-privileges statutes. The consensus among factfinders is that, as is reflected in the record and findings below, abortion providers are unable to obtain admitting privileges, and the inevitable effect of laws like the Act is therefore to obstruct people's access to abortion. The uniform findings of these courts buttress the identical determinations of the District Court here, and thoroughly undercut the Fifth Circuit's unsupported speculation that Louisiana physicians could have mitigated some of the Act's harms by obtaining privileges.

Second, the Fifth Circuit's "mitigation" theory has no basis in this Court's precedents and defies the balancing framework at the core of *Whole Woman's Health*. The essence of that decision is that an abortion restriction that does not confer benefits sufficient to justify its burdens is constitutionally invalid. The District Court here correctly applied that decision to the facts by concluding that the Act—which burdens abortion access but does little or

nothing to further any valid state interest—imposes an undue burden and is unconstitutional. Rather than confront the critical question whether the Act's insubstantial benefits justified its burdens to abortion access, the Fifth Circuit simply disregarded the Act's deficient justification and instead imposed an unprecedented requirement that physicians mitigate the harms caused by the medically unnecessary statute. The decision below is incorrect, unfaithful to this Court's decisions, and should be reversed.

ARGUMENT

I. EVERY FACTFINDER TO HAVE CONSIDERED AN ADMITTING-PRIVILEGES REQUIREMENT HAS FOUND THAT IT WOULD CAUSE SEVERE BURDENS TO ABORTION ACCESS.

The District Court's meticulous factual findings, based on an extensive record following a six-day evidentiary hearing, establish that the admitting-privileges requirement would cause severe burdens to a patient's ability to access an abortion in Louisiana by dramatically reducing the availability of abortion services in the state. *June Medical Servs. v. Kliebert*, 250 F. Supp. 3d 27, 33–35 (M.D. La. 2017). Contrary to the Fifth Circuit's appellate reconstruction of the facts, the record amply supports the District Court's factual determination that it is the Act itself that causes these burdens because—notwithstanding the physicians' good-faith efforts—most were ineligible for and unable to obtain local-hospital admitting privileges for reasons having nothing to do with their clinical competency or their credentials. *Id.* at 79–80.

Moreover, that determination is supported not only by the record here, but by parallel "findings of the other Federal District Courts that have considered . . . other States' similar admitting-privileges laws." *Whole Woman's Health*, 136 S. Ct. at 2312. In recent years, district courts in multiple states have addressed laws prohibiting physicians who are unable to obtain local-hospital admitting privileges from performing abortions, including courts in Alabama, Texas, and Wisconsin.[2] Like the District Court here, these courts consistently found, based on lengthy trials, that enforcement of an admitting-privileges requirement would substantially reduce, if not eliminate, abortion access, and that it is the requirement itself—and abortion providers' inability to comply with it—that causes the loss of abortion services. The uniformity of that determination among factfinders buttresses the District Court's conclusions here, and illustrates the error of the Fifth Circuit's alternative "mitigation" theories. *See Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015) ("Our review is even more deferential where, as here, multiple trial courts have reached the same

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[2] *See Planned Parenthood of Wis., Inc. v. Van Hollen* ("*Van Hollen I*"), 94 F. Supp. 3d 949 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014); *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014), *aff'd in part, rev'd in part sub nom. Whole Woman's Health v. Cole* ("*Cole*"), 790 F.3d 563 (5th Cir. 2015), *rev'd sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (pre-*Whole Woman's Health* trial on Texas admitting-privileges statute), *rev'd in part* 748 F.3d 583 (5th Cir. 2014).

finding, and multiple appellate courts have affirmed those findings.").

The District Court's findings and record below establish five reasons why enforcement of the admitting-privileges requirement would severely burden patients' ability to access an abortion in Louisiana. All five reasons are reinforced by the identical determinations of numerous courts examining similar laws. *First*, hospitals commonly condition eligibility for privileges on satisfying criteria unrelated to competency or credentials that many physicians providing abortions are categorically unable to fulfill. *June*, 250 F. Supp. 3d at 46. *Second*, even where physicians are not facially ineligible for privileges under hospital policy, hospitals can and do deny or refuse to consider abortion providers' privileges applications for various reasons, ranging from hospitals' business needs to their desire to avoid becoming enmeshed in a controversial subject such as abortion. *Id.* at 46, 68–69. *Third*, the unwillingness of existing hospital staff to serve as references or enter into coverage arrangements with physicians who provide abortions poses an "insurmountable hurdle" to many abortion providers' compliance with an admitting-privileges requirement. *Id.* at 49. *Fourth*, the risk of acts and/or threats of violence and disruption by some individuals opposed to abortion causes hospitals and covering physicians not to affiliate with abortion providers. *Id.* at 52–53. *Fifth*, because hospitals faithfully adhere to their privileging requirements, and because having an application for privileges rejected carries adverse consequences, physicians must tailor their applications to hospitals where they have colorable prospects—and for some physicians,

no such hospitals exist. *See June*, 905 F.3d at 825 & n.27 (Higginbotham, J., dissenting).

