APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30397

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, doing business as Hope Medical Group for Women; JOHN DOE 1; JOHN DOE 2,

Plaintiffs-Appellees,

versus

DOCTOR REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana

(Filed Sep. 26, 2018)

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Louisiana enacted the Unsafe Abortion Protection Act ("Act 620" or "the Act"), requiring abortion providers to have admitting privileges at a hospital located within thirty miles of the clinic where they perform abortions.[1] On remand for consideration in light of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*"), the district court invalidated the Act as facially unconstitutional. The court overlooked that the facts in the instant case are remarkably different from those that occasioned the invalidation of the Texas statute in *WWH*. Here, unlike in Texas, the Act does not impose a substantial burden on a large fraction of women under *WWH* and other controlling Supreme Court authority. Careful review of the record reveals stark differences between the record before us and that which the Court considered in *WWH*.

Almost all Texas hospitals required that for a doctor to maintain privileges there, he or she had to admit a minimum number of patients annually. Few Louisiana hospitals make that demand. Because Texas doctors could not gain privileges, all but 8 of 40 clinics closed. Here, only one doctor at one clinic is currently unable to obtain privileges; there is no evidence that any of the clinics will close as a result of the Act. In Texas, the number of women forced to drive over 150 miles increased by 350%. Driving distances will not increase in Louisiana. Unlike the record in Louisiana, the record in Texas reflected no benefits from the legislation. Finally, because of the closures, the remaining

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[1] La. Sess. Law Serv. Act 620 (H.B. 388), § 1(A)(2)(a). Act 620 amended LA. REV. STAT. § 40:1299.35.2, recodified at § 40:1061.10.

Texas clinics would have been overwhelmed, burdening every woman seeking an abortion. In Louisiana, however, the cessation of one doctor's practice will affect, at most, only 30% of women, and even then not substantially.

That is only a summary. As we explain in detail, other facts underscore how dramatically less the impact is in Louisiana than in Texas. Because the Louisiana Act passes muster even under the stringent requirements of *WWH* and the other Supreme Court decisions by which we are strictly bound, we reverse and render a judgment of dismissal.

I.

Act 620 requires "a physician performing or inducing an abortion" to "[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 and that provides obstetrical or gynecological health care services." LA. STAT. ANN. § 40:1061.10(A)(2)(a). "'[A]ctive admitting privileges' means that the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient. . . ." *Id.* Each violation can result in a fine up to $4,000. *Id.* § 40:1061.10(A)(2)(c).[2]

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[2] Previously, Louisiana had required abortion clinics to have either at least one physician "present" with admitting privileges or "a written transfer agreement with a physician who has admitting

Act 620 is premised on the state's interest in protecting maternal health. Introducing the Act, Representative Katrina Jackson explained, "[I]f you are going to perform abortions in the State of Louisiana, you're going to do so in a safe environment and in a safe manner that offers women the optimal protection and care of their bodies." During consideration of the Act, the Louisiana Senate Committee on Health and Welfare heard testimony from women who had experienced complications during abortions and had been treated harshly by the provider. For example, Cindy Collins with Louisiana Abortion Recovery testified that when she underwent an abortion and began to hemorrhage, "the abortion doctor could see that something had gone wrong" but, instead of assisting her, "told [her] to get up and get out." She eventually required an emergency dilation and curettage ("D&C"). Testimony also established numerous health and safety violations by Louisiana abortion clinics.

In addition to the concern for maternal health expressed at the hearing, Louisiana has an underlying interest in protecting unborn life. The state has codified its intent to "regulate abortion to the extent permitted." LA. STAT. ANN. § 40:1061.8. Its longstanding policy is that "the unborn child is a human being from the time of conception and is, therefore, a legal person . . . entitled to the right to life." *Id.* And, Louisiana enacted a trigger law such that "if those decisions of the

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privileges within the same town or city." *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 55 n.36 (M.D. La. 2017); former LA. ADMIN. CODE tit. 48, pt. I, § 4407(A)(3).

United States Supreme Court [legalizing abortion] are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced." *Id.*

A.

Act 620 was set to become effective September 14, 2014, but on August 22, 2014, Bossier Medical Suite ("Bossier"), Causeway Clinic ("Causeway"), Hope Medical Group for Women ("Hope"),[3] and two abortion doctors—Doe 1 and Doe 2[4]—(collectively "June Medical") sued to enjoin the Act,[5] mounting a facial challenge, claiming that the Act placed an undue burden on women's access to abortions. The district court entered a temporary restraining order allowing the doctors to seek privileges during the preliminary-injunction

[3] Bossier and Causeway eventually ceased operation and dropped out of the litigation. June Medical Services, L.L.C., does business as Hope. For simplicity, we refer to the plaintiffs collectively as June Medical.

[4] The district court took the unusual step of placing the doctors' names under seal—but, as the record demonstrates, their identities are well known. Because the doctors are referred to only as Doe 1 through Doe 6, we use masculine references, though some of them are women.

[5] After the first suit was filed, Women's Health Care Center, Inc. ("Women's" or "Women's Health"), Delta Clinic of Baton Rouge, Inc. ("Delta"), and Doe 5 and Doe 6 filed a separate suit. The two cases were consolidated in September 2014. In December 2014, however, these plaintiffs voluntarily dismissed their suit without prejudice.

proceedings.[6] After a bench trial, the court granted a preliminary injunction on January 26, 2016,[7] and denied a stay pending appeal.[8]

Louisiana requested and received from this court an emergency stay[9] that the Supreme Court vacated on March 4, 2016.[10] After the Supreme Court decided *WWH*, we remanded "so that the district court can engage in additional fact finding required by [*WWH*]."[11] The district court entered final judgment April 26, 2017, permanently enjoining the Act. The court found "minimal" health benefits but "substantial burdens" and ruled the Act unconstitutional on its face under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *WWH*.[12] Louisiana appeals.

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[6] *June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD-RLB, 2014 WL 4296679 (M.D. La. Aug. 31, 2014).

[7] *June Med. Servs., LLC v. Kliebert*, 158 F. Supp. 3d 473 (M.D. La. 2016).

[8] *June Med. Servs. LLC v. Kliebert*, No 3:14-00525-JWD-RLB, 2016 WL 617444 (M.D. La. Feb. 16, 2016)

[9] *June Med. Servs., L.L.C. v. Gee*, 814 F.3d 319 (5th Cir. 2016).

[10] *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (mem.).

[11] *June Med. Servs., L.L.C. v. Gee*, No. 16-30116 (5th Cir. Aug. 24, 2016) (per curiam).

[12] *June Med. Servs.*, 250 F. Supp. 3d at 86.

B.

At the time of enactment, only five abortion clinics operated in Louisiana, and only six doctors performed elective abortions, of whom only one had qualifying admitting privileges. Since the enactment, two clinics have closed for reasons unrelated to the Act, and at least one doctor has obtained qualifying privileges. The analysis is fact-bound, as required by *WWH*, 136 S. Ct. at 2310, so we begin with a detailed overview of each clinic and the abortion doctors it employs.

1. The Causeway Clinic

Causeway opened in 1999 and was located in Metairie, a suburb of New Orleans. It closed February 10, 2016, for reasons not disclosed in this record.[13] It had provided only surgical abortions during the first and second trimesters. Between 2009 and mid-2014, about 10,836 abortions were performed there. Causeway employed two abortion doctors, Doe 2 and Doe 4, neither of whom held admitting privileges at the time of Act 620's enactment. Within 30 miles of Causeway's former location, there are 10 qualifying hospitals.

[13] Nothing in the record suggests—nor does any party contend—that Causeway closed as a result of Act 620.

a. Doe 2

Doe 2 is a board-certified OB/GYN who has been performing abortions since 1980.[14] He is the only doctor in Louisiana willing to provide abortions after 18 weeks up to the legal limit of 21 weeks, 6 days.[15] At Causeway, Doe 2 performed only surgical abortions between 6 weeks and 21 weeks, 6 days. He worked 2 weekends a month and performed 25% of the clinic's abortions. In 2014, he estimated he performed about 450 abortions at Causeway, the majority being first-trimester terminations.

From 2009 through mid-2014, Doe 2 had only two patients who required hospitalization.[16] In one instance, during a second-trimester procedure, the woman experienced heavy vaginal and intra-abdominal bleeding from a rupture of her incision from a prior C-Section. Doe 2 called 9-1-1 and sent her charts and a note

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[14] Information about Doe 2 is from his court testimony, his three declarations, and the declaration of Robert Gross, Vice President of the Bossier and Causeway Clinics.

[15] Since this litigation began, Louisiana has banned abortions after 15 weeks. *See* S.B. 181, 2018 Leg., Reg. Sess. (La. 2018); *see also*, Anthony Izaguirre, *Ban on Abortions after 15 Weeks Signed into Law in Louisiana, but There's One Hurdle Left*, THE ADVOCATE (May 30, 2018, 1:19 PM), http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_fac56312-6435-11e8-b451-275614090005.html. The law will not take effect unless Mississippi's similar ban is upheld. *Id.*; Cassy Fiano, *Great News: Louisiana Governor Signs Law Banning Abortions after 15 Weeks*, LIVEACTION (May 30, 2018, 4:29 PM), http://www.liveaction.org/news/louisiana-governor-bans-abortions-15-weeks.

[16] Doe 2 later testified that over his entire career "more than 10, less than 20" women required hospitalization.

explaining the situation to the emergency room doctor. Doe 2 also called the doctor before the woman's arrival to explain the situation and visited her in the hospital after the surgery.

The second instance was also a second-trimester termination. The woman experienced some bleeding from uterine atony, and though Doe 2 believed it was non-critical bleeding, he called 9-1-1 to be safe. Though he did not have admitting privileges before the Act's effective date, Doe 2 has since secured limited, non-qualifying[17] privileges at Tulane in New Orleans.[18]

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[17] Non-qualifying privileges are those that do not meet the requirements of Act 620.

[18] Tulane granted privileges at both its Downtown and Lakeside facilities. The former facility is in New Orleans, the latter in Metairie. The parties dispute whether the privileges qualify under the Act.

Louisiana submitted a signed declaration by then-Secretary of Louisiana Department of Health and Hospitals, Kathy Kliebert, averring that the privileges qualify under the Act. Plaintiffs respond that the Act requires the doctor be able to admit *and* "provide diagnostic and surgical services." Tulane granted Doe 2 the ability to "admit." Once the patient is admitted, however, a Tulane doctor must take over care. Doe 2 testified that his understanding is that "if [he has] to put a patient into Tulane Medical Center, [he] will be on record as the admitting physician, but they immediately take over the care of that patient." He believes he "would be the admitting physician of record, but they will be the treating physicians."

In response, Louisiana points to an email sent by Tulane after Doe 2 received his letter awarding him limited privileges. It claims that email clarifies the nature of the privileges: "You will be the admitting physician. We will be the consulting physician."

b. Doe 4

Doe 4 is 82 years old and a board-certified OB/GYN with over 51 years' experience.[19] He once provided abortions at the Acadian clinic but stopped in 2003 when that clinic closed. Though he retired from practice in 2012, Causeway requested in 2013 that he fill in for a doctor who had fallen ill. He agreed and provided abortions (for the first time in ten years) at Causeway until its closure. Other than ensuring that Doe 4 remained board-certified, had a DEA license, and "was in good standing with the medicals," Doe 4 knows of no other review undertaken, similar to hospitals' credentialing process, that ensures a doctor has the requisite skills and capacity to perform relevant procedures.

Doe 4 worked Thursdays and every other weekend and performed 75% of the abortions that were done at the Causeway Clinic; all of his were first-trimester terminations. Doe 4 "imagine[s] [he performs] about a thousand, fifteen hundred" abortions annually. He explained he would provide from 5 to 15 abortions per day and that there was not a high demand or "a significant volume of business" at the Causeway clinic.

Since resuming his abortion practice in 2013, Doe 4 has had one patient experience heavy bleeding

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As discussed *infra*, plaintiffs are correct that Doe 2's privileges do not qualify.

[19] Doe 4 did not testify in court. Information is primarily from his declaration, his deposition, the declaration of Gross, and a status report.

caused by an atonic uterus. An ambulance had to be called, as the woman was not responding. Doe 4 thinks he "sent a note with her or a copy of her chart went with her to the emergency room," then he explained the situation to the doctor over the phone.

Doe 4 does not currently possess admitting privileges but did apply to Ochsner at Kenner. He applied only to Ochsner because he "worked at Ochsner before in Baton Rouge and [he] had a doctor who had privileges at Ochsner who would certify that he would back up for" him. Other than a request for additional information (which he provided) and learning that Ochsner had spoken to one of his references, Doe 4 did not receive a decision on his application, though he "think[s] he [has] a very good chance of getting privileges there." Doe 4 agreed that requiring the covering doctor to be an OB/GYN is not "an overburdensome requirement for admitting privileges."[20] But he does not know any OB/GYNs in the area because "[a]ll the doctors that [he has] known, they've kind of died out. . . . [or] are no longer in practice."

Upon Causeway's closure, Doe 4 stopped performing abortions and no longer intends to seek admitting privileges. Nothing in the record suggests he has been asked to continue at any other clinic or that the Act has caused him not to move to another clinic. In fact, during his deposition (when still working at Causeway)

[20] The requirement to have a covering physician is not mandated by Act 620 but is a part of several hospitals' criteria for gaining privilege. A covering doctor serves as a back-up in the event that the admitting doctor is unavailable.

he was asked whether he would work at other clinics if requested, and he stated he was already "working more than enough for [his] age" and "do[es]n't want to work more." That would be his "personal choice."

2. The Bossier Clinic

Bossier Medical Suite opened in 1980 and was located in Bossier City in Northwestern Louisiana. It closed on March 30, 2017, for reasons not reflected in this record.[21] It provided both medication and surgical abortions[22] during the first and second trimesters. Between 2009 and mid-2014, about 4,171 abortions were performed there. Bossier employed one abortion doctor,

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[21] As with Causeway, nothing in the record or in any party's assertions suggests that Bossier's closing was related to the enactment of Act 620.

[22] "Medication abortion involves the use of a combination of two drugs, usually mifepristone and misoprostol. . . . A woman typically takes mifepristone at the clinic and then takes misoprostol at home. Medication abortion requires no anesthesia or sedation." *Kliebert*, 250 F. Supp. 3d at 62 (citations omitted). The pills induce hemorrhaging, which causes the uterus to shed its lining as in a menstrual period and thereby causing the death of the unborn child. *See id.*

Surgical abortions during the first trimester are most commonly vacuum aspirations, in which the physician inserts a vacuum into the woman's uterus to remove the unborn child. Second-trimester surgical abortions are most commonly dilation and evacuation procedures in which the physician dilates the woman's cervix, inserts instruments to detach and tear apart the unborn child from the placenta, removes the body piece by piece, scrapes the uterus clean, and suctions out the child and remaining fetal tissue. *See generally Gonzales v. Carhart*, 550 U.S. 124, 134–36 (2007).

Doe 2, who did not hold admitting privileges at the time of the Act's enactment.[23] There are 5 qualifying hospitals within 30 miles of Bossier.

In addition to his work at Causeway, Doe 2 provided medical and surgical abortions at Bossier, his primary clinic. He worked there Tuesday through Saturday when he was not going to Causeway and Tuesday, Wednesday, and Thursday when he was going to Causeway. In 2014, he performed about 550 abortions at Bossier, at least 90% of which were first-trimester terminations.

Doe 2 applied for privileges within thirty miles of the Bossier clinic. Because he already had consulting privileges at University Health, Doe 2 inquired about upgrading to courtesy privileges. He says that the "head of the department [of OB/GYN] . . . was very reticent and reluctant to consider that because of the political nature of" abortion. The department head spoke with the Dean and then informed Doe 2 "that [he was] not going to go beyond [his] [consulting] privileges."

Doe 2 also applied to Willis Knighton Bossier City Hospital ("WKBC") on May 12, 2014. WKBC sent a letter indicating that "applicants must demonstrate they have been actively practicing Obstetrics/Gynecology

[23] Doe 2 does have "consulting privileges" at University Health within thirty miles of Bossier and Hope. Those privileges, however, are distinct from "courtesy" or "admitting" privileges. Consulting privileges do not allow Doe 2 to admit or treat patients. As the district court noted during Doe 2's testimony, he originally called his privileges "courtesy" privileges but later corrected the mistaken terminology.

(in your case only Gynecology) in the past 12 months." "In order for the Panel to sufficiently assess current clinical competence," WKBC requested that Doe 2 "submit documentation, which should include operative notes and outcomes, of cases performed within the past 12 months for the specific procedures you are requesting on the privilege request form." Doe 2 testified that "it would have been impossible for [him] to submit that information . . . because [he has not] done any in-hospital work in ten years, so there is no body of hospitalized patients that [he has] to draw from."

Doe 2 sent an email to WKBC indicating that "[o]ver the past 12 months [he] performed the procedures [he is] requesting privileges for several hundred times with no major complications" at Bossier. Instead of attaching documentation to that email, however, he merely invited "any qualified person who would like to visit the Clinic and examine the records" to do so. Doe 2 initially testified that was his only response, but he later vaguely contradicted himself on re-direct,[24] prompting the district court to question him directly to determine whether he had submitted any information. In response, Doe 2 stated, "I actually called . . . and [they] said send 20 representative cases and that's what I did."

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[24] Plaintiffs' attorney asked him if he "did more than just invite them to come to the clinic." Doe 2 responded "Yes." But, he previously testified that he never submitted any specific documentation after his email inviting someone to come review the documents, and plaintiffs never pointed to any document to support that statement.

It remains unclear whether Doe 2 sent a list of cases, as no document supporting that contention was ever supplied. Even the district court, in its thoroughly documented opinion, did not point to any evidence other than Doe 2's contradictory testimony. WKBC responded via letter that his answer (whatever it was) was not satisfactory. WKBC stated that the "application remains incomplete and cannot be processed" until the pertinent list of cases was submitted. Thus, Doe 2 has not been able to secure privileges at WKBC.

Doe 2 has not applied, nor does he intend to apply, to any other hospital within thirty miles of Bossier. For instance, he refused to apply to Christus Schumpert. He says applying would be fruitless because the Catholic hospital would be unlikely to grant him privileges on account of the nature of his work.

That assumption is belied by Doe 2's own personal history. He previously secured privileges at that hospital when he had both an OB/GYN practice and an abortion practice. Furthermore, as Doe 2 is aware, Doe 3 maintains privileges at that hospital.

Doe 2 also said he had no intention of applying to Minden Hospital because it was "very close to the [geographic] limits," is "a smaller hospital," and he "[doesn't] really know anyone there." Though a smaller hospital and close to the thirty-mile limit, Minden is a qualifying hospital under the Act.

3. Delta Clinic

Delta, in Baton Rouge, has offered abortions since 2001. It provides medication and surgical abortions up to the seventeenth week.[25] Between 2009 and mid-2014, it provided about 8,800 abortions. Two of those patients required direct hospital transfer, one because she "decided during a procedure that she no longer wanted to have the abortion," and "the physician had already begun the process." Delta employs one abortion doctor,[26] Doe 5, who does not hold admitting privileges within thirty miles of Delta. Four qualifying hospitals are located within thirty miles of Delta.

Doe 5 is a board-certified OB/GYN who has performed abortions since April 2012, when he started working at the Delta and Women's clinics.[27] He began working there after receiving a letter the clinics sent to all licensed physicians in Louisiana advertising the open position. Doe 5 is at Delta on Tuesdays and Thursdays but works additional days when necessary. It does not appear that Doe 5 maintains a separate OB/GYN practice.

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[25] The declaration and deposition of Sylvia Cochran, the Administrator of the Delta and Women's clinics, are unclear on this point. In one she stated through the seventeenth week, while in the other she stated up to sixteen weeks.

[26] Though Doe 6 serves as medical director for Delta Clinic, he stopped performing abortions there in 2012.

[27] Doe 5 did not testify in court. The information about him is primarily from his declaration, his deposition, and Cochran's declaration and deposition.

In 2013, Doe 5 performed approximately 2,000 abortions at Delta. He has performed abortions up to 18 weeks' gestation but will not go beyond that point. By week 18, the baby is formed to a certain degree that it is beyond what he "feel[s] comfortable looking at and dealing with." In a typical week, between both clinics, he performs "between 40 and 60 of the surgical abortions and 20 to 30 of the medical . . . abortions." Between the clinics, he believes he performs about 6 second-trimester abortions per week. No patient has required a direct hospital transfer.

Doe 5 has not secured qualifying privileges in Baton Rouge. He has applied to three hospitals: Woman's Hospital, Baton Rouge General Medical Center, and Lane Regional Medical Center.[28] He has not heard back from the latter two but did receive a positive response from Woman's Hospital.

Woman's Hospital indicated that it would grant privileges to Doe 5 once he identified a doctor willing to cover his service when he is unavailable. In fact, Doe 5 explained that Woman's Hospital cannot deny him privileges once he does that because, "from what [he is] told, [he] meet[s] all the qualifications. And as long as [he] meet[s] those, they can't deny [his application]." Delta has a transfer agreement with a physician at Woman's Hospital, so Doe 5 asked that doctor whether he would be his covering doctor. That doctor refused because he did not want his information or relationship

[28] Doe 5 did not apply to the fourth qualifying hospital, Ochsner, because he did not know any physicians there.

with the clinic to become public. Doe 5 does not appear to have reached out to anyone else, thus his application will remain pending until he takes further action.

Doe 5 has not followed up with the other two hospitals on the status of his applications. He says he is waiting for a complete denial from Woman's Hospital before doing so. But, as explained, Woman's Hospital marked his application as pending until he finds someone to serve as a covering physician. He has contrived a situation in which it is impossible for him to obtain privileges. Woman's Hospital will not grant or deny privileges until he takes action to find a covering physician—something solely within his control. Yet, he refuses to follow up with other hospitals until Woman's Hospital takes action, something it cannot do until after Doe 5 provides further information.

4. The Hope Clinic

Hope opened in 1980 and is located in Shreveport. It provides surgical and medication abortions through 16 weeks[29]; it performs about 3,000 abortions per year. In the past 20 years, 4 patients at Hope required hospitalization, with 2 of those occurring in the past 5 years. The clinic offers abortions 3 days a week. On busy days, it provides up to 30 terminations, but its administrator, Kathaleen Pittman, testified that it could

[29] According to Hope's administrator, Kathaleen Pittman, 69.9% of Hope's patients are Louisiana residents, 18.7% Texas, 5.6% Arkansas, and 1.2% Mississippi.

provide up to 60, though she thought that would be "quite a bit."

At the time of trial, Hope employed two doctors, Doe 1 and Doe 3, to perform abortions.[30] Following the closures of Causeway and Bossier (which occurred after the trial concluded), Hope also employs Doe 2. Because Doe 2 began working at Hope post-trial, all estimates in the record for Hope encompass only Doe 1 and Doe 3.

Doe 3 had admitting privileges before the enactment of Act 620 and remains Hope's only abortion doctor who has privileges. There are 4 qualifying hospitals within 30 miles of Hope.

a. Doe 1

Doe 1 is not an OB/GYN but, instead, is board certified in Family Medicine and Addiction Medicine.[31] He has worked at Hope as a counseling physician since 2006 but began providing abortions only in 2008. He has never had a family-medicine practice. He is at Hope 3 days a week and provides about 71% of Hope's

[30] Hope employs two other doctors for counseling and post-operative examinations.

[31] Information about Doe 1 is primarily from his two declarations, his trial testimony, the trial testimony of Doe 3, and Pittman's declaration and trial testimony. Doe 1 attended medical school in Hungary and the Netherlands. A separate bill, passed in 2016, requires abortion providers to be certified OB/GYNs or to be residents practicing under the supervision of such a certified physician. *See* Act 98, 2016 Leg., Reg. Sess. (La. 2016) (codified at LA. STAT. ANN. § 40:1061.10(A)(1) (2016)).

abortions. In a given month, Doe 1 generally performs 250–300 abortions. He performs medication abortions up to 8 weeks and surgical abortions up to 13 weeks. Between 2009 and 2014, he has had only one woman require hospitalization.

Doe 1 applied to three of the four qualifying hospitals: WKBC, Christus Health, and Minden. He originally applied to WKBC to receive privileges via their Addiction Department, as he maintains a private practice in addiction medicine. WKBC could not grant him privileges in that field because its bylaws require "successfully complet[ing] a residency training program . . . in the specialty in which" privileges are sought. Doe 1 did not complete a residency in addiction medicine because no such residency program existed when he graduated medical school.

Doe 1 then submitted a new application requesting privileges in Family Medicine. WKBC requested that he "submit documentation of hospital admissions and management of patients 18 years of age or older for the past 12 months." It also requested him to explain further the types of complications he expects to treat at WKBC. He responded with a list of all patients he treated when working at a hospital from July 2008 to May 2009. He indicated that he had not had to admit any patient for abortion-related complications in the preceding twelve months, though he has referred women to other doctors in a few situations. WKBC has not responded to that update.

Doe 1 corresponded with Christus Health at length. Christus requested additional information, and Doe 1 provided almost all such information. Christus requested Doe 1 come in to receive an ID badge to complete the application, but when he tried to do so, he was told that he could not receive the badge because he was not applying for the right privileges. He then received a letter saying his application remained incomplete for lack of a badge. That letter also said his application had been pending for 120 days, and applications pending for longer than 90 days were deemed withdrawn. Doe 1 admitted he waited until the very end of the 90-day period to try for the badge. He claims he was later told over the phone that he qualified only for a caregiver position, which would not include admitting privileges. That is not supported by documentation.

Minden Hospital informed Doe 1 that it had no "need for a satellite primary care physician." The one hospital to which he did not apply, University Health, extends privileges by invitation only. He spoke to the chair of the Family Medicine Department, and, although the chair indicated an invitation would be forthcoming, Doe 1 was later told that there was "resistance" to extending him an invitation.

b. Doe 2

Doe 2 provided abortions at Hope for a number of years before moving to the Bossier and Causeway clinics. Once those clinics closed, Doe 2 returned to Hope.

He currently provides abortions at Hope when Doe 1 or Doe 3 is absent.

c. Doe 3

Doe 3 is a board-certified OB/GYN who has been performing abortions since 1981.[32] He is the Chief Medical Officer at Hope. Of note, he has trained other doctors to provide abortions. Three of those are not OB/GYNs. One is a radiologist, another an ophthalmologist. The third, Doe 1, specialized in general family medicine. Doe 3 hired all three and was the only one to evaluate their credentials. He admits he neither performed background checks nor inquired into their previous training.

Doe 3 performs about 29% of the abortions at Hope. He provides both surgical and medication abortions two days a week. On average he sees 20–30 patients a week but has seen up to 64. If everything goes well, he can perform "about six procedures in one hour." Doe 3 says he cannot not devote any more time to Hope.

In the past twenty years, Doe 3 has had three patients require hospitalization, and he knows of a fourth from Doe 1. One woman had a perforated uterus, and Doe 3 accompanied her to the hospital and performed the necessary procedures. Another woman had heavy

[32] Information about Doe 3 is primarily from his two declarations, his trial testimony, and the declaration and trial testimony of Administrator Pittman.

bleeding. The third had placenta accrete, "a very dangerous situation because you cannot get the bleeding to stop." He implied that he also admitted her and performed her procedures. The fourth woman, Doe 1's patient, had a perforated uterus. Doe 3, who was on call at the hospital, admitted her and performed her procedures.

Doe 3 is active staff, with admitting privileges at WKBC and Christus Schumpert Hospital. He maintains those privileges on account of his private OB/GYN practice. In his declaration, Doe 3 stated that he will cease performing abortions "if he is the only provider in Louisiana with admitting privileges." Curiously, after Doe 5 obtained qualifying privileges in New Orleans—such that Doe 3 would no longer be at risk of being "the only provider in Louisiana"—Doe 3 testified that he does not "believe [he] will continue" if he is "the last physician providing abortions in *Northern* Louisiana" (emphasis added).

5. Women's Health

Women's Health, in New Orleans, began providing abortions in 2001. It performs abortions through the seventeenth week of pregnancy,[33] and it offers both medication and surgical abortions. Between 2009 and mid-2014, about 7,400 abortions were performed there,

[33] Administrator Cochran's declaration and deposition are a bit confusing. In one she says through the seventeenth week, while in the other she says up to sixteen weeks.

with 2,300 in 2013 alone.[34] Of those patients, 2 required direct hospital transfer. Women's employs 2 abortion doctors, Doe 5 and Doe 6, neither of whom had admitting privileges at the time of Act 620's enactment. Doe 5 has since secured qualifying privileges at Touro Infirmary. There are 9 qualifying hospitals within 30 miles of Women's.

a. Doe 5

Doe 5 began working at Women's in 2012. He works two days a week unless it is busy, in which case he may come in extra days. In 2013, Doe 5 performed approximately 40% of the abortions provided by Women's, all of which were surgical procedures. As noted previously, Doe 5 has secured qualifying privileges at Touro, which is within thirty miles of Women's.[35]

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[34] That 2013 number is according to Doe 5. Cochran said in her deposition that around 1,200 abortions are performed annually.

[35] Doe 5 claims to fear that Touro could revoke his privileges because people have protested the grant; as he admits, however, Touro's attorney reached out following the protests to "reassure[ ] [him] that, you know, they could not—they would not take [his] privileges away" and that they would "release a statement to the protesters" to that effect.

b. Doe 6

Doe 6 is a board-certified OB/GYN who has been performing abortions since 2002.[36] He began working at Women's and Delta in 2002 and has been the medical director of both since 2008. In 2013, he provided about 60% of the abortions occurring at Women's, which represents the percentage of medication abortions performed there. In that year, Doe 6 provided approximately 1,300 medication abortions at Women's. In his ten years at these clinics, he has had two patients require direct hospital transfer.

Doe 6 has not secured privileges. He applied to only one hospital, East Jefferson General Hospital ("EJGH"), and has not received a response. He inquired at Tulane but claims he "was told that [he] should not bother to apply because they would not grant privileges to [him] because [he has] not had hospital admitting privileges since August 2005."[37]

II.

On the above facts, the district court found that all doctors had put forth a good-faith effort to obtain privileges and that Doe 5 would be the sole remaining abortion provider in Louisiana were Act 620 to go into

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[36] Doe 6 did not testify in court, nor was he deposed. Thus, information about him is primarily from his declaration and Cochran's declaration and deposition.

[37] Among other hospitals, Doe 6 had privileges at Tulane when he maintained a private gynecology practice.

effect.[38] Because it concluded that that would substantially burden a large fraction of women, the court invalidated the law.

We review the district court's legal conclusions *de novo* and its factual findings for clear error.[39] A finding is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[40] "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[41]

A.

First we must resolve the appropriate framework for reviewing facial challenges to abortion statutes. As a general matter, "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*,

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[38] The district court found that Doe 5 would be the sole abortion provider in Southern Louisiana and, crediting Doe 3's testimony, that Doe 3 would cease practicing were Doe 3 the sole doctor in Northern Louisiana, leaving Doe 5 as the sole abortion provider in the state.

[39] *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583, 589 (5th Cir. 2014).

[40] *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[41] *Id.* at 573–74.

552 U.S. 442, 450 (2008). Louisiana says we should reverse because the district court used the wrong framework for evaluating a facial challenge and that we instead should follow *United States v. Salerno*, 481 U.S. 739, 745 (1987), under which plaintiffs "must establish that no set of circumstances exists under which the [law] would be valid."

June Medical urges, to the contrary, that *WWH* foreclosed using the *Salerno* framework in the abortion context. In *WWH*, 136 S. Ct. at 2313, 2318–20, the Court, reviewing an as-applied challenge, reversed and invalidated the law in its entirety, finding that a large fraction of women would be substantially burdened.

Before *WWH*, this court viewed the standard for facial invalidation of abortion regulations as "uncertain."[42] In *Lakey*, we explained that a plurality in *Casey*, 505 U.S. at 895, had concluded that a regulation was facially invalid if, "in a *large fraction of the cases* in which it is relevant, it will operate as a substantial obstacle." *Lakey*, 769 F.3d at 296 (quoting *Casey*, 505 U.S. at 895). Earlier decisions, however, had used the "no set of circumstances" standard. *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

In *WWH*, 136 S. Ct. at 2320, the Court eliminated the uncertainty and adopted the *Casey* plurality's large-fraction framework. As the Eighth Circuit explained, "For [facial] challenges to abortion regulations, however,

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[42] *Abbott II*, 748 F.3d at 588; *see also Whole Woman's Health v. Lakey*, 769 F.3d 285, 295–96 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014) (mem.).

the Supreme Court has fashioned a different standard under which the plaintiff can prevail by demonstrating that 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice.' "[43]

Importantly, the Court in *WWH* clarified by limiting the "large fraction" to include only "those women for whom the provision is an actual rather than an irrelevant restriction." *WWH*, 136 S. Ct. at 2320 (cleaned up) (quotation omitted). "[C]ases in which [the provision at issue] is *relevant*" is a narrower category than "all women," "pregnant women," or even "*women seeking abortions* identified by the State." *Id.* (quotation omitted). For a law regulating only medication abortions, for example, the relevant denominator is not all women seeking any type of abortion, but only those potentially impacted (i.e., those seeking a medication abortion).[44] In *WWH*, the Court treated the denominator as all women seeking abortions, but only because the statute at issue, Texas's H.B. 2, encompassed all types of abortions.[45]

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[43] *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) (second alteration in original) (quoting *Casey*, 505 U.S. at 895), *cert. denied*, 138 S. Ct. 2573 (2018).

[44] *Id.* ("[B]ecause the [law] only applies to medication-abortion providers, the 'relevant denominator' here is women seeking medication abortions in Arkansas.").

[45] *WWH*, 136 S. Ct. at 2320 (stating that the relevant class was more limited than women of reproductive age and that Texas's H.B. 2 "involves restrictions applicable to all abortions").

Here, too, the relevant denominator to determine a "large fraction" is all women seeking abortions in Louisiana, as Act 620 applies to providers of both medication and surgical abortions. Accordingly, to sustain the facial invalidation of Act 620, we would have to find that it substantially burdens a large fraction of all women seeking abortions in Louisiana.

B.

The parties present conflicting interpretations of the legal standard for finding an undue burden under *WWH*. June Medical frames *WWH*'s analysis as a balancing test: "Where an abortion restriction's burdens outweigh its benefits, the burdens are 'undue' and unconstitutional." Louisiana counters that *WWH* did not alter the well-known standard in *Casey*.

WWH's analysis is rooted in *Casey*, 505 U.S. at 877, which defined an "undue burden" as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The Court in *WWH* explained that *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[46]

In *WWH*, 136 S. Ct. at 2309, the Court relied on *Casey*'s analyses of the spousal-notification and

[46] *Id.* at 2309 (citing *Casey*, 505 U.S. at 887–98) (instructing courts to "consider the existence or nonexistence of medical benefits" while performing an undue-burden analysis).

parental-notification provisions. In parentheticals, it describes the decisional process as "balancing." *Id.* Consequently, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (quoting *Casey*, 505 U.S. at 878).

There is no doubt that *WWH* imposes a balancing test, and Louisiana errs in denying that. It is not reasonable to read the language in *WWH*, quoted above, as announcing anything but a balancing test, especially given the Court's express use of the word "balancing" to describe *Casey*.[47]

Hewing to *WWH* and *Casey*, we recognize and apply a balancing test. Louisiana, however, is correct that it is not a "pure" balancing test under which *any* burden, no matter how slight, invalidates the law. Instead, the burden must still be substantial, as we will explain.

Quoting *Casey* as cited above, the *WWH* Court began by emphasizing that to fail constitutional scrutiny, a law must place "*a substantial obstacle* in the path of a woman seeking an abortion."[48] *Casey* expressly allows for the possibility that not every burden creates a

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[47] Justice Thomas, in dissent, recognized the sea change, stating that the opinion "reimagine[d] the undue-burden standard" and created a "free-form balancing test." *Id.* at 2323–24 (Thomas, J., dissenting).

[48] *WWH, id.* at 2300 (quoting *Casey*, 505 U.S. at 878).

"substantial obstacle."[49] Thus, even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion.[50]

The proper reading of *WWH* is a combination of the views offered by June Medical and Louisiana: A minimal burden even on a large fraction of women does not undermine the right to abortion. To conclude otherwise would neuter *Casey*, and any reasonable reading of *WWH* shows that the Court only reinforced what it had said in *Casey.* Thus, we must weigh the benefits and burdens of Act 620 to determine whether it places a substantial obstacle in the path of a large fraction of women seeking abortions in Louisiana.

C.

We are of course bound by *WWH*'s holdings, announced in a case with a substantially similar statute but greatly dissimilar facts and geography. We begin by summarizing the Court's close, fact-bound balancing analysis of the benefits and burdens in *WWH*—an analysis that led the Court to conclude that Texas's

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[49] *Casey*, 505 U.S. at 874 ("[T]he incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability . . . does the . . . State reach into the heart of the liberty protected by the Due Process Clause.").

[50] Our conclusion is in full accord with the Eighth Circuit's formulation in *Jegley*, a decision the Supreme Court recently declined to review. *Jegley* read *WWH* as finding that Texas H.B. 2's "numerous burdens *substantially* outweighed its benefits." *Jegley*, 864 F.3d at 958 (emphasis added).

admitting-privileges requirement was unduly burdensome.

1.

The Court began by examining the benefits the admitting-privileges requirement might provide. It noted that the purpose of Texas's law was to "ensure that women have easy access to a hospital should complications arise during an abortion procedure." *WWH*, 136 S. Ct. at 2311. The evidence the court examined to determine whether the law served its stated purpose included expert testimony and studies about abortions in the United States generally. *Id.* The Court explained that there was "nothing in Texas' record evidence that shows that, compared to prior law (which required a 'working arrangement' with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health." *Id.* The Court specifically noted that Texas could not point to "a single instance in which the new requirement would have helped even one woman obtain better treatment." *Id.*

Further, the Court found that the privileges had no relationship to a doctor's ability. Instead, the privileges provision looked to discretionary factors such as clinical data requirements and residency requirements. One abortion doctor who had practiced for 38 years was unable to obtain privileges at any of the 7 hospitals within the required 30-mile radius of the clinic. *Id.* at 2312–13. Therefore, "[t]he admitting-privileges requirement does not serve any relevant credentialing function." *Id.* at 2313.

2.

WWH identified four burdens imposed by the admitting-privileges requirement. Primarily, it caused the closure of 80% of Texas's abortion clinics. Only 7 or 8 of the 40 remained. The Court looked to the timing of the closures as evidence of causation. When H.B. 2 began to be enforced, the number of clinics dropped to half, from 40 to 20. The day the requirement took effect, 11 more clinics closed. *Id.* at 2312.

Part of the reason for the closures was the difficulty of obtaining privileges. Many Texas hospitals conditioned admitting privileges on having a minimum number of patient admissions per year. *Id.* That created an almost-universal requirement that physicians with privileges maintain minimum annual admissions, constituting a *per se* bar to admission for most abortion doctors. The president of a Texas hospital testified that no doctor could get privileges near El Paso because not a single patient seeking an abortion had required transfer to a hospital in the past ten years. Thus, "doctors would be unable to maintain admitting privileges or obtain those privileges for the future." *Id.*

Closures in Texas caused the third burden: increased driving distances. After the closures, the number of women living more than 150 miles from a clinic rose from 86,000 to 400,000, an increase of 350%. The number of women living more than 200 miles from a clinic increased from 10,000 to 290,000, an increase of 2,800%. *Id.* at 2302, 2313. The Court "recognize[d] that

increased driving distances do not always constitute an 'undue burden,'" *id.* at 2313, but stacking that burden on top of the others, "when viewed in light of the virtual absence of any health benefit," supported the finding of an undue burden. *Id.*

The final burden was decreased capacity—"fewer doctors, longer waiting times, and increased crowding." *Id.*[51] The Court used "common sense" to conclude that the remaining clinics could not expand their capacity fivefold to meet the demand for abortions. *Id.* at 2317. The remaining clinics would need to expand from providing 14,000 abortions per year to providing 60,000–72,000 per year. *Id.* The Court found that to be unrealistic because of the capacity currently carried by existing clinics and the lack of evidence that expansion was feasible. *Id.* at 2317–18.

III.

Mirroring the fact-intensive review that the Supreme Court performed in *WWH*, we do the same in-depth analysis of the instant record, weighing both the benefits and the burdens of Act 620. Unlike Texas, Louisiana presents some evidence of a minimal benefit. And, unlike Texas, Louisiana presents far more detailed evidence of Act 620's impact on access to abortion. In light of the more developed record presented to

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[51] Though the Court more fully discussed that burden under its evaluation of the surgical-center requirement, the analysis applies equally to the district court's mistaken finding in this case that decreased capacity is a substantial obstacle.

the district court and to us, the district court—albeit with the best of intentions and after diligent effort—clearly and reversibly erred. In contrast to Texas's H.B. 2, Louisiana's Act 620 does not impose a substantial burden on a large fraction of women, so the facial challenge fails.[52]

A.

The legislative history of Act 620 plainly evidences an intent to promote women's health. Specifically, the Act seeks to accomplish that goal by ensuring a higher level of physician competence and by requiring continuity of care.

Texas presented no evidence that the credentialing function performed by hospitals differed from the credentialing performed by clinics. The record for Louisiana contains testimony from abortion providers themselves, explaining that the hospitals perform more rigorous and intense background checks than do the clinics. The record shows that clinics, beyond ensuring that the provider has a current medical license, do not appear to undertake any review of a provider's

[52] We do not mean to say that the facial challenge fails only because the facts are less compelling in Louisiana than in Texas or that the facts in Texas are borderline such that any law imposing a burden even slightly less than in Texas would be immune to attack. Instead, Act 620 passes muster independently and on its own terms. We make continuing references to the Texas statute invalidated in *WWH* to emphasize the dramatically different circumstances that called for the opposite result for Texas and to show how it is that the Louisiana law plainly satisfies both *WWH* and *Casey*.

competency. The clinics, unlike hospitals, do not even appear to perform criminal background checks.[53]

Finally, Louisiana explains that the Act brings the requirements regarding outpatient abortion clinics into conformity with the *preexisting* requirement that physicians at ambulatory surgical centers ("ASCs") must have privileges at a hospital within the community. 48 LA. ADMIN. CODE § 4535(E)(1). Procedures performed at ASCs include upper and lower GI endoscopies, injections into the spinal cord, and orthopedic procedures.

Outpatient procedures such as dental surgeries and some D&C miscarriage-management procedures do not require the same admitting privileges. Those are governed by Title 46 of the regulatory code, whereas outpatient abortion facilities and ASCs are under Title 48. Louisiana's expert, who was involved in the drafting of Act 620, testified that the differential treatment was because of that grouping and did not single out abortion providers from other outpatient

[53] Testimony illustrates that hospitals verify an applicant's surgical ability, training, education, experience, practice record, and criminal history. These factors are reviewed by a board of multiple physicians. In contrast, to be hired at the clinics, abortion doctors in Louisiana do not have to undergo extensive background checks or review of their competency. In fact, when the Act was passed, abortion providers did not even have to have OB/GYN credentials. Doe 4, who had been retired for over a year before beginning to perform abortions for the first time in ten years, testified that the clinic did nothing to test his ability but asked only whether his license was still active. And as stated, doctors who were trained for abortions at Hope included a radiologist and an ophthalmologist.

surgery centers. Thus, Louisiana was not attempting to target or single out abortion facilities.

In fact, it was just the opposite—the purpose of the Act was to bring them "into the same set of standards that apply to physicians providing similar types of services in [ASCs]."[54] The benefit from conformity was not presented in *WWH*,[55] nor were the reasons behind the

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[54] Introducing the Act to the Committee, Representative Jackson explained,

> [Act 620] puts no stringent requirements on those physicians performing abortions. It puts—it is not stringent, but it also puts less requirements than someone performing a surgical procedure, regardless of how minor it is, you must have—be on staff at a hospital. This bill doesn't go this far. It says that you must have admitting privileges at a hospital, which means if something goes wrong from your surgical procedure, you can call the hospital or follow your patient to the hospital and make sure they receive proper care. And I think that's just a commonsense method that we've always used with physicians who are set up in surgical centers. There's no doubt that abortion clinics are set up for the primary purpose of performing abortions. And so this bill cleans up, what I think that we all thought that the ambulatory surgical rules did, is make sure that the safety of women is intact.

