No. _____

In The
Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C.,
ON BEHALF OF ITS PATIENTS, PHYSICIANS,
AND STAFF, D/B/A HOPE MEDICAL
GROUP FOR WOMEN; JOHN DOE 1;
JOHN DOE 2, PETITIONERS,

v.

DR. REBEKAH GEE, IN HER OFFICIAL
CAPACITY AS SECRETARY OF THE
LOUISIANA DEPARTMENT OF HEALTH, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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

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OPINIONS BELOW

The opinion of the District Court is reported at *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017) and reprinted in the Appendix to the Petition ("App.") at 132a-279a. The Fifth Circuit's opinion (Smith, J.) is reported at *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 787-815 (5th Cir. 2018) and reprinted at App. 1a-59a. The dissenting opinion by Judge Higginbotham is reported at 905 F.3d at 816-35 and reprinted at App. 60a-103a.

The Court of Appeals's denial of Hope's petition for rehearing en banc is reported at *June Med. Servs. L.L.C. v. Gee*, 913 F.3d 573, 573 (5th Cir. 2019) and reprinted at App. 104a-05a. The dissenting opinions from the denial of rehearing by Judge Dennis and Judge Higginson are available at 913 F.3d at 573-84 and 584-85, and these are reprinted at App. 105a-30a and 130a-31a.

JURISDICTION

The Court of Appeals entered judgment on September 26, 2018 and denied rehearing en banc on January 18, 2019. App. 1a, 104a-05a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. XIV, § 1; La. Rev. Stat. § 40:1061.10 ("Act 620"); and its implementing regulations. Relevant portions of these provisions are reproduced at App. 285a-90a.

INTRODUCTION

This Court held in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), that a Texas law requiring physicians who perform abortions to have admitting privileges at a local hospital was unconstitutional because it "imposed an 'undue burden' on a woman's right to have an abortion." *Id.* at 2311. Act 620, the law at issue in this case, "was modeled after the Texas admitting privileges requirement" that this Court struck down, and "it functions in the same manner, imposing significant obstacles to abortion access with no countervailing benefits." App. 275a.

The Fifth Circuit decision upholding Act 620 cannot be reconciled with this Court's binding precedent or with basic rule-of-law principles. Indeed, if anything, Act 620's burdens on abortion access are worse than those imposed by the Texas statute. Texas's unconstitutional admitting privileges requirement closed approximately half the state's 40 abortion clinics. *Whole Woman's Health*, 136 S. Ct. at 2301. Act 620 would shutter every clinic in Louisiana but one, leaving only one doctor to care for every woman seeking an abortion in the state. App. 254a-60a.

Multiple judges dissented from the panel's 2-1 decision to uphold Act 620 and the Court of Appeals's 9-6 decision to deny rehearing en banc. For the reasons explained by the dissents, certiorari should be granted and the decision below reversed. Judge Higginbotham showed that the panel majority "fail[ed] to meaningfully apply" *Whole Woman's Health* in

upholding Act 620 and subordinated the "role of settled judicial rules." App. 60a-61a. Judge Higginson stressed that Act 620 is "equivalent in structure, purpose, and effect to the Texas law." App. 130a. And as Judge Dennis correctly observed, the Court of Appeals relied on "strength in numbers rather than sound legal principles in order to reach their desired result." App. 106a.

This Court should not allow lower courts to circumvent binding precedents with which they disagree. Because disagreement with *Whole Woman's Health* is the only explanation for the decision below, this Court should summarily reverse.

Plenary review at minimum is warranted to address the legal uncertainty over the standard of review applicable to burdensome and medically unnecessary abortion restrictions that the decision below creates. This Court addressed that uncertainty less than three years ago, but the decision below—while it stands—undermines the authority of *Whole Woman's Health*.

STATEMENT OF THE CASE

A. Act 620

Louisiana's Act 620 requires a physician to hold "active admitting privileges" at a hospital within 30 miles of the facility where an abortion is provided. App. 286a-87a. "Active admitting privileges" means the physician is a member of the hospital's medical staff, with the ability to admit patients and provide diagnostic and surgical services. *Id*. Violations are

punishable by imprisonment, fines, license revocation, and civil liability. La. Rev. Stat. §§ 40:1061.10(A)(2)(c), 40:1061.29; *see also* La. Admin. Code, tit. 48, pt. I, §§ 4401, 4415(B), 4417(A).

Act 620 was modeled after H.B.2, the Texas law that this Court struck down in *Whole Woman's Health*.[1] In fact, Act 620's statutory text is virtually identical to H.B.2 (only certain phrases appear in different order):

Louisiana's Act 620	Texas's H.B.2
"On the date the abortion is performed or induced, a physician performing or inducing an abortion shall [h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced. . . ."[2]	"A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that: is located not further than 30 miles from the location at which the abortion is performed or induced. . . ."[3]

[1] H.B.2 contained several abortion restrictions. References to H.B.2 in this petition are specific to the law's admitting privileges requirement. *See* Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A).

[2] La. Rev. Stat. § 40:1061.10(A)(2)(a) (numbering and lettering omitted).

[3] Tex. Health & Safety Code Ann. § 171.0031(a)(1) (numbering and lettering omitted).

H.B.2's admitting privileges requirement took effect in October 2013, and 11 Texas clinics closed that same day. *Whole Woman's Health*, 136 S. Ct. at 2301, 2312. Act 620 was proposed in the Louisiana legislature four months later, specifically in recognition of H.B.2's "tremendous success in closing abortion clinics and restricting abortion access in Texas." App. 195a.

B. Initial District Court Proceedings

Hope filed this lawsuit on August 22, 2014, challenging Act 620 as an unconstitutional undue burden on the right to choose abortion under the Fourteenth Amendment. App. 145a.

At the outset, the District Court granted a TRO to allow time for Louisiana hospitals to consider physicians' applications for admitting privileges, and the TRO was extended on consent while the parties conducted extensive discovery. App. 146a-48a. At the close of discovery, the District Court held a six-day trial where it received live testimony from 12 fact and expert witnesses, testimony from additional witnesses by declarations and depositions, and hundreds of exhibits. App. 140a-42a. Based upon this extensive trial record, the District Court preliminarily enjoined Act 620 on January 26, 2016. App. 151a.

