Nos. 18-1323, 18-1460

IN THE

Supreme Court of the United States

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

Petitioners,

v.

DR. REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Respondent.

DR. REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Cross-Petitioner,

v.

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

Cross-Respondents.

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

BRIEF OF TORT LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF JUNE MEDICAL SERVICES L.L.C., *ET AL.*

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INTERESTS OF *AMICI CURIAE*

Amici curiae are legal scholars and academics specializing in tort law. All *amici* are current or former professors of tort law at law schools in the United States. Collectively, *amici* have authored or contributed to five casebooks and over 45 scholarly articles related to tort law. Four are Members of the American Law Institute ("ALI"), three are advisers to the ALI's Third Restatement of Torts, and one served in a consultative group to the ALI's Third Restatement of Torts regarding economic harm. *Amici* have joined this brief to share their concerns regarding the Fifth Circuit's erroneous causation analysis, which is contrary to established principles of tort law and misapplies this Court's approach to causation in constitutional precedent.[1] *Amici* are:

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1. Pursuant to Supreme Court Rule 37.6, all parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

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SUMMARY OF ARGUMENT

The Fifth Circuit erred in applying a causation analysis that is inconsistent with established principles of tort law and this Court's precedent. The Fifth Circuit held that the causal chain between Act 620 (the "Act") and its harms was severed by the conduct of individual physicians. But under black-letter rules of tort law, causation is broken by introduction of a superseding cause that is both independent of the original actor's conduct and unforeseeable. The Fifth Circuit never addressed the issues of independence or foreseeability. Here, the physicians' efforts to obtain privileges were neither independent of Act 620, which required physicians to seek admitting privileges in the first place, nor unforeseeable, and therefore cannot break the causal chain.

The Fifth Circuit's analysis also finds no support in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*") or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), both of which are consistent with longstanding principles of tort

law. In *WWH*, this Court determined that an identical admitting-privileges requirement in Texas ("H.B. 2") caused half of that state's clinics to close. Here, the Fifth Circuit scrutinized the efforts of individual physicians to erroneously distinguish its holding from *WWH*, and failed to address how it was unforeseeable that Act 620 would cause the same harms that occurred when H.B. 2 went into effect just one year before.[2] Furthermore, the Fifth Circuit failed to explain how the efforts of a third-party physician could sever the causal chain between Act 620 and its burdens, given that the abusive conduct of a third-party spouse did *not* sever the chain in *Casey*. For the reasons set forth below, the Fifth Circuit's causation analysis does not comport with established principles of tort law or this Court's precedent, and should be reversed.

ARGUMENT

I. THE FIFTH CIRCUIT'S CAUSATION ANALYSIS IS INCONSISTENT WITH ESTABLISHED PRINCIPLES OF TORT LAW.

Following this Court's decision in *WWH*, the District Court for the Middle District of Louisiana found Act 620, which is identical to Texas's H.B. 2 admitting-privileges requirement, to be facially unconstitutional. *See June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27, 57, 88-89 (M.D. La. 2017), *rev'd sub nom. by June Med. Servs. v. Gee*, 905 F.3d 787 (5th Cir. 2018). The Fifth Circuit reversed on

2. H.B. 2 was enacted in July 2013, and its admitting-privileges requirement went into effect in October 2013. *See WWH*, 136 S. Ct. at 2300. Act 620 was signed into law in June 2014. *See Kliebert*, 250 F. Supp. 3d at 35-36.

appeal, holding that the record "failed to establish a causal connection between the regulation and its burden" because the law's "impact was severed by an intervening cause: the doctors' failure to apply for privileges in a reasonable manner." *Gee*, 905 F.3d at 807, 811, *reh'g and reh'g en banc denied by* 913 F.3d 573 (5th Cir. 2019).