The findings and record in this case leave no question that as a result of these factors, most Louisiana abortion providers could not satisfy the Act's requirements, notwithstanding their attempts to do so, and that the Act would therefore severely burden patients' access to abortion. Those well-supported factual findings are correct and entitled to deference under this Court's precedents. *See Whole Woman's Health*, 136 S. Ct. at 2316. The Fifth Circuit's unfounded speculation that some physicians could have obtained privileges and thereby mitigated some of the Act's harms flouts that precedent, and conflicts not only with the District Court's findings but with the consensus of factfinders considering comparable statutes.

A. Hospitals Condition Eligibility for Admitting Privileges on Criteria Unrelated to Competency or Credentials That Many Physicians Providing Abortions Cannot Satisfy.

The uniform determination of district courts reviewing the evidence on admitting-privileges requirements is that hospitals commonly impose criteria unrelated to clinical competency or credentials, which render many abortion providers facially ineligible for privileges. *See June*, 250 F. Supp. 3d at 46; *Van Hollen I*, 94 F. Supp. 3d at 983–84, 986; *Strange*, 33 F. Supp. 3d at 1343; *Abbott*, 951 F. Supp. 2d at 901. Three such criteria are particularly relevant here.

First, because hospitals grant admitting privileges for physicians to treat patients within the hospital, they typically require applicants "to show a record of *inpatient treatment* of patients," a requirement that renders physicians whose practice entails providing *outpatient* abortions categorically ineligible for privileges. *Van Hollen I*, 94 F. Supp. 3d at 983–84 (emphasis added); *accord Schimel*, 806 F.3d at 917 (citing example of hospital requiring "applicants for obstetrics/gynecology admitting privileges to have delivered 100 babies in the previous two years"); *June*, 250 F. Supp. 3d at 49; *W. Ala. Women's Ctr. v. Williamson*, 120 F. Supp. 3d 1296, 1303 (M.D. Ala. 2015); *Abbott*, 951 F. Supp. 2d at 901. The District Court here found that this barrier flatly disqualified Drs. Doe 1 and 2 from obtaining privileges at multiple Shreveport hospitals. *June*, 250 F. Supp. 3d at 49. Similarly, in Wisconsin, because physicians could not demonstrate a record of inpatient hospital treatment, enforcement of the admitting-privileges statute would have caused the immediate closure of the only abortion clinic in Milwaukee. *Van Hollen I*, 94 F. Supp. 3d at 983–84.

Second, as this Court explained in *Whole Woman's Health*, "hospitals often condition admitting privileges on reaching a certain number of admissions per year," a requirement most abortion providers cannot satisfy due to "the fact that abortions are so safe" and almost never result in hospitalization. 136 S. Ct. at 2312 (citation omitted); *accord June*, 250 F. Supp. 3d at 46; *Strange*, 33 F. Supp. 3d at 1343; *Abbott*, 951 F. Supp. 2d at 901.[3]

[3] In this case, Dr. Doe 3 is able to maintain privileges at Christus Highland Medical Center because he regularly admits

Moreover, the consensus among factfinders is that minimum-admissions requirements not only disqualify abortion providers from *obtaining* privileges, but they can make it impossible for any who do to *retain* them, because the requirement must be satisfied on an ongoing basis every time the physician is called upon to renew privileges. *June*, 250 F. Supp. 3d at 49–50; *Van Hollen I*, 94 F. Supp. 3d at 983–84; *Strange*, 33 F. Supp. 3d at 1344.

Third, hospitals commonly require physicians seeking privileges to live within a specified distance of the hospital. *June*, 250 F. Supp. 3d at 47; *Strange*, 33 F. Supp. 3d at 1343; *Abbott*, 951 F. Supp. 2d at 901. Such geographic proximity policies prevent physicians who travel to provide abortion services from being able to satisfy a local-hospital admitting-privileges requirement. *June*, 250 F. Supp. 3d at 47; *Strange*, 33 F. Supp. 3d at 1343.[4] In Louisiana, Drs. Doe 2 and 5 "travel significant distances from their

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patients to the hospital as part of his separate, non-abortion OB/GYN practice, thereby satisfying the hospital's fifty-admissions-per-year requirement. *June*, 250 F. Supp. 3d at 43. Dr. Doe 2, by contrast, has no hospital-based practice and cannot fulfill Christus's policy. *Id.* at 69; *see also id.* at 77 (same as to Dr. Doe 6). Despite this critical difference, the Fifth Circuit deemed Christus an "open option[]" for Dr. Doe 2, and said his decision not to apply for privileges there—notwithstanding his facial ineligibility—amounted to "s[itting] on [his] hands." *June*, 905 F.3d at 807–08.

[4] Many clinics are unable to hire local physicians to perform abortions due to, *e.g.*, threats of violence and harassment. *See* 33 F. Supp. 3d at 1348–55; *see also* Section I.D, *infra*. Those clinics rely upon physicians who travel from outside the local community to provide abortion services. *Strange*, 33 F. Supp. 3d at 1352.

respective homes" to provide abortion services and are facially ineligible for privileges at hospitals because of their geographic proximity requirements. *June*, 250 F. Supp. 3d at 47. Similarly, in Alabama, enforcement of an admitting-privileges law would have immediately forced three of the state's five abortion clinics to close due in large measure to hospitals' geographic proximity criteria, *Strange*, 33 F. Supp. 3d at 1343–47, and would subsequently have shuttered a fourth after its physician who had privileges retired, *Williamson*, 120 F. Supp. 3d at 1303.

