No. 18A774

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2,
Applicants,

v.

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

On Application to Stay the Mandate of the United States Court of Appeals for the Fifth Circuit

OBJECTION TO EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Justice Samuel A. Alito, Jr., Circuit Justice for the U.S. Court of Appeals for the Fifth Circuit:

INTRODUCTION

The panel majority undertook a painstaking review of a 17,000-page district court record and concluded that because Plaintiffs did not carry their burden of proof, the lower court erred in enjoining a Louisiana abortion regulation. That decision is fact-bound, well supported by the evidence, and faithful to this Court's abortion cases, including *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*"). As the panel majority observed: "Careful review of the record reveals stark differences between the record before us and that which the Court considered in *WWH*." Op. at 2.[1]

Plaintiffs disagree with the panel's analysis of the factual record and strive to package their disagreement as meriting review. But they do not present a single issue on which certiorari is reasonably probable, let alone one on which there is a fair prospect of reversal.

The panel's opinion hinged on a close review of a massive record, applying clear-error review to district court factfinding. Plaintiffs cannot point to obvious errors, and they give no reason why this Court should redo the panel's work. Many of Plaintiffs' questions for certiorari are themselves mere factual issues rooted in this case's unique record. Insofar as Plaintiffs present any argument that genuinely goes to legal standards in abortion cases generally, Plaintiffs identify no circuit split or

[1] This Opposition will cite to the panel slip opinion ("Op.") attached to Plaintiffs' Application and to the reported version of the district court's opinion.

other conflict in authority. At any rate the centrality of case-specific facts and evidence to the panel's conclusions renders this case a poor vehicle to review those standards.

Further, all of Plaintiffs' claims of irreparable harm rest on the premise that Louisiana will move aggressively to enforce the challenged law, potentially shutting down abortion clinics overnight. But that is not correct. Louisiana envisions a regulatory process that begins, logically, with collecting information from Louisiana's abortion clinics and their doctors. A stay would exacerbate the irreparable injury that Louisiana and its citizens have already suffered as a result of the district court's erroneous actions. It is time to bring that injury to a close.

Plaintiffs' Application to stay the mandate should be denied.

BACKGROUND

1. Louisiana Act 620 requires that physicians performing abortions must "[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." Act 620, § 1(A)(2)(a).[2]

The Louisiana Legislature passed Act 620 after hearings in which experts testified both for and against the law. ROA.11219–301. Legislative committees heard evidence that abortion carries known risks of serious complications that may require intervention in a hospital; privileges vet physician competency; abortion providers would be able to obtain privileges; and the Act would bring abortion practice into

[2] The Act amended La. R.S. § 40:1299.35.2, which has been recodified at § 40:1061.10.

conformity with the privileges requirements for doctors performing other outpatient surgeries. ROA.11221–23, ROA.11225–28, ROA.11256–60, ROA.11262–63, ROA.11266–69.

Plaintiffs — a Louisiana abortion clinic and two of its doctors, proceeding pseudonymously — sued to enjoin Act 620 before it took effect in 2014. Plaintiffs do not include anyone else, including women who might use the clinics' and doctors' services. Plaintiffs claimed that Act 620 was facially invalid because it imposed an "undue burden" on the abortion decision in violation of their patients' substantive due process rights. *E.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007) (explaining that an "undue burden" arises from regulations whose "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'") (quoting *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 879 (1992) (plurality)).

After a six-day bench trial, the district court granted a preliminary injunction based on the undue-burden theory, finding that Act 620 would reduce the number of Louisiana abortion doctors and clinics. ROA.3748–3859. Following additional proceedings and a prior appeal, *see June Med. Servs., LLC* v. *Gee*, 814 F.3d 319 (5th Cir. 2016) (granting an emergency stay), *vacated*, *June Medical Servs., LLC* v. *Gee*, 136 S. Ct. 1354 (2016), the district court entered a permanent injunction. *June Med. Servs. LLC* v. *Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017). The district court relied heavily on this Court's decision in *WWH*, which enjoined a similar admitting

privileges law in Texas — albeit with a different regulatory context and very different facts.