The Fifth Circuit's determination that physicians failed to put forth sufficient efforts cannot be reconciled with the District Court's factual finding that each doctor sought privileges in good faith. *Kliebert*, 250 F. Supp. 3d at 77-78. But regardless of this factual discrepancy, the Fifth Circuit's causation analysis is incorrect as a matter of law. It is at odds with longstanding causation principles and confuses an intervening act, which does not sever the causal chain, with a *superseding cause*, which does. The Fifth Circuit failed to address, especially in light of *WWH*, how the doctors' alleged inaction was independent of Act 620 and so unpredictable as to break the chain of causation between the Act and its burdens; indeed, under established principles of tort law, it could not. Clinic closures resulting from the physicians' lack of privileges would be the direct and foreseeable consequences of the Act itself, and the Fifth Circuit erred in holding otherwise.

A. A Third-Party Act Must Be of "Independent Origin" and "Unforeseeable" to Sever the Causal Chain.

The Fifth Circuit misapplied causation principles in concluding that the causal connection between Act 620 and its harms had been severed. It is well-established that an actor in tort is responsible for the foreseeable injuries resulting from its conduct. *See* Dan B. Dobbs,

Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 206 (2d ed. 2019) ("Dobbs on Torts") ("The foreseeability or risk rule holds the defendant subject to liability if he could reasonably foresee the nature of the harm done . . . ."). But in some circumstances an intermediary act or force of nature may inject itself between the defendant's misconduct and the claimant's injury, arguably eliminating the defendant's responsibility. *Id.* § 204 ("In the intervening cause cases, the defendant negligently creates risk of harm, but the immediate trigger of the harm is another person or a force of nature.") (footnote omitted). In response, the law has long distinguished between an intervening force, which does not relieve the original actor of responsibility, and a superseding cause, which does.[3] This Court has consistently recognized these fundamental principles in its precedent. *See infra* Section II; *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 419-21 (2011) (recognizing black-letter tort principles of causation and superseding causes); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (discussing the superseding cause doctrine).

An intervening force is the "normal consequence of a situation created by the actor's negligent conduct" and thus does not break the causal chain. Restatement (Second) of Torts § 443 (Am. Law Inst. 1965); *see also id.* § 443 cmt. b ("The word 'normal' is not . . . what is usual,

3. The District Court held that Act 620 caused clinic closures in Louisiana. *See Kliebert*, 250 F. Supp. 3d at 50, 81. The Fifth Circuit does not appear to dispute the District Court's findings with respect to causation generally; rather, its decision is largely concerned with the purported existence of an "intervening cause"—*i.e.*, that the physicians' efforts to comply with Act 620 severed the causal chain. *See Gee*, 905 F.3d at 811.

customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary."). Indeed, an intervening force "*itself* is part of the risk negligently created by the defendant," and, therefore, the defendant "is not relieved of liability merely because some other person or force triggered the injury." Dobbs on Torts § 204 (footnote omitted); *see also Sheridan v. United States*, 487 U.S. 392, 405 (1988) (Kennedy, J., concurring) ("'If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences.'") (quoting 2 F. Harper & F. James, *Law of Torts* § 20.5, 1143-45 (1956)). Ultimately, "***the fact that the harm is brought about through the intervention of another force does not relieve the [original] actor of liability,*** except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." Restatement (Second) of Torts § 442B (emphasis added).[4]

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4. *See also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 44, p. 302 (5th ed. 1984) ("Prosser and Keeton on Torts") (the question of intervening cause "has been determined by asking whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated."); 57 Am. Jur. 2d *Negligence* § 576 (2019) ("If an intervening cause is in reality only a condition on or through which a negligent act or omission operates to produc[e] an injurious result, it does not break the line of causation . . . ."); *id.* § 575 (recognizing that causation is not broken by an intervening cause that is "produced, brought about, or put into operation, by the original wrongful act or omission") (footnote omitted).