In sum, the unanimous determination of factfinders is that multiple criteria commonly imposed by hospitals preclude abortion providers from satisfying admitting-privileges requirements. As the District Court here found, these factors rendered multiple Louisiana physicians categorically ineligible for privileges at numerous hospitals.

B. Hospitals Deny Applications for Privileges for Myriad Reasons, Including Unwillingness to Associate With Abortion Providers.

The uniform findings of courts also demonstrate that physicians "who meet the prerequisites for privileges are not automatically entitled to privileges," because "the granting of staff privileges is a discretionary process." *Strange*, 33 F. Supp. 3d at 1343; *accord June*, 250 F. Supp. 3d at 46, 68–69; *Van Hollen I*, 94 F. Supp. 3d at 996–97. Hospitals can and do refuse to grant abortion providers' applications for privileges for numerous reasons wholly unrelated to proficiency—and did so here. *See, e.g.*, *June*, 250 F. Supp. 3d at 46–47 (Dr.

Doe 1's application rejected for business-related concerns); *id.* at 46 (university-affiliated hospitals do not grant privileges to non-academic faculty); *Strange*, 33 F. Supp. 3d at 1345 (same).

Foremost among those reasons, factfinders consistently determined, is the unwillingness of many hospitals to enter into an association with abortion providers because of the potential controversy such affiliation could create, institutional opposition to abortion, or both. *See June*, 250 F. Supp. 3d at 47–50. In this case, for example, a Shreveport hospital refused to upgrade Dr. Doe 2's privileges from consulting to admitting specifically because of the "controversy" and "political nature" of his abortion practice. *Id.* at 69.

Comparable developments prevented abortion providers from obtaining privileges—and would have caused clinics to close had laws taken effect—in other cases. In Alabama, a Birmingham hospital would not grant a physician's request for privileges because of the hospital's desire not to become entangled with a "politically contentious . . . procedure." *Strange*, 33 F. Supp. 3d at 1345. Likewise, in Wisconsin, the district court found that some religiously affiliated hospitals had "bylaws suggest[ing] that religious objection to abortion will be a high hurdle for any physician who performs abortions when applying for staff privileges." *Van Hollen I*, 94 F. Supp. 3d at 985. And in Mississippi, no local hospital would grant privileges to any physician at the state's sole abortion clinic. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 450 n.3 (5th Cir. 2014). The hospitals' decisions were expressly based on the applicants' provision of abortion services, with the hospitals explaining in writing that "[t]he nature of

your proposed medical practice is inconsistent with this Hospital's policies and practices as concerns abortion and, in particular, elective abortion," and "[t]he nature of your proposed medical practice would lead to both an internal and external disruption of the Hospital's function and business within this community." *Id.*

As summarized by the Wisconsin district court, hospitals' "interests run counter to granting privileges to abortion providers, who unquestionably offer little chance of hospital referrals and a real risk of controversy if formally associated with the hospital." *Van Hollen I*, 94 F. Supp. 3d at 979.

C. Hospital Requirements that Physicians Seeking Admitting Privileges Produce References from Hospital Staff and Affiliate with Covering Physicians Prevent Abortion Providers from Obtaining Privileges.

The District Court found that hospitals compel physicians requesting admitting privileges to secure the support of, and formally affiliate with, other physicians, including requiring peer recommend-dations from physicians on the hospital's staff and coverage relationships with other physicians with privileges who agree to care for the applicant's patients when that physician is unavailable. *June*, 250 F. Supp. 3d at 48–49. The court found that such requirements present "insurmountable" hurdles to abortion providers' compliance with the Act, and in particular made it impossible for the sole abortion provider in Baton Rouge, Dr. Doe 5, to obtain privileges there because he tried but was "unable" to

find a covering physician. *Id.*[5] Improperly retrying the facts, the Fifth Circuit concluded that finding a covering physician should not be difficult and that any fault rests with the physicians. *June*, 905 F.3d at 809.[6] But the record below, and the consensus among factfinders, thoroughly refutes the Fifth Circuit's conclusion.

In particular, the findings in these cases establish that affiliating with outside physicians and securing their agreement to serve as abortion providers' covering physicians is extraordinarily challenging, and often impossible, for two reasons. First, some physicians are opposed to abortion and are not willing to affiliate with an abortion provider as a covering physician. *See, e.g.*, *Planned Parenthood Ark. & E. Okla. v. Jegley for Pulaski Cty.*, No. 4:15-cv-784, 2018 WL 3029104, at *4–5 (E.D. Ark. June 18, 2018) (describing unsuccessful efforts to affiliate with covering physician, including that at some medical practices the staff were so firm in their opposition to abortion "that they would not even let [abortion clinic staff] . . . speak to the physicians and refused to take messages"); *June*, 250 F. Supp. 3d at

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[5] *See also June*, 250 F. Supp. 3d at 49 (similarly discussing Dr. Doe 3's "difficulty finding physicians to cover for him due to the animosity towards him as an abortion provider").