The Fifth Circuit reversed. *June Med. Servs. L.L.C.* v. *Gee*, 905 F.3d 787 (5th Cir. 2018). Plaintiffs petitioned for rehearing en banc, which the Fifth Circuit denied on January 18, 2019. Plaintiffs moved to stay the mandate on January 25, and the Fifth Circuit denied the stay later that day. Plaintiffs filed the instant Application that night.

2. Plaintiffs generally avoid discussing the actual majority opinion, failing even to summarize the majority's reasoning. App. at 12. Plaintiffs instead cite the district court's decision, or the panel and en banc dissents' *characterizations* of the majority opinion. A summary of the majority's reasoning — and the extensive support the majority found in the record — follows.

The majority started from the premise that *WWH* is binding law and must be applied faithfully. Op. at 24 ("We are of course bound by *WWH*'s holdings, announced in a case with a substantially similar statute but greatly dissimilar facts and geography."). The majority carefully examined the legal standards and analytical steps *WWH* applied, even disagreeing in some respects with Louisiana's interpretations of that decision. *Id.* at 20–26, 40–42. But the majority also held that the district court "overlooked that the *facts* in the instant case are remarkably

different from those that occasioned the invalidation of the Texas statute in *WWH*." *Id.* at 2 (emphasis added).[3]

Unlike in *WWH*, here there was evidence that "the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." *Id.* at 29.[4] In Louisiana, "hospitals perform more rigorous and intense background checks [on doctors] than do the [abortion] clinics." Op. at 27; *see also* ROA.7691:7–25, ROA.7692:1–19, ROA.8331, ROA.8793, ROA.8796. Louisiana abortion clinics, "beyond ensuring that the provider has a current medical license, do not appear to undertake *any* review of a provider's competency." Op. at 27 & n.53 (emphasis added); ROA.7693:1–11, ROA.7692:20–25, ROA.7693:12–25, ROA.7650:9–16, ROA.7694:1–5; *see also*, *e.g.*, ROA.14155 (116:14–25), ROA.14156 (117–119). Doe 3, the Plaintiff clinic's medical director, admitted he had hired and trained a radiologist and an ophthalmologist to perform abortions there and when hiring doctors "he neither performed background checks nor inquired

[3] Plaintiffs say that Louisiana conceded that the Louisiana and Texas admitting privileges laws were identical. App. at 1. In reality, although the two admitting privileges requirements are similar, the legal backgrounds are significantly different. *First*, Act 620 brings regulations applicable to outpatient abortions into conformity with regulations applicable to other outpatient surgeries. *Compare WWH*, 136 S. Ct. at 2315, *with* Op. at 27–28; *see also* 48 La. Admin. Code § 4535(E)(1). *Second*, unlike the Texas law at issue in *WWH*, Act 620 does not subject abortion clinics to the full panoply of requirements applicable to ambulatory surgical centers. *See WWH*, 136 S. Ct. at 2300 (citing Tex. Health & Safety Code Ann. § 245.010(a)). *Third*, Louisiana abortion providers face fewer legal obstacles to obtaining privileges than those in Texas. Op. at 2; *see also id.* at 30.

[4] Those words directly contradict Plaintiffs' assertion that the majority "did not disturb the district court's factual finding that the law provides no health or safety benefit to women." App. at 2; *id.* at 14.

into their previous training." Op. at 17. The panel majority also noted that Act 620 "brings the requirements regarding outpatient abortion clinics into conformity with the *preexisting* requirement that physicians at ambulatory surgical centers … must have privileges at a hospital within the community," indicating that "Louisiana was not attempting to target or single out abortion facilities." *Id.* at 28. The panel recognized Act 620 provides at least a "minimal" benefit to women seeking abortion. *Id.* at 29.[5]

Equally important, the majority scrutinized the record regarding Louisiana abortion providers' efforts to obtain admitting privileges. The panel began from the intuitively sound premise that (1) it is Plaintiffs' burden to establish that Act 620 *creates* an obstacle to abortion, *id.* at 31, and (2) that if providers *can* obtain privileges, "no other burdens result" from Act 620. *Id.* at 30. The majority also noted that the small number of Louisiana abortion providers (six doctors identified as Drs. Doe 1–6, working at three clinics)[6] makes it possible to "examine each abortion doctor's efforts" to obtain privileges — which the panel did. *Id*. at 30–31.