Louisiana appealed the preliminary injunction order and moved to stay the injunction on an emergency basis. *Id.* In support of its stay motion, Louisiana acknowledged that Act 620 is "identical" to Texas's admitting privileges requirement. App. 296a. Louisiana argued that, because the laws are identical, the

District Court's preliminary injunction order was inconsistent with the Fifth Circuit's decision in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 593-600 (5th Cir. 2014) ("*Abbott")*, which upheld Texas's law against a pre-enforcement facial challenge. *Id.* (Certiorari had been granted in *Whole Woman's Health* at the time Louisiana moved for a stay, but this Court had not yet decided the case.)

The Court of Appeals stayed the District Court's preliminary injunction order on February 24, 2016, enabling Act 620 to go into effect for the first and only time. App. 151a. Because most physicians who provide abortions in Louisiana had been unable to obtain admitting privileges, despite persistent efforts since Act 620 was enacted, *see*, *e.g.*, App. 220a-48a, services at Louisiana's abortion clinics were thrown into chaos overnight.[4] The clinic in Baton Rouge was shuttered.[5] The New Orleans clinic was overwhelmed.[6] Hope, the lone clinic in Shreveport, issued a public plea that,

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[4] There were five abortion clinics in Louisiana when Act 620 was enacted. App. 7a. Two clinics closed during the proceedings below for reasons unrelated to Act 620. App. 5a n.3. Only three clinics in Louisiana currently provide abortion care, located in Shreveport, Baton Rouge, and New Orleans.

[5] Jessica Williams & Andrea Gallo*, Baton Rouge's Delta Clinic No Longer Performing Abortions Because of New Louisiana Law, Will Refer Women to New Orleans Location*, The Advocate (Mar. 3, 2016), https://www.theadvocate.com/baton_rouge/news/article_095953ee-c57b-5859-9551-bb353bd882c0.html.

[6] *See* Campbell Robertson, *Appeals Court Upholds Law Restricting Louisiana Abortion Doctors*, N.Y. Times (Feb. 25, 2016), https://www.nytimes.com/2016/02/26/us/appeals-court-upholds-law-restricting-louisiana-abortion-doctors.html.

because only one of its physicians holds admitting privileges, it "may not be able to hang on for very long."[7]

Nine days later, this Court granted Hope's emergency application to vacate the Fifth Circuit's stay order and restored the District Court's preliminary injunction order. *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (mem.). Abortion services in Louisiana resumed.

C. *Whole Woman's Health v. Hellerstedt*

On June 27, 2016, this Court decided *Whole Woman's Health* and held that Texas's admitting privileges requirement was unconstitutional because it imposed an undue burden on women's right to choose abortion. 136 S. Ct. at 2310-14.

The Court found a "virtual absence of any health benefit" to women from Texas's admitting privileges law. *Id.* at 2313. In reaching this conclusion, the Court relied upon factual findings by the district court that:

- "[A]bortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure";
- "[I]n the rare case in which [hospitalization is required], the quality of care that the patient receives is not affected by

[7] *Id.*

whether the abortion provider has admitting privileges at the hospital"; and

- "Texas admitted there was no evidence in the record" of "a single instance in which the new requirement would have helped even one woman obtain better treatment."

Id. at 2311-12 (citations omitted).

The Court also rejected Texas's contention that H.B.2 furthers the state's interest in health and safety by performing a physician "credentialing" function. *Id.* at 2313. Texas had argued that requiring admitting privileges "assures peer-review of abortion providers by requiring them to be credentialed." *Whole Woman's Health v. Cole*, 790 F.3d 563, 579 (5th Cir. 2015), *rev'd and remanded sub nom*. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). But this Court held that an "admitting-privileges requirement does not serve any *relevant* credentialing function," given the "undisputed general fact" that hospitals often deny physicians admitting privileges for reasons that "have nothing to do with" their competency or "ability" to perform abortions. *Whole Woman's Health*, 136 S. Ct. at 2312-13 (emphasis added) (citing amicus briefs submitted by the Society of Hospital Medicine, Medical Staff Professionals, and American College of Obstetricians and Gynecologists).

The Court observed that "hospitals often condition admitting privileges on reaching a certain number of admissions per year," even though doctors who perform

abortions are "unlikely to have *any* patients to admit" given that "abortions are so safe." *Id*. at 2312 (emphasis added) (internal quotations omitted). In addition, the Court noted several other "common prerequisites" that prevent abortion providers from obtaining admitting privileges and have nothing to do with physicians' competency. *Id.* These include "requirements that an applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, [home and office] residency requirements, and other discretionary factors." *Id.*

Considering H.B.2's lack of health benefits together with its burdens, this Court held that Texas's admitting privileges requirement imposed an undue burden on a large fraction of women. This conclusion rested on findings by the district court that "[e]ight abortion clinics closed in the months leading up to [H.B.2's] effective date." *Id.* "Eleven more closed on the day the admitting-privileges requirement took effect," meaning that the total number of clinics in Texas "dropped in half, from about 40 to about 20." *Id.* The Court determined that H.B.2 also imposed burdens on patients of clinics that remained open, including longer travel distances, "fewer doctors, longer waiting times, and increased crowding." *Id.* at 2313.

D. District Court Proceedings on Remand

After *Whole Woman's Health* was decided, the Fifth Circuit remanded this case to the District Court for further fact-finding in light of the Court's opinion. App. 152a. On April 26, 2017, the District Court

declared Act 620 unconstitutional and permanently enjoined the law in a 116-page opinion supported by extensive factual findings. App. 278a-79a.

1. Act 620's Nonexistent Benefits and Clear Burdens

The District Court's factual findings mirror those that led this Court to invalidate H.B.2. With respect to Act 620's purported benefits, the District Court determined that the law "would do little or nothing for women's health," App. 264a, based upon evidence that included:

- "Legal abortions in Louisiana are very safe procedures with very few complications," App. 203a;
- "[Act 620's] requirement that abortion providers have active admitting privileges . . . does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana," App. 215a;
- "The record does not contain any evidence that complications from abortion were being treated improperly," App. 271a;
- "Nor did [Louisiana] proffer evidence of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment," App. 215a.