[6] As Judge Higginbotham explained, the Fifth Circuit's conclusion about the ease with which Dr. Doe 5 could find a covering physician rests entirely on a mischaracterization of the testimony. *See June*, 905 F.3d at 825–26 & n.29 (Higginbotham, J., dissenting). The testimony (from a different doctor) indicated that *maintaining* a covering physician would not be especially burdensome, but said nothing about "whether *finding* a covering physician was overly burdensome." *Id.* at 825 n.29 (emphasis in original).

49; *Strange*, 33 F. Supp. 3d at 1352–53 (reviewing numerous clinics' extensive, unsuccessful efforts to recruit covering physicians); *Williamson*, 120 F. Supp. 3d at 1304.

Second, many physicians are unwilling to affiliate with abortion providers because they fear that such affiliation would subject them to adverse professional, economic, and social consequences. *See June*, 250 F. Supp. 3d at 53 (Louisiana physician who did not provide abortions but agreed to provide emergency care for abortion patients was targeted by abortion opponents); *Strange*, 33 F. Supp. 3d at 1349 (finding that physicians in the community are aware of doctors "whose private practices were destroyed by protests due to their affiliations with abortion clinics"); *Williamson*, 120 F. Supp. 3d at 1308 (negative "ramifications have been felt even by covering physicians, who handle only complication-related care and do not perform abortions themselves"). As the Alabama district court found, such concerns are well-founded. That court reviewed numerous incidents in which physicians became the subject of protest and negative publicity—ultimately resulting in the "economic destruction" of multiple physician's obstetrics practices—because they agreed to act as abortion providers' covering physicians. *Strange*, 33 F. Supp. 3d at 1350.

For example, the Alabama district court found that after one obstetrician reluctantly agreed to serve as an abortion provider's covering physician, news of the affiliation became public and brought about the end of that physician's obstetrics practice.

> Although she was not performing abortions herself, protestors came to her

> [obstetrics] practice and began to confront her pregnant patients . . . [holding] signs depicting third-trimester abortions. The local leader of the pro-life movement [stated] that he would protest [the covering physician's] practice for as long as [she] continued to serve as covering physician for the clinic. [The covering physician] removed her children from their Catholic school due to the publicity surrounding her affiliation with the abortion clinic. She had a mass exodus of patients from her practice. Finally, she was forced to close the obstetric portion of [her] practice. Although she had initially refused to perform abortions herself, the loss of her private obstetric practice pushed her into becoming a full-time abortion provider so that she could continue to support her family as a gynecologist in Huntsville.

Id. at 1350 (internal quotation marks and citation omitted). The court similarly found that, because of the "cautionary tale" reflected by this and similar incidents, "a doctor who originally agreed to be a covering physician in Montgomery backed out after she realized her anonymity might be compromised." *Williamson*, 120 F. Supp. 3d at 1308. As the court determined, "[t]his threat of economic ruin . . . prevents these doctors from serving as covering physicians." *Id.* And indeed, that very practice of targeting affiliating physicians who do not themselves provide abortions has occurred in

Louisiana, as the District Court here found. *June*, 250 F. Supp. 3d at 53.

In short, the District Court's finding that it is difficult or impossible for abortion providers to secure covering-physician arrangements with other doctors mirrors the findings of other courts addressing the impact of similar laws. The Fifth Circuit's unfounded speculation is thoroughly contradicted by the findings and record in this case and the parallel determinations of other factfinders.

D. Threats and Acts of Violence and Disruption Reduce the Willingness of Hospitals and Covering Physicians to Affiliate with Abortion Providers, Further Limiting Their Capacity to Obtain Privileges.

The District Court found that threats and acts of violence and disruption intensify the pressure on hospitals not to affiliate with abortion providers, further impeding their capacity to obtain privileges and comply with the Act. *June*, 250 F. Supp. 3d at 51–52. The findings of other district courts reinforce that conclusion.

Every trier of fact to consider the matter has found that the climate in which many abortion providers practice is one of "palpable" fear of violence and "extreme harassment." *Strange*, 33 F. Supp. 3d at 1333–34. District courts consistently found that those fears are well-grounded. *See id.* at 1351 (describing murders, arson, assault, bombings, and "other incidents of violence" perpetrated against Alabama abortion providers); *June*, 250 F. Supp. 3d at 51–52 ("overwhelming" evidence is that abortion

providers in Louisiana are subject to violence and danger, including assault and arson); *Van Hollen I*, 94 F. Supp. 3d at 982–83 (violence against abortion providers in Wisconsin ranges from attempted murder, to vandalism, to firebombing).