Based on that examination, the majority concluded that "given the entire weight of the evidence, … the district court clearly erred in saying that all doctors

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[5] Plaintiffs are thus wrong to say the panel "assum[ed] that credentialing *necessarily* confers a benefit to women's health." App. at 18.

[6] Plaintiffs state that after the lawsuit was filed, Doe 4 retired and two Louisiana abortion clinics (Causeway and Bossier) closed. App. at 7 n.9. Plaintiffs neglect to mention that Doe 4 is 82 years old and left abortion practice as a "'personal choice,'" Op. at 7, 9; that the district court "[drew] no inference" that Causeway's or Bossier's closure had anything to do with Act 620, *June Med. Servs.*, 250 F. Supp. 3d at 81; Op. at 6 n.13; and that Bossier closed in 2017 when Act 620 was already preliminarily enjoined, Op. at 9 n.21.

had put forth a good-faith effort to obtain privileges." *Id.* at 31. The majority — relying almost entirely on the words of the doctors themselves — concluded that three of the Does who had not obtained admitting privileges had failed to make good-faith efforts to obtain privileges in the first place. *See id.* at 10–11, 32–33 (Doe 2);[7] *id.* at 13–14, 34, 36 (Doe 5);[8] *id.* at 19, 35 (Doe 6).[9] Doe 3 has admitting privileges already, and Doe 4 has retired. *See id.* at 34. Only Doe 1, who practices at Plaintiff June Medical with Doe 2 and Doe 3, had found it difficult to obtain privileges after a good-faith effort. *Id.* at 32, 38. Doe 1 is not an obstetrician/gynecologist, but a specialist in "Family Medicine and Addiction Medicine."[10] Although Doe 3 had testified he would leave abortion practice if he were the last abortion provider in Louisiana, the majority observed that his testimony "shift[ed]" and his "independent personal choice" could not be attributed to Act 620. *Id.* at 36; *June Med. Servs.*, 250 F. Supp. 3d at 74–75; ROA.7679:22–25, ROA.7680:8–10, ROA.7707:5–25, ROA.7708:1–25, ROA.7709:1, ROA.10799.

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[7] *See* ROA.7849–50 (Doe 2 admitting that he had not applied for privileges at two local hospitals), ROA.13061–64 (Doe 2 refusing to provide documentation requested by the hospital to which he did apply), ROA.15286 (sealed document).

[8] *See* ROA.14169 (Doe 5 admitting that a Baton Rouge hospital to which he had applied was waiting for him to arrange a doctor to cover for him), ROA.9925 (Doe 5 declaring that he had approached only one doctor about covering). Doe 5 also performs abortions in New Orleans, where he has admitting privileges, and so can continue practicing there even if he does not also obtain privileges in the Baton Rouge area. *See* Op. at 18, 34.

[9] *See* ROA.10787 (Doe 6 declaring that he had only applied to one hospital in his area).

[10] *June Med. Servs.*, 250 F. Supp. 3d at 41–42.

The upshot was only *one* of Louisiana's six abortion provider would cease practice as a result of Act 620, and *none* of Louisiana's three abortion clinics would have to close. *Id.* at 35–36. For that reason, most of the effects Plaintiffs attributed to clinic closures resulting from Act 620 would flow (if at all) from the independent decisions of doctors not to seek in good faith to comply with the law, or to leave abortion practice out of their own volition.