As "stated by the Supreme Court [regarding H.B.2]," the District Court found it telling and "certainly true

in Louisiana: '[T]here was no significant health-related problem that [Act 620] helped to cure.'" App. 214a.

The District Court found that admitting privileges also "do not serve 'any relevant credentialing function'" in Louisiana. App. 272a (quoting *Whole Woman's Health*, 136 S. Ct. at 2313). While competency is "a factor" that hospitals consider, App. 171a, the District Court determined that, like hospitals in Texas, Louisiana "hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency." App. 172a. Such reasons include "the physician's expected usage of the hospital and intent to admit and treat patients there, the number of patients the physician has treated in the hospital in the recent past, the needs of the hospital, the mission of the hospital, or the business model of the hospital." *Id.*

Louisiana also does not prohibit hospitals from discriminating against doctors for providing abortion services. App. 193a. In fact, Louisiana hospitals are immunized by law from civil and criminal liability for such conduct. *See* La. Rev. Stat. § 40:1061.3. The District Court found that, as a result, Louisiana hospitals "can and do deny privileges for reasons directly related to a physician's status as an abortion provider," without any regard for that physician's competency or ability to care for patients. App. 174a.

Considering Act 620's lack of benefits together with its burdens, the District Court held that Louisiana's

admitting privileges requirement imposed an undue burden on a large fraction of women. The District Court found that Act 620 would "cripple women's ability to have an abortion" because Louisiana "would be left with one provider" and two of the state's three abortion clinics would close. App. 254a, 274a. "A single remaining physician," the District Court recognized, "cannot possibly meet the level of services needed" by approximately 10,000 women who obtain abortions in Louisiana each year. App. 255a.

The District Court found that Act 620 will impose undue burdens on women beyond clinic closures. Because women will be left with "fewer physicians," they will encounter "longer waiting times for appointments, increased crowding and increased associated health risks." App. 258a. Many women "will have to travel much longer distances," imposing "severe burdens, which will fall most heavily on low-income women." App. 274a. All these burdens will produce "delays in care, causing a higher risk of complications, as well as a likely increase in self-performed, unlicensed and unsafe abortions." App. 260a. Moreover, Act 620 will leave "no physician in Louisiana providing abortions between 17 weeks and 21 weeks, six days gestation," the legal limit on abortions in Louisiana. *Id.* Women who are delayed in accessing care until "this stage of their pregnancies would be denied all access to abortion in Louisiana." *Id.*

2. Physicians' Extensive Efforts to Obtain Hospital Admitting Privileges

The District Court carefully scrutinized Louisiana physicians' efforts to obtain admitting privileges. Over the course of the proceedings, the District Court closely monitored physicians' applications for admitting privileges to hospitals throughout Louisiana and required regular status updates. App. 160a n.20. The District Court received at least nine updates regarding the status of physicians' applications over 22 months.[8] Only after these efforts were sufficiently exhausted did the District Court determine that physicians had been denied admitting privileges outright or de facto denied by hospitals' refusals to resolve their applications. App. 220a-48a.

After trial, the District Court determined—based upon documentary evidence and physicians' own testimony—that each doctor who sought privileges made "good faith efforts" to comply with Act 620. App. 249a. Doctors made these efforts notwithstanding the opaque, byzantine, and in some cases "Kafka"-esque application processes required by Louisiana hospitals. App. 222a.

The District Court made detailed findings regarding six Louisiana physicians, each of whom was identified as a "John Doe" to shield him and his family from

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[8] Several updates on the status of physicians' applications were docketed by the District Court. *See June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017) (No. 14-CV-00525-JWD-RLB), ECF Nos. 50, 91, 121, 209, 240, 245, 246, 247 & 249.

discrimination and harassment. Of the six physicians, four (Does 1, 2, 4, and 6) were ultimately unable to secure privileges despite their good faith efforts.[9] App. 220a, 225a-26a, 229a-30a, 240a-41a, 243a, 246a-47a. Hospitals denied these physicians' applications, or never acted upon them, for reasons unrelated to their competence. *Id.*

Two physicians held admitting privileges. Even before Act 620, Doe 3 had admitting privileges in connection with his hospital-based obstetrics practice. App. 241a. Doe 5 secured admitting privileges at a hospital in New Orleans after Act 620 was enacted, but he was denied admitting privileges in Baton Rouge where he primarily worked. App. 243a-45a.

The District Court determined that Act 620 would cause Doe 3 to stop performing abortions, despite his admitting privileges, for two reasons. First, Act 620 would render Doe 3 the lone abortion provider in northern Louisiana, and Doe 3 testified that he would stop providing abortions in that circumstance out of well-founded concerns for his safety. App. 241a-42a. (The District Court found this testimony credible because Doe 3 has previously been targeted with violence and harassment by opponents of abortion. App. 251a-52a.) Second, even if Doe 3 were willing to accept these dangers, Act 620 nevertheless would shutter Hope—the clinic where Doe 3 provides abortions and the only clinic within 30 miles of the hospital where he holds privileges. The District Court found that Hope

[9] Doe 4 retired after the filing of this lawsuit. App. 248a.

would no longer be financially viable because its primary physician, Doe 1, was denied admitting privileges at all hospitals where he applied. App. 156a, 220a, 256a, 273a.

Without Doe 3, the District Court found that Doe 5 would be the only physician with admitting privileges who would continue to provide abortions in Louisiana if Act 620 becomes enforceable. App. 252a-54a. In addition, the District Court found that Louisiana clinics were unlikely to be able to recruit new physicians who have admitting privileges to replace their existing doctors, forcing two of the state's three clinics to close. App. 254a-55a. One physician at one remaining clinic, the District Court determined, "cannot possibly meet the level of services needed" to care for all women seeking abortions in the state. App. 255a.