The Fifth Circuit dismissed such acts of violence and intimidation as private conduct unrelated to the burdens the Act imposes, *June*, 905 F.3d at 810 n.60, but the District Court's findings—echoed by the findings of other district courts—are directly to the contrary. The findings show that threats and disruption target—and affect—hospitals and covering physicians, directly impeding abortion providers' capacity to obtain privileges and secure hospitals' required coverage arrangements. *See June*, 250 F. Supp. 3d at 52 (threatening letters and disruptive conduct directed at hospital to "interfere with" Dr. Doe 5's ultimately unsuccessful admitting-privileges application); *Williamson*, 120 F. Supp. 3d at 1321–22 (threats of violence made "even to covering physicians"); *Strange*, 33 F. Supp. 3d at 1352 ("Clinic administrators for the Montgomery, Birmingham, and Huntsville clinics each offered examples of doctors declining requests to affiliate with a clinic or expressing great apprehension out of fear for the physical safety of themselves and their families."). The determinations of multiple courts demonstrate that threats of violence and extreme harassment further impede abortion providers' capacity to comply with an admitting-privileges requirement.

E. Because an Unsuccessful Application for Privileges Can Have Adverse Consequences, and the Application Process Is Time- and Resource-Intensive, Physicians Must Tailor Their Efforts to Hospitals Where They Have Reasonable Prospects.

Finally, the Fifth Circuit suggested that physicians should have applied for privileges even where it was apparent that they could not get them, and that by not submitting futile applications, it was the doctors, not the law, that would cause burdens on abortion access in Louisiana. *See June*, 905 F.3d at 807–08; *see also* Note 3, *supra*. Here, too, the consensus among factfinders is to the contrary. *See, e.g.*, *Van Hollen I*, 94 F. Supp. 3d at 987; *Strange*, 33 F. Supp. 3d at 1347.

The testimony and findings in similar cases consistently established that hospitals do not make exceptions to their privileging rules to accommodate abortion providers, and that physicians who pursue futile applications for privileges are likely to suffer adverse professional consequences. *See, e.g.*, *Van Hollen I*, 94 F. Supp. 3d at 987; *Strange*, 33 F. Supp. 3d at 1347. A hospital executive "testified credibly" in Alabama, for example, that "it is in the physician's best interest to . . . make sure that they meet all the criteria," because "it's not beneficial to them to . . . submit something that's going to be rejected." *Strange*, 33 F. Supp. 3d at 1347 (internal quotation marks and citation omitted). As the Alabama district court found, physicians whose applications for privileges are rejected may be reported to the National Provider Data Bank, "a database of doctors'

credentials and reputations," and may be required to disclose the rejection on future hospital privileges applications, which can "adversely affect" prospects for those applications. *Id.*; *accord June*, 905 F.3d at 825 n.27 (Higginbotham, J., dissenting). And, the Wisconsin district court explained, "hospitals are generally unwilling to bend their rules, even for physicians that they know and in the face of a regulation which they may find unnecessary," *Van Hollen I*, 94 F. Supp. 3d at 987, meaning that there is not even a *potential* upside to physicians exposing themselves to such adverse consequences.

Moreover, like the District Court in this case, these courts consistently determined that applying for privileges is inherently a "time-intensive, multi-step," and "tedious" process, *id.* at 988, which should not have to be undertaken where, *e.g.*, hospital criteria render the application futile, *Strange*, 33 F. Supp. 3d at 1347. The findings from multiple district courts reflect that the process takes months at minimum, and can easily extend for "six to nine months" or longer, *Van Hollen I*, 94 F. Supp. 3d at 988, with hospitals sometimes failing to formally grant or deny the application at all, *see June*, 250 F. Supp. 3d at 67 (Dr. Doe 1's unsuccessful attempts to secure privileges "read[] like a chapter in Franz Kafka's *The Trial*"); *Williamson*, 120 F. Supp. 3d at 1303–04 (describing physician's ultimately unsuccessful eight-month efforts to obtain privileges); *Van Hollen I*, 94 F. Supp. 3d at 988 (reviewing ten-month application process). In this case, physicians' applications to multiple hospitals extended for "well over a year." *June*, 250 F. Supp. 3d at 66, 75.

In short, the Fifth Circuit's conclusion that the physicians themselves caused burdens on abortion access by not pursuing futile applications for privileges is refuted by the record below, and by other district courts' consistent determinations that hospitals do not deviate from their privileging criteria to accommodate abortion providers, and that submitting applications that are likely to be denied would "damage [physicians'] professional reputations." *Strange*, 33 F. Supp. 3d at 1347.

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The District Court explained in painstaking detail why the Act would impose sweeping burdens on patients' ability to access an abortion in Louisiana. Far from being clearly erroneous, its determination that many Louisiana abortion providers could not obtain local-hospital admitting privileges despite their attempts to do so is correct, and is corroborated by the parallel findings of district courts that have examined the effect of similar statutes. The Fifth Circuit's contrary appellate factfinding is wholly at odds not only with the District Court's well-supported determinations and the consensus of factfinders, but with the deference owed to the "District Court's factual findings" under this Court's precedents. *Whole Woman's Health*, 136 S. Ct. at 2310.

II. THE FIFTH CIRCUIT'S REQUIREMENT THAT ABORTION PROVIDERS UNDERTAKE FUTILE MEASURES TO MITIGATE THE HARM OF A STATUTE THAT DOES NOT MEANINGFULLY FURTHER A VALID STATE INTEREST IS INCOMPATIBLE WITH THIS COURT'S PRECEDENTS.