The panel did not stop there. It *assumed* Act 620 would prevent Doe 1 from performing abortions and asked whether remaining abortion providers at the Plaintiff clinic would have capacity to meet demand. *Id.* at 812. Once more, the panel distinguished this case's record from *WWH*. In Texas, the admitting privileges law would have closed 80% of the state's abortion clinics and the remaining clinics would have been unable to increase their capacity sufficiently, burdening all women who wished to obtain abortions. *Id.* at 25, 38. In Louisiana, the two other doctors at the Plaintiff clinic — Doe 3, who has privileges, and Doe 2, should he make a good-faith effort to obtain them — could make up the difference by doing an extra hour of work twice a week. *Id.* at 39–40.[11] That extra hour of patient wait time, the majority held, "cannot be a substantial burden." *Id.* at 40. Finally, the majority concluded that Act 620 would not affect a "large fraction" of women. *Id.*; *see also id.* at 20–22. "[O]nly 30% (or, less than one-third) of women seeking an abortion would face even a *potential* burden of increased wait times[.]" *Id.* at 42 (emphasis added).

[11] As the majority observed, "[t]he record provides a wealth of information about Doe 3's capacity," and Doe 2's capacity appears comparable. Op. at 39 & n.63; *see also* ROA.7651:1–9, ROA.7687:22–25, ROA.7688:1–8.

Those findings doomed Plaintiffs' challenge: "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." *Id.* at 44.

REASONS FOR DENYING THE APPLICATION

A stay of the mandate is an extraordinary remedy. This Court evaluates stay applications with a three-part test:

> [1] [T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; [2] there must be a significant possibility of reversal of the lower court's decision; and [3] there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. *Estelle*, 463 U.S. 880, 895 (1983). Plaintiffs have not met that standard here, and so the stay should be denied.

I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE.

As to the first and second elements, Plaintiffs cannot show either a "reasonable probability" that certiorari will be granted or a "significant possibility" that this Court will reverse. *Barefoot*, 463 U.S. at 895. Plaintiffs say the panel decision conflicts with other cases, principally with this Court's decision in *WWH*. Plaintiffs are wrong. The essential features of the panel decision are fact-bound, well-supported by the record, and poorly presented for review.

A. The panel majority's purported legal errors are illusory.

Plaintiffs do not proffer a true circuit split on any issues. Instead, Plaintiffs point to supposed divergences between the panel opinion and *WWH*. *WWH* did not do

away with the "undue burden" and "substantial obstacle" test this Court has applied since *Casey*.

1. Plaintiffs fail to identify a circuit split.

Plaintiffs' *only* argument that the panel majority creates a circuit split rests on the fact that certain other lower courts invalidated admitting privileges laws after *WWH*. App. at 3; *id.* at 16 n.12. The split is entirely illusory because the cases Plaintiffs cite — like this one — turn on their particular facts and procedural histories.

For example, two of Plaintiffs' cases relied on record evidence establishing that a state's abortion doctors *did* try to obtain privileges and could not do so. *Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F.3d 908, 916 (7th Cir. 2015) ("Not that [the clinic's] doctors haven't tried to obtain the privileges."); *Burns* v. *Cline*, 387 P.3d 348, 353 (Okla. 2016) ("The record before us demonstrates that despite Burns' diligent efforts, he was unable to obtain admitting privileges to a hospital within 30 miles of his clinic."). Far from creating a split, the panel majority *followed* those decisions in considering whether Louisiana's abortion providers made similar good faith efforts.[12]

[12] Given that Louisiana's abortion doctors showed bad faith in their efforts to comply with Act 620, it would be highly inequitable to give them the same treatment courts have given doctors who *did* attempt good-faith compliance. It is proper that challenges by abortion doctors who show bad faith fail, even when doctors who show good faith succeed. *Precision Instrument Mfg. Co.* v. *Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (explaining that the "unclean hands" doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief"). That principle applies equally to the stay request.

Plaintiffs' remaining cited cases turn not on record evidence or legal principles relevant here, but on litigation choices. In one case, Mississippi conceded its admitting privileges law "'would likely require … the only currently licensed abortion facility in Mississippi[] to lose its license,'" and the state forfeited any contrary argument. *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448, 452 (5th Cir. 2014). The panel addressed whether the law survived on the theory that "Mississippi women could travel to adjoining states to obtain an abortion," *id.* at 454, and concluded that it could not because "the undue burden analysis focuses solely on the effects within the regulating state," *id.* at 457. Two more of Plaintiffs' cases involve decisions by states not to continue defending their laws after *WWH*. App. at 3 nn. 4 & 5. Those decisions can hardly be held against Louisiana, which chose to continue defending Act 620 and held Plaintiffs to their burden of proof.