E. Appellate Proceedings

1. The Fifth Circuit's Decision

On September 26, 2018, a divided panel of the Fifth Circuit reversed the District Court's judgment and declared Act 620 constitutional. App. 1a-3a, 59a.

The panel majority acknowledged that it was "strictly bound" by *Whole Woman's Health* and purported to apply its reasoning. App. 3a. Rather than rely upon the District Court's factual findings, however, the panel majority conducted its own review of the evidentiary record and found "stark" factual differences between Louisiana and Texas that the District Court supposedly "overlooked." App. 2a. In the panel

majority's view, these factual differences, as well as differences in "geography" between Louisiana and Texas, rendered *Whole Woman's Health* distinguishable and Act 620 constitutional. App. 31a.

With respect to Act 620's purported benefits, the Fifth Circuit did not disturb the District Court's findings that Act 620 "fails to actually further women's health and safety" and "is an inapt remedy for a problem that does not exist." App. 215a, 272a. Indeed, while Act 620 may have been "*premised* on the state's interest in protecting maternal health," the panel majority noted that Louisiana could not point to "any instance" where a woman seeking an abortion experienced a "worse result" because her physician "did not possess admitting privileges." App. 4a, 38a n.56 (emphasis added).

However, contrary to the District Court, the panel majority found that, because hospitals consider a physician's credentials to a greater extent than outpatient clinics, admitting privileges in Louisiana help to ensure that physicians have adequate credentials. App. 35a, 38a-39a. The panel majority conceded that this benefit was "not huge" but held that this supposed credentialing benefit, however "minimal," distinguished *Whole Woman's Health*. App. 39a. In reaching this conclusion, the panel majority found that fewer hospitals in Louisiana than Texas require physicians seeking admitting privileges to guarantee a minimum number of hospital admissions. App. 41a-42a. The panel majority, however, did not reckon with the District Court's findings that, irrespective of any rules

regarding a minimum number of admissions, Louisiana hospitals deny abortion providers admitting privileges for numerous other reasons unrelated to their competence or abilities. App. 171a-79a.

With respect to Act 620's burdens, the Fifth Circuit did not disturb the District Court's finding that only two Louisiana physicians, Doe 3 and Doe 5, currently hold admitting privileges and could lawfully continue to provide abortions if Act 620 goes into effect. *See* App. 47a-48a. However, contrary to the District Court, the panel majority found that, except for Doe 1, the reduction in abortion access resulting from any Doe physicians' cessation of services cannot be attributed to the law. App. 46a.

The Court of Appeals recognized that Doe 1 did all he could to obtain admitting privileges and found that the burdens on his patients will be attributable to Act 620. App. 42a, 46a. But in the panel majority's view, other physicians did not sufficiently exhaust efforts to obtain privileges, and their purported lack of effort would be an "intervening cause" of the burdens on their patients. App. 49a. The panel majority also discounted Doe 3's decision to stop providing abortions out of concern for his safety as a "personal choice" unattributable to Act 620. App. 48a.

The Fifth Circuit purported to apply the undue burden test that this Court announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and clarified in *Whole Woman's Health*. While it acknowledged that

Whole Woman's Health requires courts to balance an abortion restriction's burdens against its benefits, the panel majority did not balance Act 620's burdens and benefits. Rather, the panel majority reinterpreted the undue burden test and held that abortion restrictions, regardless of their purported benefits, "are unconstitutional only where they present a substantial obstacle to abortion." App. 31a. Applying its version of the undue burden test, the panel majority was able to declare Act 620 constitutional because the burdens resulting from Doe 1's inability to obtain admitting privileges—the only burdens the panel majority attributed to Act 620—did not, in its view, impose a substantial obstacle. App. 46a.

Judge Higginbotham dissented. In his dissenting opinion, Judge Higginbotham deemed it "beyond strange" that the panel majority violated the cardinal rule that "appellate judges are not the triers of fact." App. 67a, 61a. He catalogued numerous ways in which the panel "fail[ed] to meaningfully apply" *Whole Woman's Health*. App. 60a. And he showed that the panel majority's articulation of the undue burden test suffers from precisely the same errors for which "the Supreme Court has previously admonished this court." App. 95a. "It is apparent," Judge Higginbotham concluded, that the very subject of abortion "[over]shadow[ed] the role of settled judicial rules" in this case. App. 61a. Such a decision, Judge Higginbotham wrote, "ought not stand." App. 103a.

2. Denial of Rehearing En Banc

Plaintiffs filed with the Court of Appeals a petition for rehearing en banc, which was denied on January 18, 2019. App. 104a-05a. Six judges voted to rehear the appeal, including the Chief Judge of the Fifth Circuit. Judge Higginson and Judge Dennis, writing for four judges, wrote separate dissents from the denial of rehearing.

In his dissenting opinion, Judge Higginson reiterated that Act 620 is "equivalent in structure, purpose, and effect to the Texas law invalidated in *Whole Woman's Health*." App. 130a. Judge Dennis's dissenting opinion demonstrated in painstaking detail how "[t]he panel majority opinion is in clear conflict" with *Whole Woman's Health*. App. 105a-06a. Like Judge Higginbotham, Judge Dennis criticized the panel majority for "egregious and pervasive" disregard for the proper role of appellate judges by "impermissibly review[ing] the evidence de novo." App. 120a, 115a. But Judge Dennis explained that in any event "the panel majority's attempt to distinguish" *Whole Woman's Health* is "meritless" because its purported distinctions are "based on an erroneous and distorted version of the undue burden test required by [*Whole Woman's Health*] and [*Casey*]." App. 106a.

Judge Dennis found that the Court of Appeals repeated the panel majority's "mistake" in denying Hope's petition for rehearing en banc. *Id*. A "straightforward" application of *Whole Woman's Health*, Judge Dennis concluded, "leads to one possible result":

Because Act 620 "has no medical benefit," but "will restrict access to abortion," the law is "surely" unconstitutional. App. 119a. The panel majority's opposite conclusion "runs directly contrary to the Supreme Court's jurisprudence." App. 120a. In denying rehearing en banc, Judge Dennis concluded, the Court of Appeals relied on "strength in numbers rather than sound legal principles in order to reach their desired result." App. 106a.