The Fifth Circuit's analysis is also irreconcilable with the balancing framework at the heart of *Whole Woman's Health*. That decision makes clear that the undue burden analysis is driven by proportionality: An abortion restriction that fails to confer "benefits *sufficient to justify* the burdens upon access that [it] imposes" is unconstitutional. *Id.* at 2300 (emphasis added). The District Court here found that the Act confers marginal benefits at best, *June*, 250 F. Supp. 3d at 64–65, and the Fifth Circuit largely agreed, *June*, 905 F.3d at 806–07. Yet rather than accept the self-evident conclusion that a law's benefits cannot justify its burdens when it restricts abortion without meaningfully advancing a valid state interest, the Fifth Circuit sidestepped the Act's insubstantial benefits and instead insisted that Louisiana physicians were compelled to blunt the medically unjustified law's harms. *Id.* at 805–10. That approach replicates the very analytical mistakes this Court repudiated in *Whole Woman's Health*.

1. The Court in *Whole Woman's Health* explained that the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," by "weigh[ing] the asserted benefits against the burdens" to determine whether the benefits are

"sufficient to justify the burdens." 136 S. Ct. at 2300, 2309–10. Intrinsic to this balancing test is the *relative* weight of a law's putative benefits compared with its burdens. Regulations that advance little or no important state interests are more likely to impose an undue burden. *Id.* at 2318. "The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Planned Parenthood of Wis., Inc. v. Van Hollen* ("*Van Hollen II*"), 738 F.3d 786, 798 (7th Cir. 2013); *accord Schimel*, 806 F.3d at 920; *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014); *W. Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1252 (M.D. Ala. 2017) ("[T]he heart of this test is the relationship between the severity of the obstacle and the weight of the justification the State must offer to warrant that obstacle.").

The Court made clear that because it would be "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where . . . economic legislation is at issue," *Whole Woman's Health*, 136 S. Ct. at 2309, the benefits prong of the analysis focuses not on whether the government's asserted purpose is valid in the abstract, but on whether—and to what extent—the law would actually "br[ing] about" the stated benefit in practice, *id.* at 2311; *cf. Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (similarly holding that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). Hence, in *Whole Woman's Health*, where Texas contended that its laws were necessary to protect patient health but the district court's findings established that they did

little or nothing to advance the asserted interest, the Court did not credit the asserted justification—even though patient health is, in the abstract, an important interest. 136 S. Ct. at 2311. "By refusing to defer to a state's purported justifications, and instead carefully evaluating the facts, the Court ensured that in conducting its balancing analysis, pretextual purposes do not receive any weight on the 'benefits' side of the ledger." *Whole Woman's Health Alliance v. Hill* ("*Hill*"), 937 F.3d 864, 877 (7th Cir. 2019); *see also id.* ("[It] is plain, [that] . . . [a]n official action, . . . taken for the purpose of [violating constitutional rights] has no legitimacy at all under our Constitution." (quoting *City of Richmond, Va. v. United States*, 422 U.S. 358, 378 (1975))).

The Fifth Circuit failed to apply these principles. To uphold a law that burdens abortion access but does little or nothing to advance the state's interests under the theory that physicians might have done more to mitigate the harms imposed by its medically unjustified requirements is to spurn the essential premise of *Whole Woman's Health*.

With respect to whether the Act would actually further Louisiana's purported interests in benefiting patient health or physician credentialing, the District Court found, after an extensive evidentiary hearing, that the admitting-privileges requirement confers nothing but a negligible benefit, if any at all. *June*, 250 F. Supp. 3d at 64 (law "provides no benefits to women and is an inapt remedy for a problem that does not exist"); *id.* at 86 (it "confers only minimal, at best, health benefits"). That amply supported determination is in line with

both the consensus of factfinders to have considered the same question,[7] and this Court's conclusion concerning the insubstantial health benefits of Texas's indistinguishable statute. *See Whole Woman's Health*, 136 S. Ct. at 2311. The Fifth Circuit properly concluded that "the district court did not clearly err in finding that Act 620 provides minimal benefits." *June*, 905 F.3d at 807.[8]

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[7] *See, e.g.*, *Van Hollen I*, 94 F. Supp. 3d at 953; *Strange*, 33 F. Supp. 3d at 1378; *Lakey*, 46 F. Supp. 3d at 685.

[8] Without concluding that the District Court's state-interest findings were clearly erroneous, the Fifth Circuit purported to discern a sliver of daylight between the justifications for Louisiana's and Texas's identical laws by asserting that (1) Louisiana's performed a "minimal" "credentialing function," which (2) went "unaddressed" in *Whole Woman's Health*. 905 F.3d at 806–07. Both components of this assertion are incorrect. First, the District Court specifically found that the Act advances no interest in physician credentialing, *June*, 250 F. Supp. 3d at 87, and that finding is entitled to deference, *Whole Woman's Health*, 136 S. Ct. at 2316. Second, Texas *did* rely upon a credentialing rationale in attempting to defend its admitting-privileges law, *see* Brief for Respondent at 33–34, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15–274), 2016 WL 344496, which this Court expressly rejected, holding that the "admitting-privileges requirement does not serve any relevant credentialing function," *Whole Woman's Health*, 136 S. Ct. at 2313. Moreover, even if the Act conferred a minimal credentialing benefit, "that benefit does not require that the hospital . . . be within a 30–mile radius of the clinic." *Van Hollen II*, 738 F.3d at 797. Dr. Doe 5, the lone abortion provider in Baton Rouge, has privileges (and so has been "credentialed") at a hospital outside the Act's 30-mile radius. *June*, 250 F. Supp. 3d at 79. Under the Fifth Circuit's own theory, enforcement of the Act would thus shutter the Baton Rouge clinic in service of no state interest.