[55] *WWH* did address Texas's ASC requirement that sought to bring abortion *facilities* (not physician requirements) in line with regulations imposed on ASCs. That Texas requirement included such things as regulating air pressure and humidity, scrub facilities, having a one-way traffic pattern through the facility, special finishes for ceilings, walls, and floors, and the like. *See WWH*, 136 S. Ct. at 2315–16. The Court found that that provision carried no benefit, imposed prohibitive costs, and would require some clinics to rebuild entirely at a new, larger location. *Id.* at 2302–03 (summarizing

conformity—continuity of care, qualifications, communication, and preventing abandonment of patients—directly addressed.[56] Accordingly, unlike in *WWH*, the

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the district court's findings, which the Supreme Court found not clearly erroneous, *id.* at 2315).

The Court further noted that, though many Texas ASCs enjoyed waivers of some of these requirements, no waivers or grandfathering exceptions had been granted to abortion facilities. *Id.* at 2308. Texas's ASC conformity requirement is not at all similar to saying (as in Act 620) that physicians at ASCs and doctors at abortion clinics both must have admitting privileges.

[56] Louisiana suggests two other benefits of Act 620. First, the state focuses on the history of numerous health and safety code violations at Delta and Hope as well as generally unsafe conditions (the legislative history had testimony of unsanitary conditions and protection of rapists). Though horrifying, these violations are unrelated to admitting privileges.

Second, though Texas could not point to any instance in which admitting privileges would prove useful, Louisiana presents evidence of several situations in which women required direct hospitalization. At least three of those involved Doe 3's acting as the admitting and treating physician. But there is no testimony or evidence indicating that, had Doe 3 not been available, the women's health would have suffered.

The Act's failure to solve the problem of a woman's going to an emergency room that does not have an OB/GYN specialist on site also substantially undermines this benefit. Act 620 requires abortion doctors to have admitting privileges at a hospital that provides OB/GYN services. LA. STAT. ANN. § 40:1061.10(A)(2)(a). Most complications occur well after the surgery. Consequently, a woman living outside the thirty-mile radius who must go to a more rural hospital, in the event of an emergency arising after leaving the clinic, would not be helped by the admitting-privileges requirement. A woman living inside that radius would already be transported to a hospital with the relevant specialist. Moreover, the state did not provide any instance in which a worse result occurred because the patient's abortion doctor did not possess

record here indicates that the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion.

Still, the benefits conferred by Act 620 are not huge. Though we credit Louisiana's more robust record on the benefits side of the ledger, the district court did not clearly err in finding that Act 620 provides minimal benefits, given the current standard of care in highly specialized hospital settings. *See June Med. Servs.*, 250 F. Supp. 3d at 86.

B.

In *WWH*, the Court identified four obstacles erected by Texas's requirement of admitting privileges: closure of facilities, difficulty in obtaining privileges, driving distances, and clinic capacities. The Court decided not that any burden individually was sufficient but that the four dominoed to constitute a substantial burden.

The near impossibility of obtaining privileges was the first domino to fall. Had that difficulty not loomed, there would have been no facility closures, no increased driving distances, and no issues regarding clinic capacities. Given the high minimum admissions requirement at most Texas hospitals, that first burden was unavoidable.

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admitting privileges. Thus, in balancing, we do not credit either of these proposed benefits.

Originally, Texas had 40 facilities and numerous abortion doctors. Because the doctors could not obtain privileges, the number of clinics fell from 40 to only 7 or 8. Those closures undoubtedly burdened almost all women seeking abortions in Texas as a result of capacity issues and increased driving distances.

Thus, everything turns on whether the privileges requirement actually would prevent doctors from practicing in Louisiana. If that domino does not fall, no other burdens result. So we review the difficulty facing the abortion providers and trace them back to the patients to determine whether Act 620 substantially burdens a large fraction of women seeking abortions.

The paucity of abortion facilities and abortion providers in Louisiana allows for a more nuanced analysis of the causal connection between Act 620 and its burden on women than was possible in *WWH*. For one, we can examine each abortion doctor's efforts to comply with the requirements of Act 620. We also can look to the specific by-laws of the hospitals to which each applied. This more intricate analysis yields a richer picture of the statute's true impact, the sort of obstacle it imposed. And this methodology allows us to scrutinize more closely whether June Medical has met its burden.

We conclude that it has not. To the contrary, it has failed to establish a causal connection between the regulation and its burden—namely, doctors' inability to obtain admitting privileges. Specifically, there is insufficient evidence to conclude that, had the doctors put forth a good-faith effort to comply with Act 620, they

would have been unable to obtain privileges. Instead, as discussed below, the vast majority largely sat on their hands, assuming that they would not qualify. Their inaction severs the chain of causation.

The district court inquired whether the doctors had put forth a good-faith effort, without which June Medical cannot establish the requisite causation between Act 620 and a doctor's inability to obtain privileges. And, as *WWH* emphasized, 136 S. Ct. at 2313, it is June Medical's burden to put forth affirmative evidence of causation. Were we not to require such causation, the independent choice of a single physician could determine the constitutionality of a law. Using this methodology, we conclude, given the entire weight of the evidence, that the district court clearly erred in saying that all doctors had put forth a good-faith effort to obtain privileges.

Unlike the litigants in *WWH*, who presented only generalities concerning admitting privileges, the parties here provide the bylaws for the relevant hospitals. The situation differs from the circumstances in *WWH* in that the majority of hospitals do not have a minimum number of required admissions that a doctor must have to maintain privileges. Instead, most hospitals have a competency requirement. Competency is evaluated either by requesting the doctor to provide information about recent admissions at any other hospital or by having a provisional admittance period during which the hospital can personally observe and evaluate him. Although the grant of privileges remains discretionary, the death knell to Texas's H.B. 2 was the

combination of discretion and minimum admission requirements—the latter of which is less prevalent in Louisiana.

1. Doe 1

The district court concluded that Doe 1 put forth a good-faith effort and could not obtain privileges. Doe 1 applied to three of four qualifying hospitals near Hope. WKBC has not responded. There appears to be an unresolved communication problem with Christus, so it is possible Doe 1 could obtain qualifying privileges there. The record is uncertain on this point, so we cannot say that the district court clearly erred in concluding that Doe 1 put forth a good-faith effort. Doe 1 was definitively rejected by Minden for reasons other than credentials. The fourth hospital, University Health, requires an invitation to apply, and the hospital declined to extend an invitation because of department resistance to staffing an abortion provider.

2. Doe 2

The district court erroneously concluded that Doe 2 put forth a good-faith effort. Doe 2, now a back-up abortion doctor at Hope in Shreveport,[57] inquired about privileges at two hospitals within thirty miles of Hope. He claims that University Health refused to extend an invitation because of his abortion practice.

[57] Since Causeway's closure, Doe 2 does not provide abortions in New Orleans, nor is there evidence suggesting he will transition to the remaining New Orleans clinic, Women's Health.

WKBC required he submit documentation of OB/GYN procedures performed within the past twelve months. Doe 2's testimony was contradictory on whether he supplied documentation. At the very least, he explained to WKBC that he "performed the procedures [he is] requesting privileges for several hundred times" at the Bossier clinic. WKBC responded that that did not suffice—but the record does not establish whether the deficiency was his email response or actual documentation of the Bossier cases.

It is possible that Doe 2 could obtain privileges at Christus, though he has not applied. He previously had privileges there, and Doe 3 currently maintains privileges there. Thus, Doe 2's theory that a Catholic hospital would not staff an abortion provider is blatantly contradicted by the record. Opposite to what the district court found, Christus and Minden remain open options.[58]

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[58] Doe 2 applied to only one New Orleans-based hospital, Tulane, where he was granted privileges. The parties dispute whether Doe 2's privileges are sufficient, though the dispute is not particularly relevant given Causeway's closure. Act 620 mandates that an abortion doctor have "the ability to admit a patient and to provide diagnostic and surgical services to such patient . . . ." LA. STAT. ANN. § 40:1061.10(A)(2)(a). Under his current privileges, Doe 2 can admit patients at Tulane but must have another Tulane physician perform any surgical procedures.

Louisiana insists that is enough, and Secretary Kliebert signed a declaration stating as much. June Medical contests that the statute is unambiguous and contradicts Kliebert's suggestion.

June Medical correctly insists that the court is not obligated to defer to Kliebert's interpretation that the statute is unambiguous. To support its position demanding deference, Louisiana

3. Doe 3

Doe 3 already has privileges at two hospitals within thirty miles of Hope. Thus, the Act is not burdensome on him.

4. Doe 4

In order to return to retirement, Doe 4 has stopped pursuing privileges and came out of retirement to cover for a sick doctor. There is no evidence of causation, so

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proffers one statement in the *Ex Parte Young* context that the court should not "instruct[] state officials on how to conform their conduct to state law." *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). June Medical counters by offering numerous citations to support the well-established notion that courts do not *blindly* defer to agency interpretations but instead ask whether that interpretation conflicts with the statutory text. For example, in *Voting for America, Inc. v. Steen*, the court emphasized its role as interpreting a statute to be constitutional if possible and, as part of that effort, to give the state official's interpretation "meaningful weight" as the "official charged with enforcing the statute." 732 F.3d 382, 387 (5th Cir. 2013) (quotations omitted). That deference, however, is to be extended only "so long as [the interpretation] does not conflict with the statutory text." *Id.* (quoting *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 895 (5th Cir. 2012) (per curiam)).

The Act is unambiguous: For admitting privileges, it requires that a physician be allowed actually to perform the surgical procedure. Doe 2 cannot do so under his current privileges at Tulane. Because Kliebert's interpretation conflicts with the statute's plain text, we do not defer. It is a separate question whether Doe 2 could obtain privileges that conform to the Act's requirements, either at Tulane or another hospital, but his current privileges are insufficient to satisfy the Act.

we need not evaluate whether he could obtain privileges.

5. Doe 5

The district court erroneously concluded that Doe 5 put forth a good-faith effort in obtaining privileges for his practice at Delta. For his abortion practice at Women's, Doe 5 received admitting privileges at Touro, which is within thirty miles of Women's.

For his practice at Delta, Doe 5 applied to three nearby hospitals. Two have not responded, but, according to Doe 5, Woman's Hospital will grant him privileges once he finds a covering doctor. He mentions asking only one doctor to serve as his covering physician. That doctor declined, and Doe 5 provides no evidence that he has reached out, or intends to reach out, to other doctors. Though Woman's Hospital is awaiting Doe 5's further action, he inexplicably states he is waiting on Woman's Hospital's further action before following up on his other two applications. The most logical explanation for Doe 5's delay is that he is awaiting the result of this litigation before he acts.

As Doe 4 testified, finding a covering physician is not overly burdensome. Under the clear-error standard, looking to the entire weight of the evidence, we are left with the impression that Doe 5 is waiting for the outcome of this litigation to put forth an actual good-faith effort. That lackluster approach is insufficient for facial invalidation of the law. In light of Doe 5's failure to seek a covering physician, the district court clearly

erred in finding that Doe 5 put forth a good-faith effort and that his application at Woman's Hospital was *de facto* denied. The Act is not overly burdensome on Doe 5.

6. Doe 6

The district court erroneously concluded that Doe 6 put forth a good-faith effort. Doe 6 applied to one hospital, EJGH, from which he has received no response. He was told by Tulane that his lack of recent admissions is likely a barrier, so he did not apply there.

But there are nine qualifying hospitals in the area. Moreover, he has not applied to Touro, where Doe 5 was able to obtain qualifying privileges. That lack of effort demonstrates the district court's clear error in finding that Doe 6 put forth a good-faith effort.

7. Conclusion

Given the evidence, only Doe 1 has put forth a good-faith effort to get admitting privileges. Doe 2, Doe 5, and Doe 6 could likely obtain privileges. Doe 3 is definitively not burdened.

At least three hospitals have proven willing to extend privileges. On the entire evidence, we are left with the definite and firm conviction that the district court erred in finding that only Doe 5 would be able to obtain privileges and that the application process creates particular hardships and obstacles for abortion providers in Louisiana.

C.

In Texas, the admitting-privileges law caused 32 of the 40 clinics to close. In dramatic contrast, under the record presented to us, there is no evidence that Louisiana facilities will close from Act 620.[59] If the Act were to go into effect today, both Women's and Hope could remain open, though each would have only one qualified doctor. Delta would be the only clinic required to close, as its only Doctor, Doe 5, does not have admitting privileges within 30 miles. Because obtaining privileges is not overly burdensome, however, the fact that one clinic would have to close is not a substantial burden that can currently be attributed to Act 620 as distinguished from Doe 5's failure to put forth a good-faith effort. And, because Doe 5 has a pending offer and probably will be able to obtain privileges, the only permissible finding, under this record, is that no clinics will likely be forced to close on account of the Act.

Doe 3 initially indicated that he would cease practicing if he is the only remaining abortion doctor in the *entire state.* Once it became clear that at least one other doctor (Doe 5) had obtained privileges and would continue practicing, Doe 3's story changed. He testified that he would now cease practicing were he the only

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[59] Causeway and Bossier closed for unrelated reasons. Because of court action, the Act has never been enforced, and there is no evidence that those closures were related to its passage, so, as the district court said, they are not relevant to the burdens analysis. *June Med. Servs.*, 250 F. Supp. 3d at 81. This is in stark contrast to the record in Texas, where numerous clinics closed as a direct result of the statute.

remaining abortion provider in *northern* Louisiana. If he leaves the practice today, Hope would close because Doe 1 and Doe 2 do not currently have privileges. The closure, however, would also lack the requisite causation, as it rests on an independent personal choice. Doe 3's shifting preference as to the number of remaining abortion providers is entirely independent of the admitting-privileges requirement.

The district court's contrary findings are clearly erroneous.[60] To attribute a doctor's cessation of practice to Act 620, his retirement must be caused by a direct inability to meet the legal requirements of the bill. Doe 5's inaction and Doe 3's personal choice to stop practicing cannot be legally attributed to Act 620. Departure from the standard of direct causation leads to a

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[60] The district court also erroneously factored into its substantial-burden analysis that Louisiana is a strongly anti-abortion state. The court found the culture relevant in two respects: individual actions taken by Louisiana citizens and other previously enacted abortion regulations. Actions taken by individuals to protest abortion or to intimidate those who perform it are not attributable to the state generally or to Act 620 in particular. The courts cannot consider them.

Further, other abortion regulations are unrelated to admitting privileges and therefore have no bearing on the constitutionality of Act 620. *See WWH*, 136 S. Ct. at 2300; *Casey*, 505 U.S. at 879 ("We now consider the separate statutory sections at issue."). The district court considered, for example, Louisiana's trigger law that expresses the legislature's intention to comply with Supreme Court law on abortion but to ban the practice should that law change. *See* LA. REV. STAT. § 40:1229.30. Louisiana has further requirements, such as an ultrasound, 24-hour waiting period, and informed consent. *See* LA. REV. STAT. §§ 40:1299.35.2B-D; 40:1299.35.2D(2); 40:1299.35.19.

line-drawing problem that would allow unrelated decisions to inform the undue-burden inquiry. For the question of causation, although the "government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those obstacles."[61]

In *WWH*, 136 S. Ct. at 2313, the majority rejected the dissent's theory that the clinic closures could be attributed to some other cause and not H.B. 2. It did so because there was no evidence of such alternative causes in the record; accordingly, the dissent's theories were mere "speculation." *Id.* Here, by contrast, there was clear evidence in the record before the district court that various doctors failed to seek admitting privileges in good faith. Unlike in *WWH*, Act 620's impact was severed by an intervening cause: the doctors' failure to apply for privileges in a reasonable manner. Accordingly, there is an insufficient basis in the record to conclude that the law has prevented most of the doctors from gaining admitting privileges. Similarly, any clinic closures that result from the doctors' inaction cannot be attributed to Act 620.

D.

Although "increased driving distances do not always constitute an 'undue burden,' " they can be, under the right facts, "one additional burden, which, when

[61] *K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013) (internal quotation marks omitted) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

taken together with others . . . and when viewed in light of the virtual absence of any health benefit," can constitute an undue burden. *WWH*, 136 S. Ct. at 2313 (citation omitted). Louisiana does not reflect such right facts. Because all three clinics could remain open, the Act will cause no increase in driving distance for any woman—an extremely important distinction from the record in Texas.

E.

Following the implementation of H.B. 2, the number of clinics in Texas decreased, as we have repeatedly noted, from 40 to only 7 or 8. The *WWH* Court expressed concern that open facilities would not be able to "meet the demand of the entire State." *Id.* at 2316 (internal quotation marks and citations omitted). In Texas, each open facility would have had to increase its abortions from 14,000 to 60,000 or 70,000—"an increase by a factor of about five." *Id.* The Court rejected the contention that facilities could expand to meet the demand absent facility-specific evidence. *Id.* at 2317–18. In Louisiana, however, because no clinics would close, there would be no increased strain on available facilities, as no clinic will have to absorb another's capacity.

Importantly, however, it will be nearly impossible for Doe 1 to obtain qualifying privileges. Therefore, we review the facts to determine whether the remaining abortion providers at Hope have the capacity to meet the demand Doe 1 currently satisfies.

Doe 1 practices at Hope alongside Doe 2 and Doe 3. Doe 1 testified that he performs about 2,100 abortions annually. Doe 2 fills in when Doe 1 or Doe 3 is unavailable. When Doe 2 served as the primary provider at Causeway and Bossier, he performed 1,000 abortions per year. Doe 3 performs somewhere between 870 and 1,250 per year.[62]

If Doe 1 ceased performing abortions, Doe 2 could likely step in, as that is his current arrangement. Assuming Doe 2 performs at his previous capacity, there would be a gap of about 1,100 abortions at the Hope clinic. Split between Doe 2 and Doe 3, that is an additional 550 procedures per doctor per year. That is not overly burdensome, especially given Doe 3's testimony that he has performed up to 60 procedures per week and regularly performs up to 30.[63]

To put that number in perspective, the Court in *WWH* found unduly burdensome the expectation that

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[62] Hope's administrator testified that Hope provides 3,000 abortions per year and that Doe 3 covers 29% of those procedures, which would be 870. Doe 3 testified that he performs 20–30 procedures per week. Assuming an average of 25 procedures a week for 50 weeks, that is 1,250 procedures per year.

[63] The record provides a wealth of information about Doe 3's capacity, down to the number of abortions he has performed in a single hour. Our subsequent analysis draws heavily from that information in determining whether Does 2 and 3 have the capacity to absorb Doe 1's practice. Although the information about Doe 2 is not as painstakingly detailed, Doe 3 is a particularly apt comparator for understanding Doe 2's capacity, as they have the similar experience levels (both have been performing abortions in Louisiana since 1980 and 1981 respectively) and perform a similar number of abortions annually (approximately 1,000).

8 clinics could absorb the work of 40. Each remaining Texas abortion provider would have had to increase his capacity by a factor of 5. *WWH*, 136 S. Ct. at 2317. A fivefold increase for Doe 3 would mean performing 100–150 abortions per week instead of his usual 20–30.

In contrast, the loss of Doe 1 would require Doe 3 to perform only 5 extra procedures each day he currently works (2 days per week). Instead of performing 20–30 abortions per week, he would perform 30–40. It necessarily follows that a gap of 1,100 procedures per year—split between 2 doctors—does not begin to approach the capacity problem in *WWH* and is not a substantial burden.

Consider, for example, Doe 3's testimony that he can perform up to 6 abortions per hour. Using that number, adding 1,100 abortions would require 183.3 hours per year, which is an extra 3.6 hours per week, or about 1.8 hours per day, assuming a two-day work week for 50 weeks of work. Divided between two doctors, that is 54 minutes per day. Under that estimation based on the facts in the record, the extra 54 minutes of procedure time is unlikely to result in an undue burden on women. At the very least, June Medical did not produce sufficient evidence to evince such a burden.

To put it another way, Doe 2 and Doe 3 will each need to perform an additional 550 procedures per year. That amounts to six extra abortions each day that Doe 3 currently works. Using his testimony that he can perform six abortions an hour, that load would not result

in a substantial increase in wait times. Common sense dictates that an hour cannot be a substantial burden.

F.

Though we have determined that no woman would be *unduly* and thus unconstitutionally burdened by Act 620,[64] we additionally hold that the law does not burden a large fraction of women. To quantify the burden of eliminating Doe 1, the large-fraction standard requires us to determine what percentage of women seeking abortions in Louisiana would be affected by Act 620.

As an initial matter, *WWH* is less than clear on how to delimit the numerator and denominator to define the relevant fraction. The Supreme Court has limited the denominator to only individuals whose abortion rights are burdened by the statute: It encompasses "those [women] for whom [the provision] is an *actual* rather than an irrelevant restriction." *Id.* (quoting *Casey*, 505 U.S. at 895) (emphasis added).

It is an open question whether the denominator is made up of those women who could potentially be burdened by the regulation or just those women who are actually burdened.[65] Under the former, the numerator

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[64] *See Jegley*, 864 F.3d at 959 (finding the district court erred by failing to "define or estimate the number of women who would be *unduly* burdened" (emphasis added)).

[65] The parties additionally dispute whether the denominator includes only Louisiana residents or all women who utilize Louisiana's clinics. Louisiana contends that we review the impact of

is then comprised of those women who are actually burdened by the regulation.[66] Then we would review

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the Act on only *Louisiana* women, so that when considering capacity and the fraction of women burdened, the court should look only to that number. June Medical retorts that limiting the calculation to only Louisiana women would violate the Privileges and Immunities Clause by discriminating against out-of-state residents seeking abortions in Louisiana. It says that *WWH*, 136 S. Ct. at 2319, broadly considered the impact on "women seeking abortions in Texas."

A combination of the two theories is the better approach. In *WWH*, when reviewing the burden in terms of driving distances, the Court focused on Texas women. *WWH*, 136 S. Ct. at 2313 (looking at "the number of women living in *a county* more than 200 miles from a provider" (emphasis added)) (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 & n.4 (W.D. Tex. 2014) (reviewing the impact of the regulation on women of reproductive age in Texas)). Additionally, when discussing whether remaining Texas clinics could expand to meet the demand, the Court examined whether the "clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 *Texas women* who sought them each year." *Id.* at 2317 (emphasis added).

But at the same time, the Court took a realistic approach to problems of capacity. Out-of-state women do utilize the clinics, which affects the service provided to Louisiana women. Unless the clinic turns them away or gives priority to Louisiana women, the latter will be affected by capacity problems so long as out-of-state women utilize the facilities. Thus, Louisiana women's access to abortion, and the standard of care, are affected by how many women in total are seeking abortions in Louisiana. Therefore, when reviewing capacity, we look to the impact on Louisiana women *via* the number of abortions annually sought.

[66] *See Jegley*, 864 F.3d at 959 ("The court correctly held that individuals for whom the contract-physician requirement was an actual, rather than an irrelevant, restriction were women seeking medication abortions in Arkansas. Nonetheless, it did not define or estimate the number of women who would be unduly burdened by the contract-physician requirement. Instead, it focused on

whether those women are substantially burdened and whether that fraction is large. Under the second interpretation, the numerator is comprised of those women who are *substantially* burdened by the regulation.[67] And, then we would determine whether the resulting fraction is large.

We need not decide which interpretation is proper because June Medical failed to demonstrate that a large fraction of women are substantially burdened under either analysis.

1.

We start with the first interpretation—the reading most favorable for June Medical. There are approximately 10,000 abortions performed annually in Louisiana, 3,000 of which are at Hope, where Doe 1 currently works.[68] Thus, only 30% (or, less than one-third) of

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amorphous groups of women to reach its conclusion that the Act was facially unconstitutional.").

[67] *See Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006) (comparing the number of women who would be ultimately deterred from getting an abortion by Ohio's regulation—those unconstitutionally burdened—with the total number of women who sought exceptions from the requirement—those actually burdened by the requirement).

[68] Even assuming Louisiana is correct and we should limit our analysis to the number of Louisiana women burdened by the Act, the outcome is the same. Louisiana women account for 2,097 of Hope's annual abortions. Louisiana women account for 7,000 annual abortions statewide. Using these numbers, only 29.9% of Louisiana women could even potentially be burdened by the loss of Doe 1.

women seeking an abortion would face even a potential burden of increased wait times were Doe 1 to cease practicing.

The Supreme Court has not defined what constitutes a "large fraction," and the circuit courts have shed little light. The Sixth Circuit determined that 12% was insufficient and that the large-fraction requirement is "more conceptual than mathematical."[69] It concluded that "a large fraction exists when a statute renders it nearly impossible for the women actually affected by an abortion restriction to obtain an abortion." *Cincinnati Women's*, 468 F.3d at 373. In other words, as "[o]ther circuits" have found, "a large fraction [exists only] when *practically all* of the affected women would face a *substantial* obstacle in obtaining an abortion."[70]

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[69] *Cincinnati Women's*, 468 F.3d at 374; *see also Woman's Choice–E. Side Women's Clinic v. Newman*, 305 F.3d 684, 700 (7th Cir. 2002) (Coffey, J., concurring) (stating that a reduction of 10% to 13% in the number of abortions was not a large fraction and that a statute is impermissible only when the restrictions are "*severe*" and "*lead to 'significant' reductions in abortion rates*").

[70] *Cincinnati Women's*, 468 F.3d at 373–74 (emphasis added) (noting that "[t]o date, no circuit has found an abortion restriction to be unconstitutional under *Casey*'s large-fraction test simply because some small percentage of the women actually affected by the restriction were unable to obtain an abortion"); *accord Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (explaining that the Supreme Court found unconstitutional a regulation that substantially burdened 70% of women actually affected). Those decisions preceded *WWH* but, unlike the Fifth Circuit, the Sixth Circuit had already adopted and applied the *Casey* plurality's large-fraction test. *See Cincinnati Women's*, 468 F.3d at 367.

Thirty percent does not approach "practically all" women seeking abortions in Louisiana and cannot be deemed a large fraction for purposes of *WWH* or Act 620. A superficial reaction might be to think, to the contrary, that 30% is obviously large. A few easy examples show why that is not so. If 30% of a law school class failed the bar, we would say that is a large fraction. Conversely, if 30% passed the bar, we would think that small. Again, if 30% of children had food to eat for lunch today, we would think that a small fraction. But if 30% were without food, we would think that large. Thus what constitutes a large fraction requires identifying the starting point.

In every other area of the law, a facial challenge requires plaintiffs to establish a provision's unconstitutionality in every conceivable application. *See Salerno*, 481 U.S. at 745. In other words, they must demonstrate an unconstitutional burden on 100% of those impacted. Plaintiffs asserting abortion rights, however, are excused from that demanding standard and must show a substantial burden in only a large fraction of cases.

The shift from the usual standard to the large-fraction standard was intended to ease the burden on abortion plaintiffs relative to plaintiffs who bring challenges to other sorts of laws. There is a difference, however, between cracking the door and holding it wide open.

It cannot be that we force a plaintiff asserting his right to a fair trial, to freedom from unconstitutional

searches and seizures, to associate freely, or to exercise his religion freely, to shoulder the burden of demonstrating that there is *no possible* constitutional application of a law, while allowing an abortion plaintiff to succeed on a showing that the law is unconstitutional in less than one of three cases. Bearing a burden of 30% compared to the typical burden of 100% is not large. To conclude otherwise eviscerates the restrictions on a successful facial challenge.

Not only is 30% not a large fraction for purposes of *WWH* and Act 620, as already explained, any burden imposed by the Act is not substantial even on women within the 30%. The burden is only potential: Doe 1's capacity can easily be absorbed by the remaining abortion doctors. Even were that potential burden of increased wait times to materialize, it would not be substantial.

June Medical's challenge thus fails under this interpretation at both critical points. It first fails to establish that the women potentially impacted suffer an unconstitutional burden. And it further fails to show that this group of women constitutes a large fraction. Instead of demonstrating an undue burden on a large fraction of women, June Medical at most shows an insubstantial burden on a small fraction of women. That falls far short of a successful facial challenge.

2.

Under the second interpretation, June Medical fares even worse. The denominator of women actually

burdened is limited to those 3,000 women who seek abortions annually at Hope Clinic. The numerator is limited to those women substantially burdened. Since we have already concluded that Act 620 effects no constitutional deprivation, the numerator encompasses no one. In other words, the statute imposes an undue burden on 0% of women. By definition, zero percent is not large. Thus, June Medical cannot succeed on its facial challenge under this interpretation either.

IV.

We are bound to apply *WWH*, which is highly fact-bound, and the records from Texas and Louisiana diverge in all relevant respects. Act 620 results in a potential increase of 54 minutes at one of the state's clinics for at most 30% of women. That is not a substantial burden at all, much less a substantial burden on a large fraction of women as is required to sustain a facial challenge. Despite its diligent effort to apply *WWH* faithfully, the district court clearly erred in concluding otherwise.

The judgment is REVERSED, and a judgment of dismissal is RENDERED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

Twenty-six years ago, the Supreme Court laid down the now familiar metric: "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden" on the exercise of that right.[1] Yet the majority today fails to meaningfully apply the undue burden test as articulated in *Casey* and clarified in *Whole Woman's Health* and fails to give the appropriate deference to the district court's opinion, essentially conducting a second trial of the facts on this cold appellate record. With respect, I must dissent.

I.

We are to "consider the burdens a law imposes on abortion access together with the benefits those laws confer."[2] While the majority correctly rejects Louisiana's untenable position that *WWH* does not require balancing, it then misapplies that balancing. As I will detail, Act 620 will substantially burden women's access to abortion with no demonstrable medical benefit. In reaching a contrary conclusion, the majority accepts

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[1] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992).

[2] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (rejecting Fifth Circuit's standard which might have been "read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden").

the district court's findings of a want of benefits but offers a starkly different view of the burdens imposed.

On a robust trial record after conducting a six-day bench trial, the district court documented its findings of benefits and burdens in a lengthy and detailed opinion. The divergence between the findings of the district court and the majority is striking—a dissonance in findings of fact inexplicable to these eyes as I had not thought that abortion cases were an exception to the coda that appellate judges are not the triers of fact. It is apparent that when abortion comes on stage it shadows the role of settled judicial rules.

A.

While the majority correctly states that "the district court did not clearly err in finding that Act 620 provides minimal benefits," it also "credit[s] Louisiana's [claims of a] more robust record on the benefits side of the ledger" than the record of the Texas law's benefits in *WWH*. Louisiana contends that the purpose of the admitting privileges requirement is to facilitate care for women who experience complications during an abortion procedure that require admission to a hospital and to ensure the competence of physicians performing abortion procedures. The district court found that the law conferred no benefit and was "an inapt remedy for a problem that does not exist."[3]

[3] The district court went on to emphasize that the state did not proffer any evidence that patients obtain better outcomes when their physicians have admitting privileges nor could the

The record provides ample evidence for the district court's findings that Act 620 "confers only minimal, at best, health benefits for women seeking abortions." Nationally, nearly one million abortions are performed each year, approximately 90% of which occur in the first trimester. There are two types of abortion procedures: surgical and medication abortion. Surgical abortion is minimally invasive and does not require an incision or the use of general anesthesia but instead uses only mild or moderate sedation and/or local anesthesia. Complications of surgical abortions are rare and can generally be managed in the clinic setting. Patients rarely suffer complications requiring direct transfer from the clinic to the hospital. Medication abortion involves the combination of two drugs and requires no anesthesia or sedation.

The numbers are telling: the district court found that the prevalence of any complication in first trimester abortion in an outpatient setting is 0.8% and the prevalence of major complication requiring treatment in a hospital is 0.05%.[4] The risk of complication requiring hospitalization in the second trimester is 1.0%. The district court made findings that the incidence of complications requiring direct transport to a hospital is similarly low at Louisiana clinics. At the

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state point to an instance in which admitting privileges would have helped a woman obtain better treatment.

[4] The district court notes that the complication rate for a D&C procedure performed after a spontaneous miscarriage (a procedure which a doctor can legally perform under Louisiana law without admitting privileges) is higher than the complication rate for first trimester surgical abortion.

Hope Clinic, which serves approximately 3,000 patients a year, only four patients have required direct transfer to a hospital in the past 23 years. Between 2009 and mid-2014, the Bossier Clinic performed 4,171 abortions with only two patients requiring direct hospital transfer and the Causeway Clinic performed 10,836 abortions, with only one patient requiring direct hospital transfer. Among doctors involved in the litigation, the district court found that Doe 2 performed approximately 6,000 abortions between 2009 and mid-2014, with only two patients requiring direct hospital transfer, Doe 5 has performed thousands of abortions at Women's Health and Delta Clinic in the past three years and has never had a patient requiring hospital transfer, and Doe 6 has performed thousands of abortions in the past ten years with only two patients requiring a direct hospital transfer. Summarizing the evidence, the district court concluded that hospital transport was required "far less than once a year, or less than one per several thousand patients."

Those findings mirror findings credited by the Supreme Court in *WWH* 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."[5]

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[5] *WWH*, 136, S. Ct. at 2311; *see also WWH*, 136 S. Ct. at 2320 (Ginsburg, J., concurring) (summarizing amicus brief for American College of Obstetricians and Gynecologists concluding that "[a]bortion is one of the safest medical procedures performed in the United States").

The district court documents the protocol followed by physicians and clinics in the rare instances where direct transfer to a hospital is required. As the majority notes, the statutory scheme that was in place prior to Act 620's passage required abortion clinics to have "a written transfer agreement with a physician who has admitting privileges within the same town or city."[6] There was testimony describing the process at the clinics for managing complications. For example, at Hope Clinic, if a physician determines that a patient needs direct transport to the hospital (a situation the district court found has presented for four patients in the past 23 years), emergency transport is called, the Clinic ensures that the chart is complete and sent to the hospital, and the physician contacts the hospital to alert the attending physician that the patient will be arriving and provides information about the complication.[7]

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[6] Former LA. ADMIN. CODE tit. 48, pt. I, § 4407(A)(3).

[7] As the district court notes, most complications that arise from surgical abortion occur after the patient has left the clinic. In those cases, if the patient experiencing a complication contacts the clinic, the standard of care is for the clinic to advise her to go to the nearest hospital, which may be a hospital more than 30 miles from the clinic. A clinic physician's compliant admitting privileges would have no benefit to the patient experiencing a complication in that scenario (the most common class of patients experiencing complications from abortion procedures). *See also WWH*, 136 S. Ct. at 2311 (reciting district court's findings that "in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot . . . [and] if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home").

The majority notes that Louisiana, in an attempt to emphasize the importance of continuity of care, highlights three instances where Doe 3, the one physician who had admitting privileges prior to the passage of Act 620, used those privileges to care for patients who experienced complications following abortion procedures. As the majority acknowledges, however, there is no evidence in the record that those patients would not have received proper treatment had Doe 3 lacked admitting privileges. It is significant that the record is devoid of *any* instance of a patient receiving substandard care or suffering any medical hardship after experiencing a complication requiring hospital transfer at the hands of a physician without admitting privileges. The majority concedes this lack of evidence, and aptly refuses to credit a purported health benefit.

The majority does credit Act 620 with assisting in the credentialing of physicians. First, the majority contends that, unlike the Texas law at issue in *WWH*, Act 620 serves a credentialing function, filling a purported void created by the clinics' failure to perform a review of a provider's competency or to conduct criminal background checks. The district court made no such finding. Instead, the majority appears to rely on Doe 3's testimony that, as medical director at Hope, he was responsible for hiring new physicians for the clinic and, in that capacity, did not perform criminal background checks on two physicians he hired. In his testimony, Doe 3 describes the differences between the hiring process at Hope Clinic and at hospitals where Doe 3 has previously been involved in hiring, including

Bossier Medical Center, Willis-Knighton Bossier, and Doctor's Hospital. Doe 3 testified that he sat on committees of those hospitals that approve admitting privileges requests and he answered affirmatively when asked if those committees consider the applying doctors' training, education, experience, and criminal backgrounds. In contrast, Doe 3 compared hiring at Hope Clinic to "setting up a private practice." He testified that there was no "committee" responsible for hiring because "there aren't that many physicians at Hope." Doe 3 did not run background checks and was the only person to consider their qualifications because, as medical director, he had sole responsibility for hiring. There is no dispute that hiring at clinics functions differently than hiring or consideration of admitting privileges at hospitals. The majority ascribes a benefit to that difference, a finding not made by the district court and not evident in the record. Doe 3 acknowledges that he trained the two physicians he hired to perform abortion procedures because they had previously practiced as an ophthalmologist and radiologist. The record is devoid of any finding that a single physician with a criminal history has been hired by Hope (or any of the other clinics providing abortion services in Louisiana), that any physician that has performed abortions was incompetent to provide such services, or that any patient has suffered for want of physician competence. On this record the "credentialing function" benefit is "a solution in search of a

problem," one for which the majority is the main proponent.[8]

B.

Having determined the absence of evidence that Act 620 will provide any benefit, we ask whether the burden imposed by the statute is "undue."[9] It is beyond strange that it is necessary to remind that "[i]t is not our task to re-try the facts of the case; this is especially true where the lower court's findings are based on oral testimony and the trial judge has viewed the demeanor and judged the credibility of the witnesses."[10] We cannot "reverse the findings of the trial judge simply because we are convinced that we would or could decide

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[8] *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), aff'd *sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) ("On the robust trial record, the court is, if anything, more convinced that the admitting privileges requirement in Act 37 remains a solution in search of a problem." (internal quotation marks omitted)).

[9] *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) ("[W]e must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests. If a burden significantly exceeds what is necessary to advance the state's interests, it is 'undue.' "); *See also Schimel*, 806 F.3d at 920 ("The feebler the medical grounds (in this case, they are nonexistent), the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive.").

[10] *Franks v. Nat'l Dairy Prods. Corp.*, 414 F.2d 682, 685 (5th Cir. 1969) (internal citation omitted).

the case differently."[11] Yet, on the burdens side of the ledger, it is apparent that the majority here swiftly retries the case failing to credit findings that were not "clearly erroneous."

Louisiana disputes the district court's findings that two of the doctors would stop performing abortions if Act 620 went into effect. First, that the limited privileges Doe 2 obtained from Tulane qualify under Act 620 and the district court erred in concluding otherwise. Next, that the district court erred in finding that Doe 3 will no longer provide abortions in Louisiana if Act 620 takes effect because of a "well-founded concern for his personal safety" if he is the last remaining provider in either Louisiana or northern Louisiana, rejecting the district court's conclusion that Doe 3's "personal choice to stop practicing" can be legally attributed to Act 620.

Louisiana does not appear to dispute that: (1) Does 1 and 6 were unable to obtain privileges despite their good-faith efforts to do so; (2) Doe 2 was unable to obtain privileges *other* than the limited privileges obtained from Tulane (which appellant argues qualify under Act 620); and (3) that Doe 5 was unable to obtain privileges at a hospital within 30 miles of Delta Clinic. The state did not challenge the district court's findings

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[11] *Guzman v. Hacienda Records and Recording Studio, Inc.*, 808 F.3d 1031 (5th Cir. 2015) ("Indeed, the great deference owed to the trial judge's finding compels the conclusion that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" (citing *In re Luhr Bros., Inc.*, 157 F.3d 333, 338 (5th Cir. 1998))).

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.

1. Doe 1

Doe 1 provides medication abortions through 8 weeks and surgical abortions through 13 weeks, six days at Hope Clinic in Shreveport, where he provides approximately 71% of the 3,000 abortions performed each year. The district court found that Doe 1 had put forth a good-faith effort to secure admitting privileges, documenting his attempts to secure privileges at five different hospitals and his inability to do so for reasons unrelated to his competence.

Doe 1 contacted the Family Medicine Department at University Health in Shreveport (where he had done his residency in family medicine) but was told by the department director that he would not be offered a position due to staff objections to his work at Hope Clinic. In another attempt to obtain privileges, Doe 1 applied to Minden Medical Center, but the staff coordinator rejected the application, stating "[s]ince we do not have a need for a satellite primary care physician at this time, I am returning your application and check." Hope's administrator contacted a third hospital, North Caddo, on Doe 1's behalf and was told they did not have the capacity to accommodate transfers. Doe 1 applied to WKBC as an addiction medicine specialist because he has a board certification in addiction medicine and the hospital has an addiction recovery

center. His application was denied because he had not undergone a residency program in addiction medicine (a program which did not exist at the time he received his board certification). He reapplied as a family practice specialist, at which time WKBC requested documentation of hospital admissions from the last 12 months. Because abortion procedures rarely result in complications requiring hospitalization, he had not admitted any patients in that timeframe so instead provided information about his training and procedures. The application remained pending neither approved nor denied by the hospital and the district court found that, under those circumstances, the application was de facto denied. The district court concluded that a fifth application, to Christus, was also de facto denied. Doe 1 submitted his application to Christus in July 2014 and subsequently provided additional information to Christus on two occasions when it was requested. When the administrator for the Hope Clinic called to make an appointment for Doe 1 to get an ID badge (also a requirement of the application process), the administrator was told Doe 1 had submitted the wrong type of application and needed to submit a "non-staff care giver" application (a type of privilege that would not qualify under Act 620). Doe 1 then received a letter stating that his application was incomplete for failing to obtain an ID badge, and would be deemed withdrawn. Doe 1 reached out to the hospital, and was again told that he would need to apply for non-staff care giver privileges, which would not qualify under Act 620.

The majority credits the district court's finding that Doe 1 has been unable to secure admitting privileges despite good-faith efforts to do so and agrees that Doe 1 will be required to stop providing abortions if Act 620 goes into effect.[12]

2. Doe 2

Doe 2 provides medication abortions through 8 weeks and surgical abortions up to the legal limit of 21 weeks, 6 days. In the year prior to trial, Doe 2 performed 550 abortions at Bossier Clinic and 450 abortions at Causeway Clinic, or a total of 1,000 abortions. Since Bossier's closure, Doe 2 has entered into a working agreement with Hope to provide abortion services when Hope's primary physicians are unavailable to perform abortions.

The district court found that Doe 2 has been unsuccessful in his good-faith efforts to obtain active admitting privileges within 30 miles of the Bossier Clinic and that the limited privileges he obtained at Tulane were insufficient under Act 620 because those privileges did not allow him to "provide diagnostic and

[12] While the majority concedes that the district court did not clearly err in concluding that Doe 1 put forth a good-faith effort to secure privileges, it still insists that "[t]here appears to be an unresolved communication problem with Christus, so it is possible Doe 1 could obtain qualifying privileges there." That reading is illustrative of the divergence between the district court's fact-finding and the majority's rehashing of those facts: what the majority calls an "unresolved communication problem," the district court describes as reading like "a chapter in Franz Kafka's *The Trial*."

surgical services to [admitted patients]" consistent with the requirements of Act 620.

The district court documents Doe 2's attempts to secure admitting privileges at three separate hospitals. Doe 2 previously had admitting privileges at University Health while he was on staff as an Assistant Clinical Professor of Medicine with a general OB/GYN practice. After leaving the staff in 2004, Doe 2 maintained consulting privileges that did not allow him to admit patients. After the passage of Act 620, Doe 2 attempted to upgrade his privileges but was told by the head of the OB/GYN department that the hospital would not upgrade his privileges because of his abortion practice.[13]

Doe 2 also applied for privileges at WKBC in the summer of 2014. The OB/GYN department wrote to Doe 2 asking for more information including "operative notes and outcomes of cases performed within the last 12 months for the specific procedures you are requesting on the privilege request form." In his testimony before the district court, Doe 2 stated that it was impossible to submit information about procedures performed in hospitals because he had not "done any in-hospital work in ten years, so there is no body of

[13] Doe 2 testified that the head of the OB/GYN department took the request to the dean of University Health, who declined to offer Doe 2 admitting privileges. Doe 2 explained that he was not surprised by the result of the attempt "because of the political nature of what [he does] and the controversy of what [he does]."

hospitalized patients that [he had] to draw from."[14] Instead, Doe 2 testified that he submitted cases that he had done at the clinic in Bossier. At that point, WKBC sent a second letter, stating in relevant part: "The data submitted supports the procedures you perform, but does not support your request for hospital privileges. In order for the Panel to evaluate and make recommendations for hospital privileges they must evaluate patient admissions and management, consultations, and procedures performed. Without this information your application remains incomplete and cannot be processed."

Doe 2 also applied for admitting privileges at Tulane, a qualifying hospital under Act 620 within 30 miles of Causeway in Metairie. After a circuitous process, during which Doe 2 was told by a doctor at Tulane that his request would need to be discussed with the hospital's lobbyists and that there were faculty who were concerned that having an abortion provider on staff would hurt their referrals,[15] Doe 2 was granted limited privileges which would allow him to admit patients but not provide care for the patients.

