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 OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (ABA), as *amicus curiae*, respectfully submits this brief in support of the Petitioner. The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its members include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates.[2]

Promoting the rule of law is central to the ABA's mission as the "national representative of the legal profession"[3] In furtherance of this mission, the ABA adopted in 2006 a Statement of Core Principles, committing to key rule of law principles.[4] The ABA has also established a Rule of Law Initiative that works to "promote justice, economic opportunity and

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[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to preparation or submission of this brief other than *amicus curiae* and its counsel. Pursuant to Rule 37.3(a), *amicus curiae* states that counsel of record for petitioners and respondents have consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

[3] *See* ABA Goal IV, https://perma.cc/5UFF-JX2Q.

[4] ABA Policy #111 (adopted midyear 2006), https://perma.cc/Z6YX-AJJ8.

human dignity through the rule of law." ABA, Rule of Law Initiative Program Book 4 (2016). The ABA has conducted training on the rule of law internationally, holding the U.S. judicial system up as a model and highlighting the adherence to precedent as key to its integrity.

The ABA has submitted a number of amicus briefs urging faithful application of rule of law principles in order to preserve the integrity of, and public confidence in, our judicial system. For example, the ABA's policy on advancing the rule of law provided the basis for the ABA's *amicus curiae* brief in *Moore* v. *Texas*, 139 S. Ct. 666 (2019), in which the ABA explained: "No practice is more vital to preserving the rule of law—and ensuring that the ABA's promotion of that rule is legitimized in the eyes of developing countries—than the following by lower courts of binding precedent of this Court."

ABA Amicus Brief at 5, n.4.

In addition, the ABA has an interest in this case because of its policy opposing laws that interfere with access to healthcare. In particular, the ABA resolved on August 13, 2019, that it "urges federal, state, local, territorial, and tribal governments not to impose upon medical facilities or healthcare providers licensing or other regulatory requirements that are not medically necessary or that have the purpose or effect of restricting availability or burdening patients' access to healthcare services."[5] The ABA views the Louisiana statute at issue here to be inconsistent with this basic precept.

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[5] ABA Resolution 19A115F (Aug. 13, 2019).

INTRODUCTION AND SUMMARY

This case raises significant concerns about adherence to basic rule of law principles and, in particular, the manner in which the United States Court of Appeals for the Fifth Circuit treated both this Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) and the district court's decision below.

Stare decisis is a centerpiece of the rule of law. The integrity of the American legal system depends on our lower courts applying precedent faithfully, following "both the words and music of Supreme Court opinions." *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). It is particularly important that the lower courts hew closely to precedent when addressing politically charged issues that are the subject of intense public debate. No matter how deeply held, and morally grounded, one's disagreement with this Court's precedents may be, the rule of law requires that lower courts strictly apply this Court's directives, rather than avoid their application.

There is also an important structural component to the rule of law, reflecting the different responsibilities assigned to trial and appellate judges. Our system of laws assigns certain responsibilities to the courts of appeal, and others to the trial courts. On issues of law, appellate courts govern. On issues of fact, our system of laws assigns the responsibility of determining facts to trial courts, which are in a better position to view and assess the evidence.

Federal appellate courts may overturn district court factual findings only where clearly erroneous. There are important reasons for this. Any other rule would place the appellate courts in the role of plenipotentiary, granting the appellate court an arbitrary and ill-informed veto over matters better observed and weighed by the trial court. Indeed, it would render much of trial court process ministerial and irrelevant.

As shown below, the Fifth Circuit here departed from the legal analysis prescribed by *Whole Woman's Health*. And while the Fifth Circuit formally acknowledged its limited scope of review of factual matters, the decision below reflects that the court revisited and revised the district court's factual findings in a manner that resulted in that court distinguishing, rather than following, the precedent set by *Whole Woman's Health*.

ARGUMENT

I. THE RULE OF LAW REQUIRES LOWER COURTS TO ADHERE TO PRECEDENT, IN PRINCIPLE AND IN PRACTICE

A. *Stare Decisis* Is Central To Our Legal System And Sustaining Respect For The Judiciary.

Under our system of justice, lower federal courts are bound by this Court's rulings. That core rule of law principle has been reiterated over the centuries by the greatest legal scholars of each era, and of

course by this Court as well.[6] *E.g., Hutto v. Davis*, 454 U.S. 370, 374 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it . . . a respect for precedent is, by definition, indispensable.") (citations omitted); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, J., concurring) ("Fidelity to precedent . . . is vital to the proper exercise of the judicial function").