Conversely, a superseding cause exists only where the original actor contributed to the harm "but the injury was actually brought about by a later cause *of independent origin* that was not foreseeable." *Exxon*, 517 U.S. at 837 (internal quotation marks omitted) (emphasis added); *see also Staub*, 562 U.S. at 420 ("Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'") (quoting *Exxon*, 517 U.S. at 837). Stated otherwise, a third-party act constitutes a *superseding cause* that severs causation only where such act is both independent of the original actor's conduct and "so extraordinary as to fall outside the class of normal events." Restatement (Second) of Torts § 443 cmt. b; *see also Hundley v. District of Columbia*, 494 F.3d 1097, 1104 (D.C. Cir. 2007) (Kavanaugh, J.) (recognizing "the black-letter tort law principle" that a third-party act severs the causal chain only where it is "sufficiently unforeseeable as to constitute a superseding cause" and "'the chain of events leading to the injury appears highly extraordinary in retrospect.'") (quoting *Majeska v. District of Columbia*, 812 A.2d 948, 951 (D.C. 2002)). Unlike an intervening force, a superseding cause justifiably severs the chain of causation because "[i]t is a factor of such extraordinary, unforeseeable nature" that "the original wrongdoer" cannot rightfully be held liable for the victim's injuries and is therefore immunized from liability. *See* 74 Am. Jur. 2d *Torts* § 28 (2019); *see also* Prosser and Keeton on Torts § 44, p. 312 (explaining the causal chain is severed by, for example, "unforeseeable, abnormal forces of nature, such as unpredictable storms or floods") (footnote omitted).[5] Therefore, in the absence of a

5. The Fifth Circuit's own precedent provides examples of genuine superseding causes. *See, e.g.*, *Skipper v. United States*, 1 F.3d 349,

superseding cause, the defendant is generally responsible for any foreseeable harms within the scope of the risk created by his tortious conduct. *See* Restatement (Third) of Torts § 29 (Am. Law Inst. 2019) (recognizing that an actor is liable for "those harms that result from the risks that made the actor's conduct tortious.").[6]

The Fifth Circuit's causation analysis is fundamentally flawed and confuses the principles described above. Further, in concluding that the impact of Act 620 was "severed by an intervening cause," *Gee*, 905 F.3d at 811, the court failed to address entirely the requirements of independence and foreseeability. As set forth below, the Fifth Circuit's holding is therefore contrary to tort law doctrine as applied in this Court's precedent and should be reversed.[7]

353-54 (5th Cir. 1993) (relieving the original actor, a military officers' club that negligently served the victim's boyfriend alcohol, of liability for the victim's death because the boyfriend's "premeditated murder" of the victim could not have been anticipated and was a "superseding cause which extinguished any liability on the part of the" officers' club).

6. As the Fifth Circuit has recognized, an independent and premeditated criminal act may sever the causal chain. *See Skipper*, 1 F.3d at 353-54. But the Third Restatement makes clear that where third-party intervention is within the scope of risk created by the defendant, causation will not be broken. *See* Restatement (Third) of Torts § 34 cmt. d. For instance, if a guest at a hotel in a neighborhood with significant violent crime is assaulted in her room by a third party who was able to gain entry because of an inadequate locking system, the hotel is responsible for the guest's harm. Given the neighborhood's reputation for violent crime, the guest's harm would be within the scope of risk created by the hotel's inadequate locking system and thus attributable to the hotel itself. *See id.*

7. The Fifth Circuit also appears to have ignored that the State did not even attempt to show the existence of a superseding cause.

B. Under Established Principles of Tort Law, the Physicians' Efforts Are Not A Superseding Cause.

The Fifth Circuit erred in concluding the physicians' efforts to comply with Act 620 were a *superseding* cause. Any such efforts were inextricably tied to the Act and could not sever the causal chain. And because the State is liable for the foreseeable harms it brought about, the Fifth Circuit erred in absolving the State of responsibility for the burdens imposed by Act 620.