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[14] Because Doe 2 made a decision to "slow down" and stop his OB/GYN practice, he worked only at Causeway and Bossier, and "was not doing the type of practice that would lend itself to having hospitalized patients."

[15] Doe 2 was told that "[t]here were a few faculty who were not comfortable with covering; they were also concerned that 'Tulane as back up for an abortion clinic might not help our referrals.' "

Louisiana contends that the limited privileges Doe 2 was granted by Tulane are sufficient under Act 620. The majority rejects that argument, agreeing with the district court that the Tulane privileges do not satisfy the unambiguous requirements of Act 620. Louisiana does not argue on appeal that Doe 2 failed to put forth a good-faith effort to secure privileges elsewhere, instead relying on its interpretation of the Tulane privileges to argue that his limited privileges are sufficient under Act 620. Despite the fact that the state never makes the argument, the majority concludes that Doe 2's efforts with respect to securing privileges elsewhere were insufficient and that the district court's conclusion that Doe 2 had put forth a good-faith effort was clearly erroneous.

The majority notes without comment that Doe 2 claims University Health refused to extend him an invitation to apply because of his abortion practice.[16] With respect to WKBC, the majority states that "it remains unclear whether Doe 2 sent a list of cases." The majority continues, stating that the record does not establish whether WKBC found fault with the completeness of Doe 2's response to its inquiry or the actual documentation provided about cases at the Bossier Clinic. The majority's suggestion that Doe 2 was merely unresponsive to WKBC is belied by WKBC's own November letter to Doe 2—cited by the district court—stating that "*the data submitted* supports the procedures you perform, but does not support your

[16] Whether the majority credits that finding by the district court is unclear.

request for hospital privileges." More importantly, Doe 2 testimony—supported by WKBC's letter[17]—highlights the principal conundrum with his attempts to get admitting privileges: Doe 2 cannot provide documentation of in-patient procedures performed (information required by WKBC) because the nature of providing abortion services makes hospital admissions rare on account of the rarity of complications associated with the [sic] those services.[18] To the extent the majority deems clearly erroneous the district court's finding that Doe 2 put forth a good-faith effort with respect to WKBC, it defies logic to suggest that Doe 2 could be awarded privileges if he had just "tried harder;" the hospital required information that did not exist. Furthermore, it is unclear how Doe 2's experience applying to WKBC differs from Doe 1's application to that hospital which the district court found to be de facto

[17] The letter WKBC sent to Doe 2 stated that, to consider Doe 2's application, the panel needed to "evaluate patient *admissions and management*, consultations and procedures performed. Without this information your application remains incomplete and cannot be processed." (emphasis added). In short, WKBC requires documentation of hospital admissions to grant admitting privileges, documentation Doe 2 does not have because he has not admitted any patients.

[18] In response to defendant's question about whether his application had been formally denied, Doe 2 testified: "they haven't formally denied me. They just—when they receive information on hospitalized patients in the last 12 months, they will continue [ ] considering my application, even though I've explained that that information doesn't exist. I'm in a Catch 22 basically. I can't provide information I don't have."

denied, a finding the majority appears to credit in one case, and reject in the other.

The majority next suggests that, "opposite to what the district court found," it is possible that Doe 2 could obtain privileges at Christus or Minden. While the district court did not make specific findings as to Christus or Minden, the record indicates that Doe 2 did not apply to either hospital. With respect to Minden, Doe 2 testified that applying for admissions privileges was a "long, tedious and not inexpensive process and [he] wanted to . . . apply to hospitals that [he] knew had good care and that had a close geographic location to the clinic and where [he] knew people might feel more comfortable." He stated that he chose WKBC, for example, because it was a good hospital, close to the clinic, whereas Minden is a smaller hospital, very close to the 30-mile limit, and he did not know anyone there.[19] There is nothing in the record that indicates Doe 2 would have received privileges at Minden or that the district court's finding that Doe 2 was putting forth a good-faith effort—despite not applying to Minden—was clearly erroneous.[20]

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[19] Doe 2 specifically recalled trying to apply to hospitals "that [he] thought meant something" where he thought he would have the highest likelihood of success.

[20] This is especially true where Doe 1's application to Minden was denied because the hospital did not "have a need for a satellite primary care physician at this time." The majority does not identify anything in the record that would support its contention that Minden remains an open option for Doe 2 or point to anything that would differentiate the applications of Doe 2 from Doe 1.

With respect to Christus, the majority concludes that it is possible that Doe 2 could obtain privileges there because he previously had privileges there and Doe 3 currently maintains privileges there, "contradicting" Doe 2's theory that a Catholic hospital would not staff an abortion provider. The majority ignores the fact that Doe 3's privileges at Christus are contingent on his admitting at least 50 patients a year, a requirement he is able to meet only because of his OB/GYN practice. [sic] confirmed in his testimony that he previously had admitting privileges at Christus because of his OB/GYN practice and that those privileges were terminated after he ceased to have a private practice affiliation. There is no support in the record for the conclusion that Christus would potentially award Doe 2 privileges, especially where, like Minden, Doe 1's application to the hospital was de facto denied. Putting aside hostility abortion providers face in the state, basic economics make clear why hospitals have no incentive to grant and every disincentive to deny privileges to an abortion provider who does not maintain a separate OB/GYN practice: by virtue of the safety of the procedures performed at the clinics, abortion providers admit very few—if any—patients to a hospital and risks loss of business by doing so. That principle is consistent with the experience at Christus described by Does 2 and 3, that privileges at Christus are contingent on a physician's ability [sic] admit a certain number of patients, which Does 2 and 3 are (and were) only able to do by virtue of their general OB/GYN practice.

3. Doe 3

Doe 3 provides medication abortions through eight weeks and surgical abortions through 16 weeks, six days. He performs approximately 20-30 abortions a week at Hope Clinic on Thursday afternoons and all day on Saturday and also maintains an active general OB/GYN practice. Doe 3 had privileges at Christus[21] and WKBC before the passage of Act 620 because of his private OB/GYN practice.[22] When asked if Doe 3 was able to increase his capacity of services provided at Hope, he stated that he could not.[23] As Doe 3 points out, if he gave up his private practice to devote more time to Hope to compensate for the providers who would no longer be able to practice, ironically, he would "probably lose [his] admitting privileges" and would no longer be able to provide abortion services.

The district court found that "[a]s a result of his fears of violence and harassment, Doe 3 had 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

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[21] As noted previously, Doe 3's privileges at Christus require him to admit at least 50 patients a year, which he is able to do by virtue of his OB/GYN practice.

[22] When asked whether his privileges were a result of his private practice, Doe 3 testified: "That's right. I do not have admitting privileges because of my work at Hope."

[23] Doe 3 testified that his OB/GYN practice takes up approximately 70-80 hours each week, and that he spends an additional 10-15 hours working at Hope and that he physically could not handle working any more hours.

abortions."[24] The majority concludes that that finding was clearly erroneous because of Doe 3's "shifting story," at one point claiming he would stop practicing if he was the only provider left in Louisiana then, after Doe 5 obtained privileges in southern Louisiana, if he was the only provider left in northern Louisiana. In the majority's view, "Doe 3's shifting preference as to the number of remaining abortion providers is entirely independent of the admitting-privileges requirement," again a trial *de novo* finding by an appellate court.

4. Doe 4

Doe 4 performed abortions at Causeway Clinic in Metairie until January 2016, where he provided approximately 75% of the total abortions at the clinic. Prior to Causeway's closure, Doe 4 applied for privileges at Ochsner, where he did not receive a response, and testified at his deposition that he did not apply for admitting privileges at Touro Infirmary or LSU New Orleans because he had been unable to find an OB/GYN to cover for him, a requirement of both

[24] In Doe 3's declaration, he states that if Act 620 takes effect and he is the only lawful abortion provider in the state of Louisiana, he has made the decision that he would no longer provide abortions because of the risk to his life, family, patients, coworkers, and reputation. At trial, when asked whether he would continue to practice if he was the only remaining physician providing abortions in Northern Louisiana, Doe 3 testified that he did not believe he would continue. The majority attributes the shift from "Louisiana" to "northern Louisiana" to gamesmanship, suggesting that Doe 3 changed his story after learning that Doe 5 obtained privileges in the southern part of the state.

hospitals. Causeway closed in January 2016.[25] Because of Causeway's closure, Doe 4 is no longer pursuing privileges.

5. Doe 5

Doe 5 provides medication abortions through eight weeks and surgical abortions through 16 weeks. He is one of two physicians providing abortion services at Women's Health in New Orleans, where he provides approximately 40% of the abortions, and the only physician at Delta Clinic in Baton Rouge. Since the passage of Act 620, Doe 5 has obtained active admitting privileges within 30 miles of Women's Health, at Touro Infirmary, but not within 30 miles of Delta Clinic.

The district court found that Doe 5 had put forth a good-faith effort to obtain admitting privileges at a hospital within 30 miles of Delta Clinic but was unable to do so for reasons unrelated to his competence. Doe 5 applied for admitting privileges at three hospitals in Baton Rouge: Woman's Hospital, Lane Regional Medical Center, and Baton Rouge General Medical Center. None of the applications submitted by Doe 5 have been denied or granted and all remain technically "pending", leading the district court to conclude they had been de facto denied. In his declaration, Doe 5 states that, after Act 620 was enacted, he reviewed bylaws and spoke to people in the medical communities in

[25] The district court did not receive evidence on Causeway's closure and therefore "dr[ew] no inferences regarding the cause of the closure."

New Orleans and Baton Rouge to determine which hospitals would potentially grant him privileges. For example, Doe 5 describes some hospitals that require a physician to admit a certain number of patients per year to obtain privileges which he is unable to do.[26] Doe 5 chose, therefore, to apply to hospitals where "[he] believed that [he] had a realistic chance of obtaining admitting privileges" and did not apply to hospitals where he did not have a good shot, in part because of the adverse professional consequences of having an application for admitting privileges denied.[27] Doe 5 states that Woman's Hospital has expressed concern that Doe 5 resides too far from the hospital to obtain privileges and mentions that a doctor he spoke with at Woman's Hospital—one of the doctors with whom Delta Clinic has a transfer agreement—declined to be Doe 5's covering physician for his Woman's Hospital application due to fear of threats and the possibility that protesters will picket outside of his private practice.

The district court found that Doe 5 put forth a good-faith effort to obtain admitting privileges within 30 miles of Delta Clinic. The majority concludes that finding was clearly erroneous. It faults Doe 5 for failing

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[26] "Since I have not admitted patients for over two years, and the risk of a complication from an abortion requiring hospitalization is so low, I will not be able to meet these requirements."

[27] Doe 5 describes that doctors must report denied applications to the National Practitioner Data Bank and are often required to report the denial on future applications for privileges at a hospital.

to present evidence that he reached out to additional doctors after the physician at Woman's Hospital refused to act as a covering physician and attributes his lack of follow-up with those hospitals to foot-dragging. The majority concludes from this that "[t]he most logical explanation for Doe 5's delay is that he is awaiting the result of this litigation before he acts."[28] The majority also imports testimony from Doe 4 (who was also unable [sic] obtain privileges before Causeway's closure) which the majority paraphrases as Doe 4 stating "that finding a covering physician is not overly burdensome."[29] Based on the absence in the record of evidence documenting follow-up by Doe 5 to the three hospitals to which he applied and the testimony of another doctor on the topic of covering physicians in the abstract, the majority concludes that the district court clearly erred in finding that Doe 5 put forth a good-faith effort

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[28] It is unclear why the majority's explanation is any more persuasive than the district court's conclusion that the three hospitals to whom Doe 5 has applied have de facto denied his applications. Nothing in the record makes the district court's conclusion clearly erroneous. The majority simply prefers a different answer.

[29] The majority mischaracterizes Doe 4's testimony. When asked if *having* a covering physician was an overly burdensome requirement for admitting privileges, Doe 4 replied "[n]o, I don't think that's overburdening." Doe 4 was not asked whether *finding* a covering physician was overly burdensome. The distinction is more than semantics. While it is logical to agree—in the abstract—that having a covering physician is not an overly-restrictive requirement, when faced with identifying and securing such a physician, the reality on the ground appears to be very different.

to obtain privileges at a qualifying hospital near Delta Clinic.

6. Doe 6

Doe 6 provides medication abortions and is one of the two clinic physicians at Women's Health. Doe 6 had admitting privileges at various hospitals in New Orleans from 1973 until 2005, during which time he maintained an active OB/GYN practice. When Act 620 passed, Doe 6 contacted Tulane to inquire about admitting privileges but was told he would not be granted privileges because he had not had admitting privileges at any hospital since 2005. Doe 6 also applied for privileges at East Jefferson Hospital in New Orleans and, shortly thereafter, provided additional information that the hospital had requested. Since that time, the hospital has taken no action on his application. The district court concluded that his application had been de facto denied. In his declaration, Doe 6 states that, after the passage of Act 620, he researched hospitals and learned that many required that a physician admit a certain number of patients per year to obtain admitting privileges, which he could not do because the nature of his abortion practice. He applied at a hospital where he believed he had a realistic chance of obtaining privileges and knew that he was unlikely to obtain privileges at other hospitals that required a certain number of admitted patients.[30]

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[30] Based on his experience as an OB/GYN with admitting privileges for more than thirty years, Doe 6 was familiar with the

The majority concludes that the district court's finding that Doe 6 put forth a good-faith effort to obtain privileges was clearly erroneous. It faults Doe 6 for not submitting more applications for admitting privileges, especially where there are 9 qualifying hospitals in the area including Touro, where Doe 5 was able to secure admitting privileges. The majority determines that Doe 6's "lack of effort" makes the district court's finding clearly erroneous. The majority does not address Doe 6's statement in his declaration that he chose to apply to hospitals where he thought he had a "realistic chance" of obtaining privileges or his claim that he reviewed hospital bylaws and spoke with others in the medical community to determine where he could obtain admitting privileges without documentation of admitting patients since 2005.

7. Summary of the Burdens

After documenting the status of each of the six doctors who provided abortion services at the outset of the litigation, the district court made summary findings about the effects of Act 620. The court determined that Does 1, 2, 4, and 6 would be unable to provide abortions in Louisiana because of their inability to

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admitting privileges requirements of at least three New Orleans hospitals, including Tulane University Hospital, Hotel Dieu Hospital, and Methodist Hospital. Doe 6 recalls deciding not to apply to renew his privileges when they expired in 2005 because he had shifted his practice to only gynecology and the low rate of complications associated with abortions at clinics prevented him from meeting the criteria of number of patients admitted to maintain his privileges.

obtain admitting privileges, despite their good-faith efforts to do so. As to Doe 5, the court determined that he would be unable to provide abortion services at Delta in Baton Rouge because he was unable to obtain qualifying privileges at a hospital in that area, but would be able to provide abortions at Women's Health in New Orleans because he had obtained privileges there. With respect to Doe 3, the court found that he would be the only remaining provider in Northern Louisiana and, due to a well-founded concern for his safety, would no longer provide abortions in the state.

In summary, the district court found that Doe 5 would be the only remaining abortion provider in the state and only one clinic, Women's Health, would remain open. Because Doe 5 performed approximately 2,950 abortions in 2013 at Delta and Women's, if he provided that number of abortions at Women's (the only clinic which would remain open on account of Doe 5 not obtaining privileges within 30 miles of Delta), approximately 70% of the 9,976 women in Louisiana seeking an abortion annually would be unable to get one.[31]

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[31] 9,976 abortions were performed in Louisiana in 2013. The 70% figure, as the district court notes, does not take into account the problems created for women in Louisiana who would need to travel a great distance to reach the clinic in New Orleans. In *WWH*, the Supreme Court recognized that increased travel times could contribute to a finding of undue burden. *WWH*, 136 S. Ct. at 2313 ("[I]ncreases in [driving distances] are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in the light of the virtual absence of any health benefit, lead us to conclude that the record

The district court made alternative findings, determining that, "[e]ven if one were to conclude that Doe 3 will not quit or that his quitting is legally irrelevant, Act 620 will nonetheless result in a substantial number of Louisiana women being unable to obtain an abortion in this state." If Doe 3's decision to quit due to fear of providing abortions as the last remaining physician in northern Louisiana was not attributed to Act 620's passage, two clinics would remain open: Hope and Women's Health. Doe 3 sees approximately 20-30 abortion patients per week, or roughly 1,000-1,500 per year, and has testified that, because of his full-time OB/GYN practice, cannot expand his capacity to provide abortions. Assuming Doe 3 and Doe 5 continue providing abortions, the district court found that approximately 5,500 women in Louisiana seeking an abortion would be unable to get one.

The district court notes that, although the closure of Causeway and Bossier has not been attributed to Act 620, the existence of two fewer abortion clinics (notwithstanding the court's finding that no doctor who was employed at those clinics was able to obtain admitting privileges) would amplify the burdens attributable to Act 620. Furthermore, the only physician who provides abortions up to the legal limit of 21 weeks, 6 days, Doe 2, will be unable to provide abortions, preventing any woman seeking an abortion at that stage from exercising her constitutional right to do so in Louisiana. The district court concluded that

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adequately supports the District Court's 'undue burden' conclusion.").

the burdens of Act 620 would fall most heavily on low-income women in the state, one of the poorest in the country, because of increased travel distances and associated cost. Finally, the court made the "commonsense inference" that increased wait times (on account of the decreased number of providers) would lead to women seeking abortions in later gestational ages, decreasing the number of women for whom medication abortion would be an option and making it difficult for women to obtain an appointment before 16 weeks.

The majority reaches different conclusions. On its determination of the facts, only Doe 1 has put forth a good-faith effort to get admitting privileges, Does 2, 5, and 6 "could likely obtain privileges," Doe 3 "is definitively not burdened,"[32] and all three clinics could remain open. Because there was clear evidence in the record that doctors failed to seek admitting privileges

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[32] Throughout the opinion, the majority refers to the burden imposed on the physicians and concludes that Act 620 is not overly burdensome on Does 3 and 5. *Casey* and its progeny do not ask us to consider whether a statute is burdensome on doctors providing abortions. Instead, we are required to consider whether there is an "undue burden on a woman's right to decide to have an abortion." *WWH*, 136 S. Ct. at 2300 (citing *Casey*, 505 U.S. at 878) (internal quotation marks omitted). Again, the difference is more than semantics. If a statute leads to a number of abortion providers ceasing to provide services, that cessation of service will likely burden a woman's right to seek an abortion, regardless of whether the statute imposed a burden on the doctors. It is the burden on a woman's right to decide that must be weighed against the benefits of the statute, not the burden physicians face in trying to comply with new statutory requirements.

in good faith, the majority says, any negative impact on women is attributable to an intervening cause: the inaction of the doctors rather than the statute. It proceeds to weigh the impact of what it determines to be the burden: the near impossibility of Doe 1 to obtain qualifying privileges. On that reading of the effects of Act 620, the majority concludes that the 2,100 abortions that Doe 1 had performed annually could be covered by Does 2 and 3 and, accordingly, no woman would be unduly burdened.[33] From there, the majority concludes that there will not be a large fraction of women

[33] To arrive at that conclusion, the majority concludes that Doe 2 could perform the same number of abortions at Hope that he had previously performed at Causeway and Bossier (approximately 1,000 annually). While there is evidence in the record that Doe 2 has entered into a working agreement to fill in at Hope when Does 1 and 3 are "absent due to scheduled time off, illness, the demands of their other practices, or for other reasons," there is no evidence in the record that Doe 2 will work at Hope full-time (not to mention the fact that he does not currently have admitting privileges and the district court's finding that he was unable to obtain privileges despite a good-faith effort to do so). As for the remaining 1,100 unaccounted for abortions previously performed by Doe 1, the majority determines that Does 2 and 3 would be able to absorb an additional 550 procedures per year. For this finding, the majority draws on "a wealth of information about Doe 3's capacity, down to the number of abortions he has performed in a single hour." The majority does not address Doe 3's testimony that he cannot increase his capacity because of his private OB/GYN practice, which he testified consumes approximately 70-80 hours a week. With its own "math," the majority calculates that Doe 3 will be able to perform the requisite additional 550 abortions a year by putting in an extra hour each day he works at the clinic, concluding that an extra hour cannot be a substantial burden.

facing a substantial burden: at most, 3,000[34] out of 10,000, or 30%, of women seeking abortions in Louisiana would be burdened by potentially longer wait times if Doe 1 was unable to practice, and that is only a potential burden because Doe 1's capacity will "easily be absorbed."

In sum, the district court found that 70% of women seeking an abortion in Louisiana would be unable to obtain one and the majority found that a maximum of 30% of women would be burdened with increased wait times, but that the burden of increased wait times was only potential. The district court's findings are well-supported in the record and not clearly erroneous.[35]

II.

I turn now to the application of the *Casey* standard to those facts. Numbers and calculations aside, the task is straightforward: we are to identify the stated justification of Act 620, determine the extent to which Act 620 advances that interest, and compare the benefits it provides with the burdens it imposes on abortion access.[36] It is noted that Louisiana has a legitimate interest in ensuring the health and safety of patients

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[34] 3,000 represents the total number of women seeking abortions at Hope where Doe 1 practiced.

[35] *Byram v. United States*, 705 F.2d 1418 (5th Cir. 1983) (reiterating that it is not the duty of an appellate court to retry the facts, even where the court is convinced that it would have "drawn different inferences than did the district court").

[36] *Casey*, 505 U.S. at 877–79.

seeking an abortion in the state.[37] However, even a statute which furthers a valid state interest cannot be a permissible means of serving legitimate ends if that statute "has the effect of placing a substantial obstacle in the path of a woman's choice."[38] At the same time, "[*u*]*nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden" on the exercise of that right.[39]

At the outset, I fail to see how a statute with no medical benefit that is likely to restrict access to abortion can be considered anything but "undue." As I have explained, the majority draws conclusions for which there is no support in the record and rejects the district court's well-supported findings.[40] The findings of the

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[37] *WWH*, 136 S. Ct. at 2309 (citing *Roe v. Wade*, 410 U.S. 113, 150 (1973) ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.")).

[38] *Casey*, 505 U.S. at 877.

[39] *Casey*, 505 U.S. at 878 (emphasis added).

[40] Two striking examples bear repeating here. The majority concludes that Doe 2 did not put forth a good-faith effort because he did not apply to Christus and Minden which the majority determines remain open options. That flies in the face of evidence in the record that Christus requires applicants to be able to admit fifty patients annually (something Doe 2 cannot do) and evidence that Doe 1 applied and was unable to obtain privileges from either hospital (a finding the majority credits). Another doctor, Doe 5, applied to three hospitals but has been unable to find a doctor who will agree to cover him, a requirement for the application. The majority surmises—based only on the fact that there is no evidence that Doe 5 reached out to more than one doctor to serve as a covering physician—that the most logical explanation for

district court that Does 1, 2, 5 (with respect to privileges near Delta), and 6 were unable to obtain privileges despite good-faith efforts to do so, for reasons unrelated to their competence, is plausible and well-supported. Moreover, it is logical. The district court received evidence that many hospitals require doctors to admit a certain number of patients annually to maintain privileges or require documentation of admitted patients in the 12 months preceding an application to award privileges. At the most basic level, even where a hospital does not have an explicit requirement conditioning privileges on minimum annual admissions, hospitals have no incentives to offer privileges to a doctor who provides only abortion services, because the doctor is unlikely to admit any patients or, in other words, to bring the hospital any business and, being associated with abortion brings the concomitant risk of losing business.[41] Instead, the majority determines that the effort of the physicians was lackluster and that any burdens imposed would be a result of the physicians' mediocre efforts (or gamesmanship) rather than a direct result of the statute.

Doe 5's delay is that he is awaiting the result of the litigation before acting. There is no evidence in the record of litigation gamesmanship and it is unclear to me why the majority's conclusion is "logical" or, more importantly, what makes the district court's finding clearly erroneous.

[41] As was the case in *WWH*, "doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit." *WWH*, 136 S. Ct. at 2312.

The Court in *WWH* addressed causation head-on, there rejecting the dissent's suggestion that, because some of the clinics may have closed for reasons unrelated to the statute, they should not "count" the burdens resulting from those closures against the statute.[42] The Court noted that the district court credited evidence of causation as well as "plausible inferences to be drawn from the timing of the clinic closures" and concluded from that evidence that the statute "in fact led to clinic closures."[43] As in *WWH*, the district court here found that the statute will cause three doctors to cease providing abortions in Louisiana altogether because of their inability to get admitting privileges despite their good-faith efforts to do so, another doctor to limit his work to one clinic for the same reason, and a final doctor to stop performing abortions

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[42] *WWH*, 136 S. Ct. at 2313. The majority goes further than even the dissent in *WWH* would require. In his dissent in *WWH*, Justice Alito suggested that some of the clinics "may have ceased performing abortions (or reduced capacity) for one or more reasons having nothing to do with the provisions challenged here" such as in response to an unrelated law restricting family planning funding. *WWH*, 136 S. Ct. at 2345 (Alito, J., dissenting). The dissent continues, complaining that the petitioners did not present evidence "about the challenged provisions' role in causing the closure of each clinic." *Id.* The district court here credited precisely that evidence. 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.

[43] *Id.* ("The dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue.").

out of fear of practicing as the sole remaining provider in northern Louisiana. The majority here distorts the causation analysis by casting aside the district court's findings that the physicians made "good-faith efforts" to obtain privileges, concluding that an intervening cause—the physicians' lackluster efforts to obtain privileges—will be responsible for any burden, not the statute itself. But the majority in *WWH* 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 [sic] so. Instead, the majority credited the district court's findings that the requirements imposed by the statute led to clinic closures.[44]

There is no question that, if the statute went into effect today, Doe 3 and Doe 5 will be the only remaining providers. The other providers do not currently have admitting privileges. The effect of the statute would be to close one of the three remaining clinics (Hope), to prevent three of the remaining five doctors from practicing as abortion providers (Does 1, 2, and 6), and to prevent Doe 5 from practicing at one of the two clinics where he regularly works. 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*.

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[44] *WWH*, 136 S. Ct. at 2313.

Contrary to the majority's conclusion, the effect of the Act will be to place a substantial obstacle in the path of a woman's choice. Even setting aside the district court's finding that Doe 3 will stop practicing if he is the sole remaining provider in the northern part of the state, only two of the six doctors that previously provided abortions were able to obtain admitting privileges and one of the three remaining clinics will close. Numerically, Doe 5 provides approximately 2,000 abortions at Delta and 950 abortions at Women's. Because he does not have privileges near Delta, Doe 5 will be restricted to providing abortions at Women's (and Delta will close). If he provides all 2,950 abortions he had previously provided at two clinics per year at Women's and Doe 3 continues to provide 1,500 abortions per year,[45] they could cover approximately 4,450 abortions per year, or less than half of the total demand in the state.

Because the effect of Act 620 is to place a substantial obstacle in the path of a woman's right to seek an abortion, without a discernable offsetting medical benefit, I would affirm the district court's determination that the burden is undue. Inherent in the concept of "undue" is the reality that where the medical grounds of a statute are weak (or nonexistent), the burden is

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[45] According to the record, that is the high end of the number of abortions Doe 3 will be able to provide. Although the majority extrapolates from Doe 3's testimony that he has performed 6 abortions per hour to surmise that Doe 3 could cover an additional 550 abortions per year, that appellate finding is contradicted by Doe 3's testimony that he cannot increase his capacity because of his full-time OB/GYN practice.

more likely to be disproportionate.[46] The Supreme Court has previously admonished this court for "imply[ing] that a trial court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden."[47] By failing to meaningfully balance the burdens and benefits here, the court repeats its mistakes and leaves the undue burden test devoid of meaning.

A brief pause now on the majority's heralding of the Supreme Court's "large fraction" language.[48] In *WWH*, the Court explained that, in *Casey*, the phrase "large fraction" was used "to refer to 'a large fraction of cases in which [the provision at issue] is *relevant*,' a class narrower than 'all women,' 'pregnant women,' or even 'the class of *women seeking abortions* identified

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[46] *Schimel*, 806 F.3d at 920 ("An abortion-restricting statute sought to be justified on medical grounds requires not only reason to believe (here lacking, as we have seen) that the medical grounds are valid, but also reason to believe that the restrictions are not disproportionate, in their effect on the right to an abortion, to the medical benefits that the restrictions are believed to confer and so do not impose an 'undue burden' on women seeking abortions. . . . The feebler the medical grounds (in this case, they are nonexistent), the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive.").

[47] *WWH*, 136 S. Ct. at 2309.

[48] *WWH*, 136 S. Ct. at 2320 (making clear that in the abortion context, a law is facially invalid if "in a large fraction of the cases in which it is relevant, it will operate as a substantial obstacle").

by the state."[49] In other words, "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[50] The "large fraction" language does not require the court to engage in rote mathematical calculations[51] but instead directs the court to focus its inquiry on those who will be actually restricted by the law and determine whether the law will operate as a substantial obstacle for that population.[52] In other

[49] *WWH*, 136 S. Ct. at 2320 (citing *Casey*, 505 U.S. at 894–95 (emphasis supplied by *WWH*)).

[50] *Casey*, 505 U.S. at 895. For example, in *Casey*, when analyzing the spousal-notification provision the Court narrowly construed the relevant class of women for whom a spousal-notification requirement was an actual restriction as "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Casey*, 505 U.S. at 895–96. Even though all married women would have been required to comply, the Court defined the relevant class of women as only those who would truly be impacted by the law—i.e., those women who would be forced to change their behavior in light of the law. *Id.* The Court then determined that for a "large fraction" of that narrow class of women, the restriction would operate as a substantial obstacle. *Id.*

[51] *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006) (recognizing that the "large fraction" standard "is more conceptual than mathematical").

[52] The Court used the term "large fraction" in *Casey* to respond to the state's argument that the spousal-notification would affect only one percent of women seeking abortions. *Casey*, 505 U.S. at 894. Under the state's theory, because only 20% of the women who obtain abortions were married and 95% of those women notified their husbands voluntarily, the effects of the provision would only be felt by one percent of the women seeking abortions. *Id.* The Court rejected that argument, making clear that "[t]he analysis does not end with the one percent of women

words, will the law pose a substantial obstacle to a woman's choice for a large fraction of those affected.

The elaborate "mathematical" calculations attempted by the majority are improper. Indeed, the Supreme Court rejected this court's attempt to require precise mathematical calculations in *WWH*. In that case, after weighing the benefits and burdens, the district court determined that a "significant, but ultimately unknowable" number of women would be unduly burdened by the challenged provisions.[53] This court reversed, in part because the district court had not numerically calculated that a "large fraction" of women would be burdened.[54] The Supreme Court rejected that approach, emphasizing that the district court had developed a sufficient record to support its finding that weighing the benefits and burdens demonstrated that the restrictions represented an undue burden. Neither *Casey* nor *WWH* calculated a numerical fraction of women who would be burdened before

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upon whom the statute operates; it begins there. . . . The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. . . . [I]n a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 894–95. In other words, the Court's discussion of "large fraction" was intended to direct courts to focus their constitutional inquiry on the relevant population, not to require courts to engage in elaborate calculations of numerators and denominators.

[53] *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 686 (W.D. Tex. 2014).

[54] *Whole Woman's Health v. Cole*, 790 F.3d 563, 586–90 (5th Cir. 2015) (per curiam).

invalidating statutory provisions. Such a calculation is not required.

The relevant question here is, for those women actually restricted by Act 620, will that restriction amount to a substantial obstacle for a significant number of women. For those actually restricted, there is no question that the obstacle will be substantial. Over 5,000 women seeking abortions in Louisiana will be unable to obtain one within the state. Because Doe 2 has been unable to obtain privileges, no woman seeking to exercise her right to decide to seek an abortion after 16 weeks will be able to do so in Louisiana.

Even accepting the majority's incorrect supposition that only Doe 1 will stop performing abortions and accepting their premise that the Supreme Court requires a numerical calculation of the fraction of women for whom the provision represents a substantial obstacle (which it does not), the calculations are flawed.[55] If

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[55] The majority relies in part on a Sixth Circuit case that determined 12% was an insufficient number to reach the large fraction requirement. *Cincinnati Women's Servs.*, 468 F.3d at 374. In that case, however, the Sixth Circuit properly limited the analysis to the women actually affected by the restriction. *Id.* at 370. The court was considering a judicial bypass statute and found that "the group of women for whom the restriction actually operates are women who are denied a bypass and who have changed circumstances such that if they were able to reapply for a bypass, it would be granted." *Id.* The majority here continues to define the relevant population of women as women seeking abortion in the state. But that precise definition was rejected by the Supreme Court in *WWH* when it analyzed a substantially similar statute. *WWH*, 136 S. Ct. at 2320 (describing the " 'large fraction of cases in which [the provision at issue] is relevant' " as "a class narrower

Act 620 causes only one doctor to stop performing abortions at Hope Clinic, then the women for whom the law is "an actual rather than irrelevant restriction" will be *women seeking abortions at Hope Clinic*. As was the case in Texas, those are the women who will be subjected to "fewer doctors, longer waiting times, and increased crowding."[56] The question then becomes whether Act 620 will "operate as a substantial obstacle" to a large fraction of *women seeking abortions at Hope Clinic*. The majority's assumptions that (1) Doe 2 will step in to be a full-time provider at Hope and (2) Doe 3 will have the capacity to increase his patient load are unsupported (and in the case of Doe 3, contradicted) by the record.[57] Even if Doe 1 were the only provider to stop performing abortions, it would create a substantial obstacle for women seeking abortions at Hope in the form of increased wait times and the inability for some women to get an appointment before they passed the appropriate gestational stage. In short, even accepting the majority's requirement of precise numerical calculations on its own terms—and I do not—the calculations are flawed.

III.

I disagree with the majority's application of the undue burden test. Act 620 will have the effect of

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than . . . 'the class of women seeking abortions identified by the State' " (citing *Casey*, 505 U.S. at 894–95) (emphasis omitted)).

[56] *Whole Woman's Health*, 136 S. Ct. at 2313.

[57] Hope's director testified that even the loss of only Doe 1 at Hope "would be devastating" for the clinic's operations.

placing a substantial obstacle in the path of women seeking to exercise their constitutional right. Its significant burdens are not counteracted by any discernable health benefit and the majority errs in holding otherwise. But perhaps the more fundamental misstep here is that the majority fails to respect its role as an appellate court and the role of our district courts. These roles are structural, that is, case neutral.

There remains another fundamental flaw in Louisiana's joining with Texas and other states in regulating abortion services, one that also requires that the judgment of the district court be affirmed. Although it is enough under *Casey* to find an undue burden where Act 620 will have the *effect* of placing a substantial obstacle in the path of women seeking abortions in the state,[58] that is also the law's purpose. If courts continue to brush past the purpose prong of *Casey*, that prong will cease to have meaning. *Casey* directs us to examine the means chosen by the state to further its interest and warns that those means must be calculated to further that interest, not hinder it.[59] As in other areas

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[58] *WWH*, 136 S. Ct. at 2300 ("In [*Casey*], a plurality of the Court concluded that there 'exists' an 'undue burden' on a woman's right to decide to have an abortion, an consequently a provision of law is constitutionally invalid, if the '*purpose or effect*' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.' " (emphasis altered)).

[59] *Casey*, 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to

of constitutional law, courts are capable of determining whether the means chosen by the state match the legitimate ends.[60] Indeed, it remains central to much of our constitutional doctrine. While motive of a legislative body cannot for pragmatic reasons index the legitimacy of its work, legislative purpose can. At that level of abstraction, there can be little disagreement.

Despite judicial struggle with *Casey*, it must be acknowledged that the Court redefined, but did not abandon those basic principles. It moved away from the analytical construct of tiered scrutiny to "undue burden" but left intact examination of purpose by deploy of the familiar doctrinal tool of ends and means, allowing courts to identify legislative efforts to frustrate a woman's autonomy—her right to choose. As the misfit of means and ends grows so also does the

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further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.").

[60] *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) ("[T]he [challenged provision] does not advance the State's asserted interest in physician confidentiality. The limited range of available privacy options instead reflects the State's *impermissible purpose to burden disfavored speech.*" (emphasis added)); *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that [the amendment] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.").

permissible inference that the state's invocation of legitimate ends is disingenuous, that the statute is instead "designed to strike at the right itself."[61] While everyone agrees that promoting women's health is a legitimate goal, Act 620 does not further that purpose. Here the means need not be judged normatively, but rather present as a practice the efficacy of which is determinable empirically: the data make plain that the requirement of admitting privileges to the end of women's health cannot be defended. For as the claimed benefits of Act 620 are objectively determinable to be virtually nil, so the burdens are determined to be undue. In the absence of fit between the means (requiring admitting privileges) and the ends (ensuring women's health), I am left to conclude that, viewed objectively, there is an invidious purpose at play. I recall these familiar principles to make plain that while the effects prong of "undue burden" does the work here, an examination of *Casey*'s legislative purpose reaches the same end. Act 620 was enacted to frustrate a woman's right to choose.

That the Supreme Court found it necessary so recently to remind this court that a rational basis test, appropriate in review of state economic regulation, cannot be deployed to review regulation of a protected personal liberty is only confirming that when abortion shows up, application of the rules of law grows opaque, a phenomenon not unique to this court.[62] Today's

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[61] *Casey*, 505 U.S. at 874.

[62] *WWH*, 136 S. Ct. at 2309–10 ("The Court of Appeals' articulation of the relevant standard is incorrect. . . . [T]he second part

case is not a close call by either path offered by *Casey*. The opinion of my colleagues, with respect, ought not stand.

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of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.").

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30397

JUNE MEDICAL SERVICES, L.L.C.,
on Behalf of Its Patients, Physicians,
and Staff, Doing Business as
Hope Medical Group for Women;
JOHN DOE 1; JOHN DOE 2,

Plaintiffs–Appellees,

versus

DOCTOR REBEKAH GEE, in Her
Capacity as Secretary of the Louisiana
Department of Health and Hospitals,

Defendant–Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING EN BANC
Opinion 905 F.3d 787 (Sept. 26, 2018)

(Filed Jan. 18, 2019)

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at

the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.* In the poll, 6 judges voted in favor of rehearing (Chief Judge Stewart and Judges Dennis, Southwick, Graves, Higginson, and Costa), and 9 judges voted against rehearing (Judges Jones, Smith, Owen, Elrod, Haynes, Willett, Ho, Engelhardt, and Oldham).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

JAMES L. DENNIS, Circuit Judge, joined by Judges Higginbotham, Graves, and Higginson, dissenting:[1]

I respectfully but strenuously dissent from the court's refusal to rehear en banc the panel's two-judge majority opinion upholding as constitutional the Louisiana Unsafe Abortion Protection Act ("Act 620"), which requires an abortion provider to have admitting privileges at a hospital within thirty miles of the site of an abortion. The panel majority opinion is in clear

* Judge Duncan is recused and did not participate in the consideration of the petition.

[1] Judge Higginbotham dissents from the denial of rehearing en banc for the reasons stated in his dissent from the panel decision and joins Judge Dennis's dissent.

conflict with the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*"), holding unconstitutional an almost identical Texas admitting privileges requirement that served as a model for Act 620. The panel majority's attempt to distinguish *WWH* is meritless because it is based on an erroneous and distorted version of the undue burden test required by *WWH* and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). The panel majority also improperly reverses the district court's well-supported factual findings regarding the devastating effects on women's rights to abortion that will result from Louisiana's admitting-privileges requirement, instead retrying those facts de novo at the appellate level. The panel majority refuses to acknowledge, much less discuss, these mistakes, even though the panel dissenter, Judge Higginbotham, cogently pointed them out. *See June Medical*, 905 F.3d 787, 816 (5th Cir. 2018) (Higginbotham, J., dissenting). A majority of the en banc court repeats this mistake, apparently content to rely on strength in numbers rather than sound legal principles in order to reach their desired result in this specific case. The important constitutional issues involved in this case deserve consideration by the full court more so than most others for which the court has granted en banc rehearing. It is disconcerting and telling that a panel and now the active circuit judges by slim majorities have refused to even acknowledge, much less openly discuss, the implications this case will have on our important doctrines of stare decisis and clear error review of trial court factual findings.

I. BACKGROUND

A. Act 620

Act 620 was signed into law in Louisiana in June 2014. It requires "that every physician who performs or induces an abortion shall 'have 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.'" "[A]ctive admitting privileges" means "the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient."

Act 620 reflects its legislative environment and Louisiana's longstanding opposition to abortions. Louisiana has legislated multiple restrictions on access to abortions, such as an ultrasound requirement, a mandatory 24-hour waiting period, and a trigger ban that would reinstate Louisiana's total ban on abortions in the event *Roe v. Wade*, 410 U.S. 113 (1973) is abrogated. Advocacy groups and the bill's primary sponsor, Representative Katrina Jackson, expressed an intent to restrict abortion rather than further women's health and safety through the passage of Act 620. For example, Representative Jackson stated that the Act would "build on our past work to protect life in our state" and would protect "unborn children." An anti-abortion advocacy group sent Representative Jackson an email praising the bill because of its similarity to the Texas law that would ultimately be at issue in *WWH*, noting

that Texas's law had "tremendous success in closing abortion clinics and restricting abortion access in Texas."[2]

B. *WWH*

While this lawsuit challenging Act 620 was pending in the district court, the Supreme Court's decision in *WWH* invalidated the nearly identical Texas admitting privileges requirement. In so doing, the Supreme Court set out several basic legal principles that the district court applied in the instant case. First, while recognizing that states have a legitimate interest in ensuring that abortions are conducted safely, the Court reiterated its prior holding in *Casey* that a statute that "has the effect of placing a substantial obstacle in the path of a woman's choice" is unconstitutional even though it furthers a valid state interest. *WWH*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877) (quotation marks omitted). Explicitly referring to *Casey*'s undue burden test as a balancing test, the Court emphasized that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.*

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[2] Texas's H.B. 2 was basically identical to the Louisiana law at issue here: it contained the same so-called "admitting-privileges requirement," mandating that abortion providers "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." *WWH*, 136 S. Ct. at 2299 (quoting TEX. HEALTH & SAFETY CODE § 171.0031(a)).

The Court in *WWH* invalidated this circuit's prior formulation of the undue burden test because it failed to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* Our prior, abrogated test isolated the benefits and burdens from each other analytically, rather than considering the benefits and burdens together, and upheld a state abortion restriction as "'constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest.'"[3] *Id.* (quoting *Whole Woman's Health v. Cole*, 790 F.3d 563, 572 (5th Cir. 2015)). The first prong of this test, according to the Court in *WWH*, was directly contrary to *Casey*, as it "may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." *Id.* Instead, as the Court explained, the burdens and benefits of the law must be weighed against each other.[4] *Id.*

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[3] This court first applied this abrogated, two-part analysis in the context of admitting privileges requirements in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 590 (5th Cir. 2014).

[4] Likewise, the *WWH* Court concluded that the second prong of the Fifth Circuit's prior formulation of the undue burden test, requiring only that the requirement be "reasonably related to (or designed to further) a legitimate state interest," was "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review

Applying these principles, the Supreme Court in *WWH* reversed the Fifth Circuit's holding that Texas's admitting privileges requirement was constitutional, holding instead that "there is adequate legal and factual support for the District Court's conclusion" that "the legislative change imposed an 'undue burden' on a woman's right to have an abortion." *Id.* at 2310–11. The Court affirmed the district court's finding that Texas's admitting privileges requirement "brought about no . . . health-related benefit," and the requirement "does not serve any relevant credentialing function." *Id.* at 2311, 2313. "At the same time," it held, "the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice.'" *Id.* at 2312 (quoting *Casey*, 505 U.S. at 877). Specifically, the Court determined that "the record contains sufficient evidence" to support the district court's finding that half of Texas's clinics closed because of Texas's H.B. 2, meaning "fewer doctors, longer waiting times, and increased crowding" for women seeking abortions in Texas. *Id.* at 2313.