Under a balancing test that weighs benefits against burdens to answer the ultimate question of whether a law's actual benefits are "sufficient to justify" the burdens it imposes, *Whole Woman's Health*, 136 S. Ct. at 2300, restrictions that confer little to no benefit cannot be upheld if they impose anything more than a *de minimis* burden. *See, e.g.*, *Schimel*, 806 F.3d at 920 ("The feebler the medical grounds (in this case, they are nonexistent), the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive."); *accord June*, 905 F.3d at 829 (Higginbotham, J., dissenting) ("[A] statute with no medical benefit that is likely to restrict access to abortion [cannot] be considered anything but 'undue.'"). And there can be no question that the burdens imposed by the Act are far more than *de minimis*. *See, e.g.*, *June*, 905 F.3d at 808 (acknowledging that the Act would permanently prevent the primary abortion provider in Shreveport, Dr. Doe 1, from providing abortions); *id.* at 808–10 (acknowledging that Drs. Doe 2 and 6 lack qualifying privileges, as does Dr. Doe 5 in Baton Rouge, where he is the sole physician); *June*, 250 F. Supp. 3d at 79–80 (finding that these doctors are unable to obtain such privileges); *see also* Section I, *supra*. Nothing more is needed to establish the Act's constitutional invalidity. *See Whole Woman's Health*, 136 S. Ct. at 2300.

Indeed, the decision below repeats the very mistakes that this Court identified in *Whole Woman's Health*. In that case, the Fifth Circuit assumed the legitimacy of the state's interest (which evidence proved the laws did not further), acknowledged that the restrictions at issue imposed

some burden, but concluded that the burden was not substantial enough to warrant invalidation. *See Cole*, 790 F.3d at 584, 588. That analysis, this Court held, was wrong: It failed to weigh benefits against burdens to assess whether the law actually advanced the state's interest sufficiently to justify the burdens, and did not "match the standard that this Court laid out in *Casey,* which asks courts to consider whether *any* burden imposed on abortion access is 'undue.'" *Whole Woman's Health*, 136 S. Ct. at 2309–10 (emphasis added).

So too here. This Court has not hesitated to invalidate laws burdening constitutional rights that fail to advance a valid state interest in multiple contexts. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 574 (2011) (law burdening commercial speech that did not adequately further state's asserted interest cannot withstand constitutional scrutiny); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197 (1999) (law burdening ballot access "without impelling cause" is unconstitutional). That same principle requires that the judgment below be reversed.

2. The Fifth Circuit compounded its failure to reckon with the Act's insubstantial benefits by subjecting its analysis of the law's burdens to an unprecedented mitigation requirement untethered to this Court's decisions. Casting aside both the District Court's well-supported findings that the physicians tried but were unable to comply with the Act, *see* Section I, *supra*, and the findings that the statute does little or nothing to promote a valid governmental interest, *see* Section II.1, *supra*, the Fifth Circuit determined that the physicians were obligated to work more strenuously to satisfy the

Act's medically unnecessary requirements, and concluded that because the physicians did not mitigate the Act's harms, the resultant burdens to abortion access in Louisiana are not attributable to the Act. That conclusion is plainly incorrect.

Contrary to the decision below, the proposition that abortion providers are compelled to undertake inexhaustible measures to mitigate the harms of an abortion restriction—irrespective of the costs or futility of those measures, and even when the restriction does nothing to further a valid governmental interest—is thoroughly at odds with this Court's decisions. Those decisions instead correctly reflect that the extent of abortion providers' obligations to attempt to comply with a regulation, as with all aspects of the undue burden analysis, is measured by the proportionality principle at the core of the balancing test. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2318.

Thus, when faced with regulations that actually furthered the state's interest in patient health, and that providers could feasibly satisfy without undergoing disproportionate costs, this Court has upheld providers' obligation to comply. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 900–01 (1992) (requiring compliance with recordkeeping requirements, which furthered interest in patient health at "slight" cost); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80–81 (1976) (same). But this Court has not so much as suggested that abortion providers must undertake futile, costly, or impractical measures to attempt to mitigate the harms of a regulation that does not meaningfully advance any legitimate governmental interest, or that physicians bear causal responsibility

for the inevitable effects of the regulation when they cannot blunt its impact. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2318. If that were the law, states could enact pretextual statutes that impose gratuitous costs on abortion providers—and, in turn, on patients—and insist that providers undertake limitless efforts to comply, all in furtherance of no valid purpose. This Court's decisions are to the contrary. *See, e.g.*, *Casey*, 505 U.S. at 901 (state actions that "serve no purpose other than to make abortions more difficult" are prohibited); *accord Hill*, 937 F.3d at 877–78; *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997).