1. The Physicians' Efforts Were Not of Independent Origin.

As discussed in Section I.A., a superseding cause must be independent of the State's challenged actions. Here, any actions taken by the physicians were entirely derivative of Act 620, which required them to seek privileges to begin with, and therefore could never be "of independent origin." At most, the efforts put forth by the physicians in an attempt to comply with the law were an intervening *dependent* force that would not break the causal chain.[8] Indeed, "even if some element

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See Gee, 905 F.3d at 819 (Higginbotham, J., dissenting) ("The State did not challenge the district court's findings that Does 2, 5, and 6 each put in a good-faith effort to obtain admitting privileges—a plain waiver. Undeterred, the majority simply finds the opposite."). That burden rests on *the defendant*. *See, e.g.*, *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575 (9th Cir. 1995), *aff'd by* 517 U.S. 830 (1996) (defendant bears the burden of showing the existence of a superseding cause).

8. For instance, "if A carelessly exposes B to danger, the act of C in going to B's rescue, being C's reaction to B's peril, is a *dependent* intervening force . . . ." Restatement (Second) of

of 'personal choice' did influence an individual doctor's ability to obtain admitting privileges, that doctor would not have been faced with navigating that obstacle but for Act 620's" requirement. *Gee,* 913 F.3d at 582 (Dennis, J., dissenting).[9] Ultimately, the physicians' efforts to obtain admitting privileges are not independent of Act 620, but are the very mechanism through which the risks introduced by the State are realized.

Torts § 441 cmt. c (emphasis added). Here, any action taken by the physicians is a direct reaction to Act 620, which requires them to obtain admitting privileges to continue caring for patients, and is necessarily dependent on that requirement.

9. The Fifth Circuit's novel approach to causation finds no equivalent in other areas of constitutional law, such as this Court's First Amendment precedent. This Court has long held that a state cannot require its citizens "to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162 (1969) (Harlan, J., concurring); *see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 154-55 (2002) (invalidating statute requiring individuals to obtain a free permit before door-to-door canvassing as an impermissible burden on speech). In *Watchtower*, this Court invalidated the statute even though the petitioners never applied for a permit and thus never attempted to comply. *See id.* Understandably so. Where the law obligates an individual to try, the law is not then shielded from scrutiny because the individual exercised some discretion in deciding whether to do so. *See Shuttlesworth*, 394 U.S. at 162 (Harlan, J., concurring) ("It may be suggested, however, that [Petitioner's] dilemma was of his own making. He could have requested a permit months in advance . . . . But such a suggestion ignores the principle . . . which prohibits the States from requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right . . . .").

This holds true even with respect to Doe 3, whom the Fifth Circuit appeared to view as a special case. *See Gee*, 905 F.3d at 800, 809. To the extent the Fifth Circuit's analysis suggests that Doe 3's decision to stop providing abortion care was independent of Act 620, this notion is also incorrect. The District Court found that Act 620 would eliminate every abortion provider in Northern Louisiana, except Doe 3, who already has privileges by virtue of his full-time OB/GYN practice. *See Kliebert*, 250 F. Supp. 3d at 53, 83. The District Court also concluded that "[a]s a result of his fears of violence and harassment, Doe 3 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."[10] *Id.* at 74-75; *see WWH,* 136 S. Ct. at 2312 (acknowledging as legitimate the problems faced by clinics in finding physicians to perform abortions due to hostility providers face); *see also* Pet. App. 156a, 256a (explaining that due to Doe 1's lack of admitting privileges, Act 620 would leave Doe 3 as the only abortion provider at Hope

10. Anti-choice activists have distributed fliers to Doe 3's neighbors, referring to Doe 3 as an "abortionist" and explaining that they wanted to convert him to Jesus. *Kliebert,* 250 F. Supp. 3d at 52-53. "Local police have had to patrol [Doe 3's] neighborhood and search his house before he entered." *Id.* at 53. Anti-choice activists have approached Doe 3's medical practice and tried to enter the office, prompting security officers to escort these individuals off the premises. *Id.* Doe 3 testified that he fears he would become an even greater target of anti-choice violence if he were the only provider left in his part of the state or the entire state, citing the deaths of Dr. Tiller and other providers who have been killed by anti-choice advocates over the years. *Id.* ("'[A]ll [these individuals] have to do is eliminate [him] as they have Dr. Tiller and some of the other abortion providers around the country' to eliminate abortion entirely in Northern Louisiana.").