F. Emergency Stay of the Fifth Circuit's Decision

On February 7, 2019, this Court granted Hope's emergency application to stay the Fifth Circuit's mandate pending disposition of this petition for certiorari. App. 280a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision below conflicts with *Whole Woman's Health* in its result and its reasoning. In light of the Court of Appeals's disregard for this Court's binding and squarely on point precedent, summary reversal is appropriate. At minimum, plenary review is warranted.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH *WHOLE WOMAN'S HEALTH*

The Fifth Circuit—like every other inferior court—is bound by this Court's holdings and its reasoning. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996); *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam). This obligation "is both wise and

necessary" to "promote[] consistency and predictability while discouraging adventurous second-guessing by widely dispersed subaltern judges." Bryan A. Garner, Neil M. Gorsuch, Brett M. Kavanaugh, et al., *The Law of Judicial Precedent* 28 (2016).

To uphold Louisiana's admitting privileges law, the Fifth Circuit improperly recast *Whole Woman's Health* as a "fact-bound" ruling with little application beyond the specific "facts and geography" of Texas. App. 31a. The panel majority then cast aside the District Court's well-supported factual findings and purported to distinguish *Whole Woman's Health* based upon its own review of the evidence. App. 34a-59a. Numerous errors pervade the decision below, and they are discussed at length in the dissenting opinions. This petition focuses on three of the most egregious, all of which are in direct conflict with *Whole Woman's Health*.

A. Act 620 Lacks Health and Safety Benefits

First, the Fifth Circuit manifestly erred in holding that Act 620 furthers Louisiana's asserted interest in women's health and safety by performing a relevant physician credentialing function.

In *Whole Woman's Health*, this Court held that Texas's admitting privileges law conferred no health or safety benefits to women seeking abortions. 136 S. Ct. at 2311-12. This Court noted that its holding was "consistent with the findings of the other Federal District Courts that [previously] considered the health benefits

of other States' similar admitting-privileges laws." *Id.* at 2312. Numerous other medically unnecessary admitting privileges requirements have been struck down since *Whole Woman's Health* was decided,[10] and several states—including Alabama and Tennessee—have conceded that their admitting privileges laws are unconstitutional.[11]

The Court of Appeals's apparent view that Act 620 provides health and safety benefits that other admitting privileges laws do not is untenable. The panel majority acknowledged that Louisiana could not point to "any instance" where a woman seeking an abortion experienced a "worse result" because her physician "did not possess admitting privileges." App. 38a

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[10] Following *Whole Woman's Health*, this Court denied certiorari in two cases involving admitting privileges requirements. Denial of certiorari in the Wisconsin case let stand a permanent injunction against that state's law. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016) (mem.). Denial of certiorari in the Mississippi case let stand a preliminary injunction, and that state's law was permanently enjoined on remand. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016) (mem.); *Jackson Women's Health Org. v. Currier*, No. 3:12-cv-436-DPJ-FKB (S.D. Miss. Mar. 17, 2017). An Oklahoma court subsequently blocked an admitting privileges law in that state. *Burns v. Cline*, 387 P.3d 348 (Okla. 2016).

[11] *See* Mot. to Dismiss Appeal at 1, *Planned Parenthood Se., Inc. v. Strange*, No. 16-11867 (11th Cir. July 15, 2016); Joint Mot. to Enter Partial J. on Consent at 4, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 13, 2017).

n.56.[12] Nevertheless, the panel majority deemed *Whole Woman's Health* distinguishable on the ground that, supposedly unlike Texas, Louisiana proffered "some evidence of a minimal benefit" in terms of physician credentialing. App. 34a.

In fact, Texas vigorously asserted in *Whole Woman's Health* that H.B.2 advanced women's health and safety by ensuring that physicians have adequate credentials. *See Cole*, 790 F.3d at 579. This Court expressly rejected Texas's argument. *See Whole Woman's Health*, 136 S. Ct. at 2311-13. While hospitals may consider physicians' credentials to a greater extent than outpatient clinics, this Court held that admitting privileges do "not serve any *relevant* credentialing function," because it is an "undisputed general fact" that hospitals commonly deny admitting privileges for reasons "hav[ing] nothing to do with" physicians' competency, let alone their competency to provide abortion care. *Id*. at 2312-13 (emphasis added).

Nothing in this record would allow the Court of Appeals to reach a different legal conclusion than this Court did in *Whole Woman's Health* regarding the relevance of admitting privileges to physicians'

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[12] Louisiana attempted to show that admitting privileges are beneficial by citing testimony from Doe 3 that he used his privileges on three occasions to admit patients who needed hospitalization. App. 38a n.56. Even the Court of Appeals recognized that this proves nothing because Louisiana proffered "no testimony or evidence" that these patients' "health would have suffered" if Doe 3 had been unavailable and a different doctor had admitted them to the hospital. *Id.*

credentials. The Court of Appeals observed that fewer hospitals in Louisiana than Texas require physicians to admit a minimum number of hospital patients to obtain admitting privileges. App. 41a-42a. This finding was based upon the panel majority's review of certain hospitals' bylaws, which the District Court found do not fully reflect "how privileges applications are handled in actual practice." App. 172a. Moreover, the Court of Appeals completely ignored that, in addition to requiring patient minimums, Louisiana hospitals impose "myriad" other requirements—equally unrelated to a physician's credentials—that make it near impossible for most abortion providers in Louisiana to obtain admitting privileges. *Id*. As the District Court found, such reasons include a physician's lack of intent to treat hospital patients, a low number of hospital patients in the recent past, no home or office in proximity to the hospital, and the hospital's specific needs, mission, and business model. *Id*.

This Court relied on these same factors in holding that Texas's admitting privileges law did not serve a relevant credentialing function. *See Whole Woman's Health*, 136 S. Ct. at 2312-13. Admitting privileges in Louisiana, if anything, are even less indicative of an abortion provider's competency. As the District Court explained, Louisiana law does not prevent hospitals from discriminating against physicians who provide abortion care, and Louisiana hospitals "can and do deny privileges for reasons directly related to a physician's status as an abortion provider"—regardless of a doctor's credentials. App. 174a.