The reasons for *stare decisis* are many. But one central reason is that confidence in the integrity of any judicial system, and respect for that system, is enhanced if the citizenry is convinced that judicial decisions are not arbitrary, the product of the prejudices of the decision-maker, rather than the law. Law is presumed to be capable of producing consistent and uniform results, applicable to all equally. While the nature of our legal system –

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[6] *E.g.,* 1 Joseph Story, Commentaries on the Constitution of the United States § 377 (1833) ("[J]udicial decisions of the highest tribunal . . . are considered, as establishing the true construction of the laws . . . The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature."); Bryan Garner *et al.*, *The Law of Judicial Precedent* 21 (2016) ("Like cases should be decided alike. Following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability.").

including the independent role of the factfinder – makes it difficult to achieve absolute uniformity in result from court to court and case to case, there is enormous value in consistency and avoiding even the appearance of arbitrariness. Consistency in result – across a nation where this Court was created to be the final arbiter on issues of federal law – is a central goal of *stare decisis*. This Court recently affirmed that core principle in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019), reminding us that:

> Adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798, (2014). "[I]t 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." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

The lower courts have routinely acknowledged their mandate to faithfully follow this Court's precedents. *See, e.g.*, *Winslow v. F.E.R.C.*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("declin[ing] [petitioner's] invitation to flout the Supreme Court's decision" because: "Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one Supreme Court.'"); *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002) ("[W]e have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us or even how out of touch with the Supreme Court's current thinking the decision seems."). And this Court safeguards the rule of law by reversing where a lower court fails to fulfill that mandate. *E.g., Thurston Motor Lines, Inc. v. Jordan*

K. Rand, Ltd., 460 U.S. 533, 534–35 (1983) (per curiam) (finding "error" because the Court had "squarely held that federal-question jurisdiction existed" and "only this Court may overrule one of its precedents"); *Hutto v. Davis*, 454 U.S. at 374–75 (reversing where "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution"); *Cooper v. Aaron*, 358 U.S. 1, 8, 18 (1958) (affirming reversal of lower court decision ratifying state legislation "designed to perpetuate . . . racial segregation" because "the *Brown* case is the supreme law of the land").

Of course, this Court has sometimes reversed itself. Horizontal *stare decisis* – a court's adherence to its own precedents – is "not an inexorable command." *Payne*, 501 U.S. at 828. But "even in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). When deciding whether to reverse a precedent, this Court considers, *inter alia*, its workability, whether it was well reasoned, and the reliance interests at stake. *See Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). But those considerations are irrelevant here because Louisiana does not seek to overturn *Whole Woman's Health*; rather, it argues that the Court should

"clarify" or "narrow" its application to state-specific "factual issues."[7]

Adherence to vertical *stare decisis*, requires more than giving a gentle nod to a prior decision of a higher court, while finding ways to avoid that decision. Recognizing the obligation to apply precedent faithfully despite the inevitable factual variations between individual cases,[8] a "lower court in a system of . . . stare decisis headed by one Supreme Court" must "follow both the words and music of Supreme Court opinions." *United States v. Martinez-Cruz*, 736 F.3d at 1006.

Here, the Fifth Circuit was faced with a state law substantively identical to one invalidated by this Court in *Whole Woman's Health* as providing "no [] health-related benefit," 136 S. Ct. at 2311, while "plac[ing] a 'substantial obstacle in the path of'" women seeking to access abortion. *Id.* at 2312.[9] Given the same basic statute at issue, and (certainly in light of the district court's findings) the same basic facts, the legal analysis employed by this Court

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[7] *See* Respondent's Brief in Opposition to Certiorari at 36–39 (urging Court "to reject Plaintiffs' misinterpretations of *Hellerstedt"* rather than overturning it).

[8] *See* Bryan Garner *et al.*, *The Law of Judicial Precedent* 92 (2016) (deriving and articulating principle that "[f]or one decision to be precedent for another, the facts in the two cases need not be identical," just "substantially similar").