C. The District Court's Decision in the Instant Case

Faced with a challenge to Act 620 by several abortion clinics and doctors, the district court properly declared Act 620 facially invalid and permanently enjoined its enforcement. Employing the principles set forth in *WWH*, the district court made detailed findings

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applicable where, for example, economic legislation is at issue." *Id.*

of fact, some necessarily based on credibility determinations, and reached the following conclusions: (1) Act 620 does nothing to protect women's health; (2) it imposes serious burdens on a woman's choice; and (3) those burdens vastly outweigh the nonexistent benefits. Based on ample record evidence, the district court determined that, because abortions are extremely safe, low-risk procedures and admitting privileges are not necessary to address any unlikely complications that may arise, Act 620 "provides no benefits to women and is an inapt remedy for a problem that does not exist." The district court then determined that "[a]dmitting privileges also do not serve 'any relevant credentialing function,'" and "[a]s the record in this case demonstrates, physicians are sometimes denied privileges, explicitly or de facto, for reasons unrelated to [medical] competency." This finding was premised on extensive evidence about the multitude of reasons the doctors were actually denied admitting privileges in Louisiana hospitals:

> [B]oth by virtue of by-laws and how privileges applications are handled in actual practice, hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency. Examples 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. Furthermore, hospitals may grant

> privileges only to physicians employed by and on the staff of the hospital. And university-affiliated hospitals may grant privileges only to faculty members.

Further, at least two doctors were denied privileges explicitly because of the hospitals' (or hospitals staffs') objections to their active abortion practices, and the state's expert conceded that Louisiana law allows hospitals to reject applicants for privileges because of such objections.

Before proceeding to the burdens side of the Supreme Court's balancing test, the district court made specific findings about the current abortion providers' inability to obtain admitting privileges required by Act 620. The district court found that "notwithstanding the good faith efforts of Does 1, 2, 4, 5, and 6 to comply with the Act by getting active admitting privileges at a hospital within 30 miles of where they perform abortions, they have had very limited success for reasons related to Act 620 and not related to their competence."[5] Additionally, the district court determined that Doe 3 would cease his abortion practice due to Act 620 if it causes him to be "the last physician performing abortion in either the entire state or in the northern part of the state" because he fears "he [would] become an even greater target for anti-abortion violence." The district

[5] The doctors' names in this case are under seal and were referred to as Doe 1 through 6 in the district court and appellate decisions, using masculine pronouns even though some are women. I mirror that practice here.

court found this testimony "credible and supported by the weight of other evidence in the record."

The district court then found that Act 620 imposed numerous burdens on a woman's choice. The district court determined that only one physician, Doe 5, would be left performing abortions in the state if the Act were to go into effect, and "this one physician will not be able to perform 10,000 procedures per year," which is roughly how many abortion procedures women seek in Louisiana. Two of the three remaining abortion clinics would be forced to close as they would have no physician with legally sufficient admitting privileges.[6] The remaining clinic, with the one remaining physician in Louisiana, would be unable to meet the annual demand for roughly 10,000 abortions in the state. Recruiting new abortion doctors with admitting privileges would become even more difficult. Given that the remaining abortion doctor, Doe 5, has performed almost 3,000 abortions per year in the past, the district court found that, based on the total demand of approximately 10,000 abortions, "approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana." Further, the district court determined that "[t]here would be no physician in Louisiana providing abortions between 17 weeks and 21 weeks, 6 days gestation." Women in poverty, who make up a high percentage of women seeking abortions in Louisiana, would be especially

[6] By the time of the district court's ruling, two additional clinics, Causeway and Bossier, had closed, and the district court drew no inferences as to whether Act 620 caused those closures.

burdened by the closures, because any travel, child care, and required time off work would burden them disproportionately. And women living in northern Louisiana "will face substantially increased travel distances to reach [the only remaining] abortion provider in New Orleans," with women in Bossier and Shreveport, for example, facing a drive of approximately 320 miles. Finally, the district court found substantial burdens, even for women who would be able to access an abortion clinic. These women would "face lengthy delays, pushing them to later gestational ages with associated risks"; "candidates for medication abortion would have difficulty obtaining an abortion before that method becomes unavailable"; "women toward the end of the first trimester would have difficulty obtaining an appointment before they reach 16 weeks"; and "[w]omen past 16 weeks . . . will be left without any provider at all."

Based on these detailed findings, the district court concluded that the record did not support a finding that the Act would benefit women's health, "but it is clear that the Act will drastically burden women's right to choose abortions." Accordingly, the district court found it was "bound by the Supreme Court's clear guidance to reach the same result [as in *WWH*] and strike down the Act."

D. The Panel Majority's Opinion

Despite the district court's detailed factual findings and faithful application of *WWH*, the panel

majority impermissibly reviews the evidence de novo and ultimately concludes that the district court erred by overlooking "remarkabl[e] differen[ces]" between the facts in this case and in *WWH*. *June Medical*, 905 F.3d at 791. According to the panel majority, "[h]ere, unlike in Texas, the Act does not impose a substantial burden on a large fraction of women." *Id.* The panel majority reaches this conclusion by purporting to distinguish *WWH:* "Unlike Texas, Louisiana presents some evidence of a minimal benefit. And, unlike Texas, Louisiana presents far more detailed evidence of Act 620's impact on access to abortion," such that "[i]n light of the more developed record presented to the district court and to us, the district court . . . clearly and reversibly erred," because "[i]n contrast to Texas's H.B. 2, . . . Act 620 does not impose a substantial burden on a large fraction of women."[7] *Id.* at 805.

Importantly, the panel majority's conclusion that no undue burden exists here rests on the false premise that the district court found that "Act 620 provides

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[7] Though nothing in *WWH* indicates that only the burdens identified there were cognizable for purposes of the undue burden analysis, the panel majority recognizes only the four burdens discussed in *WWH*: (1) clinic closures; (2) difficulties faced by providers in obtaining privileges; (3) increased driving distances; and (4) fewer doctors, longer waiting times, and increased crowding, based on the common-sense assumption that the remaining clinics did not have capacity to absorb the demand for abortions. *June Medical*, 905 F.3d at 804 (citing *WWH*, 136 S. Ct. at 2313). In so limiting its analysis, the majority ignores the additional burdens identified by the district court specific to Louisiana, including that women in poverty in Louisiana, a state with much higher poverty rates than Texas, would face higher burdens than others.

minimal benefits," *id.* at 806, but this conclusion is not based on a fair reading of the district court's findings. The panel majority selects isolated instances in which the district court stated that Act 620's benefits were "minimal." In fact, if one reads all the instances in which the district court addressed this subject, it becomes clear that the district court found the Act conferred *no* benefit at all.[8] Turning to the burdens, the

[8] The district court refers on two occasions to the benefit here being "minimal," in one instance describing its earlier finding in conjunction with its original ruling and noting it had found the benefits to be "minimal" in that earlier ruling, and in the other instance referring to the benefits as "minimal, at best." While some of its findings use somewhat imprecise language, overall, the district court's repeated references to the lack of medical benefit make it clear that its finding was that Act 620 conferred no benefit for purposes of weighing against the burdens of Act 620 under the undue burden test. The district court made the following statements about the Act's benefits: "Requiring Abortion Practitioners to Obtain Admitting Privileges Confers No Medical Benefit"; "[Act 620] provides no benefits to women and is an inapt remedy for a problem that does not exist"; "the Act would do little, if anything, to promote women's health"; "[b]ased on the evidence admitted to the record, the facts found herein, and all reasonable inferences drawn from those facts, the Court concludes that the admitting privileges requirement . . . provides no significant health benefits to women"; "[t]he record is devoid of any credible evidence that the Act will have a measurable benefit to women's health"; "[a]s in *WWH*, Act 620 'does not benefit patients and is not necessary' " (quoting *WWH*, 136 S. Ct. at 2315); "[e]ven if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden"; "[f]or the reasons outlined above, the Court finds that Act 620 is unconstitutional on its face under *Casey* and *WWH,*" because "[t]he Act would create substantial obstacles for women seeking abortion in Louisiana without providing any demonstrated benefit to women's health or safety" and "any marginal health benefits

panel majority overturns the district court's finding that Act 620 would exclude all but one of the six abortion doctors in Louisiana from performing abortions. *June Medical*, 905 F.3d at 807. Instead, according to the panel majority, these doctors largely "sat on their hands" rather than diligently taking steps to obtain admitting privileges. *Id.* Specifically, the panel majority finds de novo that Does 2, 5, and 6 "could likely obtain privileges," and "Doe 3 is definitively not burdened,"[9] *id.* at 810, such that June Medical "failed to establish a causal connection between the regulation and [the alleged] burden," *id.* at 807. Based on its findings regarding the good faith efforts of each doctor, the panel majority concludes that the only finding supported by the record "is that no clinics will likely be forced to close on account of the Act," and thus, no burden will result.[10] *Id.* at 810–11.

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would be dramatically outweighed by the obstacles the restriction erects to women's access to their constitutional right to abortion"; "Act 620 'vastly increase[s] the obstacles confronting women seeking abortions' in Louisiana 'without providing any benefit to women's health capable of withstanding any meaningful scrutiny' " (quoting *WWH*, 136 S. Ct. at 2319).

[9] The panel majority cited to Doe 3's testimony that he would retire, pointing out that he initially said he would only stop practicing if he were the only abortion doctor left in the entire state, but later his "story changed," when he testified "he would now cease practicing were he the only remaining abortion provider in *northern* Louisiana." *Id.* at 810. According to the panel majority, then, "Doe 3's shifting preference as to the number of remaining abortion providers is entirely independent of the admitting-privileges requirement" because it rests on a personal choice. *Id.*

[10] The panel majority reaches this result by finding that the abortions provided in the past by the only doctor who acted in

II. THE PANEL MAJORITY'S ERRORS

A. The Panel Majority's Articulation of the Undue Burden Test is Wrong

The panel majority begins by setting out its interpretation of the principles set forth in *WWH*. Elaborating on the undue burden framework, the panel majority's opinion holds that "[t]he proper reading of *WWH* is a combination of the views offered by [the parties]," such that (1) "even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion," and (2) "[a] minimal burden even on a large fraction of women does not undermine the right to abortion." *Id.* at 803. This formulation is wrong and reintroduces the same misreading of *Casey* the Supreme Court rejected in *WWH*.

The effect of the panel majority's reading of *WWH* is that a court may be permitted to weigh the burdens of an abortion restriction against the benefits of that restriction only if that burden itself imposes a "substantial obstacle." *Id.* at 803 (holding that "not every burden creates a 'substantial obstacle' " and "even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion"). Under the panel majority's articulation, if a court determines that any potential burden on women is not substantial, then that court need not even

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good faith (Doe 1) could be split between Does 2 and 3. *Id.* at 812. This appellate-level factual finding ignores Doe 3's testimony that he would be unable to increase his capacity due to his private OB/GYN practice. *See id.* at 828, n.33 (Higginbotham, J., dissenting).

consider whether there are any benefits of the law, much less weigh those benefits against the burdens the law creates. This formulation runs directly contrary to the Supreme Court's admonition to this court in *WWH* that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *WWH*, 136 S. Ct. at 2309. Tellingly, in *WWH*, the Supreme Court overturned this circuit's prior test that contained this same erroneous reading of *Casey*, holding that it "may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." *Id.* The majority repeats this mistake, once again misapprehending *WWH* and *Casey* and setting forth a test that fails to truly balance an abortion restriction's benefits against its burdens.

Contrary to the panel majority's view, which eviscerates the balancing required by *Casey* and *WWH*, a proper application of the Supreme Court's guidance in this case is straightforward and leads to one possible result: Louisiana's Act 620, like the nearly identical Texas law struck down in *WWH*, has no medical benefit and will restrict access to abortion. Such a restriction is surely undue. *June Medical*, 905 F.3d at 829 (Higginbotham, J., dissenting) ("I fail to see how a statute with no medical benefit that is likely to restrict access to abortion can be considered anything but 'undue.'"). *WWH* and *Casey* require this result, and the panel majority's contrary conclusion creates bad law

for our circuit that runs directly contrary to the Supreme Court's jurisprudence.

B. The Panel Majority Did Not Review the District Court's Findings for Clear Error and, In Retrying the Facts De Novo, Reaches Incorrect Results

In addition to misreading *WWH*'s and *Casey*'s undue burden standard, the panel majority also fails to faithfully apply the well-established "clear error" standard of review to the district court's factual findings. Judge Higginbotham's dissent from the panel majority's opinion correctly catalogues the panel majority's many failures to give proper deference to the district court, which saw and heard the witnesses and determined their credibility, but the following examples demonstrate how egregious and pervasive the panel majority's retrial of the facts was.

The district court determined that Act 620 serves no relevant credentialing function. The panel majority ignored this finding, however, and incorrectly claims the district court instead found that a minimal benefit existed because requiring admitting privileges served a credentialing function. *June Medical*, 905 F.3d at 805. This runs counter to the district court's express finding that the "[a]dmitting privileges . . . do not serve 'any relevant credentialing function,'" and that doctors may be granted or denied privileges by hospitals for business and other reasons unrelated to medical competency. As the dissent noted, the district court's

finding that no credentialing function would be served by Act 620 was well supported by the record, and not subject to reversal on clear error review. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) (requiring meaningful deference of the clear error standard "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts"). Further, the panel majority's de novo factual finding that Act 620 will serve some "minimal" benefit, impermissibly undertaken at the appellate level, is unsupported by the evidence in the record. For example, hospitals in Louisiana are free to deny or simply ignore a provider's application for admitting privileges for any reason at all, including objections to abortion.[11] Notably, at least two doctors were denied admitting privileges precisely *because of* their abortion practices.

Even more troubling is the panel majority's assertion "that the district court clearly erred in saying that all doctors had put forth a good-faith effort to obtain privileges." *June Medical*, 905 F.3d at 808. Not only does this analysis err as to the proper legal standard,

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[11] The district court correctly determined that "both by virtue of by-laws and how privileges applications are handled in actual practice, hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency," including how much use the hospital expects the physician to make of the facilities, "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."

it also ignores the district court's detailed and well-supported factual findings about each doctor's substantial efforts to obtain admitting privileges. The district court set out extensive reasoning as to why each doctor's efforts were sufficient, recounting their unsuccessful attempts to obtain admitting privileges at various hospitals within the thirty-mile radius and that they were either denied expressly or de facto. Here, too, the majority opinion's contrary finding is baseless. For example, as Judge Higginbotham's dissent points out, the majority determined that Doe 2 should have applied to two additional hospitals—Christus and Minden—but, in doing so, the panel majority ignored the fact that "Christus requires applicants to be able to admit fifty patients annually (something Doe 2 cannot do) and evidence that Doe 1 applied and was unable to obtain privileges from either hospital (a finding the majority credits)." *June Medical*, 905 F.3d at 830 n.40 (Higginbotham, J., dissenting). As Judge Higginbotham further discusses in his dissent, the panel majority's conclusion that Doe 5 did not make good-faith efforts blatantly ignores his efforts in gathering information about admitting privileges, targeting hospitals at which he was most likely to obtain privileges, and his inability, despite his efforts, to find coverage from staff doctors, which is required by all the eligible hospitals in the Baton Rouge area. *See id.* at 825–26.

One additional example highlights the panel majority's failure to apply clear-error review in this case. The district court determined that Doe 3's testimony

was credible and 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." Therefore, the district court found Doe 3 would stop performing abortions and that the resulting clinic closure and reduction in abortion capacity in the state would be attributable to Act 620. Despite this finding, the panel majority determines de novo that Doe 3's anticipated retirement from abortion practice was "independent of the admitting-privileges requirement" of Act 620. *See June Medical*, 905 F.3d at 810. Ordinarily, this court declines to reweigh a district court's credibility determinations. *Reich v. Lancaster*, 55 F.3d 1034, 1052 (5th Cir. 1995) ("Defendants' assertion that the trial court clearly erred in this respect essentially rests upon a line of reasoning that asks us to reweigh the evidence and decide credibility questions differently. We decline this invitation."). Not so here. Ignoring record evidence about Doe 3's fears of violence, his problems obtaining coverage from other physicians due to their animosity against abortion providers, and the fact that anti-abortion activists have previously picketed his home and his neighbors' homes and distributed threatening flyers, the panel majority summarily, and erroneously, dismisses the evidence and the district court's findings as to Act 620's effect on Doe 3.[12]

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[12] In conjunction with its examination of the evidence before it, the district court found that Louisiana's expert on Act 620's benefits "suffered from paucity of [relevant] knowledge or experience"

C. The Panel Majority's Causation Standard Imposes a Heightened, Individualized Showing of Causation Not Required by the Court in *WWH*

The Court in *WWH* held the evidence in that case was sufficient to support the district court's finding of causation—that the Texas admitting-privileges requirement had in fact caused the burdens it identified—based only on "the timing of the clinic closures." *WWH*, 136 S. Ct. at 2313. In requiring plaintiffs to demonstrate causation to a much higher level of probability by showing that each doctor made good-faith efforts to obtain admitting privileges, not only does the panel majority set aside the district court's well-supported factual findings and inferences of causation, but it also holds that, as a matter of law, it is entitled to impose a more demanding, individualized standard of proof than the Supreme Court did in *WWH*. *June Medical*, 905 F.3d at 807–08. The panel majority justifies this heightened, individualized showing requirement by pointing out that, "[u]nlike the litigants in *WWH*, who presented only generalities concerning admitting privileges, the parties here provide the bylaws for the relevant hospitals." *Id.* According to the majority, because Louisiana had fewer abortion facilities and doctors to start with than in Texas, it was free to "examine each abortion doctor's efforts to comply with the

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and the weight of his testimony was "diminished by his bias." In stark contrast and without explanation, the panel majority expressly relies on this discredited expert in making de novo factual findings. *See June Medical*, 905 F.3d at 805–06.

requirements of Act 620," and the "specific by-laws of the hospitals to which each [doctor] applied." *Id.* at 807. But if such individualized proof was not required in *WWH*, why is it required here? Tellingly, the panel majority essentially concedes that it requires a higher showing of causation than in *WWH*, stating that its "more intricate analysis yields a richer picture of the statute's true impact, the sort of obstacles it imposed," and "allows us to scrutinize more closely whether [plaintiffs have] met [their] burden." *Id.* Raising the bar beyond what the Supreme Court has required in analyzing an almost identical law is simply wrong.

The panel majority supports its heightened showing requirement by reasoning that "[w]ere we not to require such causation, the independent choice of a single physician could determine the constitutionality of a law." *Id.* Not so. This reasoning, which is based on the panel majority's finding of fault or lack of diligence of individual doctors, obscures the real question at issue here: Whether Act 620 would cause doctors to lose their ability to perform abortions at certain clinics, thereby leading those clinics to close. *See WWH*, 136 S. Ct. at 2313 ("In our view, the record contains sufficient evidence that the admitting-privileges requirement *led to the closure of half of Texas' clinics, or thereabouts.*" (emphasis added)). Even if some element 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 medically benefitless requirement.

D. The Non-Existent Credentialing Function Identified by the Panel Majority Serves No Cognizable State Interest

The panel majority erred in making its de novo finding that Act 620 serves some indefinite credentialing function. *See June Medical*, 905 F.3d at 818 (Higginbotham, J. dissenting) (noting "[t]he district court made no such finding" and that the record is devoid of support for such a finding). But assuming arguendo that Act 620 serves a credentialing function, the panel majority fails to explain how further credentialing advances Louisiana's interest in protecting maternal health. *Roe v. Wade* recognized that a "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." 410 U.S. at 150. But nothing about the supposed "credentialing function" of Act 620 indicates that it would further an abortion patient's safety. The record demonstrates that abortions in Louisiana are extremely safe and complications are exceedingly rare, and the panel majority does not contend otherwise.[13] Furthermore, given that hospitals typically base

[13] Indeed, the district court found that "[a]bortion is one of the safest medical procedures in the United States," and "[t]he prevalence of any complication in first trimester abortion in the outpatient setting is approximately 0.8%," while "[t]he prevalence of major complications requiring treatment in a hospital is 0.05%" in the first trimester and "approximately 1.0%" in the second trimester. The risks associated with a D&C procedure performed after a miscarriage, by contrast, are greater than those associated with first-trimester abortions.

admitting-privileges decisions on business or other reasons unrelated to a doctor's medical competency, and may even deny privileges based on animus toward abortion, it strains credulity that a state seeking to ensure its abortion doctors were highly credentialed would turn to the ill-fitting, indirect approach of hospital admitting privileges. And the requirement that these privileges be at a hospital within a certain geographic location makes little sense if the true goal is to use admitting privileges to raise the medical competency of abortion doctors.

E. The Panel Majority Turns a Blind Eye to the Additional Real-World Burdens Act 620 Will Impose on Women

In overturning the district court's well-supported factual findings, the panel majority does not consider the many other burdens the district court determined will result from Act 620's enforcement beyond the four burdens discussed in *WWH*. In addition to the clinic closures, reduced access to abortion, increased driving times, and increased wait times and crowding identified in *WWH, see* 136 S. Ct. at 2313, the district court determined that Act 620 will impose additional and equally serious burdens on women seeking abortions in Louisiana. If Act 620 goes into effect, "[t]here would be no physician in Louisiana providing abortions between 17 weeks and 21 weeks, 6 days gestation," the legal limit in Louisiana. Thus, in the final stage of a pregnancy in which women may legally seek abortion in Louisiana, they will be left with no options

whatsoever, a burden the panel majority completely ignores. The district court found that longer wait times for an earlier abortion would compound this problem, as more and more women would find themselves without a scheduled procedure before the end of 16 weeks gestation, and then would be completely without recourse. Further, the district court properly determined that women in poverty would be disproportionately affected by Act 620's burdens. Louisiana's large class of poverty-stricken women would face added difficulties affording transportation and childcare for the legally required back-to-back visits, which is to say nothing of the cost of the abortion itself. Additionally, these women will be forced to take time off from work, likely without compensation, and travel to New Orleans, where they must stay overnight to comply with Louisiana's required 24-hour waiting period. These burdens will no doubt be untenable for the high number of women in poverty who seek abortions in Louisiana, who make up a high percentage of women seeking abortions in Louisiana, and who are no less entitled than other women to this constitutionally protected healthcare right.

F. The Panel Majority's Large-Fraction Analysis is Incorrect

In addition to determining that "no woman would be *unduly* and thus unconstitutionally burdened by Act 620," the panel majority also holds that the law does not burden a large fraction of women. *June Medical*, 905 F.3d at 813. Based on the district court's

factual findings, which should be affirmed, there would be an undue burden on a large fraction of women, because under those findings, 70% of women seeking abortions in Louisiana would be unable to obtain one, clearly constituting an undue burden on a large fraction of women.

The panel majority argues that, under its own de novo factual findings, a large fraction of women will not be burdened. But even based on those improper appellate de novo findings, the panel majority's calculation of the large fraction is nevertheless incorrect. The calculation is defective for the same reason as the panel majority's formulation of the substantial burden test is flawed: It "may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." *WWH*, 136 S. Ct. at 2309. Furthermore, as Judge Higginbotham points out in his dissent, the panel majority's "large fraction" analysis is overly formalistic, because the Supreme Court's guidance on this point "does not require the court to engage in rote mathematical calculations but instead directs the court to focus its inquiry on those who will be actually restricted by the law and determine whether the law will operate as a substantial obstacle for that population."[14] *See June Medical*, 905 F.3d at 832 (Higginbotham, J., dissenting).

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[14] Judge Higginbotham's dissent also rightly observes that, in making de novo factual findings that fail to recognize most of

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For these reasons, I respectfully dissent from the denial of rehearing en banc.

STEPHEN A. HIGGINSON, Circuit Judge, dissenting from denial of rehearing en banc:

I favor full court rehearing to assess whether our court preserves a Louisiana law that is equivalent in structure, purpose, and effect to the Texas law invalidated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). I am unconvinced that any Justice of the Supreme Court who decided *Whole Woman's Health* would endorse our opinion. The majority would not, and I respectfully suggest that the dissenters might not either. As Justice Thomas wrote, "[u]nless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear." 136 S. Ct. at

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the burdens Act 620 would cause, the panel majority should have simultaneously reduced the "relevant denominator" to base its unnecessary math on that same, purportedly smaller group. Specifically, because "the relevant denominator must be 'those women for whom the provision is an actual rather than an irrelevant restriction,'" *WWH*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895) (cleaned up), the panel majority, which found de novo that only Hope clinic would be affected, should have used as the denominator the population of women who would have utilized Hope clinic, rather than all women seeking abortions in Louisiana. *See June Medical*, 905 F.3d at 833 (Higginbotham, J., dissenting).

2330. As Justice Alito wrote, the "patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter." *Id.* at 2331. The panel majority acknowledges the governing rule that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 803 (5th Cir. 2018), and accepts the district court's finding "that Act 620 provides minimal benefits," *id.* at 807. Its fact-finding that Act 620 reduces Louisiana's capacity to provide abortions by 21%[1] therefore is enough to abrogate the Act under Supreme Court law, both longstanding and recent.

That the issues at the heart of this case are profoundly sensitive is more reason for us, as a full court, to be sure we reconcile our reasoning with recent Supreme Court direction.

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[1] *See June Med. Servs.*, 905 F.3d at 812 (noting Doe 1, driven from practice by Act 620, performed 2,100 abortions per year); *id.* at 814 (noting 10,000 abortions in Louisiana per year). This, of course, is down from the district court's fact-finding, after trial, of a 55% to 70% reduction—unquestionably a substantial obstacle to women seeking an abortion.

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; BOSSIER CITY MEDICAL SUITE, on behalf of its patients, physicians, and staff; CHOICE, INC., OF TEXAS, d/b/a CAUSEWAY MEDICAL CLINIC, on behalf of its patients, physicians, and staff, JOHN DOE 1, M.D., AND JOHN DOE 2, M.D.

VERSUS

KATHY KLIEBERT, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals and MARK HENRY DAWSON, M.D., in his official capacity as President of the Louisiana State Board of Medical Examiners

CIVIL ACTION

NO. 14-CV-00525-JWD-RLB

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(Filed Apr. 26, 2017)

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[5] **OVERVIEW**

I. Introduction

Since this Court issued a preliminary injunction in this matter, the Supreme Court has held that the Fifth Circuit's interpretation of the undue burden test was incorrect. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (hereinafter "*WWH*") ("The Court of Appeals' articulation of the relevant standard is incorrect."). In its ruling, this Court's conclusions of law applied the Fifth Circuit's legal standard, which *WWH* reversed. Specifically, this Court initially concluded, in line with Fifth Circuit precedent, that it could not consider evidence regarding whether the Act would actually serve its purported

purpose to advance women's health and safety in practice, and could not weigh the Act's burdens against its benefits. (Doc. 216 ¶¶ 178, 333–35, 346, 351–52, 364–67, 372) (citing, *inter alia, Whole Woman's Health v. Cole*, 790 F.3d 563, 587 n.33 (5th Cir. 2015)). Accordingly, this Court ruled it could not resolve the parties' dispute over whether the Act is medically reasonable. (*Id.* ¶ 178(C) & n.41.)

In addition, this Court held the undue burden test, as applied in the Fifth Circuit, precluded consideration of evidence related to the challenges women would face in obtaining abortions under the Act in their "real-world" context. (*Id.* ¶¶ 340-43) (citing, *inter alia, Cole*, 790 F.3d at 589). This Court therefore did not consider evidence regarding how the Act, when considered in the real-world context of abortion patients' poverty and transportation challenges, providers' fear of anti-abortion violence, pre-existing regulations, and other obstacles to abortion access, would impose unique burdens on Louisiana women. (*Id.* ¶ 344.) The Supreme Court has now clarified that these facts should be considered when evaluating whether an abortion restriction is constitutional. *See WWH*, 136 S. Ct. at 2302, 2312–13.

[6] The Supreme Court held in *WWH* that restrictions on access to abortion before viability must be subject to meaningful judicial scrutiny: rational basis review is simply not enough when "regulation of a constitutionally protected personal liberty" is at issue. *WWH*, 136 S. Ct. at 2309. Rather, under the undue burden analysis, a restriction must be shown to actually

"further" its purported interest, and it is constitutional only if its benefits outweigh its burdens. *See id.* at 2309–10. Additionally, in evaluating a restriction's benefits and burdens, courts must not simply defer to a State's assertions about any purported benefits or burdens, but must consider actual evidence. *See id.* at 2310–12. The Court explained its reasons for rejecting the Fifth Circuit's analysis:

> The rule announced in [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)] . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. And the [Court of Appeals was] wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is "undue."

Id. at 2309–10 (citations omitted). Thus, *WWH* makes clear that courts have a "constitutional duty" to look beyond a State's assertions for restricting access to abortion to evaluate whether the restrictions at issue will actually advance any legitimate interests. *Id.* at 2310.

Further, the Supreme Court specifically affirmed the relevance of evidence related to medical reasonableness and "real-world" conditions in evaluating a

law's furtherance of its purported interest and its burdens on women seeking abortion. *Id.* at 2301–03, 2312–13. Thus, the Court recounted with favor the finding of the District Court that "[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." [7] *Id.* at 2302. It affirmed that abortion "has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny," and that the challenged laws would not decrease risks, improve outcomes, or result in better care. *Id.* It also relied upon the district court's findings that the "requirements erect a particularly high barrier for poor, rural, or disadvantaged women." *Id.* The Court also clarified that no single factor is determinative as to whether a restriction imposes an undue burden, but rather the burdens' impact must be evaluated cumulatively, and are undue if unjustified by the law's purported benefits. *Id.* at 2313.

While this Court determined that the challenged Act was unconstitutional even under the Fifth Circuit's now-rejected interpretation of the undue burden test, as a result of the *WWH* decision, certain facts that Defendant argued were not legally relevant are now indisputably relevant and, indeed, critical to the constitutional analysis. To summarize, under *WWH*, this Court must consider (a) evidence regarding whether and how the restriction furthers the legislature's

purported interest, which in this case, includes the Act's medical reasonableness, and (b) evidence regarding the actual burdens the restriction places on women seeking abortions. The Court must then assess the burdens and benefits of the restriction, and weigh the former against the latter to ensure that the burden the law imposes is not "undue." A re-evaluation of certain of the Court's conclusions of law also necessarily flows from applying the standard articulated by the Supreme Court.

By Order dated January 26, 2016 (Doc. 216), and following a trial during which extensive evidence was submitted into the record, this Court preliminarily enjoined Defendant Rebekah Gee, [8] in her official capacity as Secretary of the Louisiana Department of Health and Hospitals, from enforcing Section A(2)(a) of Act Number 620, amending Louisiana Revised Statutes § 40:1299.35.2.3 ("the Act" or "Act 620"),[1] against Plaintiffs June Medical Services LLC, d/b/a Hope Medical Group for Women ("Hope" or "Hope Clinic"); Bossier City Medical Suite ("Bossier" or "Bossier Clinic"); Choice Inc., of Texas, d/b/a Causeway Medical Clinic ("Choice" or "Causeway") (collectively, "Plaintiff

[1] A copy of the final bill appears as a joint exhibit, (JX 115), and in other filings, (*See*, *e.g.*, Doc. 168-10 at 39–43). As the statute was subsequently codified, and as a statute's language need not be evidenced to be known, this Court will cite to Act 620 as codified. The Court does so throughout this opinion unless it is recounting, as it later does, *see infra* Part VI, Act 620's legislative history. In this Ruling, any and all references to "Section [ ]" or "§ [ ]" are to Act 620 as codified in Louisiana Revised Statutes. Act 620 also amended Sections 1299.35.2.1 and 2175.3(2) and (5).

Clinics"); Dr. John Doe, M.D. 1 ("Doe 1")[2] and Dr. John Doe, M.D. 2 ("Doe 2") (collectively, "Plaintiff Doctors") (collectively, "Plaintiffs"). (Doc. 5.). Now before the Court are the parties' contentions with regard to a permanent injunction in this matter.

The Court requested supplemental proposed findings of fact and conclusions of law from the parties on a permanent injunction following the parties' agreement that the Court may proceed to rule on the permanent injunction—including additional findings of fact and conclusions of law required by *WWH*—based on the existing record (Doc. 253). The parties further agreed that no further evidence is needed, apart from short stipulations submitted jointly by the parties and accepted by the Court, (Docs. 255, 265, 271), and an affidavit of Dr. Doe 2. (Doc. 272.) Therefore, pursuant to Federal Rule of Civil Procedure 65(a), and with the consent and agreement of the parties, the Court advances to the merits of the permanent injunction, consolidating it with [9] the hearing on the preliminary injunction. The record from the preliminary injunction trial is part of the merits trial record, together with the stipulations of the parties.

The hearing on the Motion for Preliminary Injunction was held from June 22, 2015, through June 29,

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[2] The identities of the Plaintiff Doctors as well as the other Louisiana abortion physicians who are not parties—Doctors. Doe 3, 4, 5, and 6 (individually, "Doe 3," "Doe 4," "Doe 5," "Doe 6")—are protected by virtue of two protective orders. (Docs. 24, 55.) Rather than repeating the formulation "Dr. Doe [ ]," this Court opts for the simpler "Doe [ ]" and, only occasionally, "Dr. Doe [ ]."

2015. (Docs. 163-64, 166, 169, 174.) At the hearing, the Court received evidence in the form of live witness testimony, exhibits, stipulations, and designated deposition testimony agreed by Plaintiffs and Defendant (collectively, "Parties") to be received in lieu of certain witness' live testimony. Plaintiffs presented live testimony from the following witnesses:

- Doe 1;
- Doe 2;
- Doe 3;
- Ms. Kathaleen Pittman ("Pittman"), June's administrator; and
- Kliebert; and
- Three experts, specifically:
    - Doctor Christopher M. Estes ("Estes"), Chief Medical Officer of Planned Parenthood of South Florida and the Treasure Coast, (PX 92);
    - Doctor Sheila Katz ("Katz"), an assistant professor at the University of Houston, (JX 91); and
    - Doctor Eva Karen Pressman ("Pressman"), the Henry A. Thiede Professor and Chair of The Department of Obstetrics and Gynecology at The University of Rochester, (PX 94).

[10] Defendant presented live testimony at trial from the following witnesses:

- Ms. Cecile Castello ("Castello"), Director of Health Standards Section ("HSS") for DHH; and
- Three other experts, specifically:
  - Doctor Robert Marier ("Marier"), Chairman of the Department of Hospital Medicine at Ochsner Medical Center in New Orleans, (DX 146);
  - Doctor Tumulesh Kumar Singh Solanky ("Solanky"), a professor and the chair of the Mathematics Department at the University of New Orleans, (DX 148); and
  - Doctor Damon Thomas Cudihy ("Cudihy"), an obstetrician-gynaecologist ("OB/GYN," "Ob/Gyn," "OBG," or "O&G") currently licensed to practice medicine in Louisiana and Texas, (DX 147).

A record of the exhibits admitted into evidence was filed. (Doc. 165.) A record of the deposition testimony designated by the Parties and offered into evidence was also docketed. (Doc. 168.[3]) In addition, the Parties submitted proposed findings of fact and conclusions of law, (Docs. 196, 200), and responses to each other's proposed findings and conclusions, (Docs. 201, 202).

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[3] Cochran's deposition appears in Document 168-4, Doe 4's in Document 168-5, Doe 5's in Document 168-6, Ms. Hedra Dubea's in Document 168-7, Mr. Robert Gross' in Document 168-8, Ms. Dora Kane's in Document 168-9, Doctor Cecilia Mouton's in Document 168-10, and Ms. Jennifer Christine Stevens in Document 168-11.

Additional stipulations of fact were submitted by the parties. (Docs. 224, 255, 265, 271.)

In making the following findings of fact and conclusions of law, the Court has considered the record as a whole. The Court has observed the demeanor of witnesses and has carefully weighed their testimony and credibility in determining the facts of this case and drawing conclusions from [11] those facts. All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed.[4] Likewise, any conclusions of law more appropriately considered a finding of fact shall be so classified.[5]

After having considered the evidence, briefing, and record as a whole, for the reasons which follow, the Court declares Act 620 unconstitutional in all of its applications, and enters a permanent injunction barring its enforcement. The active admitting privileges requirement of Section A(2)(a) of Act 620 is found to be a violation of the substantive due process right of Louisiana women to obtain an abortion, a right guaranteed by the Fourteenth Amendment of the United States Constitution as established in *Roe v. Wade*, 410 U.S. 113 (1973), and pursuant to the test first set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) ("*Casey*"), and subsequently refined in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (hereinafter "*WWH*"). Act 620

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[4] For an example of such an approach, see Doc. 14021, No. 2:10-md-02179-CJB-SS (E.D. La. Jan. 15, 2015).

[5] *Id.*

is therefore declared unconstitutional, and its enforcement enjoined in all of its applications.

FINDINGS OF FACT

II. Background and Procedural History

1. Plaintiffs are:

- Hope, a licensed abortion clinic located in Shreveport, Louisiana, suing on behalf of its physicians, staff and patients;

[12] - Bossier, a licensed abortion clinic located in Bossier City, Louisiana, suing on behalf of its physicians, staff, and patients;[6]

- Choice, a licensed abortion clinic suing on behalf of its physicians, staff, and patients;

- Doe 1, a physician licensed to practice medicine in the State of Louisiana and board-certified in Family Medicine and Addiction Medicine, suing on his own behalf and that of his patients; and

- Doe 2, a physician licensed to practice medicine in the State of Louisiana and board-certified in OB/GYN, suing on his own behalf and that of his patients.

2. Dr. Rebekah Gee, ("Defendant," "Gee," or "Secretary,") is the Secretary of DHH.[7] Pursuant to

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[6] On or about March 30, 2017, Plaintiff Bossier ceased business and surrendered its license, returning it to DHH. (Doc. 271.)

[7] Secretary Gee took office in January 2016, replacing former Secretary of DHH Kathleen Kliebert, who was originally named

§ 40.2175.6, Gee "has the authority to revoke or deny clinics' licenses for violation of this or any other law." (Doc. 109 at 5 (citing La. Rev. Stat. § 40:2175.6).)

3. On August 22, 2014, Plaintiffs filed the Complaint for Declaratory and Injunctive Relief, (Doc. 1), and the Application, (Doc. 5), seeking to enjoin various defendants from enforcing Act 620's Section (A)(2)(a). (Doc. 5-2 at 2–5.)

4. Act 620 has been codified at an amended Section 40:1299.35.2. LA. R.S. § 40:1299.35.2. Section A(2)(a) requires every doctor who performs abortions in Louisiana to have "active admitting privileges" at a hospital within 30 miles of the facility where abortions are performed. *Id.* § 40:1299.35.2A(2)(a). While the Act contains other requirements, this provision is the only one [13] being challenged. (Doc. 5-1 at 8 n.1.) Act 620 was signed into law by the Governor of Louisiana, the Honorable Piyush "Bobby" Jindal ("Jindal" or "Governor"), on June 12, 2014. (Doc. 138 at 2; *see also*, *e.g.*, H.B. 388, 2014 Leg., Reg. Sess. (La. 2014) (signed by Governor, June 12, 2014).) Its effective date was set as September 1, 2014. (*See*, *e.g.*, Doc. 5-1 at 8; Doc. 5-2 at 6.) Shortly before trial, on April 20, 2015, DHH promulgated implementing regulations that include an admitting privileges requirement repeating the language of Act 620 and a penalty provision of $4,000 per violation. La. Admin. Code tit. 48, pt. I, §§ 4401 (definition

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in this lawsuit. Throughout these findings of fact and conclusions of law, references to "Secretary," "Secretary Gee," "Secretary Kliebert," "Gee" or "Kliebert," should be read as references to the Secretary of DHH.

of "active admitting privileges"), 4423(B)(3)(e), available at 41 La. Reg. 685, 696 (Apr. 20, 2015). These were accompanied by a statement averring that they "will only be enforced pursuant to Order" in the present case. *Id.* The Order the Court issues today thus embraces these regulations as well as the Act itself.

5. Hope is one of three remaining licensed abortion clinics in Louisiana still operating. (*See*, *e.g.*, Doc. 109 ¶¶ 4–5; Doc. 14 ¶ 10 at 3.) It is located in Shreveport. Causeway was an abortion clinic in Metairie. On January 26, 2016, this Court entered a preliminary injunction that did not encompass Causeway's primary physician, Doe 4, who immediately ceased providing abortions. (Doc. 216, at 112; Doc. 255 ¶ 1.) The parties entered into a stipulation that would extend the injunction to him, which this Court so ordered on February 5, 2016. (Doc. 224.) Causeway closed permanently. (Doc. 255 ¶ 2.) It returned its license to DHH, effective February 10, 2016. (Doc. 255 ¶ 3.) Bossier was an abortion clinic in Bossier City. On or about March 30, 2017, Bossier ceased business and surrendered its license, returning it to DHH. (*See* Doc. 271.) Does 1 and 2 are two of five remaining physicians performing abortions in Louisiana. Doe 1 performs abortions at Hope; Doe 2 performed abortion at Bossier, and now performs [14] abortions at Hope. (Doc. 109 ¶¶ 10–11; *see also*, *e.g.*, Doc. 14 ¶¶ 14–15; Doc. 272 ¶ 3.) Doe 4 no longer offers abortion care in Louisiana. (Doc. 255 ¶ 1.)

6. The Court issued the TRO on August 31, 2014, enjoining enforcement of Act 620 "until a hearing is

held for the purpose of determining whether a preliminary injunction should issue." (Doc. 31 at 18.) Per this order, Plaintiffs were expected to continue seeking admitting privileges at the relevant hospitals. (*Id.* at 1–2.) Thus, the Act would be allowed to take effect, but the Plaintiffs would not be subject to its penalties and sanctions for practicing without the relevant admitting privileges during the application process. (*Id.* at 2, 18.) The Plaintiff Clinics were allowed to operate lawfully while the Plaintiff Doctors continued their efforts to obtain privileges. (*Id.*)

7. On September 19, 2014, three other plaintiffs—Women's Health Care Center, Inc. ("Women's Health" or "Women's Clinic"); Delta Clinic of Baton Rouge, Inc. ("Delta"); Doctor John Doe 5 ("Doe 5"); and Doctor John Doe 6 ("Doe 6") (collectively, "Women's Health Plaintiffs")—filed the Complaint for Declaratory and Injunctive Relief, thereby initiating a separate case, and a Motion for Preliminary Injunction. (Docs. 1, 5, No. 3:14-cv-00597-JWD-RLB.) On that same day, these parties tendered a motion to consolidate their case with this earlier proceeding. (Doc. 2, No. 3:14-cv-00597-JWD-RLB.) By this Court's order, these two cases were consolidated on September 24, 2014. (Doc. 8, No. 3:14-cv-00597-JWD-RLB.)

8. All the Parties agreed in briefs and orally at a status conference held on September 30, 2014, that significant discovery would need to be done to prepare for the hearing; therefore, the Court set the preliminary injunction hearing for March 30, 2015. (Doc. 45.) A Joint Proposed Scheduling Order was submitted by

the Parties on October 8, 2014, (Doc. 49), and adopted as this Court's order on October 21, 2014, (Doc. 56).

[15] 9. On November 3, 2014, following the addition of the Women's Health Plaintiffs, this Court issued the Order Clarifying Temporary Restraining Order of August 31, 2014. (Doc. 57.) For the reasons given therein, the Court ruled: "It was and is the intention of this Court that the TRO remain in effect as to all parties before it until the end of the Preliminary Injunction Hearing." (*Id.* at 6.)

10. On December 5, 2014, the Women's Health Plaintiffs filed the Motion for Voluntary Dismissal. (Doc. 70.) With the consent of the Parties, the Court dismissed this suit without prejudice on December 14, 2014. (Doc. 77.) In light of that dismissal, the Court on January 15, 2015, issued the Second Order Clarifying Temporary Restraining Order of August 31, 2014. (Doc. 84.) In this order, for reasons explained therein, this Court ruled that "the TRO of August 31, 2014 (Doc. 31) remains in force until the Preliminary Injunction hearing on March 30, 2015 or as otherwise modified by this Court." (*Id.* at 4.)

11. On February 16, 2015, Defendants filed the Motion for Partial Summary Judgment ("Partial MSJ"), (Doc. 87), which was opposed, (Doc. 104). On February 24, 2015, Defendants filed an Unopposed Motion to Set Oral Argument on Motion for Partial Summary Judgment (Doc. 90.) On March 3, 2015, the Court granted that motion, (Doc. 92), and oral

argument was set and heard on March 19, 2015, (Docs. 128, 137).