To support the conclusion that Act 620 is beneficial, the Court of Appeals made statements throughout the decision below that seem to *assume* that physician credentialing *necessarily* confers a health or safety benefit. *See*, *e.g.*, App. 38a-39a. In *Whole Woman's Health*, however, this Court held that courts cannot merely assume that abortion restrictions are beneficial. *See* 136 S. Ct. at 2309-10. Rather, because constitutional rights are at stake, courts may credit only benefits that are proven by "evidence in the record." *Id*. at 2310. The decision below cited no such evidence and did not even "explain how further credentialing advances Louisiana's interest in protecting maternal health."[13] App. 126a.

In his opinion dissenting from the denial of rehearing, Judge Dennis explained why the panel majority could cite no such evidence: It "strains credulity that a state" would "turn to the ill-fitting, indirect approach of hospital admitting privileges" to ensure that women receive competent and safe abortion care. App. 127a.

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[13] The panel majority cited testimony from Doe 3 that he does not perform criminal background checks on doctors who apply to his clinic. App. 22a. While there may be a difference between the vetting done in private practice versus a hospital, Judge Higginbotham explained in dissent that Doe 3's testimony does not "ascribe[] a benefit to that difference" and no benefit is "evident in the record." App. 66a. Moreover, physicians in Louisiana must be licensed by the Louisiana State Board of Medical Examiners, and that agency conducts rigorous background checks (including for criminal records) as part of the licensure process. *See* Louisiana State Board of Medical Examiners, *Background Check*, https://www.lsbme.la.gov/content/background-check (last visited Apr. 11, 2019).

In fact, "if the true goal is to use admitting privileges" to verify a physician's "competency," Louisiana's requirement that a physician hold privileges *within 30 miles* of the clinic makes no sense. *Id.* In Judge Dennis's correct view, the Court of Appeals's decision to uphold Act 620—absent evidence that the law benefits women's health or safety—"eviscerates" *Whole Woman's Health*. App. 119a.

B. Act 620 Will Cause Extensive Burdens on Women Seeking Abortions in Louisiana

Second, the Court of Appeals erred as a matter of law in holding that Act 620's extensive burdens on women in Louisiana could be attributed to intervening causes.

This Court held in *Whole Woman's Health* that Texas's admitting privileges law—which drastically curtailed abortion access, but left roughly 20 clinics in operation—imposed an unconstitutional undue burden. 136 S. Ct. at 2310-14. Act 620's burdens will be even more devastating. As the District Court found, Act 620 will leave just one physician at one clinic to care for every woman seeking an abortion in the state, resulting in a cascade of burdens that will prevent and delay women from accessing abortion care. App. 254a-65a. Moreover, Act 620 will leave "no physician" in Louisiana who provides abortions between 17 weeks and 21 weeks, six days gestation—effectively imposing

a statewide ban on abortion prior to viability after 17 weeks. App. 260a.

The Court of Appeals discounted virtually all of Act 620's burdens by attributing them to other causes. According to the panel majority, except for the burdens on Doe 1's patients, Act 620 cannot be considered the cause of any burdens on abortion access that will result from physicians' lack of admitting privileges or cessation of care. The cause of these burdens will be the physicians' own purported failures to adequately pursue admitting privileges and Doe 3's supposed "personal choice" not to put his safety at risk if Act 620 leaves him isolated as the last abortion provider in his region. App. 48a.

The dissenting opinions dismantle, as a factual matter, the fallacy that physicians did not try hard enough to obtain admitting privileges. *See* App. 67a-89a and 120a-23a. In his dissent, Judge Higginbotham also noted that Louisiana did not contest on appeal the District Court's factual findings that each physician pursued admitting privileges diligently and in good faith—a plain waiver that the Court of Appeals brushed aside. App. 68a-69a.

In any event, the Court of Appeals's attempt to shift responsibility for Act 620's burdens onto "intervening" causes is foreclosed by *Whole Woman's Health* and established principles of causation. App. 49a.

This Court addressed causation in *Whole Woman's Health* "head-on" and "did not require proof that every abortion provider in Texas had put in a good-faith

effort to get privileges and had been unable to so."[14] App. 92a-93a. Causation was deemed satisfied by evidence that Texas clinics where doctors lacked admitting privileges closed right before and after H.B.2 went into effect. *Whole Woman's Health*, 136 S. Ct. at 2313.

Petitioners established causation through evidence more direct than this Court relied on in declaring H.B.2 unconstitutional. At trial, Hope proffered direct evidence from physicians and clinics that, due to the lack of admitting privileges, they would cease performing abortions once Act 620 goes into effect. *See* App. 252a-54a. This is, in fact, precisely what happened when Act 620 became effective for nine days between the time the Court of Appeals stayed the District Court's preliminary injunction order and this Court restored the injunction. *See supra* pp. 6-7. Hope also proved that, if not for Act 620, Doe 3 would continue to provide abortions because his safety concerns would be mitigated, and because the clinic where he works would remain financially viable. App. 156a, 220a, 241a-42a, 256a, 273a. This evidence exceeds not only

[14] In *Abbott*, the Fifth Circuit's precursor to *Whole Woman's Health*, Texas relied on this heightened causation standard to successfully shift blame for the state's drastic reduction on abortion access away from H.B.2 and onto doctors' purported failures to comply with the law. *See Abbott*, 748 F.3d at 598-99 (upholding H.B.2 because "the record does not show that abortion practitioners will likely be unable to comply with the privileges requirement" if physicians adequately pursue them). Texas sought to do the same in *Whole Woman's Health*. *See*, *e.g.*, Joint App. Vol. III at 550-56, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) (evidence adduced by Texas at trial that doctors did not apply to all hospitals within 30 miles of their clinics).

the standard of proof required by the majority in *Whole Woman's Health*, but even the standard urged by three Justices who dissented specifically on the issue of causation.[15] *See* App. 92a-93a n.42.