Clinic, which would devastate the clinic's operations and financial viability). Thus, Doe 3's decision would not sever causation because it too would be the result of Act 620. The State is not relieved of responsibility simply because a third party may exercise some degree of personal discretion in responding to the law's mandates. *Cf.* Dobbs on Torts § 204 (the original actor is not relieved of liability for harms resulting from the risks it created "merely because some other person or force triggered the injury"); Restatement (Second) of Torts § 442B (where "the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability"). Applying established causation principles, there was no reason for the Fifth Circuit to examine the physicians' individual efforts as a means to break the causal chain, and the court erred in doing so.

2. Clinic Closures Are Direct and Foreseeable Consequences of the Act.

As set forth above, the Fifth Circuit erred by failing to address the "independent origin" requirement and concluding that the physicians' efforts constitute a superseding cause. This error was compounded by the court's failure to address foreseeability at all—*i.e.*, that the physicians' efforts to comply or the resulting clinic closures were somehow unforeseeable consequences of the Act. On the heels of *WWH* and in light of extensive empirical evidence in the record, the State cannot plausibly maintain that clinic closures and associated harms to pregnant patients in Louisiana were an unforeseeable result of Act 620.

When Texas's identical H.B. 2 provision went into effect, the majority of Texas abortion providers were without admitting privileges, and nearly half of the state's 40 clinics were shuttered. *WWH*, 136 S. Ct. at 2312. This did not go unnoticed in Louisiana. Anti-abortion activists urged the legislature to pass Act 620 and explained to the law's legislative sponsor that H.B. 2 enjoyed "tremendous success in closing abortion clinics and restricting abortion access in Texas" and that Act 620 "follows this model." *Kliebert*, 250 F. Supp. 3d at 55-56; *see also* JA 6639, 8902, 8928.[11] And at the time the Act was adopted, only one of six doctors performing abortions in Louisiana had qualifying privileges. *See Kliebert*, 250 F. Supp. 3d at 77 (identifying Doe 3 as having privileges because "he maintained these admitting privileges for years in order to facilitate his general OB/GYN practice which was and is unrelated to that portion of his practice performing abortions at Hope."). There can be no credible claim, three years after this Court recognized the effects of H.B. 2 in Texas, that clinic closures are an unforeseeable consequence of the Act, especially since this exact result was anticipated by the law's sponsor. The Fifth Circuit failed to address how it was unpredictable that an identical statute could trigger similar results in Louisiana.

Moreover, the record here confirms that it was entirely foreseeable that physicians would be unable to continue

11. Based on record evidence and after a six-day trial, the District Court found that a "purpose of the bill is to make it more difficult for abortion providers to legally provide abortions and therefore restrict a woman's right to an abortion." *Kliebert*, 250 F. Supp. 3d at 59. But regardless of this finding or the intended purpose of Act 620, clinic closures are within the scope of risk introduced by the State and are foreseeable consequences of the Act for the other reasons set forth in this Section.

providing abortion care as a direct result of Act 620. As in Texas, doctors in Louisiana can be denied privileges based on a number of administrative or other reasons unrelated to competency, thus decreasing their chances of success in obtaining privileges at a qualifying hospital and making clinic closures all the more likely. *See id.* at 87. For instance, a physician can be denied privileges in Louisiana because he or she cannot comply with hospital requirements regarding "the physician's expected usage of the hospital and intent to admit and treat patients there, [and] the number of patients the physician has treated in the hospital in the recent past." *Id.* at 46. This hurdle is particularly problematic for physicians who perform abortions, given that the procedures they perform rarely result in complications or require hospitalization. *Id.* at 61-62.[12] Physicians can also be denied privileges because they do not live within a certain distance of the hospital at which privileges are sought, have not recently admitted patients at any hospital, or are unable to provide mandatory paperwork that does not and cannot exist. *Kliebert*, 250 F. Supp. 3d at 47, 69. For example, as part of the application process, Doe 2 was required to