[9] Act 620, La. Rev. Stat. § 40:1061.10, is materially identical to the admitting privileges provisions of Texas HB2 found unconstitutional in *Whole Woman's Health*. See Pet. App. 112a. Indeed, Act 620 was expressly modeled on HB2, Pet. App. 194a-196a, and it is "equivalent in structure, purpose, and effect to the Texas law." *Id.* at 130a.

in *Whole Woman's Health* should produce the same result in this case. The interests of women seeking abortion in Texas and Louisiana are the same. There is no difference in the underlying medical facts between the two cases; abortions rarely produce complications and there is no evidence at all that, even if complications occurred, the lack of admitting privileges would impact the continuity or quality of care. Both States have relatively few clinics where abortion services are offered; few doctors provide those services, and those that do would, at a minimum, have difficulty obtaining admitting privileges often precisely because abortion is safe (so that there would be few occasions to admit patients to hospitals). Moreover, the trial court engaged in extensive fact-finding, hearing witnesses and considering evidence, and concluded that there was no material factual basis to distinguish the Louisiana law from the Texas law.

Nonetheless, the Fifth Circuit found Act 620 to be lawful, while this Court found that Texas's law was not. The Fifth Circuit justified its decision by purporting to discern a different set of controlling facts concerning admitting privileges in Louisiana, and by subjecting the factual record in the case to what it described in part as a more "nuanced" analysis than this Court conducted in *Whole Woman's Health*. *June Med. Servs. v. Gee*, 905 F.3d 787, 807 (5th Cir. 2018) (hereinafter "*June Medical II*"). This decision is not only at odds with *Whole Woman's Health*, but with the decisions of many other courts that have found admitting privileges requirements for physicians providing abortion services to be unconstitutional, both before and after *Whole Woman's Health*. *See Whole Woman's Health*,

136 S.Ct. at 2312 (citing *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), aff'd *sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014)). Courts adhering to *Whole Woman's Health* when reviewing admitting privileges laws have enjoined their enforcement or found them unconstitutional in states surrounding Louisiana: Oklahoma and Mississippi. *Burns v. Cline*, 387 P. 3d 348, 350 (Okla. 2016) (finding Oklahoma law unconstitutional); *Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828, 834 (S.D. Miss. 2018) (amending permanent injunction against Mississippi law to include declaratory and statewide relief).

The result of the Fifth Circuit's decision, if allowed to stand, would be a stark, and at least a facially anomalous, inconsistency between what is an acceptable law concerning abortion services in Louisiana, as opposed to Texas and the rest of the country. Such inconsistency suggests the appearance of arbitrariness that *stare decisis* seeks to avoid. *See Payne*, 501 U.S. at 827 (adherence to precedent fosters "evenhanded, predictable, and consistent" application of federal law); *Martin v. Hunter's Lessee*, 14 U.S. 304, 347–48 (1816) (emphasizing the "necessity of uniformity of decisions throughout the whole United States").

B. The Rule of Law Also Requires Faithful Adherence To The Structural Components of Our Legal System.

The rule of law also has important structural components, assigning different roles to courts at different levels. Thus, we entrust fact-finding to the trial courts. And we bar appellate courts from fact-finding because they are not well positioned to judge the facts.

In our judicial system "[t]he trial judge's major role is the determination of fact." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Appellate courts are not well-suited to that fact-finding task. Whereas the district court's procedures equip it to "evaluate the credibility of witnesses and to weigh the evidence" by virtue of the court's responsibility for holding trials, listening to and observing witnesses, and admitting exhibits, *Inwood Labs., Inc.*, *v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982), the courts of appeal engage with parties only through briefing and oral argument, and never observe or engage directly with witnesses.

Further, "[t]o permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority." Fed. R. Civ. P. 52(a), advisory committee's note to 1946 amendment, 28 U.S.C. App. note (2012) (Judiciary and Judicial Procedure), pp. 408-09. That approach would fundamentally detract from the trial process in which we ask litigants to participate:

> The parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'"

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985).

This basic division of responsibility is encapsulated in Rule 52(a)'s "clear command" that "a court of appeals 'must not[]set aside' a district court's '[f]indings of fact' unless they are 'clearly erroneous.'" *Teva Pharm. U.S.A. v. Sandoz, Inc.,* 135 S.Ct. 831, 836 (2015). So long as the "district court's account of the evidence is plausible in light of the record viewed in its entirety," *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), a court of appeals may not substitute its own judgment for that of the fact-finder. And when the "findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Anderson*, 470 U.S. at 575. Here, as shown below, the Fifth Circuit's decision reflects that it engaged in a review of the district court's determinations that strayed into the district court's province as the finder of fact. In so doing, the court ventured outside the carefully structured confines of the role of appellate courts in a manner that should not stand uncorrected.