The Court of Appeals acknowledged that it was imposing a higher standard of causation than this Court did in *Whole Woman's Health*, but it found that a closer review of the facts is possible because Louisiana has fewer abortion providers than Texas. App. 40a. Judge Dennis in dissent rightly called this justification "simply wrong." App. 125a. Merely "because Louisiana had fewer abortion facilities and doctors to start with than in Texas" did not give the panel majority license to "impose a more demanding, individualized standard of proof." App. 124a. No inferior court, Judge Dennis noted, has the authority to "[r]ais[e] the bar beyond what the Supreme Court has required." App. 125a.

In addition to *Whole Woman's Health*, the Court of Appeals's conclusion that physicians' efforts to obtain

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[15] According to the dissenting Justices in *Whole Woman's Health*, the Texas plaintiffs should have proffered direct evidence regarding the role the admitting privileges requirement played in causing clinic closures because—to "the extent that clinics closed" for a reason "unrelated to [admitting privileges]," such as lack of demand, declines in funding, or other restrictive laws—those burdens "may not be factored into the analysis." 136 S. Ct. at 2346 (Alito, J., dissenting). Hope proffered direct evidence of causation. Moreover, Louisiana physicians' inability to secure admitting privileges is not "unrelated" to admitting privileges in the way that the potential intervening causes that troubled the dissenting Justices were.

admitting privileges and Doe 3's safety concerns would be "intervening" causes of the burdens on Louisiana women is contrary to longstanding principles of causation. App. 49a. It is well-established that state actors are responsible for constitutional injuries so long as their actions were a "proximate" cause. *See Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1545-49 (2017). Even where the injuries are ultimately inflicted by a third party or other intervening cause, proximate causation is satisfied if the risk of harm was foreseeable. *Id.*; *see also* Restatement (Second) of Torts § 442B cmt. b (Am. Law Inst. 1965) ("any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate,' no matter how it is brought about. . . .").

Here, physicians' inability to obtain admitting privileges and the resulting decrease in abortion access were plainly foreseeable consequences of Act 620, especially when an identical law very publicly shuttered clinics in neighboring Texas only one year before. It was similarly foreseeable that some physicians with privileges, like Doe 3, would not continue to provide abortions out of heightened concern for their safety. In fact, this Court credited similar concerns in *Whole Woman's Health*. *See* 136 S. Ct. at 2312 (crediting evidence that H.B.2 would close clinics because physicians with privileges would be unwilling to provide abortions "due to . . . hostility that abortion providers face").

C. Act 620's Non-Existent Benefits Are Outweighed by Its Extensive Burdens

Third, the Court of Appeals misapplied the undue burden test to uphold Act 620 and effectively reinstated the legally incorrect articulation of the test that this Court overruled in *Whole Woman's Health*.

Central to *Whole Woman's Health* was this Court's holding that a court is required to always "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. In reaching that conclusion, this Court expressly overruled the Fifth Circuit's prior articulation of the undue burden test because it wrongly "impl[ied]" that, unless an abortion restriction imposes a substantial obstacle, a court need not "consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." *Id.*

Although the decision below pays lip-service to the balancing required by *Whole Woman's Health*, the panel majority did not actually balance Act 620's burdens against the "minimal" benefit of physician credentialing that it found the law provides. Rather, applying its own lopsided formulation of the undue burden test, the panel majority held that, even if Act 620's benefits are minimal, the law must be upheld because its burdens do not rise to the level of a substantial obstacle. App. 39a, 59a. The panel majority found no substantial obstacle in Act 620 because, as discussed above, it

attributed virtually all the burdens stemming from physicians' lack of admitting privileges to other causes.

The dissenting opinions explain that the undue burden test that the panel majority relied upon to uphold Act 620 "repeats [the same] mistake" for which this Court specifically "admonished" the Fifth Circuit in *Whole Woman's Health*. App. 95a, 119a. In doing so, the decision below resurrects a repudiated version of the undue burden test that will immunize from meaningful review abortion restrictions that provide little or no benefit to women's health. This result "runs directly contrary" to *Whole Woman's Health*. *Id.*

II. SUMMARY REVERSAL IS APPROPRIATE TO ADDRESS THE FIFTH CIRCUIT'S DISREGARD FOR BINDING PRECEDENT AND REAFFIRM THE RULE OF LAW

The judgment of the Court of Appeals should be summarily reversed because the decision below conflicts with *Whole Woman's Health* and undermines its authority.

Summary reversal is appropriate where a lower court decision is "so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument" is unnecessary. Stephen M. Shapiro, et al., *Supreme Court Practice* § 5.12(a) (10th ed. 2013). Summary reversal is also a means to "enforce the Court's supremacy over recalcitrant lower courts." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 2 (2015).

On numerous occasions, this Court has summarily reversed lower court decisions that conflict with a prior holding of this Court.[16] Most recently, in *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam), this Court summarily reversed a lower court decision that—while it purported to apply this Court's prior decision finding errors in the court's determination of a criminal defendant's intellectual disability—"repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." *Id*. at 672 (Roberts, C.J., concurring).

Summary reversal is especially appropriate where a lower court has circumvented a recent decision of this Court on a matter of national importance that has generated substantial opposition. For example, in *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), this Court summarily reversed a decision by the Arkansas Supreme Court upholding a state law that prohibited married persons of the same sex from both

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[16] *See*, *e.g.*, *White v. Wheeler*, 136 S. Ct. 456, 458 (2015) (per curiam) (summarily reversing decision that "contravene[d] controlling precedents from this Court" concerning standard of review applied to state court convictions under the Antiterrorism and Effective Death Penalty Act); *Tolan v. Cotton*, 572 U.S. 650, 659-60 (2014) (per curiam) (summarily vacating decision that "reflect[ed] a clear misapprehension" of "precedents" concerning the legal standard for summary judgment); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam) (summarily vacating decision that "misread[ ] and disregard[ed] the precedents of this Court" interpreting the Federal Arbitration Act); *Bobby v. Mitts*, 563 U.S. 395, 399 (2011) (per curiam) (summarily reversing decision that circumvented recent precedent that "all but decided the question presented").

being listed on a child's birth certificate. That decision directly conflicted with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015), which only two years earlier had held—over strong opposition of some in the public and the judiciary—that same-sex couples have a right to marriage "on the same terms and conditions as opposite-sex couples."[17]

This Court decided *Whole Woman's Health* less than three years ago, and courts at the time were divided on the proper application of the undue burden standard and the constitutional validity of admitting privileges requirements. *Compare Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) (finding admitting privileges requirement unconstitutional), *with Abbott*, 748 F.3d at 600 (finding admitting privileges requirement constitutional).