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12. In fact, pregnant patients are fourteen times more likely to die as a result of childbirth than because of an abortion procedure. *See* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 J. Obstetrics & Gynecology 215, 216 (2012); *see also WWH*, 136 S. Ct. at 2302 ("[T]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.") (internal quotation marks omitted). There is no compelling reason for Louisiana hospitals to grant admitting privileges to abortion providers, rendering it all the more likely that clinics would close.

provide documentation about patients he had admitted to a hospital in the previous 12 months. *See id.* at 69. But due to the nature of Doe 2's current practice, he had not worked in a hospital during that timeframe and thus the paperwork requested did not exist. *Id.*[13] In addition to this practical hurdle, physicians' applications could also be, and were, *de facto* denied after certain hospitals failed to respond or act on their applications at all. *See, e.g.*, *id.* at 45, 51, 69 (explaining that "[u]nlike some states, there is also no statute or rule in Louisiana which sets a maximum time period within which a physician's application for admitting privileges must be acted upon . . . a hospital can effectively deny a doctor's application of privileges by never acting on it").

Even more daunting, Louisiana physicians are unable to apply to certain hospitals absent an invitation from the hospital to do so, *Gee*, 905 F.3d at 799, and some hospitals deny privileges based solely on a physician's status as an abortion provider. *See, e.g.*, *Kliebert*, 250 F. Supp. 3d at 46-48 (finding that "[u]nder Act 620, for reasons unrelated to competency, [the doctors] are now unable to secure active admitting privileges" even though they had "no problem obtaining and maintaining admitting privileges at a number of hospitals" when they had full OB/GYN practices); *id.* at 49 (describing Doe 5's inability to find a local physician willing to provide coverage due to hostility toward abortion providers). The record also shows that the application process is costly, requires considerable resources and time, and can result in a black mark on a

13. As Doe 2 testified in the District Court: "'I'm in a Catch-22 basically. I can't provide information I don't have.'" *Kliebert*, 250 F. Supp. 3d at 69.

physician's record if privileges are denied. *See id.* at 46 (explaining that physicians may be required to repeat the verification process if their applications are not processed within 150 days of filing at Tulane hospital); *Gee,* 905 F.3d at 823, 825 (Higginbotham, J., dissenting) (noting Doe 2's testimony that the process was "long, tedious and not inexpensive" and recognizing the "adverse professional consequences" that can occur should an application be denied). For these reasons, it was entirely foreseeable that when the State enacted Act 620, physicians would be prevented from providing abortion care and Louisiana clinics would close.

In sum, the Fifth Circuit's conclusion that the State is not responsible for the harms imposed by Act 620 depends on its erroneous determination that the physicians' efforts severed the causal chain. But their efforts to comply are neither independent of the Act nor an unforeseeable consequence of the admitting-privileges requirement. To the contrary, it is only because the State made admitting privileges a prerequisite to providing abortion care that doctors need to seek admitting privileges at all. Any efforts made by the physicians were the result of the Act itself, and the causal link between the admitting-privileges requirement and the foreseeable harm of clinic closures (because physicians were left without privileges) remains intact.[14] The State is thus responsible for the foreseeable

14. The Fifth Circuit's causation analysis also threatens to immunize other statutes from constitutional scrutiny, such as those regulating constitutional rights under the Second Amendment. Increasing gun-control laws have caused weapons dealers to close their doors due to increased costs and stricter burdens of compliance. For instance, when San Francisco's last remaining gun shop closed in 2015, the general manager explained that the store

harms resulting from the risks it created by introducing Act 620. The Fifth Circuit defied longstanding causation principles in absolving the State of responsibility for the burdens imposed by Act 620, as the physicians' efforts were, at most, an intervening force.