The analysis in *Whole Woman's Health* directly refutes the Fifth Circuit's mitigation theory. In that case, the evidence established that Texas's ambulatory surgical center requirement would have done nothing to benefit patient health, but that the costs of attempting to comply with it were "considerable." 136 S. Ct. at 2318. Under the reasoning of the Fifth Circuit in this case, the Texas clinics "sever[ed] the chain of causation" by not expending those costs to mitigate the law's burdens to abortion access and were themselves responsible for causing the law's burdens. *June*, 905 F.3d at 807. This Court ruled to the contrary, holding that it was the challenged statute—not the clinics' failure to undertake costly and disproportionate efforts to mitigate its inevitable impact on abortion access—that "pose[d] a substantial obstacle to women seeking abortions." *Whole Woman's Health*, 136 S. Ct. at 2318.

The Court applied the same approach to Texas's admitting-privileges requirement. Under the

logic of the Fifth Circuit's decision in this case, "[i]t is possible" that Texas physicians might have obtained privileges even at hospitals with policies that rendered them facially ineligible, *June*, 905 F.3d at 807–08, and by not exhausting all such efforts, the Texas physicians themselves caused any burdens to abortion access in Texas through their "lackluster approach," *id.* at 809; *see also* Note 3, *supra*. Once again, that conclusion does not bear the slightest resemblance to what this Court said or did. Far from holding that Texas physicians were compelled to, *e.g.*, pursue privileges at hospitals where they did not have colorable prospects, this Court instead relied on evidence showing that "it would be difficult" for outpatient abortion providers to satisfy the requirement for precisely the reasons identified by the District Court here, and concluded that it was the statute, not the physicians, that "in fact led to the clinic closures." *Whole Woman's Health*, 136 S. Ct. at 2312–13.

Other courts addressing admitting-privileges statutes have likewise rejected the proposition that it is incumbent on abortion providers to pursue applications at hospitals where they are facially ineligible for privileges or where their prospects for obtaining privileges are remote. *See, e.g.*, *Schimel*, 806 F.3d at 916 (upholding decision based on credible testimony that "the chances of [plaintiff-providers] being granted admitting privileges are 'slim to none'"); *Strange*, 33 F. Supp. 3d at 1347 (rejecting argument "that, despite the evidence that the current doctors are ineligible for privileges at local hospitals, the court should nonetheless refuse to find that the doctors would not receive privileges until the doctors actually apply"). The findings in those cases establish

that hospitals do not "bend their rules" to accommodate abortion providers, *Van Hollen I*, 94 F. Supp. 3d at 987, and that "it would damage [physicians'] professional reputations to file such futile applications," *Strange*, 33 F. Supp. 3d at 1347; *see also* Section I.E, *supra*. The premise that states may compel physicians to incur those harms in an effort to mitigate the effects of a statute that does little or nothing to further a valid state interest finds no support in this Court's abortion jurisprudence, and is thoroughly incompatible with the undue burden test's proportionality requirement. *See Whole Woman's Health*, 136 S. Ct. at 2318; *Schimel*, 806 F.3d at 920.

Indeed, the Fifth Circuit's mitigation theory is unfaithful not only to this Court's abortion precedents, but to its approach to constitutional rights more generally. When the government restricts fundamental rights, this Court does not require litigants to undertake onerous measures, and risk incurring harm, to alleviate the burdens a law imposes. In the ballot access context, for example, when addressing whether a state can restrict the population of initiative-petition circulators to registered voters, this Court did not compel circulators to attempt to mitigate the statute's harm by registering to vote, even if complying with the requirement was not a significant hardship. *Buckley*, 525 U.S. at 194–95; *accord Fulani v. Krivanek*, 973 F.2d 1539, 1545 (11th Cir. 1992) (political party not required to mitigate harm to ballot access imposed by statute, even where burdens of compliance are "not insurmountable"). Similarly, while this Court has made clear that a content-neutral regulation of speech may be upheld if, *inter alia*, it affords ample

alternative channels of communication, it has not required plaintiffs to pursue "more cost[ly]" and "less effective" avenues of communications to alleviate the harm to speech. *Linmark Assocs., Inc. v. Willingboro Tp.*, 431 U.S. 85, 93 (1977). And indeed, when evaluating a poll tax even under rational basis review, this Court did not suggest that voters mitigate the harm by paying the tax, even if they were able to pay, and even if the cost of compliance is modest. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966). The Fifth Circuit's holding that physicians must engage in exhaustive and futile efforts, and risk incurring professional harm, to mitigate the effects of a statute that does nothing to further any valid state interest conflicts not only with this Court's abortion jurisprudence, but its approach to constitutional rights more broadly.

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The District Court correctly found that the Act would dramatically reduce abortion access in Louisiana because numerous physicians could not satisfy its requirements despite good-faith efforts. It likewise correctly determined that the Act inflicts this harm without meaningfully furthering any legitimate state interest. As such, the burdens it imposes are undue. The Fifth Circuit's decision upholding the Act in the face of those findings repudiates this Court's precedents and cannot stand.

CONCLUSION

For the reasons set forth above, and in the Brief for the Petitioners, the judgment below should be reversed.

Respectfully Submitted,

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