II. *WHOLE WOMAN'S HEALTH* DIRECTLY CONTROLS THIS CASE

In *Whole Woman's Health*, this Court considered the constitutionality of a Texas admitting privileges law substantively identical to the Louisiana law at issue here, Act 620. Employing the balancing analysis articulated in *Casey*, the Court held that the Texas law suffered from a "virtual absence of any health benefit," and imposed numerous burdens on access to abortion services in Texas. *Whole Woman's Health*, 136 S. Ct. at 2313. The Court therefore held that the Texas admitting privileges law constituted an "undue burden" and was unconstitutional.

In this case, on the extensive factual record before it, the district court made findings regarding the lack of health benefits flowing from Act 620, and the burdens imposed by the Act, that paralleled those found determinative in *Whole Woman's Health*. And under the facts as it found them, the district court concluded that *Whole Woman's Health* required the invalidation of Act 620 because the significant burdens on women's access were not outweighed by any benefits.

The Fifth Circuit acknowledged the balancing analysis mandated by *Casey* and reaffirmed in *Whole Woman's Health*. Nonetheless, its review of the district court's analysis and findings did not successfully adhere to the precedent set in *Whole Woman's Health* in two important respects that, if left uncorrected on a record so nearly identical to that in *Whole Woman's Health*, undermine the rule of law. First, in its analysis of both the benefits and burdens of Act 620, the Fifth Circuit failed to carefully adhere to the legal analysis prescribed by

Whole Woman's Health. Second, while formally acknowledging its limited authority to review the facts as found by the district court, the Fifth Circuit revisited and revised the district court's factual findings regarding both benefits and burdens in a manner that was directly at odds with the structure of our legal system and the role assigned to appellate courts.

We address below both the legal error, and the error in factual review, first with respect to benefits, and then with respect to burdens.

A. The Fifth Circuit Erred In Finding Cognizable Benefits

1. The Legal Analysis

In *Whole Woman's Health*, this Court concluded that the admitting privileges requirement in the Texas law was not medically necessary and did not advance the asserted goal of protecting women's health. *Whole Woman's Health*, 136 S. Ct. at 2311–12. Given that abortion is "extremely safe with particularly low rates of complication," there was "no significant health-related problem that the new law helped to cure," and it served no "relevant credentialing function." *Id.* at 2311, 2313.

On a fully-developed record, the district court here made nearly identical factual findings respecting Act 620. *June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27, 63–65, 86–87 (M.D. La. 2017) (hereinafter, "*June Medical I*"). The district court found that the admitting privileges requirement does not serve Louisiana's stated goal of advancing women's health and, in particular, that it "does not

serve any relevant credentialing function." *Id.* at 87 (internal quotation marks omitted).

The Fifth Circuit, however, purported to identify a credentialing benefit in the admitting privileges law, albeit a "minimal" one. It based that finding on what it perceived as a "more robust record" than had been presented in *Whole Woman's Health*. Specifically, it relied on record evidence that hospitals perform more extensive background checks than clinics.[10] In doing so, the Fifth Circuit lost sight of the relevant legal inquiry directed by this Court in *Whole Woman's Health*.

Whole Woman's Health made clear that the benefit to be weighed against the constitutional interest in access to abortion must be one that, in fact, advances the State's asserted interest in imposing the restriction – here, promoting women's health. *Whole Woman's Health*, 136 S. Ct. at 2311–12. Further, the benefit must advance that interest in comparison to prior law. *See id.* at 2311–12 (Texas failed to show that "compared to prior law" the new law advanced an interest in women's health by ensuring "better" treatment). Stated simply, if the new restriction does not improve outcomes, then there is no *relevant* benefit to counterweigh any burden.

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[10] The court's predicate for re-examining credentialing was not obvious. Credentialing had already been advanced by Texas and rejected by this Court in *Whole Woman's Health*. 136 S. Ct. at 2312–13; *see also* Respondent's Brief in Opposition at 22–23, *Whole Woman's Health*, 136 S. Ct. at 2292 (citing record evidence regarding credentialing function of the Texas law similar to that presented regarding Act 620).