12. On May 12, 2015, the Partial MSJ was granted in part, finding that under then-binding Fifth Circuit jurisprudence, the admitting privileges requirement of Act 620 was "rationally related" to a legitimate state interest. (Doc. 138 at 25.) In all other respects, the motion was denied. (*Id.*)[8]

[16] 13. Based on a stipulation reached among the Parties, the Joint Motion to Dismiss Defendant Mark Dawson was filed on March 17, 2015, (Doc. 110), and granted the same day, (Doc. 111). On March 20, 2015, the Parties conferred with the Court and agreed to a continuance of the hearing on the preliminary injunction until the week of June 22, 2015. (Doc. 129.) The Parties agreed that the TRO would remain in effect until the completion of the trial and ruling on the merits of the preliminary injunction. (*Id.*)

14. On April 1, 2015, oral argument was heard on motions in limine filed by the Parties. (Docs. 136, 151.) In the ruling issued that same day, the Court denied Plaintiffs' Motion in Limine to Preclude Expert Testimony of Dr. Tumulesh Solanky, (Doc. 96), and

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[8] WWH states that this Court must "consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." WWH, 136 S. Ct. at 2309. Therefore, summary judgment on the issue of whether Act 620 was "rationally related" to the State's asserted interest in maternal health is not a proper application of the undue burden standard. This Court will not revisit the summary judgment decision, but this opinion supersedes that ruling.

Defendant's Motion to Exclude Expert Testimony of Sheila Katz, Ph.D., (Doc. 99). (Doc. 136.) Plaintiffs' Motion in Limine to Preclude Expert Testimony of Dr. McMillan, (Doc. 97), was denied as moot. (Doc. 136.) Because of their connection to the Partial MSJ, Defendant's Motion in Limine to Exclude Irrelevant Evidence ("Defendant's Motion in Limine"), (Doc. 95), and Plaintiffs' Motion in Limine to Preclude Evidence of DHH Deficiency Reports and Related Evidence, (Doc. 98), were taken under advisement. (Doc. 136.) These two motions were ultimately denied. (Docs. 139, 140.)

15. On June 11, 2015, Defendant filed the Motion to Reconsider Rulings on Summary Judgment and Motion in Limine. (Doc. 144.) Plaintiffs submitted their response in opposition on June 16, 2015. (Doc. 150.) Because this was submitted for consideration only six days before trial, the motion was taken under advisement and deferred to trial.

[17] 16. Trial on the Motion for Preliminary Injunction began on June 22, 2015, and ended on June 29, 2015. (Docs. 163, 164, 166–69, 174). The Redacted Transcript[9] of the trial was later docketed.[10] (Docs.

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[9] The unredacted transcript was sealed on the joint motion of the Parties. (Doc. 183.)

[10] Each of the six volumes of testimony corresponds to the trial day in which the evidence was received: Document 190 is Volume I, June 22; Document 191 is Volume II, June 23; Document 192 is Volume III, June 24; Document 193 is Volume IV, June 25; Document 194 is Volume V, June 26; and Document 195 are Volume VI, June 29. Document 190 (or Volume I) contains the testimony of Pittman, Doe 3, and Estes; Document 191 (or Volume II), that of Doe 2, Katz, and Kliebert; Document 192 (or Volume

190–95.) On January 26, 2016, the Court declared Act 620 facially unconstitutional and entered a preliminary injunction against enforcement of Act 620 as to the Plaintiffs—Hope, Bossier, Causeway and Does 1 and 2. (Doc. 216, at 111–112.) The parties stipulated that the injunction would also include Doe 4. (Docs. 224, 226.) The Court's judgment was entered on February 10, 2016 (Doc. 227) and Defendant filed her notice of appeal with the Fifth Circuit. (Doc. 228.) This Court denied Defendant's motions for a temporary stay and for a stay pending appeal (Doc. 229) on February 16, 2016 (Doc. 234).

17. On February 24, 2016, the Fifth Circuit granted Defendant's emergency motion for a stay pending appeal, *June Medical Services, L.L.C. v. Gee*, 814 F.3d 319 (5th Cir. 2016), with the result that, for the first time, the admitting privileges requirement of Act 620 became enforceable, requiring doctors without active admitting privileges to stop providing abortion care, and clinics without such doctors on staff, to stop providing abortion services.

18. On March 4, 2016, the United States Supreme Court granted Plaintiffs' emergency motion to vacate the Fifth Circuit's stay, reinstating this Court's preliminary injunction. *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016).

III), that of Doe 1 and Castello; Document 193 (or Volume IV), that of Marier and Solanky; Document 194 (or Volume V), that of Cudihy; Document 195 (or volume VI), that of Pressman.

[18] 19. On August 8, 2016, the parties agreed at a status conference that the Court could proceed to rule on a permanent injunction based on the existing evidentiary record and a stipulation regarding Causeway and Doe 4, following submission of supplementary proposed findings of fact and conclusions of law (Doc. 253). On August 24, 2016, the Fifth Circuit remanded Defendant's appeal "so that the district court can engage in additional fact finding required by the decision in *Whole Woman's Health v. Hellerstedt*." (Doc. 254.)

20. The Court today reaffirms its declaration that the admitting privileges requirement of Act 620 is unconstitutional on its face, and enters a permanent injunction barring enforcement of the law in all of its applications.

III. Contentions of the Parties

21. The Court acknowledges that the following summary of the parties' contentions reflects the parties' positions on issues of fact relating to preliminary, rather than permanent injunctive relief, and were made prior to the *WWH* decision. For the most part, however, the summary remains accurate. *See* Docs. 256 and 257-1.

22. In broad terms,[11] Plaintiffs contend that Act 620 is facially[12] unconstitutional first, because the Act places an undue burden on the right of Louisiana women seeking an abortion by placing substantial obstacles in their path, (*See*, *e.g.*, Doc. 202 at 46–53);[13] second, because the [19] purpose of the Act is to create those obstacles, (*see*, *e.g.*, *id.* at 53–58) and third, because Act 620 does not further a valid state interest, (*see*, *e.g.*, *id.* at 58–65).

23. Plaintiffs argue that a preliminary injunction should issue enjoining the enforcement of Act 620 because Plaintiffs are likely to succeed at trial, (Doc. 196 at 67–85); absent an injunction, irreparable harm will occur, (*id.* at 85–86); the balance of hardships weighs in Plaintiffs' favor, (*id.* at 86–87); and finally, granting the preliminary injunction will not adversely affect the public interest, (*id.*).

24. Defendant counters broadly that Act 620 places no substantial burden on a woman's right to seek an abortion in Louisiana, (*see*, *e.g.*, Doc. 200 at 59–66), and that the Act serves a valid purpose, (*see*,

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[11] The Parties' specific contentions underlying these broad positions are discussed in connection with the individual issues to which they are relevant.

[12] Plaintiffs state emphatically that they are not making an "as-applied" challenge and that their only challenge is facial. (Doc. 202 at 53.)

[13] Page references to the Parties' briefs and other docketed documents are to the docketed document's page number and not its internal pagination. In contrast, for exhibits, this Court will employ their internal page number so as to permit a reader to more easily and quickly locate the relevant data.

e.g., *id.* at 66–74). Further, Defendant argues that this Court has already ruled that Act 620 serves a valid state interest and has a rational basis. (*See*, *e.g.*, *id.* at 6–7.)

25. Defendant argues that Plaintiffs have failed to carry their burden that they are likely to succeed at trial and further, urge that no irreparable harm will occur by allowing the enforcement of Act 620. (*See*, *e.g.*, *id.* at 88–90.)

26. Finally, Defendant contends that the balance of hardships weighs in her favor and that the enforcement of Act 620 will not adversely affect the public interest. (*Id.*)

IV. The Factual Issues

27. Four main issues of fact were tried at the June hearing:

(A) What is the purpose of Act 620?

(B) Is Act 620 medically necessary and reasonable?

(C) How, if at all, will the implementation of Act 620 affect the physicians and clinics who perform abortions in the state of Louisiana?

[20] (D) How, if at all, will the implementation of Act 620 affect the ability of Louisiana women to obtain an abortion?

28. Whether these factual issues and their resolution are relevant under the applicable legal

standard, and whether they play a role in this Court's ruling, is discussed in the Conclusions of Law section. *See infra* Parts XI–XII.

V. Abortion in Louisiana

A. Generally

29. According to DHH, approximately 10,000 women obtain abortions in Louisiana annually. (DX 148 ¶ 11.)

30. Nationally, approximately 42% of women who have abortions fall below the federal poverty level, and another 27% fall below 200% of that level. (JX 124 at 480; Doc. 191 at 190–91.)[14] That number is likely significantly higher for Louisiana women seeking abortions. (*Id.*) The expert and lay testimony on this issue are consistent. (*See*, *e.g.*, Doc. 190 at 34 (Testimony of Pittman) (testifying that 70% to 90% of patients at Hope are below the federal poverty level).)

31. Under Louisiana law, a patient must receive state-mandated counseling and an ultrasound at least 24 hours before an abortion. (JX 109 ¶ 18; JX 116 ¶ 11; JX 117 ¶ 8.)

32. Due to this notification and waiting period, patients who wish to obtain an abortion must make two trips to the clinic: the first to receive the

[14] The Court accepted Katz as an expert in the sociology of gender and the sociology of poverty. (Doc. 191 at 123–26.) The Court found Katz well qualified and credible.

ultrasound and state-mandated counseling, and the second to obtain the sought abortion. (JX 109 ¶ 19.)

[21] **B. The Clinics**

33. At the time of trial, there were five women's reproductive health clinics in Louisiana that provided abortion services. (*See*, *e.g.*, Doc. 109 at ¶ 3; JX 109 ¶ 13.) Since then, two of those clinics, Causeway and Bossier, have ceased operation. (Docs. 255 ¶¶ 2-3; 271.)

(1) Hope

34. Hope is a women's reproductive health clinic located in Shreveport, Louisiana, that has been operating since 1980 and offers abortion services. (Doc. 109 at 4; *see also* Doc. 14 ¶ 11 at 5.) Hope is a licensed abortion clinic suing on its own behalf and on behalf of its physicians, staff and patients. (Doc. 14 ¶ 11 at 5; Doc. 190 at 14.)

35. Hope provides medication abortions through eight weeks and surgical abortions through 16 weeks, six days LMP.[15] (Doc. 190 at 35, 119, 132.) Hope employs two doctors who perform abortions, Does 1 and 3. (*Id.* at 21.) Doe 1 performs approximately 71% of the abortions provided by Hope, and Doe 3 performs the remaining 29%. (*Id.*; JX 116 ¶ 5.)

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[15] Throughout this opinion, the Court will define the length of pregnancy based on the time elapsed since the first day of a woman's last menstrual period, or LMP.

36. 69% of Hope's patients are Louisiana residents, but the remainder travel from outside the state to Hope. (JX 116 ¶ 10; Doc. 190 at 19, 34.)

(2) Bossier

37. On or about March 30, 2017, Bossier ceased business and surrendered its license, returning it to DHH. (Doc. 271.)

38. Bossier was a women's reproductive health clinic that had been operating in Bossier City since 1980 and provided first and second trimester abortions. (Doc. 109 at 4; Doc. 14 ¶ 12.) [22] Bossier was a licensed abortion clinic and a plaintiff suing on its own behalf and on behalf of its physicians, staff, and patients. (Doc. 14 ¶ 12.)

39. Bossier provided medication abortions through eight weeks and surgical abortions through the state's legal limit of 21 weeks, six days LMP. (Doc. 191 at 22-23, 55-56; JX 117 ¶ 4.)

40. Bossier employed one doctor, Doe 2, who performs first and second trimester surgical procedures as well as medication abortions. (Doc. 191 at 21; JX 117 ¶ 5.) Doe 2 is the only doctor in Louisiana who performs abortions after 16 weeks, six days LMP. (JX 187 ¶ 4; Doc. 191 at 21–22.)[16]

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[16] There is testimony that Doe 5 has also performed abortions up to 18 weeks although it is unclear whether he is referring to the present or what he has done in the past. (Doc. 168-6 at

41. Bossier's patients were primarily from Louisiana, but also traveled to the clinic from surrounding states. (Doc. 191 at 20.)

(3) Causeway

42. Causeway was a women's reproductive health clinic located in Metairie, Louisiana, and had provided abortion and reproductive health services since 1999. (Docs. 109 ¶ 7; 14 ¶ 13.) Causeway was a licensed abortion clinic that sued on its own behalf and on behalf of its physicians, staff, and patients. (Doc. 14 at 1.)

43. Causeway offered surgical abortions through 21 weeks, six days LMP, and did not offer medication abortions. (JX 117 ¶ 4).

44. Causeway employed two doctors who performed abortions, Does 2 and 4. (*See*, *e.g.*, Doc. 168-5 at 8.) Doe 2 performed approximately 25% of the abortions provided at Causeway, and Doe 4 performed the remaining 75%. (JX 117 ¶ 5.) Doe 4 refrained from [23] performing any abortions at Causeway subsequent to the Court's January 26, 2016 preliminary injunction order. (Doc. 255 ¶ 1.) A joint stipulation was filed on February 1, 2016 (Doc. 224) regarding the applicability of the injunction to Doe 4 and so ordered by the Court on February 5, 2016 (Doc. 226.) Causeway returned its

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7-8.) The resolution of this issue is not critical to the Court's ruling.

license to DHH, effective February 10, 2016. (Doc. 255 ¶ 3.)

(4) Women's Health

45. Women's Health is a women's reproductive health care clinic located in New Orleans, Louisiana, and has provided abortion and women's reproductive health services since 2001. (Doc. 109 at 5; JX 168 ¶ 1; JX 110 ¶ 1.)

46. Women's Health employs two doctors who perform abortions, Does 5 and 6. (JX 110 ¶ 3; JX 168 ¶ 4.) Doe 5 performs approximately 40% of the abortions provided at Women's Clinic, and Doe 6 performs the remaining 60%. (JX 110 ¶ 3; JX 168 ¶ 4.)

47. Women's Health provides surgical abortions for women through 16 weeks and medication abortions through eight weeks. (Doc. 168-4 at 19.)[17] Doe 6 provides only medication abortions. (*Id.* at 55.)[18]

(5) Delta

48. Delta is a women's reproductive health care clinic located in Baton Rouge, and has provided abortion and women's reproductive health services since 2001. (Doc. 109 at 5.)

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[17] The designated deposition testimony appears within the larger docketed document. (Doc. 168.) For the sake of consistency and ease, the Court continues to use the page numbers of the uploaded document and not of the deposition transcript itself.

[18] *See infra* note 18.

49. Delta employs one doctor who performs abortions, Doe 5. (JX 110 ¶ 35.)

[24] 50. Delta provides surgical abortions for women through 16 weeks LMP, and medication abortions through eight weeks. (Doc. 168-4 at 13–14, 19.)[19]

51. The northern part of Louisiana is now served only by Hope in Shreveport. (Docs. 191 at 17; 190 at 110; 271.) The southern part of this state is served by Delta in Baton Rouge and Women's Health in New Orleans. (JX 110 ¶ 1; JX 114 ¶ 1; JX 109 ¶ 13.)

C. The Doctors

52. There are currently five doctors who perform all abortions in Louisiana. (Doc. 109 ¶ 4; *see also*, *e.g.*, JX 109 ¶ 14; Doc. 255 ¶ 1.)

(1) Doe 1[20]

53. Doe 1 is a board-certified physician in Family Medicine and Addiction Medicine and is one of two clinic physicians at Hope. (Doc. 109 at 5).

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[19] *Id.*

[20] Pursuant to this Court's order, Plaintiffs have provided monthly updates to the Court beginning in March 2016 regarding the status of the doctors' applications for admitting privileges. There has been no material change to the privileges status of Dr. Does 1 through 6, except that Dr. Doe 4 no longer intends to pursue hospital admitting privileges in light of the closure of Causeway. (Letter of May 2, 2016, Doc. 246.)

54. Doe 1 has over 10 years of experience, seven of those as an abortion provider. (Doc. 190 at 139–40; Doc. 14 ¶ 14.) He provides medication abortions through eight weeks and surgical abortions through 13 weeks, six days LMP. (Doc. 192 at 21; Doc. 190 at 132.)

55. Doe 1 was trained to provide abortion services by Doe 3, the medical director of the Hope Clinic, where they both work. (Doc. 192 at 140–41.)

56. Despite beginning his efforts to get admitting privileges at a nearby hospital in July 2014, (*id.* at 52), Doe 1 still does not have active admitting privileges at a hospital within 30 miles [25] of Hope Clinic. (Doc. 190 at 21.) The efforts of all six doctors to gain active admitting privileges and the results of those efforts are reviewed in more detail in another section of this Ruling. *See infra* Part VIII.

(2) Doe 2

57. Doe 2 is a board-certified obstetrician-gynecologist and had been, until February 2016, one of two clinic physicians at Causeway and the only clinic physician at Bossier who, while that clinic was in operation, provided abortion services there. (Doc. 109 at ¶ 11; Doc. 255 ¶ 3.)

58. Since Bossier's closure, Doe 2 has entered into a working agreement with Hope to provide abortion services when Hope's primary physicians, Doe 1 and Doe 3, are unavailable to perform abortions. (Doc. 272 ¶¶ 3–4.)

59. Doe 2 has been performing abortions since 1980. (Doc. 191 at 17:3-6.) Doe 2 performs medication abortions through eight weeks and surgical abortions up through the state's legal limit of 21 weeks, six days LMP. (*Id.* 21:16-22:4; JX 187 ¶ 4). He performs medication and surgical abortions at Bossier, and had performed only surgical abortions at Causeway. (*Id.* at 22:3-11.) In the year prior to trial, Doe 2 performed approximately 550 abortions at Bossier and 450 abortions at Causeway (*Id.* at 17:21-18:5).

60. Doe 2 performs first and second trimester surgical abortions through 21 weeks, six days LMP, and is the only one of two physicians in Louisiana to offer abortion after 16 weeks, six days LMP. (*Id.* at 21–22.)[21]

61. Doe 2 has been unsuccessful in getting active admitting privileges within 30 miles of Bossier and, prior to Causeway's closure, had been able to obtain only limited privileges, which [26] did not meet the requirements of Act 620, within 30 miles of Causeway. (*See*, *e.g.*, Doc. 191 at 24:23-29:18.)

(3) Doe 3

62. Doe 3 is a board-certified obstetrician-gynecologist and one of two clinic physicians at Hope. (Doc. 109 at 5.) He is also the medical director at Hope. (*Id.*)

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[21] *Id.*

63. Doe 3 has been licensed to practice medicine in Louisiana since 1976. (Doc. 190 at 109.) In addition to his abortion practice, he has an active general OB/GYN practice, where he delivers babies and routinely performs gynecological surgery including hysterectomies, laparoscopies, and dilation and curettages ("D&Cs"). (*Id.* at 110.)

64. Doe 3 is the chief medical officer of Hope Clinic, where he has worked since 1981. (Doc. 190 at 108, 117, 21.) He provides medication abortions through eight weeks and surgical abortions through 16 weeks, six days LMP. (*Id.* at 35, 119, 132.)

65. Doe 3 performs abortions at Hope Clinic on Thursday afternoons and all day on Saturday. He sees approximately 20 to 30 abortion patients a week. (*Id.* at 117–18, 153.) On occasion, he will cover for Doe 1 and will see more patients in those instances. (*Id.*)

66. Doe 3 currently has admitting privileges at Willis-Knighton Hospital in Bossier ("WKB") and at Christus Highland Medical Center in Bossier ("Christus"), both of which are within 30 miles of Hope Clinic. (*Id.* at 21–22, 120, 148–49.) Doe 3's current privileges at Christus require him to admit approximately 50 patients per year. (*Id.* at 150–52; JX 59.)

67. Doe 3 has his current admitting privileges because he regularly admits patients to the hospital as part of his private OB/GYN practice, not because of his work at Hope Clinic. (*Id.* at 124, 147.)

[27] ***(4) Doe 4***

68. Doe 4 is a board-certified obstetrician-gynecologist and had been one of two clinic physicians at Causeway. (Doc. 109 at 5, ¶ 13.)

69. Doe 4 obtained his license to practice medicine in Maryland in 1959 and in Louisiana in 1965. (Doc. 168-5 at 5-6.) He served as an assistant professor or assistant instructor in obstetrics and gynecology for seventeen years at Earl K. Long Hospital. (*Id.* at 12.)

70. When Doe 4 maintained a full OB/GYN practice, he had admitting privileges at four hospitals in the Baton Rouge area. (Doc. 168-5 at 6.) He was required to have admitting privileges to do OB/GYN surgery and, in his words, "to deliver babies." (*Id.*) The existence of these privileges did not benefit his pregnancy termination patients because, to his knowledge, none of his abortion patients experienced any problem and required hospital admission. (*Id.* at 19-20.)

71. Doe 4 performed abortions at Causeway in Metairie until January 2016. (Doc. 109 at 5, ¶ 13; Doc. 168-5 at 8; Doc. 255 ¶ 1.) He was not able to get admitting privileges at a hospital within 30 miles of Causeway. (Doc. 191 at 18:6-19; *see also*, *e.g.*, Doc. 168-5 at 16.)

(5) Doe 5

72. Doe 5 is a board certified obstetrician-gynecologist. (Doc. 109 at 5; *see also* Doc. 168-6 at 4–5.) He is one of two clinic physicians at Women's Clinic

and the only clinic physician at Delta Clinic. (Doc. 109 at 5; *see also* Doc. 168-6 at 4, 13–14, 22.)

73. Doe 5 has been licensed to practice medicine in Louisiana since 2005. (Doc. 168-6 at 5.) He provides surgical abortions at Delta Clinic and Women's Health through 16 weeks LMP. (*Id.* at 20; *see also* JX 110 ¶ 1.)[22]

[28] 74. Doe 5 has been successful in getting active admitting privileges within 30 miles of Women's Health in New Orleans but has been unsuccessful in his efforts to get active admitting privileges within 30 miles of Delta in Baton Rouge. (Doc. 168-6 at 11–13; *see also*, *e.g.*, JX 109 ¶¶ 33–34; JX 110 ¶¶ 15–19.)

(6) Doe 6

75. Doe 6 is a board certified obstetrician-gynecologist and one of two clinic physicians at Women's Health. (Doc. 109 at 5; *see also* Doc. 168-4 at 13.)

76. Doe 6 has been practicing medicine for 48 years. (JX 109 ¶ 8.) He is currently the medical director of Women's Clinic and Delta Clinic. (*Id.*) Doe 6 provides only medication abortions and does so only at Women's Clinic. (*Id.* ¶¶ 8–9.)

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[22] *Id.*

77. Doe 6 has been unsuccessful in his efforts to get active admitting privileges within 30 miles of Women's. (*Id.* ¶¶ 23–26.)

D. Admitting Privileges in Louisiana

78. In order to perform abortions legally in Louisiana, Act 620 requires an abortion doctor to have "active admitting privileges" at a hospital within 30 miles of the facility where he or she performs abortions. LA. R.S. § 40:1299.35.2A(2)(A). To have "active admitting privileges" the physician must be a "member in good standing of the medical staff" of a hospital "with the ability to admit a patient and to provide diagnostic and surgical services to such patient . . . ." *Id.* The phrase "member in good standing of the medical staff" is not separately defined. (*Cf.* Doc. 193 at 12.)

[29] 79. Thus, how a physician may obtain "medical staff" and "active admitting" privileges from a Louisiana hospital is critical in determining the effect, if any, that Act 620 has on abortion providers and, in turn, the women that they serve.

80. The expert testimony regarding hospital admitting privileges came primarily from two experts – Pressman, Plaintiffs' expert, (Doc. 195 at 11–96), and Marier, Defendant's (Doc. 193 at 4–124) – and, to a lesser extent, from the other physicians, including Does 1, 2, 3, 4, 5, and 6, who testified. *See supra* Part I. On the issue of admitting privileges and hospital credentialing, the Court found both Pressman and Marier to be generally well qualified.

81. Additional information about the credentialing process and the specific requirements of various hospitals came from certain hospital by-laws introduced into evidence. (*See*, *e.g.*, JX 46, 48, 67, 72, 76, 78–79, 81, 138, 140–43.)

82. Credentialing is a process that hospitals employ to determine what doctors will be allowed to perform what tasks within that hospital. (Doc. 193 at 11; *see also*, *e.g.*, Doc. 195 at 23–27; Doc. 168-5 at 24.)

83. Part of this process involves the hospital's granting or denying "admitting privileges." (*See*, *e.g.*, Doc. 193 at 20; Doc. 195 at 17, 23–25.) These privileges govern whether or not a physician is authorized to admit and treat a patient at that hospital and what care, services and treatment the physician is authorized to provide. (*See*, *e.g.*, Doc. 193 at 20–21; Doc. 195 at 23, 25–26.)

84. Admitting privileges are related to but not the same as being on the "medical staff" of a hospital. (Doc. 193 at 11; Doc. 195 at 25–26.)

[30] 85. There is no requirement that a physician have admitting privileges or be on the medical staff at a hospital in order to practice medicine. (*See*, *e.g.*, Doc. 195 at 26.) Many physicians who do not have a hospital based practice, i.e. do not intend to admit and treat their patients in a hospital setting, have neither as there is no need for staff or admitting privileges under those circumstances. (*See*, *e.g.*, Doc. 175 at 75; Doc. 192 at 41–42; Doc. 195 at 75.)

86. There is no state or federal statute which governs the rules for the granting or denial of hospital admitting privileges in Louisiana.[23] *Cf. Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) ("The criteria for granting admitting privileges are multiple, various, and unweighted."). Rather, partly as a consequence of this absence, these rules vary from hospital to hospital and are governed by each one's distinct by-laws.[24] (*See*, *e.g.*, Doc. 193 at 12, 15; Doc. 195 at 28.)

87. Specifically, there is no state or federal statute which defines or sets uniform standards for the categories of admitting privileges a hospital may grant. (Doc. 193 at 11–12.) Like other rules, these are therefore set by each hospital's by-laws. (*Id.*; *see also*, *e.g.*, Doc. 195 at 28; JX 81 at 1798.) To make matters more confusing, the terms used to describe those categories (e.g. "active admitting privileges", "courtesy admitting

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[23] While one statute, commonly known as the Church Amendment, does impose a type of germane privileges requirement on hospitals accepting federal funds, 42 U.S.C. § 300a-7(c)(1)(B), this statute was not shown to apply to the hospitals involved in this case, *see infra* note 33.

[24] *Cf.* AM. MED. ASS'N, OPINION 4:07 – STAFF PRIVILEGES (June 1994) ("Privileges should not be based on numbers of patients admitted to the facility or the economic or insurance status of the patient. . . . Physicians who are involved in the granting, denying, or termination of hospital privileges have an ethical responsibility to be guided primarily by concern for the welfare and best interests of patients in discharging this responsibility."). The evidence presented in this case shows that these aspirational goals are not reflected in the by-laws of the Louisiana hospitals whose rules and practices are before the Court.

privileges", "clinical admitting privileges") vary from [31] hospital to hospital. (*See*, *e.g.*, Doc. 190 at 167; Doc. 191 at 104; Doc. 193 at 11–12; Doc. 195 at 28.)

88. Similarly, terms like "medical staff", "active staff", "courtesy staff", "clinical staff" vary among hospitals. (Doc. 191 at 35; Doc. 193 at 12; Doc. 195 at 28; *cf.* JX 79 at 1707–12.)

89. For example, at some hospitals, an "active" staff appointment does not, alone, automatically entitle the physician to admit patients. (*See*, *e.g.*, JX 46 at 185; JX 79 at 1673; JX 141 at 3259–60.)

90. Because of the varying definitions given to the categories of admitting privileges and the varying requirements for the attainment of same, whether a physician has been given "active admitting privileges" or is a "member in good standing on the medical staff" within the meaning of Act 620 entirely depends upon the specific definition, requirements and restrictions imposed by a given hospital in a given circumstance. (*See*, *e.g.*, Doc. 193 at 12.)

91. Unlike some states,[25] 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. Thus, unless there

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[25] Texas sets a 170 day time limit within which a hospital's credentialing committee must take final action on a completed application for medical staff membership or privileges. TEX. HEALTH & SAFETY CODE § 241.101; *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014) ("*Abbot II*") (making this point).

is such a time limit in the hospital's by-laws, a hospital can effectively deny a doctor's application of privileges by never acting on it, a decision on any one doctor's application permanently delayed without a consequence being effected or a reason being given. A definite decision stays unreached—but, with his or her request suspended, the relevant doctor's privileges [32] remain, as a matter of fact and law, nonexistent. In this Ruling, the Court uses the term "de facto denial" of privileges to describe this circumstance.[26]

92. At some hospitals in Louisiana, there are suggested time frames in which hospitals should

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[26] In other contexts, this notion has appeared. *See*, *e.g.*, *Khorrami v. Rolince*, 539 F.3d 782, 786 (7th Cir. 2008) (observing that a judicial ruling's delay can sometimes be "so long . . . that the delay becomes a *de facto* denial"); *Morgan v. Gandalf, Ltd.*, 165 F. App'x 425, 431 (6th Cir. 2006) (construing a court's failure to explain its reason as a "*de facto* denial" and reviewing such a denial for abuse of discretion); *Omnipoint Commc'ns Enters., L.P. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386, 393 (3d Cir. 2003) (observing that under Pennsylvania law, a de facto exclusion exists "where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality" (internal quotation marks omitted)); *Alexander v. Local 496, Laborers' Int'l Union*, 177 F.3d 394, 408–09 (6th Cir. 1999) (finding that a "longstanding and demonstrable policy" where the union's "working-in-the-calling" rule, which was memorialized in its constitution and bylaws, resulted in the "de facto exclusion" of African Americans from union membership). Seemingly, though also in other contexts, the Fifth Circuit has recognized such a possibility. *See Chevron USA, Inc. v. Sch. Bd. of Vermilion Parish*, 294 F.3d 716, 720 (5th Cir. 2002) ("Arguably, the district court's order was a de facto denial of class certification (although the parties have not treated it as such, and no motion for class certification was ever filed).").

review admitting privileges applications. (JX 72 at 1320–23; *see also*, *e.g.*, JX 67 at 857–58; JX 76 at 1444–47.) However, those guidelines are not requirements, and there is no legal recourse for an applicant if the hospital fails to act on the application within the suggested time period. (*See*, *e.g.*, JX 67 at 858–59; JX 72 at 1320–24; JX 109 ¶ 27.) For example, Tulane University Medical Center ("Tulane") has an expectation, but has adopted no requirement, that applications will be processed within 150 days. (JX 78 at 1554.) If the Board of Trustees has not taken action on the application within 150 days, the applicant must repeat the verification process to ensure the information contained therein is still accurate. (*Id.*)

93. A hospital's failure to act on an application by either approving or denying it may result in the hospital considering the application withdrawn. (*See*, *e.g.*, Doc. 195 at 93; JX 71 at 1279.) In this additional respect, a hospital's failure to act is, in effect, a de facto denial of the application.

[33] 94. While a physician's competency is a factor in assessing an applicant for admitting privileges, it is only one factor that hospitals consider in whether to grant privileges. (*See*, *e.g.*, Doc. 190 at 158–59; Doc. 195 at 25–26; Doc. 192 at 50–51; Doc. 168-5 at 17; Doc. 168-6 at 12; JX 110 ¶ 10; JX 168 ¶¶ 11–13, 17; PX 183.)

95. Defendant argues: "When Louisiana hospitals decide whether to grant a physician staff membership, privileges to admit patients, or privileges to perform particular procedures, hospital by-laws

indicate that they may make such determinations based on the physician's prior and current practice, and indicia of the physician's clinical competence."[27] (Doc. 200 ¶ 114 at 38 (citing to JX 2873; JX 1838; JX 1542–43; JX 852–53).)

96. The Court finds that this is only partly true because both by virtue of by-laws and how privileges applications are handled in actual practice, hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency. Examples 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. Furthermore, hospitals may grant privileges only to physicians employed by and on the staff of the hospital. And university-affiliated hospitals may grant privileges only to faculty members. These possible variances in causes and justification for any particular denial are attested to by this case's evidentiary submissions and testimony. (*See*, *e.g.*, Doc. 195 at 25–26; Doc. 190 at 123, 168–70; Doc. 193 at 82–83; JX 109 ¶¶ 27–28; JX 110 ¶ 10; JX 168 ¶¶ 11–13, 17; Doc. 168-5 at 6, 23.)

[34] 97. An apparently benign example of such a non-competency based, business driven reason for denying privileges is the denial of Doe 1's application

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[27] The Defendant's briefing cites exhibits by Bates page numbers rather than exhibit numbers.

to the Minden Medical Center ("Minden"). (JX 50 at 318; Doc. 192 at 50–51.) In declining his application for staff membership and clinical privileges, Minden's Medical Staff Coordinator wrote to Doe 1: "Since we do not have a need for a satellite primary care physician at this time, I am returning your application and check." (JX 50 at 318; *see also* JX 72 at 1323.)

98. When they had full OB/GYN practices delivering babies and performing gynecological surgery, Does 2, 4, and 6 had no problem obtaining and maintaining admitting privileges at a number of hospitals. (*See*, *e.g.*, Doc. 168-5 at 6–8; JX 109 ¶ 30.) However, under Act 620, for reasons unrelated to competency, they are now unable to secure active admitting privileges. (*See*, *e.g.*, Doc. 191 at 24–26; Doc. 168-5 at 16–17; JX 109 ¶¶ 23, 30, 31–34.)

99. Another example of a non-competency based application criteria is that some hospitals require the physician seeking privileges to live and/or practice within a certain distance of the hospital. (JX 83 at 1865; JX 139-a at 2925; JX 79 at 1679–83.) Does 2 and 5 travel significant distances from their respective homes to provide abortion services and would not be able to meet this criteria for hospitals within 30 miles of some or all of the clinics where they provide abortions. (Docs. 191 at 20–21; 168-6 at 4, 11–13; JX 109 ¶¶ 31–36.)

100. Defendant argues that "[t]here is no evidence suggesting that, in making the determinations about staff membership or privileges, Louisiana

hospitals discriminate against physicians based on whether they provide elective abortions." (Doc. 200 ¶ 115 at 38 (citing Marier's testimony, as it appears on Doc. 193 at 83–86).) In his testimony, however, Marier only acknowledged that he personally knew of no hospitals which refused to extend privileges to a doctor [35] "simply because he or she performs an abortion." (Doc. 193 at 83–85.) Regardless, to the extent Marier's testimony can be so construed, the Court finds his testimony on this point to be not credible and contradicted by an abundance of evidence introduced at the hearing demonstrating that hospitals can and do deny privileges for reasons directly related to a physician's status as an abortion provider. (*See*, *e.g.*, Docs. 168-6 at 12; 190 at 53; JX 109 ¶¶ 28, 30, 39.)

101. For instance, Doe 1 contacted the director of the Family Medicine Department at University Health Hospital in Shreveport ("University" or "University Health")[28] where he had done his residency in family medicine. Dr. Doe 1 was initially told that he would be offered a job as a faculty member teaching sports medicine which would "take care of the admitting privileges thing." (Doc. 192 at 45.) Doe 1 was told that the application forms for admitting privileges would be forwarded to him. (*Id.*)

102. When Doe 1 did not get the application forms and inquired, he was told by the director of the

[28] This hospital is a teaching hospital associated with LSU Medical School and is sometimes referred to as LSU Shreveport Hospital. (*See*, *e.g.*, JX 79; Doc. 192 at 19, 47.)

department that he would not be offered a position because "there was some objection from certain staff about [Doe 1] coming to work there because of where [he] work[ed], at Hope Medical." (*Id.* at 45–46.)[29]

[36] 103. This same essential response was also given to Doe 2 when he attempted to upgrade his courtesy privileges at University Health. (Doc. 191 at 24–26.)

104. There is no Louisiana statute which prohibits a Louisiana hospital or those individuals charged with credentialing responsibilities from declining an application for admitting privileges based on the applicant's status as an abortion provider.

105. Section 40:1299.32 provides: "No hospital, clinic or other facility or institution of any kind shall be held civilly or criminally liable, discriminated

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[29] This testimony was objected to as hearsay, which objection was overruled. (Doc. 192 at 46:7-13.) It was overruled for two reasons. First, the ordinary rules of admissibility are relaxed in a preliminary injunction hearing and hearsay may be admitted. *See*, *e.g.*, *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993); *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987); *see also* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2949 (3d. 2015). Although the present opinion is no longer considering a preliminary injunction, by virtue of their agreement to convert the preliminary injunction to a permanent injunction on the existing record, Doc. 253, *see also* Fed. R. Civ. P. 65(a)(2), the parties have waived further evidentiary objections. Second, as this testimony was presented so as to explain Doe 1's failure to make formal application for privileges at University, the testimony was not offered to prove its truth and was thus, for this limited purpose, not hearsay. Fed. R. Civ. P. 801(c)(2).

against, or in any way prejudiced or damaged because of any refusal to permit or accommodate the performance of any abortion in said facility or under its auspices." LA. R.S. § 40:1299.32.[30]

106. The Court was surprised that Defendant's credentialing expert, Marier, was unaware of this provision, but Marier agreed that, by virtue of this provision, "a hospital, if it chooses to, may discriminate against any abortion provider with no consequence under Louisiana law." (Doc. 193 at 84.)

107. Section 40:1299.33(C) states: "No hospital, clinic, or other medical or health facility, whether public or private, shall ever be denied government assistance or be otherwise discriminated against or otherwise be pressured in any way for refusing to permit facilities, staff or employees to be used in any way for the purpose of performing any abortion." LA. R.S. § 40:1299.33(C).[31]

[37] 108. While Doe 2 ultimately received limited privileges at Tulane, the negotiations that led to these

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[30] The statute was introduced as an exhibit. (PX 183.) Not before the Court is the efficacy of this state statute in the face of the Church Amendment, which prohibits a hospital which receives funding under the Public Health Service Act, 42 U.S.C. § 201 *et seq.*, from discriminating in employment against those who perform abortions. 42 U.S.C. § 300a-7. Furthermore, no evidence was introduced as to whether any of the hospitals where credentials were sought in this case, or in Louisiana generally, receive such funds. The text of the Church Amendment was submitted as an exhibit. (DX 162.)

[31] This subsection was introduced as an exhibit. (PX 182.)

privileges being granted clearly demonstrate that Doe 2's status as an abortion provider was a central issue in the decision making process over whether to grant him privileges and the limitations those privileges would have. (*See* JX 161–81; *see infra* Part VIII.)

109. There are ways in which the hospital staff's and/or the general public's hostility to abortion and abortion providers can be injected into the credentialing process. For instance, many applications for privileges require references from at least two physicians who recently have observed the applying physician as to applicant's medical skill and "character." (JX 143 at 3357; JX 79 at 1680–81; JX 83 at 1873; JX 143 at 3351.) For example, Minden prefers that an applicant's peer recommendations come from physicians already on staff at that hospital. (JX 72 at 1300.) Although competent, an abortion provider can face difficulty in getting the required staff references because of staff opposition to abortion. (*See*, *e.g.*, Doc. 168-6 at 12; Doc. 190 at 53; JX 109 ¶¶ 28, 30, 39.)

110. Other hospitals' admitting privileges applications require the applying physician to identify another physician on staff who will "cover" his or her patients if the applying physician is unavailable, frequently called a "covering physician." (JX 78 at 1539; JX 79 at 1677; JX 138 at 2855; JX 83 at 1866.) As summarized below, the evidence shows that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician.

111. For example, Doe 5 has applied for admitting privileges at three hospitals in the Baton Rouge area: Woman's Hospital in April or May of 2014 and Lane Regional Medical Center and Baton Rouge General Medical Center in July of 2014. (Doc. 168-6 at 11.) Doe 5 has been unable [38] to find a local physician who is willing to provide coverage for him when he is not in Baton Rouge, which all three hospitals require. (JX 109 ¶¶ 32–33; JX 110; Doc. 51; Doc. 168-6 at 11–12.)[32] Doe 3 also has had difficulty finding physicians to cover for him due to the animosity towards him as an abortion provider. (Doc. 190 at 11–13.) While Doe 2 ultimately got limited privileges at Tulane, (JX 183), the evidence therefore demonstrates that staff physicians who oppose abortion present a real obstacle, *see infra* Part VIII.B.

112. Some other non-competency based admitting privileges requirements create a particular obstacle for abortion providers whose practice is not hospital based, who do not admit patients to a hospital as a part of their practice, and who do not perform surgeries at a hospital.

113. As one example, hospitals often grant admitting privileges to a physician because the physician plans to provide services in the hospital. (*See*, *e.g.*, Doc. 195 at 24–25; Doc. 193 at 66.) In general, hospital admitting privileges are not provided to physicians

[32] This continues to be an obstacle to Doe 5 getting privileges in Baton Rouge. (JX 193.) While Dr. Doe 2 was ultimately able to get limited privileges, it appears that this difficulty may have played a role in the limitations imposed on his privileges.

who never intend to provide services in a hospital. (Docs. 195 at 23–25, 27, 74–75; 193 at 66–67.)

114. Thus, in connection with the applications of Does 1 and 2 at Willis-Knighton Medical Center ("WKMC"), Willis-Knighton South ("WKS"), and Willis-Knighton Pierremont Health Center ("WKP") in Shreveport, (JX 53, 144), the Willis-Knighton Health System ("Willis-Knighton"), which runs these three (as well as other) entities, has required these doctors to submit data on hospital admissions, patient management and consultations of patients in the past 12 months in a hospital. (Doc. 192 at 75–76; JX 128; JX 89 at 1950.)

[39] 115. Because their abortion practice is not hospital based, neither doctor can possibly comply with that requirement. In the case of Doe 1, since he formally responded to a hospital's request for more information regarding his history of admitting patients during the preceding twelve months, saying he had no such information, he has never again heard from the hospital – there being neither a denial nor an approval of his application. (Doc. 192 at 75–78.) Similarly, when Doe 2 gave the hospital the only information in his possession, he received formal notice that this was insufficient and "[w]ithout that [additional] information, your application remains incomplete and cannot be processed." (JX 89 at 1950.) Doe 2 could do nothing else, explaining, "I'm in a Catch-22 basically. I can't provide information I don't have." (Doc. 191 at 79–80.)

116. Even if these Does and similar practitioners somehow got admitting privileges, it is unlikely they would be able to keep them. If over a period of two to three years, a physician has not admitted any patients to the hospital, a hospital credentialing committee is likely to understand that this physician no longer requires admitting privileges. (*See*, *e.g.*, Doc. 195 at 91.) Because, by all accounts, abortion complications are rare, (*See*, *e.g.*, Doc. 168-5 at 14, 16, 20–21; Doc. 193 at 81–82; Doc. 195 at 38–39), an abortion provider is unlikely to have a consistent need to admit patients.

117. Furthermore, surgical privileges are meant for providers who plan to perform surgeries at the hospital. (Doc. 195 at 95–96.)

118. For the reasons outlined above, the Court finds that the Louisiana practice of credentialing, i.e. a hospital's consideration of and acting (or not acting) upon applications for admitting privileges, creates particular hardships and obstacles for abortion providers.

119. The efforts made by Does 1–6 to comply with the admitting privileges requirement of Act 620, and the result of those efforts, is reviewed in another section of this Ruling. *See infra* Part [40] VIII. In this case, Act 620 requires abortion doctors to get "active admitting privileges," including being admitted as a member in good standing of the medical staff, at a nearby hospital. La. Rev. Stat. § 40:1299.35.2.

120. However, the Act does not set the criteria necessary for obtaining those privileges and there is no

state law or other uniform standard that sets these criteria. *See infra* Parts VI-IX. Instead, the law relies on the highly variable requirements set in the bylaws of each hospital. *Id.*; *see also WWH*, 136 S. Ct. at 2312 (noting that hospitals often have "prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures").

121. The Act therefore anticipates and relies upon existing private hospitals' varying bylaws' admitting privileges requirements as allowed under Louisiana law. It delegates to private hospitals the duty of granting (or withholding) active admitting privileges and thereby utilizes bylaws and private hospital credentialing committees as instruments for the implementation of the Act. Unquestionably then, the admitting privileges law and practices existing in Louisiana before Act 620 are related to Act 620. The inability of Does 1, 2, 4, 5 (in Baton Rouge), and 6 to get the kind of active admitting privileges which the Act itself mandates, *see supra* Part V.D (above), has been caused by Act 620 working in concert with existing laws and practices, as discussed in detail, *infra* Part IX.

122. As discussed here and in Part IX, the Court finds that Louisiana's credentialing process and the criteria found in some hospital bylaws work to preclude or, at least greatly discourage, the granting of privileges to abortion providers, including the following:

[41] - There are no laws or regulations in Louisiana mandating certain minimum objective credentialing criteria to assure that credentialing decisions are made only on objective, competency-related factors, akin to the American Medical Association's guidelines;[33]

- The credentialing processes adopted by the hospitals in question permit them to deny privileges for reasons purely personal and unrelated to the competency of the physician including, specifically, anti-abortion views held by some involved in credentialing;

- Louisiana law does not prevent hospital or credentialing personnel from discriminating against abortion providers based on their status as abortion providers, regardless of their competency; and,

- By having no maximum time period within which applications must be acted upon, a hospital can effectively deny a physician's application without formally doing so and therefore affect a de facto denial without expressing the true reasons (or any reasons) for doing so.