Given the importance of this question of federal constitutional law, this Court granted certiorari and committed its limited resources to resolve this conflict.

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[17] *See also Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam) (summarily reversing decision that distinguished away this Court's decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), which held unconstitutional a federal ban on corporate independent political expenditures); *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (summarily reversing contempt conviction for refusing to comply with segregated seating requirements in courtroom); *Pennsylvania v. Bd. of Dirs. of City Trusts of City of Phila.*, 353 U.S. 230 (1957) (per curiam) (summarily reversing decision that the denial of admission to an educational institution on the basis of an applicant's race was consistent with the Fourteenth Amendment).

The decision below, by holding the opposite of *Whole Woman's Health* and resting on legal conclusions that this Court rejected, undoes this Court's substantial undertaking. Summary reversal would reestablish this Court's authority to say what the law is and reaffirm the principle that lower courts are absolutely bound to follow this Court's precedents—a principle that is most likely to be tested in controversial and politically charged cases such as this. *Cf. Casey*, 505 U.S. at 866-67 (decisions that "resolve [an] intensely divisive controversy[,]" such as abortion rights, require this Court to speak with particular "precedential force to counter the inevitable efforts to overturn it and to thwart its implementation").

No doubt Louisiana will argue that the Fifth Circuit's aggressive fact-finding makes this case a poor candidate for summary reversal. The panel majority's failure to "accept a district court's findings unless clearly erroneous," however, weighs in favor of granting certiorari. *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) (reversing in part for failure to defer to the district court's factual findings). And when a lower court has clearly "misapplied settled law," as the Fifth Circuit did here, this Court "has not shied away from" granting summary reversal, even in "fact-intensive cases." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016).

III. PLENARY REVIEW IS WARRANTED IN THE ALTERNATIVE

Plenary review at minimum is warranted. The decision below renders the holding of *Whole Woman's Health* at best uncertain, and lower courts are once again divided over the constitutionality of admitting privileges requirements. The same considerations that compelled this Court to grant certiorari in *Whole Woman's Health* warrant plenary review in this case as well.

No seismic changes have occurred in the past three years that would justify overruling *Whole Woman's Health*. Whether a decision of this Court is to be modified in any respect, however, is this Court's solemn responsibility after full consideration of the merits. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("[O]nly this Court may overrule one of its precedents."). It is not the prerogative of lower courts to reform this Court's precedent by watering down or distinguishing its holdings to the point of irrelevancy. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (criticizing lower court for overruling binding precedent "on its own authority").

Denial of certiorari would leave the irredeemably flawed decision of the Court of Appeals on the books, and it would weaken the constitutional protections recognized in *Whole Woman's Health*—at the very least—in Louisiana, Texas and Mississippi. Denial of certiorari also would dissolve this Court's stay of the Fifth

Circuit's decision and put Act 620 into immediate effect. Should that happen, abortion access in Louisiana, which is already hanging by a thread, would be reduced to just one doctor overnight.[18]

Because one doctor cannot possibly meet the needs of approximately 10,000 women who obtain abortions in Louisiana each year, a "substantial number" of women will be completely "unable to obtain" an abortion in the state. App. 256a. Some women will be compelled to continue an unplanned pregnancy to term. Some will self-manage their abortions. App. 260a. Others will seek out unsafe or unlawful alternatives for ending their pregnancies, putting them at significant risk of complications and adverse outcomes. *Id*.

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[18] In opposition to Hope's application to this Court to stay the Fifth Circuit's mandate, Louisiana's Department of Health ("LDH") published a "Notice" outlining a 45-day procedure that LDH purportedly plans to follow to verify clinics' compliance with Act 620. App. 291a-93a. Justice Kavanaugh, in a dissenting opinion from this Court's stay order, suggested that this Notice would prevent Act 620 from having an immediate impact and provide physicians with an additional 45 days to obtain admitting privileges. This is not correct. Louisiana's "Notice" does not represent that physicians without admitting privileges could lawfully continue to provide abortions during the 45-day verification period, and the "Notice" grants no reprieve from Act 620's criminal sanctions or enhanced tort liability. *See* La. Rev. Stat. §§ 40:1061.10(A)(2)(c), 40:1061.29; *see also* La. Admin. Code, tit. 48, pt. I, §§ 4401, 4415(B), 4417(A). Moreover, most abortion providers in Louisiana have pursued admitting privileges for years, without success. *See*, *e.g.*, App. 220a-48a. There is no reason to believe that allowing Act 620 to take effect will have any result other than severely limiting access to abortion in Louisiana.

Even women still able to access abortions will suffer. Women "will face lengthy delays" securing appointments. App. 264a. To reach the one remaining doctor at the one remaining clinic, women who live in other regions of the state will shoulder significant "burdens associated with increased travel distances and costs." App. 277a. All these hardships will fall disproportionately on women who are poor or rural who, as Judge Dennis emphasized in dissent, are "no less entitled than other women" to their "constitutionally protected" right to decide whether to remain pregnant. App. 128a.

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Granting Hope's petition for certiorari and reversing the Fifth Circuit's decision requires this Court to break no legal ground. *Whole Woman's Health* is on all fours with this case, and Louisiana's admitting privileges requirement is clearly unconstitutional under a straightforward application of that binding precedent. It nevertheless is critically important that the Court act and reverse the Fifth Circuit's decision. Only reversal, whether by summary disposition or after plenary review, will address the significant threat to the rule of law posed by the decision below and preserve the constitutional rights of women in Louisiana to access abortion.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

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