Far from illustrating a circuit split, Plaintiffs' cases show the consistency in lower courts' understanding of *WWH*: Courts agree that *WWH* requires careful review of the record. "[U]niformity" in outcomes is not necessary or desirable because courts do not review uniform evidentiary records. *Id.* at 3. As the Eighth Circuit recently held in another case Plaintiffs cite, "[*WWH*] did not find, as a matter of law, … that provisions similar to the laws it considered would never be constitutional." *Comprehensive Health of Planned Parenthood Great Plains* v. *Hawley*, 903 F.3d 750, 758 (8th Cir. 2018); *see* App. at 3 n.6. The panel majority acted consistently with that principle, and Plaintiffs cite no contrary holding.

2. Most of Plaintiffs' purported conflicts with *WWH* are only factual disputes.

That leaves Plaintiffs' purported conflicts with *WWH*. Many of those conflicts boil down to assertions that the panel majority should have reached the same resolution of factual issues as *WWH*, notwithstanding different factual records. There is no significant chance this Court would grant certiorari and reverse on such grounds. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual finding[.]").

1. Plaintiffs say the panel split from *WWH* by holding that Act 620 improves "credentialing" for doctors hired to perform abortions at clinics in Louisiana: "[T]his Court held [in *WWH*] that Texas's admitting privileges requirement 'does not serve *any* relevant credentialing function,'" they assert, and "[t]he rule cannot be different here." App. at 17 (quoting *WWH*, 136 St. Ct. at 2313) (emphasis added by Plaintiffs). But the question whether hospital admitting privileges aid in credentialing doctors *in Louisiana* is a narrow factual question, unlike the legal issues that make up this Court's docket.

Nor does WWH support Plaintiffs' reading. The *WWH* Court premised its factual conclusions on the *Texas* record and on "the lower courts' evaluation of the evidence," *see* 136 S. Ct. at 2310, neither of which determines the result in any other case. *See also id.* at 2311 ("We have found nothing *in Texas' record evidence* that shows that, compared to prior law … , the new law advanced Texas' legitimate interest in protecting women's health.") (emphasis added). The question whether Act 620 supplements the credentialing — or lack thereof — performed by Louisiana

abortion clinics depends on what clinics and hospitals actually do *in Louisiana*, not in Texas or "nationwide." App. at 17. If the facts and the record are different in Louisiana, the conclusions will be different. That is hardly a ground for certiorari.

As the panel majority observed, in *WWH* "Texas presented no evidence that the credentialing function performed by hospitals differed from the credentialing performed by clinics," while in this case, Louisiana *did* present such evidence. Op. at 27. That difference in record evidence does not mean a conflict with *WWH*.

2. Plaintiffs' argument that the panel majority failed to apply the correct "causation standard" are also fundamentally factual. App. at 19–22. Plaintiffs' first such argument attacks the panel majority's holding that because three Louisiana abortion providers failed to seek admitting privileges in good faith, burdens allegedly caused by those doctors leaving abortion practice cannot be attributed to Act 620. *Id.* at 19–20. Plaintiffs say that in so doing the majority "applied a causation standard that *WWH* found wholly inappropriate." *Id.* at 19. But Plaintiffs do not point to a split of authority on that issue. As noted, lower courts addressing admitting privileges laws *have* considered whether particular doctors tried to obtain privileges. *Schimel*, 806 F.3d at 916; *Burns*, 387 P.3d at 353. So did the panel here.