- Indeed, the Court finds that, Act 620 was enacted, these specific aspects of how Louisiana hospitals grant, deny, or withhold hospital admitting privileges, have played a significant contributing role in Louisiana's abortion providers not being given privileges or being given only limited privileges.

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[33] *See supra* note 23.

E. The Climate

123. The evidence is overwhelming that in Louisiana, abortion providers, the clinics where they work and the staff of these clinics, are subjected to violence, threats of violence, harassment and danger.

[42] 124. Defendant offered no evidence to counter Plaintiffs' evidence on this point. Rather, Defendant makes two arguments: first, some of the Plaintiffs' evidence on this point is hearsay, and second, the violence is "legally irrelevant" to the undue burden analysis. (Doc. 201 at 14–15.) The issue of legal relevance is addressed in the Conclusions of Law section of this Ruling. *See infra* Parts XI–XII.

125. Defendant objects to the testimony and exhibits cited in Plaintiffs' proposed findings and conclusions (Doc. 196 ¶¶ 79, 84, 87, 89), as hearsay. However, almost all of this testimony was not objected to by Defendant at the time it was introduced. Moreover, in some instances, this testimony came in by way of exhibits offered jointly by the Parties or in questions asked by counsel for the Defendant.

126. But even if the objected-to evidence were excluded, there is a mountain of un-contradicted and un-objected to evidence supporting this conclusion, some of which is summarized below.

127. In addition to the harassment and violence, as was discussed briefly in the previous section and will be discussed in more detail in the section reviewing the doctors' efforts to gain admitting privileges, the

personal and/or religious feelings against abortion by the public, some members of the medical profession and hospital administrators has had a negative effect on the doctors' efforts to gain admitting privileges. (*See*, *e.g.*, Docs. 168-6 at 12; 190 at 53; 191 at 24–26; 192 at 45–46; JX 109 ¶¶ 28, 30, 39.)

128. Indeed, after reviewing Plaintiffs' motion to allow the Plaintiff doctors to use pseudonyms as well as their supporting affidavits, the United States Magistrate Judge concluded: "The Court is satisfied that the potential for harassment, intimidation and violence in this case, [43] particularly recent instances of such conduct, both nationwide and in Louisiana, justifies the unusual and rare remedy of allowing the individual Plaintiffs to proceed anonymously." (Doc. 24 at 3; *see also* Docs. 190 at 108; 191 at 12; 192 at 6.) A similar order was signed when Does 3–6 were added as parties. (Doc. 55.)

129. Also recognizing these legitimate safety concerns, Defendant joined with Plaintiffs in a Joint Consent Motion Regarding Confidential Trial Procedures, (Doc. 158), granted on June 23, 2015. (Doc. 161). These procedures included allowing Does 1–3 to testify from behind a screen.[34] (Doc. 158 at 1.)

130. The security concerns even went beyond the Parties, however. A request for anonymity was made on behalf of a hospital which had granted privileges to

[34] The screen was positioned so as to protect the identity of the witness from the public but allowed the Court to see and judge the demeanor of the witnesses.

Doe 5 and the non-party doctors who assisted in the privileges request. No objection was made by any party and the Court ordered this hospital to be called "Hospital C" and the doctor involved for that hospital, "Dr. C." (*Id.*) Other doctors involved in granting the limited privileges to Doe 2 were ordered to be called "Dr. A" and "Dr. B." (*Id.*)

131. In order to insure the use of the pseudonyms and protect the identities of Plaintiff doctors as well as certain non-party doctors and hospitals, the Plaintiffs and Defendant filed a joint motion to redact portions of the trial transcript, which the Court granted. (Doc. 180.) By their filings in this case, therefore, Defendant and Plaintiffs have implicitly acknowledged the charged emotions generated by this particular issue within and outside this state.

132. The evidence, in turn, leaves no question about the dangers and hostility regularly endured by Plaintiffs.

[44] 133. Each of Louisiana's five clinics experiences frequent demonstrations by anti-abortion activists. (Docs. 190 at 24, 108; 191 at 13; JX 109 ¶¶ 10–12; JX 117 ¶ 6; JX 112 ¶ 2; JX 113 ¶ 2; Doc. 168-6 at 25.) These demonstrations require some clinics to have additional security on site. (Doc. 190 at 23.)

134. Hope Clinic in Shreveport has been the subject of three violent attacks: once by a man wielding a sledgehammer, once by an arsonist who threw a Molotov cocktail at the clinic, and once by having a hole

drilled through the wall and butyric acid poured through it. (Doc. 190 at 23; JX 116 ¶ 8.)

135. In the fall of 2014, following passage of the Act, anti-abortion activists attempted to interfere with Doe 5's admitting privileges application at Woman's Hospital in Baton Rouge by sending threatening letters to the hospital. (JX 110 ¶ 14; JX 109 ¶ 29.) Woman's Hospital also had to remove anti-abortion activists from its medical staff offices due to the activists' disruptive conduct. (JX 110 ¶ 14.)

136. When Doe 5 worked as a hospital employed physician, protests outside the hospital caused the hospital administration to give him an ultimatum: quit performing abortions or resign from the hospital staff. (JX 110 ¶ 21; *see also* Doc. 168-6 at 23–24.) In his words, he "was therefore forced to stop working at the hospital so that . . . [he] could continue providing services at Women's Clinic and Delta Clinic." (JX 110 ¶ 21; *see also* JX 109 ¶ 30.)

137. After Doe 5 recently acquired privileges at a local hospital (Hospital C), anti-abortion activists began sending threatening letters to that hospital causing him to fear that he might lose the privileges that he acquired. (JX 110 ¶ 20; *see also* JX 109 ¶ 39.)

[45] 138. Anti-abortion activists picketed the school of the children of a doctor formerly affiliated with Delta, after which that doctor quit. (Doc. 168-4 at 23–24.)

139. A physician quit working at Causeway after receiving harassing telephone calls at his private practice and anti-abortion activists demonstrated outside the hospital where he worked. (Doc. 168-8 at 8.)

140. Doe 1 works at Hope – but he does so in fear of violence. (Doc. 192 at 78–79.)

141. Doe 2 has received threatening phone calls, has been followed into restaurants and accosted, and has been shouted at with profanity and told that he was going to hell. (Doc. 191 at 12–13.)

142. Doe 2 was forced to leave a private practice when the practice's malpractice insurer refused to cover him if he continued to perform elective pregnancy terminations. (*Id.* at 16–17.)

143. Doe 3 has been threatened as a result of his work at Hope Clinic. (JX 113 ¶ 3.) Last year, anti-abortion activists from outside Louisiana left fliers on neighbors' mailboxes calling him an abortionist and saying they wanted to convert him to Jesus. (Doc 190 at 108–09.) Local police have had to patrol his neighborhood and search his house before he entered. (JX 113 ¶ 4.)

144. These individuals also approached Doe 3's regular medical practice patients as they tried to enter his office, requiring the building security officers to escort the activists off the premises. (*Id.* ¶ 3.) These individuals told Doe 3's patients that he killed babies and that they should not see him. (Doc. 190 at 109.)

145. Doe 3 fears that, if the other Louisiana abortion providers are not able to obtain admitting privileges, he will become an even greater target for anti-abortion violence. (JX 113 ¶¶ 6–7.) He specifically testified that "all [these individuals] have to do is eliminate [him] as they [46] have Dr. Tiller and some of the other abortion providers around the country" to eliminate abortion entirely in northern Louisiana. (Doc. 190 at 174.)

146. Doe 3 also explicitly emphasized that he is concerned that such individuals could "cause a lot of other . . . problems that would affect [his] ability to perform the rest of [his] practice." (*Id.* at 174–75; *cf.* JX 113 ¶¶ 6–7.)

147. Doe 3 has difficulty arranging coverage for his OB/GYN practice because other OB/GYN doctors in the Shreveport area refuse to cover his practice as a result of his work at Hope. (Doc. 190 at 111–13.)

148. As a result of his fears, and the demands of his private OB/GYN practice, Doe 3 has testified that if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions. (*Id.* at 174–76.)

149. Anti-abortion activists have picketed the homes – and neighbors' homes – of Does 5 and 6, also distributing threatening flyers. (Doc. 168-6 at 24; JX 109 ¶ 11.)

150. Anti-abortion activists have targeted at least one physician who agreed to provide emergency

care for abortion complications, even though he did not provide abortions himself. (Doc. 168-6 at 11, 24–25; JX 110 ¶ 20.)

VI. Act 620

A. Text of Act 620 and Related Provisions

151. The challenged statute is Act 620. LA. R.S. § 40:1299.35.2.

152. Act 620 amended Louisiana Revised Statutes § 40:1299.35.2(a), 1299.35.2.1, and 2175.3(2) and (5). (*Id.*)

[47] 153. On June 12, 2014, Governor Bobby Jindal signed Act 620 into law, with an effective date of September 1, 2014. (*See*, *e.g.*, Doc. 109 at 4.)

154. Act 620 provides that every physician who performs or induces an abortion shall "have 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 and that provides obstetrical or gynecological health care services." LA. R.S. § 40:1299.35.2A(1).

155. The Act defines "active admitting privileges" to mean that "the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient . . . ." *Id.* § 40:1299.35.2A(2)(a).

156. Regulations connected to the Act and promulgated after the commencement of this litigation by DHH use the same definition of "active admitting privileges." LA. ADMIN CODE tit. 46, § 4401.[35] These regulations note that federal litigation is pending on the issue of admitting privileges and that licensing provisions regarding admitting privileges will only be enforced pursuant to an order, judgment, stipulation, or agreement issued in this case. *Id.* § 4423.

157. The Act provides that any outpatient abortion facility that knowingly or negligently provides abortions through a physician who does not satisfy the Act is subject to denial, revocation, or non-renewal of its license by DHH. La. Rev. Stat. § 40:1299.35.2A(1).

158. The Act provides that a physician who fails to comply with the admitting privileges requirement can be fined $4,000 per violation. *Id.* § 40:1299.35.2A(2)(c).

[48] 159. In addition, discipline by the Board is made an enforcement provision in Act 620. *Id.* § 40:1299.35.2.1E. The Board has the authority to take disciplinary action against any physician. *Id.* § 37:1261 *et seq*. The Board has the authority to investigate physicians for violations of law, such as Act 620. *Id.* § 40:1299.35.2E. By violating this law, physicians could be subjected to fines or other sanctions, including the suspension or revocation of the physician's license

[35] A copy of this regulation was submitted as a joint exhibit. (JX 137.)

to practice medicine. (Doc. 168-10 at 12, 14–15; *see also* Doc. 31 at 4 n.4.)

B. Louisiana's Policy and Other Legislation Regarding Abortion

160. The Louisiana legislature has codified a statement of opposition to legalized abortion, stating:

> It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.

La. Rev. Stat. § 40:1299.35.0; *see also State v. Aguillard*, 567 So. 2d 674, 676 (La. Ct. App. 1990)

(observing that "the Louisiana legislature has expressed its disfavor for abortion" with this provision).

161. Consistent with this explicit statement of legislative intent, as shown below, Louisiana has enacted other laws that place restrictions on women seeking abortion in the state, and doctors and clinics who perform abortions.

[49] 162. In 2006, the Louisiana legislature passed a "trigger" ban – banning abortion with only a limited exception to save a woman's life – to take immediate effect should *Roe v. Wade* be overturned or a constitutional amendment be adopted to allow states to ban abortion. S.B. 33, 2006 Leg., Reg. Sess. (La. 2006) (codified as La. Rev. Stat. §§ 40:1299.30, 14.87). The trigger ban carries a criminal penalty of up to 10 years' imprisonment "at hard labor" for a physician performing an abortion. La. Rev. Stat. §§ 40:1299.30D, 14:87D(1).

163. Another law mandates that every woman undergo an ultrasound before an abortion, even when not medically necessary, and that she be required to listen to an oral description of the ultrasound image. *Id.* §§ 40:1299.35.2B–D, 40:1299.35.6, 40:1299.35.12.

164. Louisiana requires a two-trip, 24-hour waiting period for women, and further mandates that a physician – and not another medical professional – give certain state-mandated information designed to discourage abortion to his patient; violation of this provision carries criminal penalties. *Id.* §§ 40:1299.35.2D(2), 40:1299.35.6, 40:1299.35.19.

165. The Louisiana legislature prohibits public funding of abortion for victims of rape or incest unless the victim reports the act to law enforcement and certifies a statement of rape or incest that is witnessed by the physician. *Id.* §§ 40.1299.34.5, 40:1299.35.7.

166. Physicians who provide for the "elective termination of an uncomplicated viable pregnancy" are expressly excluded from malpractice reform provisions afforded to all other health care practitioners under the state's medical malpractice protection laws. *Id.* §§ 40.1299.31–39A, 40:1299.41(K).

167. The legislature has passed laws prohibiting insurance coverage of abortion in state exchanges under the Affordable Care Act. *Id.* § 22:1014. Louisiana does not allow women to obtain [50] insurance coverage for abortion even when a woman's life is endangered or when the pregnancy is a result of rape or incest. *Id.*

168. The Louisiana legislature permits hospitals to refuse to accommodate the performance of abortions. *Id.* § 40:1299.31–33.

169. Louisiana has no law which prohibits a hospital from discriminating against a physician applying for privileges there based on that physician's status as an abortion provider. *Compare* TEX. OCC. CODE § 103.002(b).

170. The effect of Act 620 is thus significantly different from admitting privileges requirements in

states where physicians are protected from discrimination. *See*, *e.g.*, *Cole*, 790 F.3d at 563; *see also Abbott II*, 748 F.3d at 598 n.13.

171. Before the enactment of Act 620, Louisiana already had in force numerous laws and regulations covering abortion facilities, including requirements that facilities be inspected at least annually, *see*, *e.g.*, La. Rev. Stat. 40:1061 et seq. (re-designated from La. Rev. Stat. 40:1299 et seq.); La. Rev. Stat. 40:2175.1 et seq., and that they retain a readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital (i.e. a transfer agreement).[36] *See also generally* La. Admin. Code tit. 48, pt. I, §§ 4405, 4407(A).

[51] **C. Drafting of Act 620**

172. Act 620 was modeled after similar laws which have had the result of closing abortion clinics in other states. On May 5, 2014, Ms. Dorinda Bordlee ("Bordlee"), the Vice President and Executive Counsel

[36] Louisiana regulations had previously provided: "[A licensed abortion] facility shall ensure that when a patient is in the facility for an abortion, there is one physician present who has admitting privileges or has a written transfer agreement with a physician(s) who has admitting privileges at a local hospital within the same town or city to facilitate emergency care"). Former La. Admin. Code tit. 48, pt. I, § 4407(A)(3), available at 29 La. Reg. 706-07 (May 20, 2003). Shortly before trial, Defendant Kliebert repealed the prior regulation, and replaced it with an admitting privileges requirement identical to the Act. La. Admin. Code, tit. 48, pt. I., § 4423(B)(3)(e), available at 41 La. Reg. 696 (Apr. 20. 2015)

of the Bio Ethics Defense Fund, an anti-abortion advocacy group, sent the draft's primary legislative sponsor, Representative Katrina Jackson ("Jackson"), an email regarding a similar statute passed in Texas that had "tremendous success in closing abortion clinics and restricting abortion access in Texas." (Docs. 191 at 200; 196-5 at 2; 196-10 at 1.) Bordlee told Jackson that "[Act 620] follows this model." (Docs. 191 at 200; 196-5 at 2; 196-10 at 1.)

173. Evidence received demonstrates the coordination among advocacy groups, Jackson, and DHH employees regarding efforts to restrict abortion. (*See*, *e.g.*, Doc. 191 at 199–202, 211–13, 215–16, 220–21; JX 3, 6–16.)

174. In a press release regarding Act 620 released on March 7, 2014, Jindal declared his position that Act 620 was a reform that would "build upon the work . . . done to make Louisiana the most pro-life state in the nation." (PX 174 at 1; Doc. 191 at 224–27.) Jindal stated:

> Promoting a culture of life in Louisiana has been an important priority of mine since taking office, and I am proud to support [Act 620] this legislative session. In this state, we uphold a culture of life that values human beings as unique creatures who were made by our Creator. [Act 620] will build upon all we have done the past six years to protect the unborn.

(PX 174 at 1.)

175. Indirectly referencing the legislation just summarized, Jackson is quoted in this press release as saying that Act 620 "will build on our past work to protect life in our state." (*Id.* at 2.)

[52] 176. Similarly, in her testimony before the Louisiana House Committee in support of Act 620, Kliebert testified that Act 620 would strengthen DHH's ability to protect "unborn children." (Doc. 191; JX 140 at 1.)

177. The talking points prepared for Secretary Kliebert by Representative Jackson's office stated that DHH was "firmly committed to working with Representative Jackson and the Legislature to continue to work to protect the safety and well-being of Louisiana [women] and the most vulnerable among us, unborn children." (Doc. 191 at 222–23; *see also* JX 24 at 2–4.)

D. Official Legislative History of Act 620[37]

178. Act 620 (at the time known as HB 388) was considered by the House Health and Welfare Committee on March 9, 2014, and the Senate Health and Welfare Committee on May 7, 2014. The House

[37] The official legislative history, submitted as one document, (DX 119), contains the reports of the House and Senate as well as a transcript of various senators' comments, each of which commence with their own page number. Thus, for the sake of easy location, this Court cites to the page number of the pdf document itself. Within Document Number 119, the House report appears on pages 2 through 30, the Senate report on pages 33 through 67, and the transcript of the Senate floor debate on pages 69 through 73.

and Senate Committees heard extensive testimony regarding the purposes of proposed statute. (DX 119 at 1–30, 39–67.)

179. More specifically, the House and Senate Committees heard testimony that the proposed statute was intended to safeguard the health and safety of women undergoing abortions in outpatient clinics in Louisiana. (*Id.*)

180. For example, the House and Senate Committees heard testimony that:

- Abortion carries the risk of serious complications that could require immediate hospitalization. (*Id.* at 3, 5.)

[53] - Women who experience abortion complications frequently rely on the care of emergency room physicians, who often must call on the assistance of a specialist in obstetrics or gynecology. (*See id.* at 4, 5, 8.)

- "[M]ost emergency departments lack adequate on-call coverage for medical and surgical specialists, including obstetricians and gynecologists." (*Id.* at 48.)

- The history of health and safety violations by Louisiana abortion clinics raises concerns about the potential for serious abortion-related complications. (*Id.* at 10.)

- Requiring outpatient abortion providers to have admitting privileges benefits the safety of women seeking abortion and also enhances

regulation of the medical profession. (*Id.* at 3, 48.)

- For instance, the admitting privileges requirement improves the "credentialing process" for physicians by "provid[ing] a more thorough evaluation mechanism of physician competency than would occur otherwise." (*Id.* at 48.)

- The requirement also "acknowledges and enables the importance of continuity of care" for an abortion patient. (*Id.*)

- Additionally, the requirement "enhances inter-physician communication and optimizes patient information transfer and complication management." (*Id.*)

- Finally, the requirement "supports the ethical duty of care of the operating physician to prevent patient abandonment." (*Id.* at 3, 48.)

- A virtually identical admitting privileges requirement in Texas had recently been upheld by the U.S. Fifth Circuit as a reasonable measure for achieving these health and safety goals. (*Id.* at 48.)

[54] - There was no obstacle preventing abortion providers from obtaining admitting privileges at Louisiana hospitals. (*Id.* at 9 (testimony that one Louisiana abortion provider already had admitting privileges).)

- Louisiana hospitals grant or deny admitting privileges "based entirely on [the applicant's] medical training and experience." (*Id.* at 50.)

- Louisiana hospitals have recognized categories of staff membership to accommodate physicians who are expected to admit low numbers of patients for a variety of reasons. (*Id.* at 50.)

181. Additionally, the House and Senate Committees also heard testimony that, unlike physicians performing surgical procedures in ambulatory surgical centers in Louisiana, physicians performing abortions in outpatient clinics had not previously been required to have any kind of hospital privileges. The committees heard testimony explaining that the proposed statute was designed to close that loophole and thus achieve greater consistency in the overall regulation of outpatient surgical procedures in Louisiana. (*See id.* at 2–4 (House committee testimony regarding goal of achieving greater consistency with ASC regulations), 41–43 (Senate committee testimony regarding same subject).)

182. For example, the House and Senate Committees heard testimony that:

- The Act was intended to bring outpatient abortion facilities in line with "the standard that is currently in place for [ASCs] as set forth in Louisiana Administrative Code, Chapter 45 ... Section 4535." (*Id.* at 4.)

[55] - The Act intended to "close a loophole" in Louisiana regulation by requiring outpatient abortion providers to have privileges comparable to those required for physicians

performing outpatient surgery in ASCs. (*Id.* at 41–42.)

- The Act's requirement of admitting privileges is consistent with requiring surgical privileges for ASC physicians. (*Id.* at 49 (explaining that "the effect is the same both in terms of ... the credentialing process itself and in the application of the standards by the state").)
- In both cases, the privileges requirement is based on the "well-established principle ... that a provider should not undertake a procedure unless he is qualified and able to take care of whatever complications there might be." (*Id.* at 49.)

183. The full House and Senate heard statements in support of HB 388 explaining that it was intended to protect "the safety of women" and ensure that "every physician performing any surgery, including abortions, does so in a prudent manner and with the best interest of each woman's health in mind," (*Id.* at 34–35), and also that it was intended to safeguard "the lives and safety of pregnant women who may experience short-term risk[s] of abortion, which can include hemorrhaging, uterine perforation, or infection," (*Id.* at 48).

184. The full House was informed that the proposed law tracked the Texas admitting-privileges law, HB 2, which had been upheld as constitutional by the U.S. Fifth Circuit Court of Appeals a week earlier. (*Id.* at 34–35 (referring to *Abbott II*).)

185. The Senate approved one amendment to the proposed statute, concerning the definition of admitting privileges, and rejected another amendment that would have eliminated the 30-mile radius requirement. (*Id.* at 69–70.)

[56] 186. The proposed statute passed both chambers, with 85 House members and 34 Senators voting in favor, and 88 House members concurring in the Senate amendment. *See* https://www.legis.la.gov/legis/ViewDocument.aspx?d=887948 (House final passage); https://www.legis.la.gov/legis/ViewDocument.aspx?d=903997 (Senate final passage); https://www.legis.la.gov/legis/ViewDocument.aspx?d=903981 (Senate amendment); https://www.legis.la.gov/legis/ViewDocument.aspx?d=906861 (House concurrence) (all legislative websites last visited Aug. 24, 2015).

VII. The Purpose and Medical Need for and Reasonableness of Act 620

187. The evidence introduced to show the purpose of Act 620 came in several forms. The Plaintiffs offered: (1) press releases, public statement, emails, and similar evidence produced by public officials, lobbyists, advocacy groups and others involved or interested in the drafting and passage of Act 620; (2) the testimony of some of those involved in these communications; (3) Louisiana's legislatively stated "longstanding policy . . . to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United

States Supreme Court. . . .," La. R.S. § 40:1299.35.0; and (4) expert testimony purporting to show two things: first, there is no medical need for Act 620 because legal abortion is safe, and second, that Act 620 is medically unreasonable in that Act 620 does not advance the health and safety of women undergoing abortions.

188. In support of her position, Defendant offered: (1) the text and legislative history of the Act, including testimony considered during the legislature's deliberations, and (2) expert testimony at trial purporting to show that the admitting privileges requirement is needed because of potential [57] complications from abortions and that the Act is medically necessary and beneficial for the health and safety of a woman undergoing an abortion.

189. In its original Ruling (Doc. 216, at 51-53), the Court made the findings of fact which follow. However, the Court did not detail its weighing of the evidence on these points because, under the then existing Fifth Circuit test, these conclusions were legally irrelevant. (*See* Doc. 216, footnotes 39-43.) Given the standard the Court must now apply, these findings of fact are relevant and the Court will follow its summary of findings with a review of how it reached them.

(A) A purpose of the bill is to improve the health and safety of women undergoing an abortion.

(B) Another 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.

(C) There is a dispute medically and scientifically as to whether Act 620 serves a legitimate medical need and is medically reasonable.

(D) Legal abortions in Louisiana are very safe procedures with very few complications.

(E) The vast majority of women who undergo abortions in Louisiana are poor. (*See*, *e.g.*, JX 124 at 2480; Docs. 191 at 190–91; 190 at 34.) As a result of that poverty, the burden of traveling farther to obtain an abortion would be significant, fall harder on these women than those who are not poor and cause a large number of these women to either not get an abortion, perform the abortions themselves, or have someone who is not properly trained and licensed perform it. (*See*, *e.g.*, JX 124 at 2480; Docs. 191 at 190–91; 190 at 34.)

[58] (F) The medical benefits which would flow from Act 620 are minimal and are outweighed by the burdens which would flow from this legislation.

190. The relevance and weight of these factual findings in the context of the prevailing Supreme Court test is discussed in more detail in this Ruling's final substantive sections. *See infra* Parts X–XI. What follows is the Court's review of the evidence on these points including the weighing of the testimony and credibility of the witnesses which supports its findings.

A. Expert Testimony

191. Evidence concerning the safety of abortion was adduced largely through expert testimony, which was borne out by the experience of Louisiana abortion providers who testified. The Court turns now to a discussion of its credibility findings concerning the parties' experts; the factual findings that stem from the experts' opinions follow.

192. The Court was impressed with the credibility and expertise of Plaintiffs' experts.[38] Dr. Eva Pressman is the Chair of the Department of Obstetrics and Gynecology at the University of Rochester Medical Center, where she is in charge of a department of 50 faculty members. (Doc. 195 at 11:13-12:16.) Subsequent to her residency, and before coming to the University of Rochester, Dr. Pressman served as a professor and Director of Fetal Assessment at Johns Hopkins. (*Id.* at 13:13-14:10; PX 94, 131 ¶¶ 3-4.) At Johns Hopkins, Dr. Pressman had a surgical abortion practice, up to 24 weeks gestation. (Doc. 195 at 13:6-12.) Dr. Pressman has published in excess of 70 research articles in peer-reviewed medical journals and received more than 20 research grants, including from the National Institutes of Health. (*Id.* at 14:11-15:5; *see generally* PX 94.) The [59] Court accepted Dr. Pressman as an expert in hospital credentialing, obstetrics, and abortion care. (*Id.* at 17:16-20:25.)

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[38] *See* Doc. 216, footnote 42.

193. Dr. Christopher Estes is an OB/GYN with a master's degree in public health from Columbia University. (Doc. 190 at 186:8-189:10.) For seven years, he was a professor on the faculty of the University of Miami's Miller School of Medicine and an OB/GYN surgeon who performed, among other procedures, first and second trimester abortions, with a specialty in high-risk patients. (*Id.* at 189:16-191:8.) Dr. Estes is presently the Medical Director of Planned Parenthood of South, East, and North Florida, where he provides the full spectrum of family planning services and surgery. (*Id.* at 186:10-23, 192:8-193:12; *see generally* PX 92.) The Court accepted Dr. Estes as an expert in public health, obstetrics, and abortion care. (Doc. 190 at 194:7-196:23.)

194. Plaintiffs' expert medical witnesses are both experienced women's health practitioners, with extensive experience, research, and knowledge of peer-reviewed medical literature related to abortion. Both testified candidly on direct and cross-examination. (*Id.* at 197:1-268:6; Doc. 195 at 11:12-96:12.) While these physicians had personal opinions about abortion, the Court did not find their expert opinions skewed by those opinions, which were well-supported by reliable facts and data, and are fully credited by the Court as truthful and reliable.

195. Defendant presented expert testimony from Dr. Damon Cudihy and Dr. Robert Marier. The Court

had serious concerns about the credibility and reliability of Dr. Cudihy's testimony.[39] His testimony and opinions were shown to be contradicted by his own prior inconsistent statements and the sources on which he purported to rely. (*E.g.* Doc. 194 at 73:18-88:16 (opining that D&C, a [60] miscarriage treatment comparable to early surgical abortion, should always be performed in a hospital, but relying on sources stating "a D&C can be done in a healthcare provider's office, a surgery center, or a hospital" and "for uncomplicated cases curettage in an operating room adds to the costs and inconvenience yet offers no medical benefit over outpatient curettage")). He was evasive on the stand. (*E.g.*, *id.* at 133:18-134:8, 134:16-135:12, 141:2-142:3, 161:20-162:9, 173:6-176:5.). His testimony also demonstrated a bias against legal abortion, which he described as "appalling, horrifying, tragic, and unnecessary," and which he testified should be criminalized. (*Id.* at 205:12-206:3.).

196. Further, Dr. Cudihy lacks relevant experience regarding the matters on which he offered opinions. He testified that he has never performed an abortion, nor has he studied the provision of abortion. (Doc. 194 at 21:16-21.) He has not treated a single abortion complication in the two years he has practiced medicine in Louisiana. (*Id.* at 73:25-74:8.) He conceded that several of his opinions about abortion relied on no sources at all, (*e.g.*, *id.* at 100:15-106:10;

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[39] See Doc. 216 footnote 39 ("[T]he Court had serious concerns about the credibility and bias of defense expert Dr. Damon Cudihy . . . ")

111:25-112:12), and that others were based on conversations with a non-testifying defense expert, Dr. John Thorp, (*id.* at 140:1-18), whose testimony has been discredited in other suits regarding abortion restrictions, e.g. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 968-69 (W.D. Wis. 2015), *aff'd*, 806 F.3d 908 (7th Cir. 2015), *cert denied*, 136 S. Ct. 2545 (2016); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1394 (M.D. Ala. 2014).

197. The Court accordingly gives Dr. Cudihy's testimony minimal weight. However, even if fully credited, Dr. Cudihy's testimony would not change the Court's findings of fact as the Court found the expert testimony of the Plaintiffs' experts to be reasoned and supported.

[61] 198. Dr. Marier was accepted by the Court as an expert in internal medicine, the regulation of physicians and other health care professionals in Louisiana, and hospital administration. (Doc. 193 at 9:24-10:23.) He was Chairman of the Department of Hospital Medicine at Ochsner Medical Center and previously served as the Executive Director of the Louisiana State Board of Medical Examiners. (*Id.* at 4:16-9:21.)

199. Dr. Marier's testimony regarding hospital privileging was well within his area of experience and expertise, and the Court gives considerable weight to that testimony.

200. However, Dr. Marier's testimony regarding the purported benefits of Act 620 to abortion patients

suffered from his paucity of knowledge or experience concerning medical or surgical abortion procedures.[40] Dr. Marier has never performed an abortion and has not had any experience with obstetric or gynecological surgeries since medical school. (*Id.* at 51:14-25.)

201. Dr. Marier's testimony was also diminished by his bias, manifested in his testimony that abortion, and even contraception methods such as emergency contraception and intrauterine devices, should be outlawed in the United States. (*Id.* at 106:10-107:19, 27:9-18, 89:2-14, 94:1-19, 94:20-97:10, 99:12-100:16.)

202. The Court accordingly gives Dr. Marier's testimony regarding the purported benefits for Act 620 minimal weight. However, even if fully credited, this portion of Dr. Marier's testimony would not change the Court's findings of fact.

B. Abortion Safety

203. The Court makes the following findings regarding abortion safety based on expert and lay testimony, supported by the exhibits received in evidence.

[62] 204. Abortion is a common medical procedure in the United States, with nearly one million procedures performed each year. (Doc. 190 at 197:1-6, 232:7-13; JX 123 ¶ 24.) Approximately one in three

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[40] See Doc. 216 footnote 39 ([T]he Court had serious concerns about . . . Marier's expertise as it pertained to the subject of abortion practice. . . .").

women in the United States will have an abortion during their lifetimes. (Doc. 190 at 197:1-6; JX 123 ¶ 24.)

205. Abortion is one of the safest medical procedures in the United States. (Doc. 190 at 199:6-24; Doc. 195 at 32:7-10; JX 123 ¶ 24.) Dr. Marier acknowledged "that most first-trimester abortions are performed without serious complications." (JX 135 at 2804.) There is far more risk associated with carrying a pregnancy to term and delivering a baby than with abortion. (Doc. 190 at 129:22-130:5, 199:6-10; JX 123 ¶ 61; Doc. 195 at 32:4-10.)

206. Approximately 90% of abortion procedures occur in the first trimester, almost all of which are performed in an outpatient setting. (Doc. 190 at 197:7-15; JX 123 ¶ 13; Doc. 195 at 33:16–19.)

207. There are two types of abortion procedures, surgical abortion and medication abortion. (JX 123 ¶ 15.) Surgical abortion is a minimally invasive procedure that involves the use of instruments to evacuate the contents of the uterus, but does not require an incision or the use of general anesthesia. (Doc. 190 at 138:24-139:17; Doc. 195 at 32:11-20, 48:20-49:3; JX 123 ¶ 16.)

208. First trimester surgical abortions are nearly identical to D&Cs to complete a spontaneous miscarriage or for other diagnostic or therapeutic reasons. (JX 123 ¶ 19; Doc. 168-6 at 6.) Physicians are not required to have admitting privileges in order to perform D&Cs to complete a spontaneous miscarriage or

for other diagnostic or therapeutic reasons in Louisiana. (Doc. 194 at 116:10-15.)

[63] 209. Virtually all surgical abortions require only mild or moderate sedation and/or local anesthesia. (Doc. 190 at 138:24-139:17.) Mild or moderate sedation and local anesthesia are much safer than the general anesthesia used in an operating room setting. (Doc. 190 at 197:24-198:12; Doc. 195 at 33:24-35:19; JX 123 ¶ 18; PX 185 ¶ 793.)

210. Complications from surgical abortion are rare and include infection, hemorrhage, retained tissue, incomplete abortion, and perforation of the uterus. (Doc. 190 at 36:21-37:25, 198:13-199:5.)

211. Most complications of surgical abortions can be managed in the clinic, including by administering medications that reduce bleeding or cause the uterus to contract, massaging the uterus, applying pressure, suturing, or administering oral antibiotics to treat infection. Surgical intervention is not commonly required. (Docs. 190 at 25:3-6, 89:15-90:1, 135:10-137:9, 201:15-207:22; 195 at 38:22-39:4.) Serious complications requiring transfer directly from the clinic to a hospital are extremely rare. (Doc. 190 at 39:25-40:5, 246:6-9.)

212. Medication abortion involves the use of a combination of two drugs, usually mifepristone and misoprostol. (Doc. 190 at 130:9-131:2; JX 123 ¶ 22.) Plaintiff clinics offer medication abortion up to eight weeks LMP. *See supra* Part V.B. A woman typically takes mifepristone at the clinic and then

takes misoprostol at home. (Doc. 190 at 131:20-132:7, 208:23-209:15.) Medication abortion requires no anesthesia or sedation. (JX 123 ¶ 23.) Medication abortion is also used as a treatment option in connection with spontaneous abortion, also known as miscarriage. (Doc. 190 at 210:23-211:12.)

[64] 213. The most common complication from medication abortion is incomplete abortion or retained tissue, which is typically remedied by a return visit to the clinic for a suction curettage procedure. (Docs. 190 at 132:9-22, 209:16-210:16; 195 at 43:19-44:4.)

214. The prevalence of any complication in first trimester abortion in the outpatient setting is approximately 0.8%. The prevalence of major complications requiring treatment in a hospital is 0.05%. The risks of abortion remain low through the second trimester, but the risks increase with gestational age. The risk of complication requiring hospitalization in the second trimester is approximately 1.0%. (Docs. 190 at 198:13-199:5, 199:11-24, 199:25-200:9; JX 123 ¶ 25; 195 at 42:2-44:18, 75:14-76:5, 95:3-18; PX 195 at 499.)

215. By comparison, a D&C procedure performed after a miscarriage carries greater risk than a first trimester surgical abortion because, during a miscarriage, the cervix is already open, allowing the passage of bacteria into the uterine cavity, which increases the risk of infection. (Doc. 195 at 31:20-32:3, 35:21-36:2.)

216. Patients who visit the emergency room after an abortion often are experiencing normal side effects

of the procedure and can be observed and released, or treated and released without admission. (Doc. 190 at 212:1-17; Doc. 195 at 37:20-39:4.)

217. It is more common for women to present at the emergency room with symptoms of miscarriage than with complications following an induced abortion. (Doc. 190 at 212:18-25.) Emergency room doctors are equipped to treat a patient who is experiencing complications from either. (Doc. 190 at 213:1-6, 213:18-22; Doc. 195 at 59:5-7.) When a complication from abortion requires surgical intervention in the hospital setting, emergency physicians stabilize the patient and [65] facilitate treatment by the appropriate specialist. This is the standard of care. (Docs. 190 at 213:7-17, 249:8-250:21; 195 at 39:5-40:3, 55:14-56:12, 57:25-58:3; 193 at 52:21-53:1.)

218. In Louisiana, it is not required by law nor is it standard practice for a physician to have admitting privileges in order to transfer a patient to another medical facility for emergency care: Doe 1, who previously worked as a rural emergency physician, routinely transferred patients with severe emergencies to other hospitals without admitting privileges. (Doc. 192 at 18:13-19:15.)

219. In the last 23 years, Hope Clinic, which serves in excess of 3,000 patients per year, had only four patients who required transfer to a hospital for treatment. (Doc. 190 at 25:14-18, 127:8-11.) In each instance, regardless of whether the physician had admitting privileges, the patient received appropriate care.

(*Id.* at 127:11-23, 128:5-14, 128:15-129:8, 172:13-173:5, 129:9-21.) At Hope Clinic, if a physician determines that a patient needs to be transported to the hospital, he directs an employee to call for emergency transport. The administrator ensures that the chart is complete so that a copy can be sent to the hospital. The physician also contacts the hospital to alert the attending physician that the patient will be arriving and to provide information about the complication. (*Id.* at 25:19-26:14.)

220. From 2009 through mid-2014, approximately 4,171 abortions were performed at Bossier Clinic, and only two patients required direct hospital transfer following an abortion. (JX 117 ¶ 9.)

221. In the same period, approximately 10,836 abortions were performed at Causeway Clinic, and only one patient required direct hospital transfer after an abortion. (JX 117 ¶ 9.)

222. Dr. Doe 2, who has performed 30,000 to 40,000 abortions since 1980, has had no more than twenty patients who required hospitalization. (Doc. 191 at 46:12-21.)

[66] 223. From 2009 through mid-2014, Dr. Doe 2 directly cared for approximately 6,000 patients who received abortions. Only two of these patients experienced complications requiring direct hospital transfer. (JX 187 ¶ 6.) In both of those situations, he spoke with the hospital doctor who took over care when the patient was admitted to the hospital. Both of these patients received appropriate care. (Doc. 191 at 43:14-45:10, 45:11-46:11.) He has never sent a patient

to another institution without calling the doctor taking over care for the patient and sending all available written patient medical records to that doctor. (*Id.* at 42:20-43:13.)

224. Dr. Doe 5 has performed thousands of abortions at Women's Clinic and Delta Clinic in the past three years and has never had to transfer a patient to the hospital. (JX 110 ¶ 7.)

225. Dr. Doe 6 has performed thousands of surgical and medical abortions over more than the past ten years and only two of those patients required a direct transfer to the hospital. (JX 168 ¶ 8.)

226. In sum, the testimony of clinic staff and physicians demonstrated just how rarely it is necessary to transfer patients to a hospital: far less than once a year, or less than one per several thousand patients. As stated by the Supreme Court in its affirmation of the District Court's findings in *WWH* and certainly true in Louisiana: "[T]here was no significant health-related problem that the new law helped to cure." 136 S. Ct. at 2311.

227. Louisiana physicians, even were they able to obtain admitting privileges, would rarely if ever have an occasion to use them, and would never need to, given that they are not required to admit patients to a hospital in the extremely unlikely event that a patient needs hospital transfer.

228. When women do not have access to safe abortion, because abortion is expensive or difficult to

obtain, they may be forced to delay and seek an abortion at a later gestational age, which [67] increases the risks of the procedure. (Doc. 190 at 200:20-201:6, 223:19-224:8; JX 123 ¶ 60.) Women may also resort to trying to self-induce abortions, seek unsafe abortions, or obtain medications through the internet, which can carry significant risk of death, complications, or poor health outcomes. Women without financial resources are at the greatest risk of these consequences. (Doc. 190 at 224:9-225:3; JX 123 ¶¶ 60, 62.)

C. Requiring Abortion Practitioners to Obtain Admitting Privileges Confers No Medical Benefit

229. The Act's requirement that abortion providers have active admitting privileges at a hospital within 30 miles does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana. (Doc. 190 at 214:3-13, 225:4-6.) It provides no benefits to women and is an inapt remedy for a problem that does not exist. (*Id.* at 222:13-16; Doc. 195 at 26:5-16, 28:13–20; Doc. 168-10 at 23-24.)

230. Defendant did not introduce any evidence showing that patients have better outcomes when their physicians have admitting privileges. Nor did Defendant proffer evidence of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment.

231. Admitting privileges requirements such as the Act's are opposed by the medical community.

Specifically, the American College of Obstetricians and Gynecologists ("ACOG") and the American Medical Association ("AMA") are opposed to these admitting privileges requirements. (PX 142; JX 136; Doc. 190 at 215:4-15); *see also WWH*, 136 S. Ct. at 2312-13. Both ACOG and the AMA have taken the position that "there is simply no medical basis to impose a local admitting privileges requirement on abortion providers," and that such requirements are "out [68] of step with modern medical practice, which contemplates provision of emergency care by specially trained hospital physicians at a hospital near the patient's residence." (PX 142 at 16, 22); *see also WWH*, 136 S. Ct. at 2312.

232. Whether or not a patient's treating physician has admitting privileges is not relevant to the patient's care. Patients who present to the emergency room do not receive a lesser standard of care because their treating physician did not have admitting privileges. (Doc. 190 at 221:1-14.)

233. If a patient needs to be admitted to the hospital for care, the patient can present to the emergency room and will be admitted to the hospital. A hospital cannot turn away a patient experiencing an emergency because it is unethical and would be a violation of federal law. (Doc. 190 at 221:1-8); 42 U.S.C. § 1395dd (2011).

234. It is routine for emergency room doctors to assess patients, many of whom are experiencing the stress of injury, illness, or trauma. Patients, even when in significant levels of distress, are able to give

emergency room doctors pertinent medical history. (Doc. 190 at 260:6-261:15, 265:2-20.)

235. If a patient needs emergency surgery, the patient will be treated by the specialist on call who is best qualified to perform the type of surgery needed. (*Id.* at 220:11-25; Doc. 191 at 15:16-16:2; Doc. 195 at 28:21-29:17.)

236. Admitting privileges do little to advance and are not necessary for continuity of care. In the medical community, continuity of care is understood to mean that if a physician is not able to continue providing care to a patient, the physician will make certain that another physician has the information needed to care for the patient. (Docs. 190 at 124:23–125:12; 191 at 40:24–41:19.) Continuity of care can be accomplished by communicating with the physician to whom the patient's [69] care is being turned over. (Doc. 190 at 124:23–125:3.) For example, physicians within an OB/GYN practice routinely care for each other's patients, including deliveries. (Doc. 190 at 124:15-125:12; Doc. 191 at 40:24-41:19.) And, as Dr. Doe 2 testified, on the rare occasions when he transferred a patient to the hospital, he communicated directly with the physician assuming care and provided the patient's records. (Doc. 191 at 42:20-43:13.)

237. Many physicians who practice in office settings are able to ensure continuity of care for their patients without having admitting privileges. (Doc. 190 at 216:8-21; Doc. 195 at 28:21-30:10.)

238. Indeed, the normal practice of medicine involves physicians handing patients off from one shift to the next, from an office-based setting to an emergency room, and from an emergency room to an inpatient ward. (Docs. 190 at 218:1-8; 195 at 79:1-6.) When physicians rely on other physicians to assist in caring for their patients, it is not considered patient abandonment. (Doc. 168-10 at 11.) A physician's transfer agreement with another physician, which all abortion clinics must maintain under pre-existing law, is a mechanism to ensure continuity of care. (Docs. 168-7 at 26; 168-9 at 17; 168-10 at 22.) Continuity of care for a patient is often maintained even without formal measures like transfer agreements. (Doc. At 190 241:13-23, 242:19-243:1.)