The Fifth Circuit's approach elided the question prescribed by *Whole Woman's Health*: Is there actually an improvement to women's health outcomes? The record before the district court confirmed that there was no evidence of any such benefit. The district court found "no credible evidence" that admitting privileges improved outcomes or would have helped even one woman obtain better treatment. *June Medical I,* 250 F. Supp. 3d at 64–65; *see also id.* at 87 ("Admitting-privileges [] do not serve 'any relevant credentialing function'"). Following the guidance of *Whole Woman's Health,* the district court found that Act 620 therefore prescribed "an inapt remedy for a problem that does not exist." *June Medical I,* 250 F. Supp. 3d at 64. Regardless of the comparative strength of hospital versus clinic background checks on physicians, Act 620 is precisely the type of medically "[u]nnecessary health regulation[]" that this Court has found unsustainable. *Whole Woman's Health*, 136 S. Ct. at 2309. *See also* ABA Resolution 19A115F (Aug. 13, 2019).

The Fifth Circuit's mistaken legal analysis led it to conclude that there was a relevant credentialing benefit to the Act, which in turn led to two additional errors.

First, the "nonexistence of medical benefits" has a decisive effect on any constitutional balance. *See Whole Woman's Health,* 136 S. Ct. at 2309. As Judge Higginbotham noted in dissent, it is difficult "to see how a statute with no medical benefit that is likely to restrict access to abortion can be considered anything but 'undue.'" *June Medical II*, 905 F.3d at 829.

Second, the absence of any medical benefit is evidence of improper purpose, which may itself be sufficient to invalidate the statute. *See Casey*, 505 U.S. at 877 ("undue burden is . . . shorthand for the conclusion that a state regulation has *the purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." (emphasis added)). The record contained ample evidence of improper purpose, including that Act 620 was modelled on the Texas law precisely because of that law's "tremendous success in closing abortion clinics and restricting abortion access." *June Medical I,* 250 F. Supp. 3d at 56. And the district court specifically found that one purpose of Act 620 was "to make it more difficult for abortion providers to legally provide abortions and therefore restrict a woman's right to an abortion." *See id.* at 59; *see also June Medical II*, 905 F.3d at 834 (Higginbotham, J., dissenting) (cautioning that, courts should not "brush past the purpose prong of *Casey*."). The Fifth Circuit's contrary conclusion on the existence of a credentialing benefit, based on mistaken legal analysis, undermines these points which derive directly from this Court's decisions in both *Casey* and *Whole Woman's Health*.

2. The Factual Analysis

The Fifth Circuit's review of the district court's conclusions on the benefits of Act 620 – or, more precisely, the absence of benefits – also, strayed beyond the bounds of appellate factual review. The district court issued its 116-page decision after three years of litigation and 6 days of trial with live testimony from 12 witnesses. *June Med. Servs.*, No. 3:14-cv-00525, ECF No. 274 (Dec.). As noted above, *supra* at 11-12, typically, a district court's factual

determinations, based on such a well-developed record, are entitled to the greatest deference. However, the Fifth Circuit's determination that Act 620 carries a credentialing benefit directly contradicted the district court's finding on this factual issue and rested on a reweighing and reinterpretation of the record evidence in its totality – a task assigned to the trier of fact, not the reviewing court.

For example, the Fifth Circuit's identification of a credentialing benefit was supported by testimony by one of the physicians suggesting that hospitals considering granting admitting privileges will consider a range of background facts. *See June Medical II*, 905 F.3d at 805 n.53; *see also id.* at 818–19 (Higginbotham, J., dissenting). But the Fifth Circuit cited no testimony connecting that hospital credential review with any specific competencies needed to perform abortions safely and effectively. And, the record established (as the district court found) that "by virtue of by-laws and how privileges applications are handled in actual practice, hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency," including, in some instances, because of the "physician's status as an abortion provider." *June Medical I*, 250 F. Supp. 3d at 46–47. Viewing the record as a whole, the district court determined that these facts demonstrated that "Louisiana's credentialing process and the criteria found in some hospital bylaws work to preclude or, at least greatly discourage, the granting of privileges to abortion providers" and, thus, the Act did not actually "serve 'any *relevant* credentialing function.'" *Id.* at 87 (quoting *Whole Woman's Health*, 136 S. Ct.

at 2313) (emphasis added). The Fifth Circuit's contrary determination – supported by little evidence in the record – was in actuality a re-interpretation of the evidence, one that failed to give due weight to the district court's considered judgment.