II. THE FIFTH CIRCUIT'S "INTERVENING CAUSE" HOLDING IS INCONSISTENT WITH THIS COURT'S ABORTION PRECEDENT.

The Fifth Circuit's causation analysis also finds no support in *WWH* and *Casey*. The majority and dissenting opinions in *WWH* and this Court's decision in *Casey* are consistent with traditional causation principles, and do not countenance the Fifth Circuit's finding of an "intervening cause."

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felt it could no longer keep up with state and local laws and believed it would be regulated out of business. *See* Peter Holley, *Citing Onerous Regulations, San Francisco's Last Gun Store Is Closing Its Doors*, Wash. Post (Oct. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/10/04/citing-onerous-regulations-the-last-gun-store-in-san-francisco-is-closing-its-doors/. The store begrudgingly but voluntarily closed. Likewise, in 2018, Illinois lawmakers proposed legislation that would increase the costs associated with acquiring a license to sell guns, causing concern that such costs would drive small dealers out of business. *See* Dave Taylor, *Some Illinois Gun Stores Closing Their Doors*, Tribune Star (June 4, 2019), https://www.tribstar.com/news/local_news/some-illinois-gun-stores-closing-their-doors/article_7abb26d0-c53a-5019-97ba-2a05d99e3afd.html. Under the Fifth Circuit's approach, challenges to such laws could be futile and judicial scrutiny of constitutional issues avoided, so long as the blame could be shifted to the store owner's or dealer's decision—no matter how foreseeable—not to undertake exhaustive efforts to comply with mounting regulations.

The Fifth Circuit's causation approach is inconsistent with both the majority and the dissenting opinions in *WWH*. In *WWH*, this Court reviewed testimony and drew "plausible inferences . . . from the timing of the clinic closures" to attribute the clinic closures and other harms to H.B. 2's challenged provisions. *WWH*, 136 S. Ct. at 2313. For instance, in Texas, approximately twenty clinics closed around the time that H.B. 2's admitting-privileges requirement went into effect. *See id.* at 2301. But the *WWH* majority did not require individualized evidence of physicians' efforts, such as the number of applications submitted or the supporting paperwork provided, to make a determination as to the cause of each closure. Yet that is precisely what the Fifth Circuit has done here. *See Gee*, 905 F.3d at 807 (recognizing the court's "more nuanced" analysis and examination of "each abortion doctor's efforts to comply").

Nor did the majority in *WWH* "require proof that every abortion provider in Texas had put in a good-faith effort." *Id.* at 830 (Higginbotham, J., dissenting). The Fifth Circuit nevertheless concluded that the "paucity of abortion facilities and abortion providers in Louisiana allow[ed] for a more nuanced analysis of the causal connection between Act 620 and its burden." *Id.* at 807. But principles of causation do not vary based on the geography of the state or the number of clinics therein. Requiring Petitioners to "demonstrate causation to a much higher level of probability," *Gee,* 913 F.3d at 582 (Dennis, J., dissenting), than required in *WWH* based solely on Louisiana's small number of providers merely increases the risk that pregnant patients living in states with a small number of clinics—whether due to a small population, pre-existing state regulations, or other factors—will not have access to abortion care.

The Fifth Circuit's analysis fares no better under the dissenting opinion in *WWH*. The dissent agreed that "there can be no doubt that H.B. 2 caused some clinics to cease operation," but took issue with "the absence of proof regarding the reasons for particular closures . . . because some clinics have or may have closed for at least four reasons other than the two H.B. 2 requirements at issue here." *WWH*, 136 S. Ct. at 2344 (Alito, J., dissenting). Specifically, the dissent pointed to the following as other possible causes of clinic closures in Texas: (1) "H.B. 2's [separate] restriction on medication abortion," which the petitioners did not challenge in *WWH*; (2) the "[w]ithdrawal of Texas family planning funds" by an unrelated state law that eliminated grants for certain clinics; (3) a "nationwide decline in abortion demand" generally; and (4) pre-planned "[p]hysician retirement (or other localized factors)" that were *not* caused by the admitting privileges or surgical center requirements. *Id.* at 2344-45. But these hypothetical explanations for clinic closures would be true *superseding* causes, unrelated or exogenous to the challenged H.B. 2 provisions. *See Gee*, 905 F.3d at 830, n.42 (Higginbotham, J., dissenting) ("Justice Alito in his dissent did not require what the majority demands here: the elimination of every potential intervening cause and the mitigation by physicians and clinics of the effects of the law . . . . The majority today essentially holds that, because private actors (the physicians) have not tried hard enough to mitigate the effects of the act (a conclusion contradicted by the district court's factual findings), those effects are not fairly attributable to the act. That position finds no support in *WWH*.").