239. Most complications from surgical abortion do not occur immediately at the clinic, which is why transfer directly to a hospital is so very rare. (*See generally* Doc. 190 at 90:23-91:15.) If a patient experiences a complication after she leaves the clinic, the clinic will advise her to go to the hospital closest to her, which is not necessarily a hospital within 30 miles of the clinic. (Doc. 190 at 90:23-91:15, 126:17-127:7; JX 159 at 3491; JX 162 at 3504; JX 165.) This is the standard of care. (Doc. 190 at 222:1-12.)

[70] 240. In conclusion, there is no credible evidence in the record that Act 620 would further the State's interest in women's health beyond that which is already insured under existing Louisiana law. Indeed, the overwhelming weight of the evidence demonstrates that, in the decades before the Act's passage,

abortion in Louisiana has been extremely safe, with particularly low rates of serious complications, and as compared with childbirth and with medical procedures that are far less regulated than abortion.

241. Indeed, the Court notes that this Court's findings are consistent with that of other District Courts who have tried this issue. *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D.Tex. 2014) ("The great weight of the 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."), *quoted with approval in WWH*, 136 S.Ct. at 2302, 2311); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015) *aff'd sub nom. Planned Parenthood of Wis. Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014), *cited with approval in WWH*, 136 S. Ct. at 2311-12.

242. In the preliminary injunction order, the Court refrained from making a finding as to whether Act 620 serves the State's purported interest in women's health because it was limited by then-prevailing Fifth Circuit precedent. In light of *WWH*, the Court now assesses the relevant evidence and resolves as a factual matter that Act 620 would do very little, if anything, to advance women's health and indeed would, by limiting access to legal abortions, substantially increase the risk of harm to women's health

by increasing the risks associated with self-induced or illegal and unlicensed abortions.

[71] VIII. Efforts of Doctors to Comply With Act 620 and the Results of Those Efforts

A. Doe 1

243. For over a year prior to his trial testimony on June 24, 2015, Doe 1 has been trying, in various ways, to gain active admitting privileges at a hospital within 30 miles of Hope where he performs abortions and thereby comply with Act 620. (Doc. 192 at 42–44.)

244. The Court finds that Doe 1 is a well-qualified physician and a credible witness. (*See*, *e.g.*, Doc. 192 at 7–14; JX 111 ¶ 1; 116 ¶ 5.)

245. The Court finds that despite his good faith efforts to comply with Act 620, Doe 1 has failed to get active admitting privileges at five different hospitals for reasons unrelated to his competence. (*See*, *e.g.*, JX 116 ¶ 27.)

246. Doe 1 has attempted to get privileges at five separate nearby hospitals and, despite his efforts and his qualifications, has not been given active admitting privileges at any of these hospitals, including University Health, Minden, North Caddo Regional ("North Caddo"), Christus, and Willis-Knighton. (*See*, *e.g.*, Doc. 192 at 47–51.)

247. Doe 1 contacted the director of the Family Medicine Department at University Health in

Shreveport where he had done his residency in family medicine. Doe 1 was initially told that he would be offered a job as a faculty member teaching sports medicine which would "take care of the admitting privileges thing." Doe 1 was told that the application forms for admitting privileges would be forwarded to him. (*Id.* at 45; *see also* JX 186 ¶ 7.)

248. When Doe did not get the application forms and inquired, he was told by the director of the department that he would not be offered a position because "there was some objection from [72] certain staff about [Doe 1] coming to work there because of where [he] work[ed], at Hope Medical." (Doc. 192 at 44–45; *see also* JX 186 ¶ 7.)[41]

249. The director suggested that he try with the OB/GYN Department but when that route was explored, Doe 1 was advised by email that it would be "inappropriate" to have a family medicine doctor on the OB/GYN staff. (Doc. 192 at 47.)

250. Based on these communications, Doe 1 did not file a formal application for admitting privileges to University. (*Id.*)

251. When Pittman, Hope's Administrator, made inquiries about admitting privileges to North Caddo on behalf of Doe 1, she was told that they did not have the capacity for and could not accommodate transfers.

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[41] This testimony was objected to as hearsay, (Doc. 192 at 46), which objection was overruled for the reasons summarized above. *See supra* note 29.

(JX 116 ¶ 22; *see also* Doc. 192 at 49.) Therefore, Doe 1 did not file a formal application. (Doc. 192 at 49; *cf.* JX 116 ¶ 22.)

252. Doe 1 filed a formal application for privileges at Minden. (JX 50; Doc. 192 at 50–51.) Minden's Medical Staff Coordinator wrote to Doe 1 declining his application: "Since we do not have a need for a satellite primary care physician at this time, I am returning your application and check." (JX 50 at 318; *see also* Doc. 192 at 50–51).

253. While the Court, like Doe 1, does not understand the meaning of the stated reason for declining the application, it is clear that the denial of privileges is unrelated to the qualifications and competence of Doe 1. (*See* Doc. 192 at 51.)

254. Doe 1's efforts to get admitting privileges at Christus reads like a chapter in Franz Kafka's *The Trial*. (*See*, *e.g.*, JX 71; Doc. 192 at 52–66.)

[73] 255. Doe 1 submitted his application for courtesy privileges to Christus on July 25, 2014, on a form provided by Christus. (JX 132 at 2772; JX 116 ¶ 23; Doc. 192 at 52.) Courtesy privileges gives a physician with such privileges the ability to admit patients. (Doc. 192 at 52–53.)

256. On August 25, 2014, Christus asked for additional information, (JX 71 at 1254; *see also* Doc. 192 at 54–55), which he provided on September 17, 2014, (JX 71 at 1267; JX 133; Doc. 192 at 55–56).

257. Via a letter dated October 14, 2014, yet more information was sought from Doe 1 by Christus, (JX 71 at 1268; *see also*, *e.g.*, Doc. 192 at 58–59), which he supplied on October 20, 2014, (JX 71 at 1273; Doc. 192 at 59-60), and October 25, 2014, (JX 134 at 2802–03).

258. When Pittman called Christus to make an appointment for Doe 1 to get an identification badge, also a requirement of the application process, an appointment was refused because, Pittman was told, Doe 1 had submitted the wrong kind of application and that he should be submitting a "non-staff care giver" application. (Doc. 192 at 62; *cf.* JX 71 at 1268, 1270, 1276.)

259. On December 17, 2014, Doe 1 then received a letter stating that his application was incomplete because Doe 1 hadn't gotten the badge (the same badge Christus would not give him an appointment to get) and because more than 90 days had elapsed since his application was submitted, the application was "deemed withdrawn." (JX 71 at 1279; Doc. 192 at 63.)

260. In a follow up conversation initiated by Doe 1 and in a subsequent email from Christus, Doe 1 was told that he needed to file an application for non-staff care giver privileges, a type of privilege that would not allow him to admit patients and therefore would not qualify as "active admitting privileges" under Act 620. (JX 190 at 3662; Doc. 192 at 63–66.)

[74] 261. While there was never a formal denial of Doe's application, Christus's delays and failure to

formally act, as outlined above, constitutes a de facto denial of his application for the privileges required by Act 620.

262. Doe 1's experience was similar when he applied for courtesy privileges at Willis-Knighton beginning on June 15, 2014. (JX 53; JX 116 ¶ 27; Doc. 192 at 67–78.) These privileges would have allowed Doe 1 to admit patients. (Doc. 192 at 68–69.)

263. Because of his Board Certification in addiction medicine and because Willis-Knighton has an addiction recovery center, Doe 1 filed his application for privileges as an addiction medicine specialist. (*Id.* at 70.)

264. Doe 1's application was denied because he had not undergone a residency program in addiction medicine, despite his board certification in addiction medicine and even though there was no residency program available when he got his board certification. (JX 51 at 508; Doc. 192 at 72–73.)

265. On February 1, 2015, Doe 1 re-submitted an application, this time as a Family Practice specialist. (JX 97 at 2069–2117; Doc. 192 at 73–74.)

266. On March 11, 2015, Willis-Knighton requested information regarding documentation of "hospital admissions and management of patients 18 years old of age or older in the past 12 months." (JX 128; Doc. 192 at 75–76.)

267. On March 24, 2015, Doe 1 provided the requested information. (JX 189; Doc. 192 at 77–78.)

Because of the nature of his practice, he had not admitted any patients in the last 12 months, but he did provide detailed information about his training and procedures done during that same time period. (*Id.*)

[75] 268. Despite the lapse of more than eight months since his second application and more than five months since he provided the information requested in support of that application, Willis-Knighton has neither approved nor denied his application. (*See*, *e.g.*, *id.* at 78.) Under these circumstances, the Court finds that this application has been de facto denied.

B. Doe 2

269. Before its closure on March 30, 2017, Doe 2 performed abortions at Bossier Clinic, and through January 30, 2016, also performed abortions at Causeway Clinic. (Doc. 191 at 17:5-9; Doc. 255 ¶ 1.) Currently, Doe 2 has a working agreement with Hope under which he performs abortions when Hope's primary physicians, Doe 1 and Doe 3 are unavailable to perform abortion care. (Doc. 272 ¶¶ 3–4.)

270. The Court finds Doe 2 to be a well-qualified and competent physician and a credible witness. (*Id.* at 13–17; JX 112 ¶ 1.)

271. Doe 2 does not currently have active admitting privileges at a hospital within 30 miles of Bossier Clinic. (Doc. 191 at 19.)

272. Doe 2 has been unsuccessful in his good faith efforts to get admitting [sic] active admitting

privileges within 30 miles of the Bossier Clinic. (*See*, *e.g.*, Doc. 191.)

273. Doe 2 worked as an Assistant Clinical Professor of Medicine at LSU Medical School, now known as University Health, at various times for approximately 18 years total, leaving LSU in 2004. (*Id.* at 14–15.)

274. While he was on staff at University and during the years in which he engaged in a general OB/GYN practice, Doe 2 had admitting privileges at various hospitals. (*Id.* at 24, 95.)

[76] 275. When he left the University staff in 2004, Doe 2 was given consulting privileges, which allow him to consult but not to admit patients. (Doc. 191 at 23–24, 84–88; JX 79 at 1708–09; JX 185.)[42]

276. Following the passage of Act 620, Doe 2 attempted to upgrade his privileges at University to allow him to admit patients in order to comply with the requirements of the Act. (Doc. 191 at 24–25.)

277. When he spoke to Dr. Lynne Groome ("Groome"), the head of the OB/GYN Department at University, about upgrading his privileges, he was told this would not happen because of his abortion practice. (*Id.* at 25–26; *cf.* JX 116 ¶ 27.)

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[42] While Doe 2 initially thought that these were called "courtesy privileges," he corrected his mistake on cross examination. (Doc. 191 at 23, 81-87; JX 185.)

278. In his testimony before this Court, he thusly described his communication with Groome:

> Q. What's your understanding of why you were not able to upgrade your privileges at LSU?
>
> A. Well, Dr. Groome told me that he was reluctant to even consider that, because it was such a controversial topic, but he would take it to the Dean and ask, which he did and he essentially said that you're not going to go beyond your [clinical] privileges.
>
> Q. Were you surprised by that response?
>
> A. No.
>
> Q. Why weren't you surprised?
>
> [77] A. Just because of the political nature of what I do and the controversy of what I do.

(*Id.* at 25-26.)[43]

279. During the summer of 2014, Doe 2 also applied for privileges at WKB. (*Id.* at 26–27.)

280. On August 11, 2014, the Department of OB/GYN and Pediatrics Performance Peer Review Panel ("PPRP") at WKB wrote to Doe 2 asking for additional information: "In order for the Panel to sufficiently assess your clinical competence, you will need to submit documentation, which should include operative notes and outcomes, of cases performed within the

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[43] This testimony was objected to as hearsay. (Doc. 191 at 25.) For the same reasons summarized above, *see supra* note 29, the objection was overruled.

last 12 months for the specific procedures you are requesting on the privilege request form." (JX 144 at 3445–46; *see also*, *e.g.*, Doc. 191 at 29.)

281. After Doe 2 made information regarding his prior outpatient operations available to WKB, (Doc. 191 at 30), he received another letter from WKB dated November 19, 2014, stating in pertinent part:

> The data [you] submitted supports the outpatient procedures you perform, but does not support your request for hospital privileges. In order for the panel to evaluate and make recommendations for hospital privileges [,] they must evaluate patient admissions and management, consultations and procedures performed. Without this information your application remains incomplete and cannot be processed.

(JX 89 at 1950; *see also* Doc. 191 at 30–31.)

282. Because of the nature of his non-hospital based practice, Doe 2 was unable to provide the requested information. (*See*, *e.g.*, Doc. 191 at 29:8-31:1.) Thus, while Defendant is correct that Doe 2's application was not formally denied (Doc. 201 at 11), Doe 2's application would never have been approved according to WKP's [sic] own letter. (JX 89; *see also*, *e.g.*, JX 144 at 3445-46.)

[78] 283. As explained by Doe 2, "You know, they haven't formally denied me. . . . I'm in a Catch-22 basically. I can't provide information I don't have." (Doc. 191 at 79–80.)

284. This situation mirrors Doe 1's experience with three other Willis-Knighton-branded entities. Specifically, the Court also notes that although Doe 1, in response to a similar letter from WK Medical Center, WK South, and WK Pierremont, (JX 128), formally responded showing he had not had any hospital admissions in the last 12 months, (JX 189 at 3579; Doc. 192 at 77–78), WK still has not denied or approved his application, (Doc. 192 at 78).

285. The Court finds that, under these circumstances, Doe 2's inability to gain privileges at WKB are unrelated to his competence and that his application to WKB has been de facto denied.

286. While Defendant argues that Willis-Knighton's inaction is related to Dr. Doe 2's competence because, due to the nature of his practice, he cannot demonstrate "current clinical competence" (Doc. 201 at 11), the Court is not persuaded. The reality is different. Doe 2, a Board Certified OB/GYN who spent many years as an Assistant Clinical Professor at LSU Medical School and who, by Willis-Knighton's admission, has demonstrated his ability regarding outpatient surgeries, is in what he correctly describes a "Catch-22" created by a combination of the Act's requirement and the nature of his practice as an abortion provider.

287. Because Doe 2 also practiced at Causeway Clinic in Metairie, he applied for admitting privileges at Tulane, which is within 30 miles of Causeway. (*See*, *e.g.*, Doc. 191 at 32:24-35:21, 230:9-19; JX 180 at 3359.)

288. While Defendant has argued that the admitting privileges requirement is only about insuring competency of doctors who perform abortions and the process of gaining admitting privileges is neutral and devoid of considerations of the political, religious and social hostility [79] against abortion, the email exchanges between Doe 2 and Dr. A at Tulane demonstrate a very different reality, even in a metropolitan, university-based hospital. (JX 169–78;[44] *see also* Doc. 191 at 49–54.)

289. In this exchange, Dr. A first feels the need to discuss Doe 2's request for privileges "with our lobbyists." (JX 169.) Because Doe 2 is a "low/no provider" in hospitals in the New Orleans area, Dr. A states: "This is truly a rock and a hard place." (JX 172.) When Doe 2 expresses frustration with the lack of success in the application process, Dr. A states: "This is just ridiculous. I can't believe the state has come to this." (JX 174; *cf.* JX 170.) Dr. A continues: "I am working on an approach where you would get admitting privileges only for your patients. . . ." (JX 175.) When a proposed solution is found and Doe 2 expresses doubt that this will meet the requirements of the law, Dr. A responds: "Technically, you will have admitting privileges. Isn't that what the law says?" (JX 177). When discussing the need for a covering physician, Dr. A clarifies some of the problems surrounding Doe 2's application: "There were a few faculty who were not comfortable with covering; they were also concerned that 'Tulane as back

[44] These exhibits, being jointly submitted, were admitted into evidence. (Doc. 191 at 54.)

up for an abortion clinic might not help our referrals.' Given this concern, Dr. B will cover for you formally." (JX 178.)

290. When privileges were finally granted by Tulane, Doe 2 was notified by Dr. A that the proposed privileges would have "the following limitations: 'Admissions of patients from the physician's clinical practice with complications of first and second trimester abortions with referral of those patients to an attending physician on the Tulane staff credentialed for OB/GYN privileges who has agreed to provide for such care for the physician's patients.'" (JX 181; *see also* Doc. 191 at 57, 60–61.)

[80] 291. Consistent with this email, Tulane's formal grant circumscribed Doe 2's privileges in these terms: "Admission of patients from the physician's clinical practice . . . with referral of those patients to an attending physician on staff at [Tulane Medical Center] credentialed for OB/GYN privileges who has agreed to provide care for the physician's patients at TMS." (JX 183 at 3652–3; *see also* Doc. 191 at 33, 55–58.)

292. The Parties disagree as to whether these admitting privileges qualify as "active admitting privileges" within the meaning of Act 620. (*Compare* Doc. 200 at 46–47, *with* Doc. 196 at 19–20.)

293. Defendant has filed an affidavit in which she states that the admitting privileges granted to Dr. Doe 2 by Tulane "are sufficient to comply with the

Act." (JX 191 at 3668; *see also* Docs. 196 at 20; 200 at 48.)

294. Plaintiffs argue:

> Although Secretary Kliebert has taken the position that Dr. John Doe 2's privileges at Tulane satisfy Act 620, Dr. John Doe 2 has concerns that her position is inconsistent with the plain language of the Act, which requires that 'the physician is a member in good standing of the medical staff of a hospital . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient.' . . . Based on Tulane's letters, Dr. John Doe 2 cannot provide diagnostic and surgical services to patients admitted to Tulane as required by the plain language of the statute.

(Doc. 196 ¶ 47 at 20 (*citing to* Doc. 193 at 123; Doc. 191 at 38–40).)

295. Plaintiff further argues:

> Dr. John Doe 2 has concerns that the position Secretary Kliebert has taken regarding his privileges at Tulane during the course of this litigation may change at a later date. As a result, he will not risk his medical license by performing abortions in Metairie if Act 620 is allowed to take effect.

(*Id.* ¶ 48 at 20 (*citing* Doc. 191 at 38–40; JX 191).)

[81] 296. Defendant makes two counters:

> Plaintiffs' 'concerns' about the Defendant's determination that Dr. Doe 2's privileges at Tulane satisfy the Act are legally irrelevant, because Defendant is the state official charged with interpretation and enforcement of the Act. Furthermore, Plaintiffs' assertions regarding the nature of Dr. Doe 2's privileges at Tulane Medical Center are clearly wrong because they are contradicted by the overwhelming weight of the evidence.

(Doc. 201 ¶ 47 at 12.)

297. Defendant further argues:

> Plaintiffs' 'concerns' that the Defendant's determination that Dr. Doe 2's Tulane privileges satisfy the Act "may change at a later date" are legally irrelevant. Plaintiffs have produced no evidence indicating that any such "change" in position by Defendant with respect to Dr. Doe 2's Tulane privileges is likely to occur. The evidence therefore does not show that the Act or the Defendant pose any credible, concrete threat to Dr. Doe 2's ability to continue his practice at Causeway clinic. If Dr. Doe 2 voluntarily ceases to perform abortions at Causeway because of his fears that the Defendant (or some future Secretary) will change her position, that cessation would be attributable to Dr. Doe 2 alone and not to the Act itself.

(*Id.* ¶ 48 at 12.)

298. In light of Defendant's argument, so as to resolve this dispute and determine whether Doe 2 has "active admitting privileges" at Tulane, the Court must first determine whether it is bound by the interpretation given by Defendant and, if not, compare the privileges granted by Tulane with Act 620's definition of "active admitting privileges."

299. Whatever discretion the Secretary may have in a law's enforcement, no deference is owed to an opinion contrary to the law's unambiguous and plain meaning. *See*, *e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (observing that "an agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole . . . does not merit deference" (alteration in original) (citations omitted) (internal quotation marks omitted)); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (reaffirming the interpretive principle that only "[i]n [82] the absence of any unambiguous statute or regulation" does a court turn to an agency's interpretation"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997) (emphasizing that a court's inquiry "must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent" and explaining that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" (internal quotation marks omitted)). Quite simply, if the legislative intent is clear,

as evidenced by the use of an unambiguous word, "that is the end of the matter; for the court, as well as the agency, must give effect to th[at] unambiguously expressed intent." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984) ("*Chevron*"); *see also Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1363 (5th Cir. 1993) (quoting *id.*).

300. If the relevant statute is ambiguous, however, at least some deference is owed. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). But such deference is only accorded if the statute is truly "ambiguous" regarding the precise "question at issue" and if the agency's interpretation is a "reasonable" and hence "permissible construction of the statute" at hand. *Orellana-Monson v. Holder*, 685 F.3d 511, 517 (5th Cir. 2012); *see also*, *e.g.*, *Siew v. Holder*, 742 F.3d 603, 607 n.27 (5th Cir. 2014) (citing *id.*); *United States v. Baptiste*, 34 F. Supp. 3d 662, 670 (W.D. Tex. 2014) (same). Thus, even if the pertinent statute is ambiguous, an agency's interpretation may be denied "controlling weight" if "arbitrary, capricious, or manifestly contrary to the statute." *Rodriguez-Avalos v. Holder*, 788 F.3d 444, 449 (5th Cir. 2015) (quoting *Orellana-Monson*, 685 F.3d at 517).

[83] 301. Critically, as federal courts are bound to "interpret a state statute as that state's courts would construe it," *Newman*, 305 F.3d at 696, the same type of measured deference is afforded to

agency interpretations by this state's courts. *Compare Silva-Trevino v. Holder*, 742 F.3d 197, 199–200 (5th Cir. 2014), *with Zeringue v. State Dep't of Public Safety*, 467 So. 2d 1358, 1361 (La. Ct. App. 5 Cir. 1985). Like their federal counterparts, Louisiana state agencies are "entitled to deference regarding . . . interpretation and construction of the rules and regulations that . . . [they] promulgate[ ]." *Women's & Children's Hosp. v. State*, 07-1157 (La. App. 1 Cir. 02/08/08); 984 So. 2d 760, 768–69; *see also Oakville Cmty. Action Grp. v. La. Dep't of Envtl. Quality*, 05-1365 (La. App. 1 Cir. 5/5/06); 935 So. 2d 175, 186 ("A state agency is charged with interpreting its own rules and regulations and great deference must be given to the agency's interpretation.")

302. However, as with *Chevron*, the statute itself must be ambiguous for such respect to be accorded. *Clark v. Bd. of Comm'rs*, 422 So. 2d 247, 251 (La. Ct. App. 1982) ("[A]lthough an agency's interpretation of a statute under which it operates is entitled to some deference, such deference is constrained by the court's obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history."); *cf. Comm-Care Corp. v. Bishop*, 96-1711 (La. 07/01/97); 696 So. 2d 969, 973 ("The meaning and intent of a law is to be determined by consideration of the law in its entirety and all other laws on the same subject matter, and a construction should be placed on the provision in question which is consistent with the express terms of the law and with the obvious intent of the lawmaker in enacting it.").

303. Moreover, again as with a federal statute, "agency[ ] interpretations" lose any persuasive value, forfeiting any right to judicial deference, if "arbitrary, capricious or manifestly contrary to its rules and regulation." *In re Recovery I*, 93-0441 (La. App. 1 Cir. 04/08/94); 635 So. [84]2d 690, 696; *see also*, *e.g.*, *Doctors Hosp. of Augusta v. Dep't of Health & Hosps.*, 13-1762 (La. App. 1 Cir. 9/17/14); 2014 La. App. Unpub. LEXIS 481, at *19–20, 2014 WL 4658202, at *7 (refusing to accord any deference to an interpretation by the same agency here, deeming it "an abuse of discretion" that effectively rewrote the relevant statute); *Bowers v. Firefighters' Ret. Sys.*, 08-1268 (La. 03/17/09); 6 So. 3d 173, 176 ("Under the arbitrary and capricious standard, an agency decision is entitled to deference in its interpretation of its own rules and regulations; however, ***it is not entitled to deference in its interpretation of statutes*** and judicial decisions." (emphasis added)).

304. The Court finds that Defendant's interpretation of Act 620 is contradicted by its plain language. Expressly and unambiguously, the statute defines "active admitting privileges" to include "the ability to admit a patient and to provide diagnostic and surgical services to such patient consistent with the requirements of Paragraph (A)(1) of this Subsection [requiring a physician performing abortions to be licensed and

have completed or be enrolled in an OB/GYN or family residency program]." LA. R.S. § 40:1299.35.2A(2)(a).[45]

305. Because the validity of Defendant's interpretation arose during trial, the Court asked the following question to Marier, Defendant's expert witness, a physician who helped draft Act 620, (Doc. 193 at 94): "And I understood you to say that the doctor, in order to meet Act 620 would have to—would not have to be able to perform all diagnostic and surgical services, but *would have to perform some diagnostic and surgical services.* Did I understand that correctly?" (Doc. 193 at 123 (emphasis added).) To this question, Marier answered: "Yes. Yes, Your Honor." (*Id.*)

306. Because Doe 2's privileges are limited to "admission of patients" with the obligation to refer his patient to a "Tulane staff OB/GYN" for surgery and other kinds of treatment as well as [85] diagnostic services, this arrangement does not allow Doe 2 to perform any (let alone "some") diagnostic, surgical or other kinds of treatment himself. Regardless of that fact that Tulane has chosen to label him an "admitting physician," (JX 184), he cannot "provide diagnostic and surgical services," and Act 620 expressly defines "active admitting privileges" as encompassing the ability to do so, La. Rev. Stat. § 40:1299.35.2A(2)(a). Hence, Doe 2's privileges do not and cannot meet the plain language of Act 620.

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[45] As already noted, *see supra* note 2, the text of Act 620 can be found in a joint exhibit. (JX 115.)

307. Here, as Defendant's own expert testified and as the statute's plain meaning makes clear, the Secretary's interpretation flies in the face of the law's basic text. The words are clear, their meaning patent, and, under these circumstances, the Defendant's interpretation is not entitled to deference. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803); *see*, *e.g.*, *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 09-1916 (La. 05/11/10); 41 So. 3d 438, 449 ("Although courts may give due consideration to the administrative construction of a law, we are certainly not bound by them."); *Salazar-Regino v. Rominski*, 415 F.3d 436, 448 (5th Cir. 2005) (citing this maxim in the context of weighing the reasonableness of an agency's particular interpretation); *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 336 (6th Cir. 2014) (rejecting an agency interpretation as contrary to the statutory language as interpreted).

308. The Court also notes that the Defendant's interpretation allowing (and, in the case of Dr. Doe 2 and Tulane, requiring) the abortion provider to turn over the actual care of the patient to another doctor, flies in the face of one of Act 620's main purposes and purported medical benefits: "continuity of care," the ability of a [sic] the abortion provider to *treat* his patient in the hospital if admission to the hospital is necessary. (*See*, *e.g.*, Doc. 193 at 21–23; Doc. 200 ¶¶ 91 at 98–101.)

[86] 309. While Defendant is correct that Secretary Kliebert was the person charged with enforcing

this provision, it is also true that the Secretary of DHH often changes every few years.[46] (Doc. 191 at 198–99, 195–96.)

310. It is also true that the new Secretary may disagree with her predecessor and reverse course on her current interpretation of Act 620.[47]

311. The Court finds that Doe 2 has legitimate concerns about relying on the declaration of Defendant to practice as an abortion provider if Act 620 were to go into effect.

312. More importantly, the Court finds that Doe 2 does not have active admitting privileges within the meaning of Act 620 at a hospital within 30 miles of Causeway Clinic. In any event, Causeway closed and

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[46] Indeed, in the wake of the recent gubernatorial election, Dr. Rebekah Gee has become DHH's new head.

[47] At the time, Kliebert did not even say she will bind herself to this interpretation during her time in office. While not directly relevant to this matter, the Court notes that in a recent case, this same agency has submitted multiple inconsistent declarations and abruptly changed legal positions without much explanation. *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 15-cv-00565-JWD-SCR, 2015 WL 6551836, at *8–9, *33, 2015 U.S. Dist. LEXIS 146988, at *27–29, *109–10 (M.D. La. Oct. 29, 2015). Though these inconsistencies do not appear in this case, this Court may take judicial notice of its own public docket. FED. R. EVID. 201; *see*, *e.g.*, *EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1049 (C.D. Cal. 2013); *Richardson v. Monaco (In re Summit Metals, Inc.)*, 477 B.R. 484, 488 n.1 (Bankr. D. Del. 2012); *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 8 (1st Cir. 1999). Of course, there is now a new Secretary whose position is not declared in this record.

returned its license to DHH, effective February 10, 2016. (Doc. 255 ¶ 3.)

C. Doe 3

313. Doe 3 currently has admitting privileges at the WKB and Christus, both of which are within 30 miles of Hope Clinic where he performs abortions. (Doc. 190 at 21–22, 120, 148–49; JX 188 ¶ 6; JX 116 ¶ 18.)

314. The Court finds that Doe 3 is a well-qualified physician and a credible witness. (*See*, *e.g.*, JX 188 ¶ 1; Doc. 190 at 109–11.)

[87] 315. Doe 3's current privileges at Christus require him to admit approximately 50 patients per year. (Doc. 190 at 150–52; JX 59.)

316. Doe 3 has had admitting privileges at Christus since the 1990's and at WKB since late 1997 or early 1998. (Doc. 190 at 120–21.)

317. Doe 3 uses his admitting privileges primarily in connection with his busy obstetrics practice delivering babies and, to a lesser extent to his private practice in gynecology, not because of his work at Hope Clinic. (*Id.* at 124, 147; *see also* JX 188 ¶ 7.)

318. As a result of his fears of violence and harassment, Doe 3 has credibly testified that if he is the last physician performing abortion [sic] in either the entire state or in the northern part of the state, he will not

continue to perform abortions. (Doc. 190 at 174–76; *see also*, *e.g.*, JX 188 ¶¶ 10–11.)

D. Doe 4

319. Doe 4 performed abortions at Causeway Clinic in Metairie. (*See*, *e.g.* JX 114 ¶ 1; Doc. 168-5 at 8.)

320. He does not currently have admitting privileges at a hospital within 30 miles of that clinic. (Doc. 191 at 18.)

321. Doe 4 testified by deposition, (Doc. 168-5), and so the Court did not have the opportunity to directly measure his demeanor. However, the Court finds that Doe 4 is a well-qualified physician, (*See*, *e.g.*, JX 114 ¶ 1; Doc. 168-5 at 5–6, 9, 12), and that his testimony is credible and consistent with the other testifying doctors who perform abortions.

322. On August 6, 2014, Dr. John Doe 4 applied for admitting privileges at Ochsner-Kenner Medical Center ("Ochsner"). (JX 57 at 762–808; *see also* Doc. 168-5 at 16–17.)

[88] 323. Doe 4 chose to apply to Ochsner because he knew a physician there who agreed to provide coverage for him. (*Id.* at 17.) Ochsner was the only hospital where Doe 4 knew a physician who would cover for him and who met the hospital's criteria to be a covering physician. (*Id.* at 85, 109–10.)

324. Ochsner requested additional information, which Doe 4 provided. (JX 98 at 2118; JX 60 at 824), but he did not receive a response over the subsequent year prior to the closure of Causeway Clinic. (Doc. 240.)

325. Doe 4 did not apply for admitting privileges at Touro Infirmary or LSU New Orleans because both hospitals required Doe 4 to find an OB/GYN to cover for him, which Doe 4 has been unable to do. (*Id.* at 23.)

326. The Court finds that, despite a good faith effort to gain admitting privileges at a hospital within 30 miles of where he performs abortions, and given the fact that it has been well over a year since he applied for privileges with no response, the Court finds that Doe 4's inability to meet the requirements of Act 620 is unrelated to his competence and his request for privileges has been de facto denied.

E. Doe 5

327. Doe 5 performs abortions at two facilities: Woman Health's [sic] in New Orleans and Delta in Baton Rouge. (*See*, *e.g.*, Doc. 168-6 at 4; JX 109 ¶ 7.)

328. Like Doe 4, Doe 5 testified by deposition, and this Court hence did not have the opportunity to directly measure his demeanor. However, in reviewing his deposition and related documentation, (*See*, *e.g.*, Doc. 168-6; JX 109), the Court finds the testimony to be credible and consistent with the other testifying doctors who perform abortions.

[89] 329. The Court finds that Doe 5 has active admitting privileges at Hospital C, a hospital within 30 miles of the Women's Clinic in New Orleans, but that he has been unable to get admitting privileges within 30 miles of Delta. (*See*, *e.g.*, JX 109 ¶ 32–5.)

330. On July 24, 2014, Doe 5 received admitting privileges at Hospital C, which is within 30 miles of Women's Clinic where he performs abortions. (Docs. 168-4 at 25–26; 168-6 at 11; JX 109 ¶ 34.)

331. The Parties have stipulated that Doe 5's privileges at Hospital C are "active admitting privileges" as defined in Act 620. (Docs. 176; Doc. 168-4 at 26; 168-6 at 11–13.)

332. Doe 5 does not currently have admitting privileges at a hospital within 30 miles of Delta in Baton Rouge. (*See*, *e.g.*, Doc. 168-6 at 22; JX 109 ¶ 23.)

333. Doe 5 has applied for admitting privileges at three hospitals in the Baton Rouge area: Woman's Hospital in April or May of 2014 and Lane Regional Medical Center and Baton Rouge General Medical Center in July of 2014. (Doc. 168-6 at 11; JX 109 ¶¶ 32–33.)

334. Doe 5 has been unable to find a local physician who is willing to provide coverage for him when he is not in Baton Rouge, which all three hospitals require. (JX 109 ¶¶ 32–33; Doc. 51; Doc. 168-6 at 11–12.)

335. The Court finds that Doe 5, despite good faith efforts to meet the requirements of Act 620, has been unable to do so in the Baton Rouge area for a

period of well over a year for reasons unrelated to his competence. Under these circumstances, while his applications have not been finally acted upon and are therefore technically "pending," the Court finds that they have been de facto denied.

[90] **F. Doe 6**

336. Doe 6 is a Board Certified OB/GYN with 48 years of experience who is the Medical Director of Woman's [sic] Clinic in New Orleans and Delta Clinic in Baton Rouge. (JX 168 ¶ 1; *see also* JX 109 ¶ 8.)

337. Doe 6 provided his testimony by declaration, (JX 168), and so the Court did not have the opportunity to directly measure his demeanor. However, in reviewing his Declaration, the Court finds the testimony to be credible and consistent with the other testifying doctors who perform abortions in Louisiana.

338. While Doe 6 is Medical Director at both Women's and Delta, "[d]ue to [his] age and the demands of traveling back and forth between New Orleans and Baton Rouge, along with [his] private gynecology practice in New Orleans, [he is] no longer able to provide abortion[s] in Baton Rouge." (JX 168 ¶ 3; *see also* JX 109 ¶ 8.)

339. As a result, Doe 6 ceased performing abortions at Delta in Baton Rouge in April of 2012, leaving only Doe 5 performing abortions at that facility. (JX 168 ¶ 3; *see also* JX 109 ¶ 9.)

340. Doe 6 does not currently have admitting privileges at a hospital within 30 miles of Women's Clinic or Delta Clinic. (JX 168 ¶¶ 15, 21.)

341. From approximately 1973 to 2005, when he had an OB/GYN practice, Doe 6 had admitting privileges at various hospitals in New Orleans. (*Id.* ¶ 13.) As his private practice became solely a gynecology practice, and due to the low rate of abortion complications, he was unable to meet the hospitals' requirements to admit a minimum number of patients each year. (*Id.*) Doe 6 also did not need admitting privileges because he was not admitting patients to the hospital. (*Id.*) Consequently, when his admitting privileges expired, he did not apply to renew them. (*Id.*)

[91] 342. Doe 6 contacted Tulane about the possibility of obtaining admitting privileges and was told not to bother applying because he would not be granted privileges, as he had not had admitting privileges at any hospital since 2005. (JX 168 ¶ 12.)[48] Defendant argues that this testimony is inconsistent with that of Doe 2, who was able to get courtesy privileges at Tulane. (Doc. 201 at 14.) Especially given Doe 6's age and other differences in the professional circumstances of these two doctors, (*compare* JX ¶ 8, *and* JX 168 ¶ 13, *with* Doc. 191 at 14–16, 22–23), this assertion is not supported and unpersuasive. In addition,

[48] While Defendant argues that this testimony is hearsay, (Doc. 201 at 14), Defendant did not make this objection prior to or at trial. Even if the objection would have been made, it would have been overruled for the same reasons as her other similar objections. *See supra* note 30.

Doe 6's limited privileges, like Doe 2's, do not meet the requirements of Act 620, read and construed as enacted. (*See supra* Part VIII.)

343. Prior to September 1, 2014, Doe 6 applied for admitting privileges at East Jefferson Hospital in New Orleans, which is within 30 miles of Women's Clinic. (JX 109 ¶¶ 31–33; JX 168 ¶ 15.) On September 17, 2014, East Jefferson requested additional information, which he then provided. (Doc. 51 at 2.) Since that time, no action has been taken. (*Id.*; *see also*, *e.g.*, JX 168 ¶ 15.) That application, now pending for over a year, is considered by the Court to have been de facto denied.

344. Doe 6 testified that he did not apply to other hospitals within 30 miles of Women's Clinic because, due to the nature of his practice as an abortion provider, he did not admit a sufficient number of patients to receive active admitting privileges. (JX 168 ¶ 11.)

[92] **G. Post-Hearing Updates**

345. On September 17, 2015, the Court requested that Plaintiffs update the Court on or before September 24, 2015, on the status of the admitting privileges of the doctors and, if there were any changes, to provide the details of same. (Doc. 206.)

346. By letter of September 25, 2015, the Plaintiffs informed the Court and Defendants that, after making inquiries, they were unaware of any material

changes in the status of the applications of Does 1–6. (Doc. 209.)

347. At a telephone status conference of September 28, 2015, this letter was received into evidence without objection as JX 193. (Doc. 210.) Since the issuance of the preliminary injunction on January 26, 2016, the Plaintiffs advised the Court that, after making inquiries, they are unaware of any material changes in the status of the applications of Does 1, 2, 4, 5 and 6, beyond the fact the Doe 4 is no longer pursuing privileges due to the February 2016 closure of Causeway clinic. (Doc. 249; Doc. 255 ¶¶ 2—3.) Additionally, Plaintiffs informed the Court that on March 30, 2017, Bossier ceased business and returned its license to DHH, but that Doe 2 is still performing abortions at Hope when Does 1 and 3 are unavailable to provide abortion care. (Docs. 270; 272 ¶¶ 3—4.)

IX. Effects of Act 620

A. The Effect of Act 620 on Does 1-6

348. The number and location of doctors and clinics providing abortions varies widely from state to state. The effect of an admitting privileges requirement on those providers and the concomitant effect on women's right to an abortion has also varied state to state.

349. Before the passage of Act 620, doctors performing abortions in Louisiana were not required to and, for their practices, did not need to have admitting

privileges at any hospital, let [93] alone a nearby hospital, in order to safely provide services for their patients. (Docs. 190 at 25, 36–37, 39, 127, 197–98; 191 at 46; 195 at 32; JX 135 at 2804; JX 110 ¶ 7; JX 168 ¶ 8.)

350. As summarized above, at the time Act 620 was passed, only one of the six doctors performing abortions, Doe 3, had admitting privileges at a hospital and 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.

351. Since the passage of Act 620, all five remaining doctors have attempted in good faith to comply with Act 620. All five have attempted to get admitting privileges at a hospital within 30 miles of where they perform abortions. All five have made formal applications to at least one nearby hospital and three of the five doctors have filed applications at multiple hospitals within thirty miles.

352. Two of the doctors, Does 2 and 5, performed abortions in two separate cities and thus, each had to apply at hospitals in two different locales.

353. Based on a careful review of the evidence, the Court finds that, notwithstanding the good faith efforts of Does 1, 2, 4, 5 and 6 to comply with the Act by getting active admitting privileges at a hospital within 30 miles of where they perform abortions, they have had very limited success for reasons related to Act 620 and not related to their competence.

354. The five doctors have filed thirteen separate formal applications at nearby hospitals. In only one of those cases – Doe 5 at Hospital C[49] – were active admitting privileges granted. In another case, that of Doe 2 at Tulane, he was given admitting privileges that do not comport with the plain language of Act 620.

[94] 355. Of the thirteen formal applications filed, only one has been frankly denied, the application of Doe 1 at Minden.

356. The remaining ten applications have never been finally acted upon because the doctor applying, given the nature of his practice as an abortion provider, either cannot provide the information required or the information has been provided and the application remains in limbo for undisclosed reasons. In almost every instance, more than a year has passed since the original applications were filed.

357. Defendant argues that where these applications are "pending," the applications have not been denied and therefore Plaintiffs have failed to prove that Act 620 has caused the failure of these doctors to get admitting privileges.

358. The Court disagrees. Because Louisiana has no statutorily prescribed time limit within which

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[49] It is noteworthy that Hospital C, a hospital in a major metropolitan area and not a party to this action, is so concerned about the ramifications of having its identity publically revealed, that it requested that it be named only through a pseudonym and, with the consent of all the Parties, this was allowed. *See supra* Part V.E.

a hospital must act on a physician's application, *see supra* Part V.D, a hospital can effectively deny the application by simply not acting upon it. Given the length of time involved in these applications, the Court finds that this is precisely what has occurred here.

359. Doe 3 has been threatened as a result of his work at Hope Clinic. (*See*, *e.g.*, JX 113 ¶ 3.) Last year, anti-abortion activists from outside Louisiana left fliers on neighbors' mailboxes calling him an abortionist and saying they wanted to convert him to Jesus. (Doc. 190 at 108–09; *see also* JX 113 ¶ 3.)

360. These individuals also approached Doe 3's regular medical practice patients as they tried to enter his office, requiring the building security officers to escort the activists off the premises. (Doc. 190 at 109; *see also* JX 113 ¶ 3.) These individuals told Doe 3's patients that he killed babies and that they should not see him. (Doc. 190 at 109.)

[95] 361. Doe 3, the only abortion doctor who had privileges at the time Act 620 was passed, (*See*, *e.g.*, JX 116 ¶ 18), fears that, if the other Louisiana abortion providers are not able to obtain admitting privileges, he will become an even greater target for anti-abortion violence. (*See*, *e.g.*, JX 113 ¶¶ 3–7.) He specifically testified that "all [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. (Doc. 190 at 174–75.)

362. Doe 3 is also concerned that such individuals could "cause a lot of other . . . problems that would affect [his] ability to perform the rest of [his] practice." (*Id.* at 174–75; *cf.* JX 113 ¶ 8.)

363. Doe 3 has difficulty arranging coverage for his OB/GYN practice because other OB/GYN doctors in the Shreveport area refuse to cover his practice as a result of his work at Hope Clinic performing abortions. (Doc. 190 at 111–13.)

364. Dr. Doe 3 testified that, as a result of his fears, and the demands of his private OB/GYN practice, if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions. (*Id.* at 174–76; *see also* JX 116 ¶ 19.) The Court finds his testimony credible and supported by the weight of other evidence in the record.[50]

365. To summarize,

- If Act 620 takes effect, Doe 1 will no longer be allowed to provide abortions in Louisiana because he does not have admitting privileges pursuant to the Act within 30 miles of Hope.

- If Act 620 takes effect, Doe 2 will no longer be allowed to provide abortions in Louisiana, because he does not have active admitting privileges pursuant to the Act within 30 miles of Bossier [96] or Hope. The

[50] The issue of whether this fact is legally relevant to the undue burden analysis is discussed in this Ruling's Conclusions of Law. *See infra* Parts XI–XII.

privileges Doe 2 obtained at Tulane in an attempt to be able to provide abortions at Causeway Clinic prior to its closure, were limited such that they did not comply with Act. Causeway, in any event, is now closed.

- If Act 620 takes effect, Doe 3, who does not have admitting privileges pursuant to the Act within 30 miles of Hope, will no longer provide abortions in Louisiana because of a well-founded concern for his personal safety. Since Doe 2 has been unable to get active admitting privileges within 30 miles of Hope or Bossier, Doe 3 would be the sole remaining provider.

- If Act 620 takes effect, Doe 4 would not be able to provide abortions in Louisiana because he could not obtain admitting privileges pursuant to the Act, based on his unsuccessful efforts to do so prior to the closure of Causeway Clinic.

- If Act 620 takes effect, Doe 5 will be able to provide abortions at Women's Clinic, in New Orleans, where he has admitting privileges pursuant to the Act but Doe 5 will be the only physician available to provide abortion care in southern Louisiana, and in all likelihood, the only physician available to provide abortion care in the entire state.