Even if the evidence might have permitted the Fifth Circuit to make such a finding in the first instance, the appellate panel had no basis to make such a finding while reviewing only for clear error. As this Court has frequently emphasized, "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson,* 470 U.S. at 574. Given the district court's well-supported findings, and having found no error in the district court's determination, adherence to the rule of law dictates that the Fifth Circuit should have deferred to those findings.

B. The Burdens of Act 620

1. The Legal Analysis

In *Whole Woman's Health,* this Court explicitly rejected the dissent's assertion that the burden inquiry required a factual finding as to the cause of each clinic closure. 136 S. Ct. at 2313; *compare id.* at 2345 (Alito, J., dissenting). Rather, this Court held, a district court can draw reasonable inferences from the record about clinic closures and need not rule out the possibility of some independent cause of the closures. *Id.* at 2313.

Here, following the analysis in *Whole Woman's Health,* the district court determined that, as a result of Act 620, only one of the five Louisiana physicians providing abortions in the state would

continue to do so and, consequently, only one clinic would likely remain open. *June Medical I*, 250 F. Supp. 3d at 80–81. The district court relied on and assessed the credibility of direct testimony by the physicians: several testified that they were unable to gain admitting privileges, one testified that he would no longer be able to provide abortions at one of his two clinics, and one testified that he would no longer provide abortions since he would be the only remaining provider in northern Louisiana and feared for his safety. *Id*. The result would leave only one clinic in operation.

The Fifth Circuit rejected those conclusions by finding intervening cause in what it viewed as the personal decisions of the physicians seeking admitting privileges – that is, the court's analysis imposed a higher standard that focused on "each abortion doctor's efforts to comply with [Act 620]." *June Medical II*, 950 F.3d at 807. Unless the physician could show that the withdrawal from abortion practice was the result of "a direct inability to meet the legal requirements of the bill," the court deemed the causal chain broken by the physician's "independent personal choice." *Id.* at 810–11.

But that elevated causal test was a fundamental departure from the legal framework prescribed by this Court. The *Whole Woman's Health* inquiry focuses on the actual effect of the statute on women seeking abortion, not on whether the physicians subject to those statutory requirements are sufficiently vigorous in their efforts to comply with the new law. If the physician's decision to stop providing abortions is the product of Act 620, it is not "independent" of Act 620. If the Act will cause physicians to withdraw from abortion practice, and

as a consequence the ability of women to access abortion services is limited, then the law has had precisely the effect of undue burden that *Casey* and *Whole Woman's Health* prohibit.

2. The Factual Analysis

The Fifth Circuit's review of the district court's analysis of the burdens imposed by Act 620 also raises an important question of whether the court confined itself to its limited role as an appellate court, or whether it ventured too far into the province of the trial court.

There were five physicians who perform abortions in Louisiana when the district court declared Act 620 invalid; collectively, they perform approximately 10,000 abortions annually. *June Medical*, 250 F. Supp. 3d. at 39. The district court listened to and evaluated testimony from each of them as to their attempts to obtain the admitting privileges required by Act 620. Of the five, one physician had admitting privileges prior to Act 620's enactment, and a second physician obtained admitting privileges within 30 miles of his New Orleans clinic but not within 30 miles of the Baton Rouge clinic where he also provides abortions.

The district court credited that physician testimony. *See id.* at 78. The district court's opinion documented each physician's attempts to obtain privileges, why each was denied (to the extent known), and the impediments to obtaining privileges confronted by each physician. As to one of the two physicians who retained admitting privileges, Doe 3, the district court found that Act 620 would force the clinic where he practiced to close. But even were the clinic to remain open, the district court found that

"as a result of his fears of violence and harassment, Doe 3 [an OB/GYN] has *credibly* testified that if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions." *Id.* at 74–75 (emphasis added). On that record, the district court concluded that Act 620 would cause all but one clinic, with one remaining physician, to close. As a result, "approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana." *Id.* at 80.

The Fifth Circuit rejected these findings. But in doing so, it substituted its view for that of the district court in judging the physicians' efforts, thereby taking on for itself a role assigned to the trier of fact. Two examples are illustrative.

a. Doe 2

The district court found that Doe 2 tried to obtain admitting privileges at three separate hospitals, none of which granted his request. *June Medical I*, 250 F. Supp. 3d at 68–69. One of the hospitals, WKBC, asked him to provide the "operative notes and outcomes of cases performed within the last 12 months for the specific procedures you are requesting on the privilege request form." *Id.* at 69. Because Doe 2 had not performed any work in hospitals, he was unable to comply with the hospital's request. *Id.* The district court found that Doe 2 nonetheless submitted a list of cases he had worked on at the clinic, to which the hospital replied that "[t]he data[] submitted supports the [] procedures you perform, but does not support your request for hospital privileges. … '[W]ithout that information your application cannot be processed.'"