In contrast, here the Fifth Circuit identified only the doctors' efforts to comply with Act 620 as a break

in the causal chain. But the doctors' success or failure in complying with the requirements of Act 620 is not independent of that statute and is entirely distinguishable from the wholly unrelated alternative causes that troubled the *WWH* dissent. The same is true with respect to Doe 3's potential decision to stop providing abortion care, which would result in the closure of Hope Clinic. The Fifth Circuit recognized that Hope Clinic's main provider, Doe 1, was unable to obtain admitting privileges, *see Gee*, 905 F.3d at 808, thus rendering that clinic financially unsustainable. *See infra* Section I.B.1. And because of Act 620, the clinic would be unable to retain the services of Doe 3 given the hostilities he would face as the last provider in Northern Louisiana. *See infra* Section I.B.1; *see also WWH*, 136 S. Ct. at 2312 (treating H.B. 2 as responsible for closures due to clinics' inability to secure a doctor with admitting privileges due to "the hostility that abortion providers face") (internal quotation marks omitted). Even the *WWH* dissent recognized that causation turns on whether a physician's retirement is "caused by the admitting privileges" requirement "as opposed to age or some other factor." *WWH*, 136 S. Ct. at 2345. Doe 3's decision to stop providing abortion care is not the result of "age or some other factor," but the direct result of Act 620, which would eliminate other abortion providers throughout the State.

The Fifth Circuit's causation analysis also is inconsistent with *Casey*. In *Casey*, this Court invalidated Pennsylvania's "spousal notification" requirement, which would have required married pregnant patients to notify their spouses before obtaining an abortion. *Casey*, 505 U.S. at 844, 893. This Court found the law unconstitutional on the grounds that many pregnant patients would have been

unable to comply due to spousal abuse and violence, among other reasons. *See id.* at 893-95 (recognizing spousal abuse as an "unfortunate yet persisting condition[]" and that "women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion" should the provision have gone into effect). In doing so, this Court did not treat the conduct of the third-party spouse as severing the causal chain between the law and the burden imposed. *See id.* at 895-98. And for good reason. The requirement that a pregnant patient notify her spouse before obtaining an abortion originated with the statute, and so it was *the law* that caused the expected harm. Any degree of third-party involvement in the matter was the direct result of the statute requiring notification and was therefore inextricably linked to the law itself.

Where the State enacts a law that risks burdening pregnant patients' access to abortion, it is responsible when those foreseeable harms materialize, regardless of whether third-party discretion is also involved. The State cannot avoid responsibility by shifting the blame to the third-party doctors it has required to take mandatory action. The Fifth Circuit's causation analysis is not supported by the majority or dissenting opinions in *WWH* or by this Court's decision in *Casey*, both of which adopted reasoning consistent with established principles of causation.

CONCLUSION

The Fifth Circuit erred in holding that the physicians' efforts to comply with Act 620 severed the causal chain, such that the harms caused by the Act are not attributable to the State. In doing so, the Fifth Circuit applied a causation standard that is contrary to black-letter tort law and this Court's precedent. The physicians' efforts, which were a direct and foreseeable result of the law, cannot operate to shield the State's actions from scrutiny. The Fifth Circuit's decision should be reversed.

Respectfully submitted,

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