- However, Doe 5 will not be able to provide abortions at Delta in Baton Rouge because he does not have admitting privileges pursuant to the Act within 30 miles of Delta and, despite good faith efforts to get same, has been unable to do so.

- If Act 620 takes effect, Doe 6 will no longer be allowed to provide abortions in Louisiana because he does not have admitting privileges pursuant to the Act within 30 miles of Women's Clinic.

[97] 366. The Court finds that the inability of Does 1, 4 and 6 to get active admitting privileges at any hospital is directly related to the requirements of Act 620 as they apply in concert with existing Louisiana law and the Louisiana rules and practices for getting admitting privileges.

367. The Court finds that the inability of Doe 2 to get active admitting privileges within 30 miles of Bossier and only limited privileges (not "active admitting privileges") within 30 miles of Causeway as well as Doe 5's inability to get active admitting privileges within 30 miles of the Delta are also directly attributable to the requirements of Act 620 as they apply in concert with the rules and practices for getting admitting privileges in Louisiana.

B. The Effect of Act 620 on the Clinics and Women of Louisiana

368. If Act 620 were to be enforced, three of the five doctors currently providing abortions in Louisiana – Does 1, 2, and 6 – would not meet the admitting privileges requirement. If Doe 3 quits the abortion practice, as he has testified he will, Louisiana would be left with one provider and one clinic. As is analyzed in more detail below, this would result in a substantial number of Louisiana women being denied access to

abortion in this state. A single remaining physician providing abortion services in Louisiana cannot possibly meet the level of services needed in the state. The Court finds that this one physician will not be able to perform 10,000 procedures per year. (Doc. 168-6 at 8; DX 148 ¶ 11.)

369. If Act 620 were to be enforced, two of the three remaining clinics – Hope and Delta – would have no abortion provider, with the one remaining clinic (Women's) without one of the two doctors that normally serves its patients.

370. Women's Clinic would have only Doe 5 to handle not only all patients at that facility but the patients at the other four. According to Cochran, the Administrator at Women's Health, Doe [98] 6 provided 60% of the abortion services at this center. As she testified, "[e]ven if Dr. Doe 5 were to commit all of his time to serving patients at Women's Clinic, I do not see how we could serve all of the patients who [would] be coming to our doors once Delta Clinic closes . . . ." (JX 109 ¶ 37.)

371. Furthermore, since Women's Health would be the only clinic to serve all the women of Louisiana, it clearly could not perform that task as a logistical matter. Doe 5 performed a total approximately 2,950 abortions in the year 2013 at Delta and Women's. (JX 110 ¶ 7.) Given the 9,976 abortions performed in Louisiana in that same year,[51] and putting aside the

[51] This data is taken from the affidavit of Defendant's expert, Solanky, who, in turn, took it from DHH's website. (DX 148 at 5.)

issue of the distance which would need to be traveled by women in north Louisiana,[52] approximately 70% of the women in Louisiana seeking an abortion[53] would be unable to get an abortion in Louisiana.

372. Even if one were to conclude that Doe 3 will not quit or that his quitting is legally irrelevant, Act 620 will nonetheless result in a substantial number of Louisiana women being unable to obtain an abortion in this state. Just the loss of Doe 1 at Hope would be, according to Pittman, Hope's administrator, "devastating" to its operations and viability. (Doc. 190 at 29:15-21.)

[99] 373. Doe 3 sees about 20 to 30 abortion patients per week, or roughly 1,000 to 1,500 per year. (*Id.* at 118:1-4.) This would leave roughly 5,500 Louisiana

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[52] The Court in WWH noted that "increases [in distance travelled] are but one additional burden [ ] which [ ] [should be] taken together with others that the closings brought about, and [ ] viewed in light of the virtual absence of any health benefit..." *WWH*, 136 S. Ct. at 2313.

[53] The Court in *WWH* rejected Texas' position that the proper denominator in measuring whether a "large fraction" of women are unduly burdened should be Texan women of reproductive age. 136 S. Ct. at 2320. "[ ] *Casey* used the language 'large fraction' to refer to 'a large fraction of cases in which [the provision at issue is relevant,' a class narrower than 'all women," "pregnant women.' Or even 'the class of women seeking abortions identified by the State.' 505 U.S. at 894-895, 112 S. Ct. 2791 (opinion of the Court) (emphasis added) Here, as in *Casey*, the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.' *Id.*, at 895, 112 S. Ct. 2791." *WWH*, 136 S. Ct. at 2320.

women seeking an abortion (or 55%) without the ability to get one.

374. Even if one additionally assumes that Defendant's interpretation of Doe 2's privileges at Tulane is correct, so that he meets the requirements of Act 620 at Tulane, Causeway closed in January 2016. The Bossier clinic is now closed, but even if it reopened, Doe 2 would not be permitted to perform abortions there were Act 620 to go into full effect.

375. Hope and Women's, the two clinics that would remain, assuming Doe 3 did not quit or that his quitting was (incorrectly, in this Court's view) determined to be insufficiently related to Act 620, would each be without one of the two providers who normally perform abortions, an insufficient number to service the patients in the region, let alone the number of patients who might come from other parts of the state because of insufficient capacity.

376. Analyzed regionally, if Act 620 were to be enforced, the Baton Rouge and Shreveport areas would have no facility, and the New Orleans area would have only one provider. If, as Defendant argues, Doe 3's quitting is legally irrelevant, Baton Rouge and Bossier City would be left with no facility, Shreveport with one (Hope) and New Orleans with one (Woman's [sic]). But both remaining facilities would have only half the previous number of providers. Doe 3 and Doe 5 cannot possibly meet the demand of 10,000 abortion patients in Louisiana each year.

377. Although the court did not receive additional evidence beyond the stipulation of the parties regarding the closure of Causeway Clinic, and therefore draws no inferences regarding the cause of the closure, the fact that women seeking abortions now have one fewer clinic available, [100] does not change, and, if anything, further supports the Court's findings regarding the impact of Act 620 on access.

378. Similarly, the Court did not receive evidence regarding the reason for Bossier's closure and draws no inference as to the reason for it. But, regardless of the reason, its closure reinforces the Court's findings regarding access.

379. Common sense dictates that the result of two fewer clinics will be greater demand on the remaining clinics, thus amplifying the impact of any change that will result in additional closures or fewer physicians providing abortions. It is plain that Act 620 would result in the closure of clinics, fewer physicians, longer waiting times for appointments, increased crowding and increased associated health risks.

380. Abortion clinics in Louisiana routinely make efforts to recruit doctors to work at the clinics, such as placing advertisements throughout the state and working with reproductive health specialists to identify potential candidates. (Doc. 190 at 22, 24–25, 33, 87; Doc. 168-8 at 7–8.)

381. The anticipated admitting privileges requirement of Act 620 has made it difficult to recruit

new doctors. (Doc. 190 at 24.) In Pittman's words, "It definitely has." (*Id.*)

382. For example, Hope recently identified an interested doctor, but this potential physician ultimately proved to be an unviable candidate as a result of Act 620's admitting privileges requirement. (*Id.* at 24–25.)

383. In addition, doctors who appear to be good candidates consistently express reluctance to be hired in Louisiana because of the numerous restrictions placed on abortion providers by Louisiana's existing laws and regulations. (*See id.* at 22–25.) The hostile environment against abortion providers in Louisiana and nationally is another factor making recruiting difficult. (Doc. [101] 190 at 22:17-25:2; JX 110 ¶¶ 16, 23 n.1; JX 109 ¶ 14.) This includes harassment and violence towards abortion providers, including the murders of eight abortion providers across the country. (Doc. 190 at 22:20-23:12, 23:21-24:1, 87:9-11.) As one of the physicians noted, in light of "the hostile environment in Louisiana towards abortion providers and the extreme harassment and intimidation by anti-abortion activists, most doctors are simply too afraid." (JX 110 ¶ 16.)

384. For the same reasons that Does 1, 2, 4, 5, and 6 have had difficulties getting active admitting privileges, reasons unrelated to their competence, the Court finds that it is unlikely that the effected [sic] clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges. A significant contributing factor to that inability

is Act 620 and the difficulties it creates for a doctor with an abortion practice gaining active admitting privileges in the context of Louisiana's admitting privileges rules and practices.

385. The Court finds that the enforcement of Act 620 and the concomitant effect on restricted access to abortion doctors and clinics would result in delays in care, causing a higher risk of complications, as well as a likely increase in self-performed, unlicensed and unsafe abortions. (*See*, *e.g.*, *id.* at 222–24; Doc. 191 at 157–62.)

C. The Real-World Effect of Act 620 on Louisiana Women

386. All women seeking an abortion in Louisiana would face greater obstacles than they do at present were Act 620 to be fully implemented, due to the dramatic reduction in the number of providers and the overall capacity for services, especially given the context in which this Act will operate. In addition, the clinic closures that will result from the Act's enforcement will have additional, acute effects for several significant subgroups of women of reproductive age in Louisiana.

[102] 387. There would be no physician in Louisiana providing abortions between 17 weeks and 21 weeks, six days gestation. Women seeking abortion at this stage of their pregnancies would be denied all access to abortion in Louisiana and will be unable to exercise their constitutional right. *See supra*, Part V.B.

388. The heaviest burdens of Act 620 would fall disproportionately upon poor women. To illuminate these burdens, the Court credits Dr. Sheila Katz, an Associate Professor of Sociology at the University of Houston, as an expert in the sociology of gender and the sociology of poverty. (Doc. 191 at 110:11-114:12, 123:23-126:4.) Dr. Katz's academic scholarship is focused on qualitative research on low-income women's lived experiences with poverty. (*Id.* at 110:25-115:21.)

389. Louisiana is one of the poorest states in the country, with the nation's third-highest levels of overall and child poverty. Twenty-six parishes are classified by the U.S. Department of Agriculture as persistently poor. (*Id.* at 128:5-8, 130:14-131:3, 131:25-132:4, 133:8-136:3; JX 124 ¶¶ 7, 9, 10; PX 166; PX 167.) Approximately 230,000 Louisiana women of childbearing age live below the federal poverty line. (Doc. 191 at 135:15-17.)

390. Women who seek abortion in Louisiana come from all socioeconomic and ethnic backgrounds (Doc. 190 at 18:17-23; Doc. 191 at 19:12-20:4) but are disproportionately poor. (Doc. 191 at 191:23-192:9; JX 124 ¶¶ 8, 13, 14.) Approximately 42% of women having abortions in the U.S. in 2008 subsisted at or below the federal poverty line, and another 27% had incomes at or below 200% of the poverty line. Given the high rate of poverty, in Louisiana these figures are likely to be much higher. Few women seeking an abortion in Louisiana have medical insurance [103] that covers the procedure. (Doc. 190 at 20:11-21:5.) In some instances, poor women must choose between paying

for an abortion and paying for other basic necessities, such as rent. (*Id.* at 18:17-19:14, 34:6-23, 89:9-14; Doc. 191 at 135:5-14, 158:10-23; JX 116 ¶ 14.) Nearly 75% of women who obtain abortions in Louisiana already have one or more children, which is higher than the national average. (Docs. 190 at 94:7-12; 191 at 152:20-153:2; JX 192 at 3.)

391. The Court also finds that, with just one or two providers remaining, many more women will be forced to travel significant distances to reach a clinic, which also imposes a substantial burden.

392. Many Louisiana women have difficulty affording or arranging for transportation and childcare on the days of their clinic visits, in addition to the challenge of affording the abortion itself. (Doc. 190 at 18:17-19:14; Doc. 191 at 142:25-143:22, 145:19-146:1.) Increased travel distance to clinics exacerbates the difficulty of securing transportation. (Doc. 191 at 20:17-24.) This will be particularly burdensome for women living in northern Louisiana, who will face substantially increased travel distances to reach an abortion provider in New Orleans, either because Doe 3 stops providing and Hope Clinic closes, or the clinic remains open with very limited capacity. For example, many or all women in Shreveport or Bossier City who once could access a clinic in their own area will now have to travel approximately 320 miles to New Orleans.

393. Due to the 24-hour notification and waiting period, patients must make two trips to the clinic: the

first to receive the ultrasound and state-mandated counseling and the second to obtain an abortion. (JX 109 ¶ 19.) Women who must travel increased distances to access abortion will in many cases have to take at least two days off from work, which has financial costs if the time off is [104] unpaid, as is often the case in low-wage jobs. (Doc. 191 at 149:18-50:3; JX 124 ¶ 30.) Many women are even at risk of losing their jobs for taking time off. (Doc. 191 at 150:4-17; JX 124 ¶ 31.)

394. Intercity travel for low-income women presents a number of significant hurdles, including the logistics and cost of transportation, the costs associated with time off from work, and childcare costs. (JX 124 ¶¶ 16, 17.) Low-income women are likely to live in households that have no vehicles. (Doc. 191 at 142:15-24; 146:2-10.) Even under current law, patients frequently call to reschedule appointments due to transportation and childcare issues, thus delaying their access to abortion. (Doc. 190 at 17:20-20:8.)

395. Women who cannot afford to pay the costs associated with travel, childcare, and time off from work may have to make sacrifices in other areas like food or rent expenses, rely on predatory lenders, or borrow money from family members or abusive partners or ex-partners, sacrificing their financial and personal security. (Doc. 191 at 158:10-159:23; JX 124 ¶¶ 37-38.) Travel to a different city to seek a medical procedure also imposes significant socio-psychological hurdles on low income women. (Doc. 191 at 160:16-161:3; JX 124 ¶¶ 16, 17, 35.)

396. Based on all of the evidence, the Court makes the common-sense inference that those women who can access an abortion clinic will face lengthy delays, pushing them to later gestational ages with associated increased risks. Those who would be candidates for medication abortion would have difficulty obtaining an appointment before that method becomes unavailable because of later gestational age; many women toward the end of the first trimester would have difficulty obtaining an appointment before they reach 16 weeks. Women past 16 weeks LMP will be left without any provider at all. As the Supreme Court has recognized, patients seeking services at [105] overtaxed facilities are "less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered." *WWH*, 136 S. Ct. at 2318. Facilities "attempting to accommodate sudden, vastly increased demand . . . may find that quality of care declines." *Id.* (citation omitted). Women have the right not to be forced to "travel long distances to get abortions in crammed-to-capacity superfacilities," "in the face of no threat to [their] health." *Id.*

397. In short, Act 620 would do little or nothing for women's health, but rather would create impediments to abortion, with especially high barriers set before poor, rural, and disadvantaged women. These burdens would have the effect on increasing health risks among the State's poorer women. The burdens imposed by Act 620 on abortion outweigh the benefits,

particularly given this Court's finding that the Act would do little, if anything, to promote women's health.

CONCLUSIONS OF LAW

X. Summary of Legal Arguments

398. Both parties recognize the change to Fifth Circuit law brought by *WWH*, requiring a weighing of "the asserted benefits and burdens of the regulations in question." (Doc. 256 at 45; Doc. 257-1 at 28.) Plaintiffs emphasize the benefits and minimize the burdens. Defendant does the opposite.

399. Specifically, Plaintiffs challenge Act 620 as unconstitutional as a violation of *Casey* and *WWH*. They argue that Act 620 imposes substantial obstacles to Louisiana women in accessing abortion, without offering any countervailing health benefits. Act 620 places an undue burden on a woman's right to choose abortion, they assert, because the admitting privileges requirement fails to confer any health benefit, but has dramatic implications for the availability of abortion in the state. [106] Given this imbalance, Plaintiffs urge this Court to declare Act 620 unconstitutional in all of its applications and enter a permanent injunction against its enforcement.

400. Defendant, on the other hand, argues that Plaintiffs have failed to establish that Act 620 imposes an undue burden on women seeking abortion in Louisiana and argues that the benefits of the Act are significant. (Doc. 257-1 at 28-38.) Defendants urge the

Court to find that Plaintiffs have failed to show an undue burden and declare Act 620 constitutional. (*Id.* at 36.) The Court now considers the question in the light of the test as clarified in *WWH*.

XI. Test for Determining the Constitutionality of Act 620

401. "[F]or more than 40 years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 453 (5th Cir. 2014) (citing *Roe*, 410 U.S. at 153). A state may enact regulations "to foster the health of a woman seeking abortion" or "to further the State's interest in fetal life," provided that these regulations do not impose an "undue burden" on the woman's decision. *Casey*, 505 U.S. at 877-78 (plurality opinion). "A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

402. "[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.*; *WWH*, 136 S. Ct. at 2309. "Moreover, '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle in the path of a woman seeking abortion impose an undue

burden on the right.'" *WWH*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878).

[107] 403. "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *WWH*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887). This balancing of benefits and burdens is central to addressing the question of whether "any burden imposed on abortion access is 'undue.'" *Id.* at 2310.

404. When evaluating the constitutionality of laws regulating abortion and conducting this balancing, courts may "place[] considerable weight upon evidence and argument presented in judicial proceedings," rather than leaving questions of medical uncertainty to the legislature to resolve. *Id.* at 2310. The courts have an "independent constitutional duty to review factual findings where constitutional rights are at stake." *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)) (affirming that the district court correctly placed "significant weight" on the evidence in the record, and properly "weighed the asserted benefits against the burdens," in striking down Texas's admitting privileges requirement).

405. In assessing the burdens imposed by a restriction, courts must consider not only the impact of the law with respect to closure of clinics and reduction in the number of available providers in the state, but also the "additional burden[s]" imposed on women by reducing abortion access, including longer wait times,

increased crowding, and longer travel distances. *Id.* at 2313. Additionally, "[c]ourts are free to base their findings on commonsense inferences drawn from the evidence." *Id.* at 2317 (accepting the district court's "commonsense inference" that closing four-fifths of the abortion clinics in a state would render the remaining fifth unable to meet demand).

406. In *WWH*, for example, the Supreme Court evaluated the constitutionality of Texas's admitting privileges restriction by carefully reviewing the evidence in the record and the District Court's findings on its benefits and burdens. The Court noted that prior to passage of the admitting [108] privileges requirement, abortion clinics in Texas were already required "to meet a host of health and safety requirements," *id.* at 2314, and concluded that "[w]e have found nothing in Texas' record evidence that shows that, compared to prior law (which, required a 'working arrangement' with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health." *Id.* at 2311.

407. Turning to the burdens, the Supreme Court clarified that no single factor is determinative as to whether a restriction imposes an undue burden, but rather the burdens' impact must be evaluated cumulatively, and are undue if unjustified by the law's purported benefits; it explained:

> In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics,

> or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." We recognize that increased driving distances do not always constitute an "undue burden." But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion.

Id. at 2313 (citations omitted).

408. The Court concluded that Texas's admitting privileges requirement (alone and in combination with another challenged law requiring abortion clinics to comply with regulations applicable to ambulatory surgical facilities) "vastly increase[d] the obstacles confronting women seeking abortions in Texas" in a variety of ways. *Id.* at 2319. The requirement decreased the number and geographic locations of legal abortion providers, thereby increasing the distances that [109] women would need to travel to access care, delaying that care, forcing women to seek care in facilities that are overtaxed and pushed beyond their

capacity, and preventing some women from accessing abortion care at all. *See id.* at 2313, 2315-18. Because these burdens vastly outweighed the "virtual absence" of any benefits, the Court held both requirements unconstitutional under *Casey*. *See id.* at 2313.

XII. Analysis

409. In light of WWH, the Court has made additional findings of fact. Under the Supreme Court's current guidance, this Court has found that Act 620 confers only minimal, at best, health benefits for women seeking abortions, and that enforcement of the Act will increase the risk of harm to women's health. *See supra* at Parts VII.C, X.

410. Having now weighed the evidence of the substantial burdens imposed by Act 620, and their cumulative impact on abortion services in the state, as well as the evidence regarding the Act's lack of any significant health benefits, the Court again finds that Act 620 places an unconstitutional undue burden on women seeking abortion in Louisiana.

A. Act 620 Does Not Protect Women's Health

411. Based on the evidence admitted to the record, the facts found herein, and all reasonable inferences drawn from those facts, the Court concludes that the admitting privileges requirement does provides [sic] no significant health benefits to women. As in *WWH*, Defendant has presented no credible evidence showing

that, compared to prior law, Act 620 advances the state's interest in protecting women's health and safety. WWH, 136 S. Ct. at 2311.

[110] 412. As explained *supra*, Part V.B, abortion in the state of Louisiana is safe, with extremely low rates of complication.[54]

413. As the Supreme Court explained with regard to the nearly-identical Texas statute, there "was no significant health-related problem that the new law helped to cure." *WWH*, 136 S. Ct. at 2311. The record does not contain any evidence that complications from abortion were being treated improperly, nor any evidence that any negative outcomes could have been avoided if the abortion provider had admitting privileges at a local hospital.

414. In short, this Court concludes that Act 620 will not further the State's asserted interest in the health of women seeking abortions as admitting privileges do not improve health outcomes in the event of complications. This conclusion is consistent with the Supreme Court's conclusion in *WWH* and the conclusions of other federal district courts that have considered the health benefits of similar admitting privileges

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[54] There is broad consensus for this proposition among federal courts analyzing admitting privileges restrictions. *See WWH*, 136 S. Ct. at 2311-12; *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014).

laws. *WWH*, 136 S. Ct. at 2311-12 (citing *Planned Parenthood of Wis., Inc. v. Van Hollen* ("*Van Hollen*"), 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel* ("*Schimel*"), 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016); *Planned Parenthood Se., Inc. v. Strange* ("*Strange*"), 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014).).

415. Admitting privileges also do not serve "any relevant credentialing function," *WWH*, 136 S. Ct. at 2313, *see supra* Part V.D. The Louisiana State Board of Medical Examiners ensures physician competency through licensing and discipline. Hospitals grant privileges to physicians to promote the smooth functioning of the hospital, or to serve other goals or priorities of the particular [111] hospital. As the record in this case demonstrates, physicians are sometimes denied privileges, explicitly or de facto, for reasons unrelated to competency.

416. In summary, the record in this case demonstrates that Act 620 does not advance Louisiana's legitimate interest in protecting the health of women seeking abortions. Instead, Act 620 would increase the risk of harm to women's health by dramatically reducing the availability of safe abortion in Louisiana. *See supra* Parts [sic] IX. Under *WWH* and in light of the medical evidence in the record in this case, the Court holds that Act 620 is not medically necessary and fails to actually further women's health and safety. While the Court is able to reach this conclusion based on the medical evidence alone, the findings of fact related to the

legislative history of the Act, and the circumstances of its passage, *see supra* Parts VI.D, VII, provide additional support.

B. The Burdens Imposed by Act 620

417. Turning to the burdens imposed by Act 620, the Court finds that the Act places substantial obstacles in the path of a woman's choice to seek an abortion. Act 620 will result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two, and leaving only one, or at most two, physicians providing abortions in the entire state. *See supra* Part IX.

418. Currently, about 10,000 women per year seek abortions in the state. Plaintiffs have shown that, should the Act take effect, there will be just one physician left, Dr. John Doe 5, providing abortions in the state. Working four to five days per week, he is able to provide fewer than 3,000 abortions per year. Even working an implausible seven-day week, it would be impossible for him to expand his practice to meet even half the state's need for abortion services.

[112] 419. Even if Doe 3 continued to provide at Hope in Shreveport—which is not consistent with this Court's factual findings that Doe 3 is unlikely to continue to provide, and in any event the loss of Doe 1 would likely not allow his clinic to remain open—the demand for services would vastly exceed the supply.

420. Viewing all of the evidence together, the Court concludes that the remaining abortion providers—whether one facility or two—would not be able to meet the demand for abortion services in Louisiana. If allowed to take effect, Act 620 would therefore cripple women's ability to have an abortion in Louisiana.

421. In addition to these practical concerns and difficulties of increased risk of complications caused by delays in care, the reduction in availability of abortion would lead to an increase in self-performed, unlicensed and unsafe abortions. (Doc. 190 at 223–24.)

422. For these reasons, the Court concludes that Act 620 would have a negative impact on women's health.

423. Act 620 would also substantially increase the burden on women who are able to receive licensed, safe abortions. As discussed *supra* in Part IX, many women will have to travel much longer distances to reach the few providers who will continue to provide abortions, and that travel will impose severe burdens, which will fall most heavily on low-income women.

424. The result of these burdens on women and providers, taken together and in context, is that many women seeking a safe, legal abortion in Louisiana will be unable to obtain one. Those who can will face substantial obstacles in exercising their constitutional right to choose abortion due to the dramatic reduction in abortion services.

[113] **C. The Burdens Imposed by Act 620 Vastly Outweigh its Benefits**

425. *WWH* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *WWH*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887-898). The record is devoid of any credible evidence that the Act will have a measurable benefit to women's health, but it is clear that the Act will drastically burden women's right to choose abortion. The Supreme Court found that "when taken together . . . , and when viewed in light of the virtual absence of any health benefit," the burden created by the nearly-identical Texas admitting privileges requirement was undue. *WWH*, 136 S. Ct. at 2313. As in *WWH*, Act 620 "does not benefit patients and is not necessary." *Id.* at 2315. Even if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden.

426. This result is consistent with the decision in *WWH* as well as other decisions addressing similar or identical admitting privileges requirements.[55] Indeed, there is no legally significant distinction between this case and *WWH*: Act 620 was modeled after the Texas admitting privileges requirement, and it functions in the same manner, imposing significant obstacles to abortion access with no countervailing benefits. The

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[55] *WWH*, 136 S. Ct. at 2313; *Van Hollen*, 94 F.Supp.3d 949; *Strange*, 33 F.Supp.3d 1330.

Court is bound by the Supreme Court's clear guidance to reach the same result and strike down the Act.

XIII. Conclusion

427. "The party seeking a permanent injunction must . . . establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not [114] disserve the public interest." *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006) (citations omitted).

428. For the reasons outlined above, the Court finds that Act 620 is unconstitutional on its face under *Casey* and *WWH*. The Act would create substantial obstacles for women seeking abortion in Louisiana without providing any demonstrated benefit to women's health or safety. Any marginal health benefits would be dramatically outweighed by the obstacles the restriction erects to women's access to their constitutional right to abortion. The Act therefore cannot withstand the scrutiny mandated by *WWH*. Plaintiffs have succeeded on the merits of their constitutional claim that the Act violates the Fourteenth Amendment.

429. Given that the Act violates women's constitutional right to abortion, Plaintiffs have established that irreparable injury will result in the absence of an injunction barring its enforcement. *See Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)

(finding that the conclusion that the right to abortion is "'either threatened or in fact being impaired' . . . mandates a finding of irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Further, some women's total inability to access abortion care, and unreasonable and dangerous delays experienced by others in scheduling an abortion procedure, will constitute irreparable harm for Louisiana women seeking abortions. *See Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013) (finding that closure of the State's only clinic constitutes irreparable harm), *aff'd*, 760 F.3d 448 (5th Cir. 2014) *cert. denied*, 136 S. Ct. 2536 (2016). Many women will also face irreparable harms from the burdens associated with increased travel distances and costs in reaching an abortion clinic. *See WWH*, 136 S. Ct. at 2313. These harms outweigh any damage to the State by the entry of an injunction.

[115] 430. Given the substantial injury threatened by enforcement of the Act, a permanent injunction will serve the public interest. *See Currier*, 940 F. Supp. 2d at 424 ("[T]he grant of an injunction will not disserve the public interest, an element that is generally met when an injunction is designed to avoid constitutional deprivations."); *see also Nobby Lobby, Inc. v. Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) ("the public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve") (citation omitted). The Court will therefore enter an order permanently enjoining the enforcement of the Act.

431. An order permanently enjoining enforcement of Act 620 in all of its applications is the appropriate remedy. As with the Texas abortion restrictions enjoined in all their applications by the decision in *WWH*, Act 620 would close most of the abortion facilities in Louisiana and "place added stress on those facilities able to remain open." *WWH*, 136 S. Ct. at 2319. Act 620 "vastly increase[s] the obstacles confronting women seeking abortions" in Louisiana "without providing any benefit to women's health capable of withstanding any meaningful scrutiny." *Id.* Therefore, Act 620 is unconstitutional on its face. Pursuant to this Court's authority under 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure, this Court will enter orders declaring Act 620 unconstitutional and permanently enjoining the Act in all of its applications.

In light of the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED THAT:

1. The active admitting privileges requirement of La. R.S. § 40:1299.35.2 (Act 620) is DECLARED unconstitutional as a violation of the Fourteenth Amendment to the United States Constitution;

2. A PERMANENT INJUNCTION is ENTERED barring enforcement of La. R.S. §40:1299.35.2 (Act 620);

[116] 3. Any implementing regulations of Act 620, including La. Admin. Code tit. 48, pt. I, §4423(B)(3)(e) and La. Admin. Code tit. 48, pt. I, 4401 (definition of "active admitting privileges"), are, for the foregoing

reasons, likewise DECLARED UNCONSTITUTIONAL and PERMANENTLY ENJOINED.

4. Judgment shall be entered in favor of the Plaintiffs and against the Defendant by separate document in conformity with Rule 58.

Signed in Baton Rouge, Louisiana, on April 26, 2017.

/s/ John W. deGravelles
JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D

SUPREME COURT OF THE UNITED STATES

JUNE MEDICAL SERVICES, L.L.C., ET AL.
v. REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

ON APPLICATION FOR STAY

No. 18A774 Decided February 7, 2019

The application for a stay presented to JUSTICE ALITO and by him referred to the Court is granted, and the mandate of the United States Court of Appeals for the Fifth Circuit in case No. 17-30397 is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would deny the application.

JUSTICE KAVANAUGH, dissenting from grant of application for stay.

I respectfully dissent from the Court's stay order. In this case, the plaintiffs raised a pre-enforcement

facial challenge to Louisiana's new admitting-privileges requirement for doctors who perform abortions. The Fifth Circuit rejected the plaintiffs' facial challenge based on that court's factual prediction that the new law would not affect the availability of abortions from, as relevant here, the four doctors who currently perform abortions at Louisiana's three abortion clinics. In particular, the Fifth Circuit determined that the four doctors likely could obtain admitting privileges. The plaintiffs seek a stay of the Fifth Circuit's mandate. They argue that the Fifth Circuit's factual prediction is inaccurate because, according to the plaintiffs, three of those four doctors will not be able to obtain admitting privileges. As I explain below, even without a stay, the status quo will be effectively preserved for all parties during the State's 45-day regulatory transition period. I would deny the stay without prejudice to the plaintiffs' ability to bring a later as-applied complaint and motion for preliminary injunction at the conclusion of the 45-day regulatory transition period if the Fifth Circuit's factual prediction about the doctors' ability to obtain admitting privileges proves to be inaccurate.

Louisiana's new law requires doctors who perform abortions to have admitting privileges at a nearby hospital. The question presented to us at this time is whether the law imposes an undue burden under our decision in *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___ (2016). All parties, including the State of Louisiana, agree that *Whole Woman's Health* is the governing precedent for purposes of this stay

application. I therefore will analyze the stay application under that precedent.

Louisiana has three clinics that currently provide abortions. As relevant here, four doctors perform abortions at those three clinics. One of those four doctors has admitting privileges at a nearby hospital, as required by the new law. The question is whether the other three doctors—Doe 2, Doe 5, and Doe 6—can obtain the necessary admitting privileges. If they can, then the three clinics could continue providing abortions. And if so, then the new law would not impose an undue burden for purposes of *Whole Woman's Health.* By contrast, if the three doctors cannot obtain admitting privileges, then one or two of the three clinics would not be able to continue providing abortions. If so, then even the State acknowledges that the new law might be deemed to impose an undue burden for purposes of *Whole Woman's Health.*

The law has not yet taken effect, so the case comes to us in the context of a pre-enforcement facial challenge. That means that the parties have offered, in essence, competing *predictions* about whether those three doctors can obtain admitting privileges. The District Court concluded that the three doctors likely could not obtain admitting privileges. The District Court therefore enjoined the law. The Court of Appeals for the Fifth Circuit concluded that the three doctors likely could obtain admitting privileges. The Fifth Circuit therefore lifted the injunction.

Before us, the case largely turns on the intensely factual question whether the three doctors—Doe 2, Doe 5, and Doe 6—can obtain admitting privileges. If we denied the stay, that question could be readily and quickly answered without disturbing the status quo or causing harm to the parties or the affected women, and without this Court's further involvement at this time. That is because the State's regulation provides that there will be a 45-day regulatory transition period before the new law is applied. The State represents, moreover, that Louisiana will not "move aggressively to enforce the challenged law" during the transition period, Objection to Emergency Application for Stay 2, and further represents that abortion providers will not "immediately be forced to cease operations," *id.*, at 25. Louisiana's regulation together with its express representations to this Court establish that even without admitting privileges, these three doctors (Doe 2, Doe 5, and Doe 6) could lawfully continue to perform abortions at the clinics during the 45-day transition period. Furthermore, during the 45-day transition period, both the doctors and the relevant hospitals could act expeditiously and in good faith to reach a definitive conclusion about whether those three doctors can obtain admitting privileges.

If the doctors, after good-faith efforts during the 45-day period, cannot obtain admitting privileges, then the Fifth Circuit's factual predictions, which were made in the context of a pre-enforcement facial challenge, could turn out to be inaccurate as applied. And if that turns out to be the case, then even the State

acknowledges that the law as applied might be deemed to impose an undue burden for purposes of *Whole Woman's Health*. In that circumstance, the plaintiffs could file an as-applied complaint or motion for preliminary injunction in the District Court, and the District Court could consider under *Whole Woman's Health* whether to enter a preliminary or permanent injunction.

On the other hand, if the doctors can obtain necessary admitting privileges during the 45-day transition period, then the doctors could continue performing abortions at the three clinics both during and after the 45-day transition period, as envisioned and predicted by the Fifth Circuit. And in that circumstance, the Louisiana law as applied would not impose an undue burden under *Whole Woman's Health*.

In order to resolve the factual uncertainties presented in the stay application about the three doctors' ability to obtain admitting privileges, I would deny the stay without prejudice to the plaintiffs' ability to bring a later as-applied complaint and motion for preliminary injunction at the conclusion of the 45-day regulatory transition period. The Court adopts an approach—granting the stay and presumably then granting certiorari for plenary review next Term of the plaintiffs' pre-enforcement facial challenge—that will take far longer and be no more beneficial than the approach suggested here. I respectfully dissent from the Court's stay order.

APPENDIX E

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

Louisiana Revised Statutes

Title 40	Public Health and Safety
Chapter 5	Health Provisions: Abortion
Section 1061.10	Abortion by physician; determination of viability; ultrasound test required; exceptions; penalties

A. (1) Physician requirements. No person shall perform or induce an abortion unless that person is a physician licensed to practice medicine in the state of Louisiana and is currently board-certified in obstetrics and gynecology or family medicine or enrolled in a residency program for obstetrics and gynecology or family medicine, when that resident performs or induces an abortion under the direct supervision of a physician who is board-certified in obstetrics and gynecology or family medicine. Any outpatient abortion facility that knowingly or negligently employs, contracts with, or provides any valuable consideration for the performance of an abortion in an outpatient abortion facility by any person who does not meet the requirements of this Section is subject to having its license denied, nonrenewed, or revoked by the Louisiana Department of Health in accord with R.S. 40:2175.6. For the purposes of this Subsection, "direct supervision" shall mean that the physician must be present in the hospital, on the campus, or in the outpatient facility, and immediately available to furnish assistance and direction throughout the performance of the procedure. The physician need not be present in the room when the procedure is performed in order to maintain direct supervision.

(2) On the date the abortion is performed or induced, a physician performing or inducing an abortion shall:

(a) Have 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 and that provides obstetrical or gynecological health care services. For purposes of this Section, "active admitting privileges" means that the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient consistent with the requirements of Paragraph (A)(1) of this Subsection.

. . .

Redesignated from R.S. 40:1299.35.2 by H.C.R. No. 84 of the 2015 Regular Session. Acts 2014, No. 620, § 1, eff. Sept. 1, 2014.

APPENDIX G

Louisiana Administrative Code

Title 48	Public Health—General
Part I	General Administration
Subpart 3	Licensing and Certification
Chapter 44	Abortion Facilities
Subchapter B	Administration and Organization
Section 4423	Staffing Requirements, Qualifications, and Responsibilities

. . .

B. Administrator. The outpatient abortion facility shall have an administrator designated by the governing body who is responsible for the day-to-day management, supervision, and operation of the outpatient abortion facility. The administrator shall be a full-time employee, available and on-site, during the designated business hours.

. . .

3. Duties and Responsibilities. The administrator shall be responsible for:

. . .

e. ensuring that a licensed physician, who has admitting privileges at a hospital located not further than 30 miles from the location at which the abortion is performed or induced and provides obstetrical or gynecological health care services, to facilitate emergency care is on the licensed premises when a patient is scheduled to undergo an abortion procedure;

. . .

C. Medical Staff. The outpatient abortion facility shall provide medical and clinical services. The outpatient abortion facility shall employ qualified medical staff to meet the needs of the patients. No person shall perform or induce an abortion unless that person is a physician who meets the following qualifications and requirements.

. . .

2. Physician Requirements. On the date the abortion is performed or induced, the physician performing or inducing the abortion shall:

a. 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 and that provides obstetrical or gynecological health care services; and

. . .

APPENDIX H

Louisiana Administrative Code

Title 48	Public Health—General
Part I	General Administration
Subpart I	Licensing and Certification
Chapter 44	Abortion Facilities
Subchapter A	General Provisions
Section 4401	Definitions

. . .

Active Admitting Privileges—the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient.

1. The hospital shall be located not further than 30 miles from the location at which the abortion is performed or induced, and shall provide obstetrical or gynecological health care services.

2. Violations of active admitting privileges provisions shall be fined not more than $4,000 per violation.

. . .

APPENDIX I

Notice to Licensed Outpatient Abortion Facilities Update: Act 620 of the 2014 Regular Session

NOTICE OF PROCEDURE TO VERIFY ADMITTING PRIVILEGES UNDER ACT 620

In anticipation of Act 620 becoming effective, the Louisiana Department of Health, Health Standards Section (hereinafter "Department" or "LDH HSS") issues this notice to licensed outpatient abortion facilities as to the process that the Department will utilize to verify that a physician performing or inducing an abortion at a licensed outpatient abortion facility has admitting privileges that meet the requirements of Act 620:

1. Upon the effective implementation date of Act 620, the Department will issue a separate written notice to each licensed outpatient abortion facility, with instructions and/or a form for providing information to the Department. The licensed outpatient abortion facility will have forty-five (45) days to submit the completed form, information, and/or documentation to the Department, demonstrating that the physicians performing abortion procedures at the licensed outpatient abortion facility have active admitting privileges at a local hospital pursuant to the requirements of Act 620.

2. Upon receipt of the form, information and/or documentation from the licensed outpatient abortion facility, the Department will verify the admitting privileges of the physicians.

3. The Department anticipates that verifying admitting privileges may entail individualized determinations as to whether a given physician's privileges meet the requirements of Act 620. The Department will resolve any such questions on a case-by-case basis pursuant to applicable law. The Department will work with each licensed outpatient abortion facility, physician, or hospital, as necessary, to resolve questions as to whether particular admitting privileges satisfy the requirements of Act 620.

4. Should the licensed outpatient abortion facility fail to respond within forty-five (45) days to the written notice referenced in Item 1 above, or should the Department be unable to verify the admitting privileges based on the form, information, and/or documentation provided, then the Department will issue a statement of deficiencies to the licensed outpatient abortion facility.

    a. The facility will be required to submit a plan of correction for the deficiencies; this plan of correction is subject to review and approval by the Department.

    b. The Department will then conduct a survey to verify that the deficiencies have been corrected.

    c. The Department may issue appropriate sanctions for deficiencies cited.

d. Appropriate sanctions may include, but are not limited to, civil monetary penalties and license revocation action.

   i Any license revocation action issued by the Department is appealable to the Division of Administrative Law ("DAL").

   ii. An appeal of a license revocation action is a suspensive appeal.

APPENDIX J

No. 16-30116

In the United States Court of Appeals for the Fifth Circuit

JUNE MEDICAL SERVICES LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; BOSSIER CITY MEDICAL SUITE, on behalf of its patients, physicians, and staff; CHOICE, INC., OF TEXAS d/b/a/ CAUSEWAY MEDICAL CLINIC, on behalf of its patients, physicians, and staff; JOHN DOE 1, M.D., and JOHN DOE 2, M.D.,

Plaintiffs—Appellees

v.

DR. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals,

Defendant—Appellant

On Appeal from the U.S. District Court,
Middle District of Louisiana
No. 14-cv-525-JWD

EMERGENCY MOTION OF APPELLANT FOR STAY PENDING APPEAL

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RULE 27.3 EMERGENCY CERTIFICATION

On Wednesday, February 10, 2016, the court below entered judgment facially invalidating and preliminarily enjoining Louisiana's Act 620, which requires outpatient abortion providers to have admitting privileges at local hospitals.[1] Appendix ("App.") A; App. B at 111-12.[2] Within an hour of entry of judgment, Louisiana appealed; asked the lower court for a stay pending appeal on or before Friday, February 12, 2016; and

[1] *See* H.B. 388, § (A)(2)(a), 2014 Leg., Reg. Sess. (La. 2014), codified at 42 LA. REV. STAT. § 40:1299.35.2. On January 26, 2016, the lower court entered findings of fact and conclusions of law that were not, however, accompanied by the separate judgment required by Federal Rule of Civil Procedure 58(a). App. B. Moreover, there was doubt regarding which doctors were covered by the injunction, which the court clarified in its separate judgment of February 10, 2016. App. A

[2] Louisiana has moved to file under seal a separate Sealed Appendix ("Sealed App."), containing documents subject to a protective order below.

asked for a temporary stay pending consideration of its stay motion. Docs. 228, 229, 229-1. During a conference call that afternoon, the court denied a temporary stay. Doc. 231. On February 16, 2016, at 1:13 p.m. central time, the court denied a stay pending appeal, App. K, and Louisiana immediately filed this emergency stay motion. Louisiana respectfully asks the motions panel to act within ten business days, **by 5 p.m. central time on Friday, February 26, 2016**.

The lower court declared Act 620 facially[3] unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and preliminarily enjoined it.[4] The ruling flatly contravenes this Court's decisions in *Abbott I* and *Abbott II*, which facially upheld a Texas privileges requirement identical to Louisiana's.[5] The lower court ruled that Act 620 had the "effect" of impeding abortion for a "large fraction" of Louisiana women, App. B, at ¶374, but it applied a "large fraction"

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[3] As the lower court observed, plaintiffs "emphatically" denied bringing "an 'as-applied' challenge." App. B, at ¶17 & n.14.

[4] The Act had been in effect until then, with a temporary restraining order barring enforcement only against plaintiffs while their privileges applications were pending. *See* App. B, at ¶6 (explaining that, under August 31, 2014 TRO, "the Act would be allowed to take effect," but was unenforceable against plaintiffs "during the application process"); *id.* at ¶10 ("second clarification" of TRO explaining that "the TRO of August 31, 2014 . . . remains in effect" until preliminary injunction hearing).

[5] *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 414-16 (5th Cir. 2013) ("*Abbott I*"); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 593-600 (5th Cir. 2014), *reh'g en banc denied*, 769 F.3d 330 (5th Cir. 2014) ("*Abbott II*").

test of its own invention, one that inflates by orders of magnitude the number of Louisiana women allegedly "denied" abortion access. Furthermore, the court's ruling does not mention the unrebutted evidence of Louisiana's expert statistician, who established that the Act would still leave over 90% of Louisiana women within 150 miles of an abortion provider. Under *Abbott I* and *Abbott II*, that unrebutted evidence establishes the Act's facial constitutionality as a matter of law. Moreover, the court overrode the determination of the Secretary charged with enforcing Act 620 that an additional doctor had obtained qualifying privileges. By doing so, the court both exceeded its jurisdiction and further skewed its inflated "large fraction" analysis.

Louisiana respectfully asks this Court to enter an emergency order staying the district court's ruling pending Louisiana's appeal, as it did in *Abbott I*. The only difference between the cases is that, in *Abbott I*, the district court entered a pre-enforcement injunction just before Texas's law was to take effect, *see Abbott I*, 734 F.3d at 410, whereas here the district court initially allowed Louisiana's law to take effect but has now issued a post-enforcement injunction against it. It is still possible, however, for the Court to restore the *status quo ante* by acting expeditiously and staying the district court's erroneous ruling. As this Court has observed, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* at 419 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)).