Id. at 49, 69. Because the hospital required information which Doe 2, by virtue of his clinic-based practice, was unable to provide, the district court found that "Doe 2's application would never have been approved according to [the hospital's] own letter." *Id.* at 69.

Reviewing the exact same evidence, the Fifth Circuit concluded that "[t]he district court erroneously concluded that Doe 2 put forth a good faith effort." *June Medical II*, 905 F.3d at 808. Whereas the district court credited Doe 2's testimony that he submitted a list of cases to WKBC, the Fifth Circuit, without benefit of Doe 2's live testimony, found that his "testimony was contradictory on whether he supplied the documentation" and inferred from that a lack of good faith. *Id.* It also speculated that he may have been unresponsive to WKBC's request, thus justifying the hospital's denial of admitting privileges and providing evidence that Doe 2 did not put forth good faith efforts. *Id.* ("the record does not establish whether the deficiency was his email response or actual documentation of the . . . cases").

The Fifth Circuit's concerns about Doe 2's efforts are belied by the record, which makes clear that he was responsive to WKBC's request. Indeed, WKBC's letter to Doe 2, specifically states that "*[t]he data submitted* supports the procedures you perform, but does not support your request for hospital privileges." *June Medical II*, 905 F.3d at 821 (Higginbotham, J, dissenting) (emphasis added). The court's conclusion that Doe 2 lacked good faith is therefore troubling on two levels: first, because that conclusion is not supported by the record; and second, because the court "substitut[ed] its

interpretation of the evidence for that of the trial court simply because [it gave] the facts another construction [and] resolve[d] the ambiguities differently.'" *Inwood Labs*, 456 U.S. at 857.

b. Doe 3

Doe 3 is one of two physicians with admitting privileges, which he retains only because "he regularly admits patients to the hospital as part of his private OB/GYN practice, not because of his work at Hope Clinic." *June Medical I*, 250 F. Supp. at 43. In a declaration, he stated that he would retire if Act 620 were to take effect and he were the only remaining physician performing abortions in the state. At trial, he was asked whether he would retire if he was the last remaining physician providing abortions in northern Louisiana, to which he responded that he would. Having heard this testimony, the district court found that "as a result of his fears of violence and harassment, Doe 3 [an OB/GYN] has *credibly testified* that if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions." *June Medical I*, 250 F. Supp. 3d at 74–75 (emphasis added).

The Fifth Circuit rejected this finding; in its view, Doe 3 was not credible because his "story changed."[11] 905 F.3d at 810. The court attributed

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[11] There is no inconsistency between the two statements. That Doe 3 would retire if he were the last physician providing abortions in Louisiana, and that he would also retire if he were the last physician providing abortions in northern Louisiana,

(continued...)

Doe 3's "shifting preference," *id.*, to the fact that another physician had obtained admitting privileges in southern Louisiana. Therefore, it concluded that Doe 3's decision to retire was not, as the physician testified, because of his fears of being targeted by anti-abortion activists, but "entirely independent" of the Act. *Id.* The Fifth Circuit therefore made its own credibility determination regarding Doe 3's testimony.

But the credibility of the witness on the ultimate questions – whether and why the physician would retire – is expressly within the province of the district court. *See Anderson*, 470 U.S. at 575 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings."). That the Fifth Circuit might "find a more sinister cast to actions which the [d]istrict [c]ourt apparently deemed innocent" is immaterial in a faithful clear error analysis. *Inwood Labs*, 456 U.S. at 857–58.

In sum, it appears that the Fifth Circuit lost sight of its role as reviewing court in re-considering the facts at issue here. This Court should reverse and remand for a decision consistent with that limited role, as well as with this Court's decision in *Whole Woman's Health*, thereby reaffirming core rule of law principles central to the integrity of, and public confidence in, our judicial system.

(continued...)
can both be true. Indeed, the district court credited both statements. *June Medical I*, 250 F. Supp. 3d at 75.

CONCLUSION

The Court should reverse the Court of Appeals' decision.

Respectfully submitted,

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