Plaintiffs' only supposed support is their assertion that in *WWH*, "Texas similarly sought to minimize the burdens caused by its admitting privileges requirement by showing that Texas clinics closed for reasons other than physicians' lack of admitting privileges, despite the district court's factual conclusions to the contrary." App. at 20. According to Plaintiffs, the *WWH* majority disagreed with

Texas because "it was self-evident that Texas's admitting privileges requirement would cause a reduction in access to abortion," given that "clinics closed right before and after the law went into effect." *Id.*

That is not what *WWH* held. The *WWH* majority understood Texas as asking the Court to *speculate* that "other evidence, *not presented at trial or credited by the District Court*," might show alternative causes for clinic closures. *WWH*, 136 S. Ct. at 2313 (emphasis added). The *WWH* majority rejected Texas' argument because it did not find enough evidence to support it. But if a record *does* show "unrelated reasons" why abortion doctors have failed to obtain privileges, *id.* at 2313, nothing in *WWH* forbids a court to consider that evidence and reach a different result. That is not holding Plaintiffs "to a higher level of causation," App. at 21; it is evaluating the burdens of abortion regulations in light of all the evidence presented by both sides.

Plaintiffs' contrary argument implies that even if abortion providers refuse to comply with a law in good faith and threaten to leave abortion practice, a federal court is bound by *WWH* to attribute the resulting burdens to the law itself. Such a rule would allow abortion providers to unilaterally manufacture "burdens" by acting in *bad* faith.[13] No court has so held, and it is inconceivable that abortion providers could hold duly enacted laws hostage in that way. A federal court *must* be permitted to distinguish self-inflicted harms from ones created by a challenged law. *Cf. Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("In other words, respondents cannot

[13] As the panel put it, "[d]eparture from the standard of direct causation leads to a line-drawing problem that would allow unrelated decisions to inform the undue-burden inquiry." Op. at 37.

manufacture standing merely by inflicting harm on themselves[.]"). The panel majority was entirely correct to examine abortion providers' efforts at good-faith compliance and find them lacking. There is no likelihood this Court would review such a sensible examination.

It follows that questions about the efforts of Louisiana abortion providers to obtain privileges go not to the "causation standard," App. at 19, but to the panel majority's review of a complex evidentiary record. There is no reason for the Court to retread that fact-bound territory. S. Ct. R. 10.

3. Plaintiffs also claim a *WWH* conflict because "the panel majority improperly dismissed the loss of abortion access resulting from Doe 3's cessation of abortion services as his 'personal choice,' not the result of Act 620." App. at 22. Doe 3 — who undisputedly has admitting privileges that satisfy Act 620, *see June Med. Servs.*, 250 F. Supp. 3d at 74 — testified (inconsistently) that he would leave abortion practice if other abortion doctors did. Op. at 36; *June Med. Servs.*, 250 F. Supp. 3d at 74–75; ROA.7679:22–25, ROA.7680:8–10, ROA.7707:5–25, ROA.7708:1–25, ROA.7709:1, ROA.10799. According to Plaintiffs, "*WWH* credited similar concerns." App. at 22, so Doe 3's choice (and any resulting burdens on abortion availability) therefore *must* be chalked up as a consequence of Act 620.

That is not what *WWH* said. All Plaintiffs cite is a single parenthetical quotation of an *amicus* brief, following a "*cf.*" citation at the end of a string cite. *Id.* at 22 (citing *WWH*, 136 S. Ct. at 2312). The proposition supported by the string cite, in turn, was merely that several abortion clinics closed before the Texas admitting

privileges law went into effect. *WWH*, 136 S. Ct. at 2312. Certain *amici* contended that "hostility" to abortion would prevent Texas clinics from hiring *new* qualified abortion providers. *Id.*

It is not possible to infer, from that lone citation, a rule requiring the panel majority to credit Doe 3's wavering assertions about his supposed professional plans. Whatever the theoretical link might be between clinic hiring and public views about abortion, *id.*, it does not prove anything about any particular doctor. Doe 3's situation involves evidentiary issues to be evaluated based on Doe 3's own testimony. Again, this Court is unlikely to review the majority's common-sense approach.[14]

3. There is little possibility this Court will choose to review Plaintiffs' purported legal conflicts with *WWH*.

Insofar as Plaintiffs do assert any *legal* divergence between *WWH* and the panel majority, it is unlikely that this Court will choose to review the panel's decision. This is especially so because the panel majority looked to *WWH* at every step of its reasoning and sought to apply that decision faithfully.

1. Plaintiffs assert that the panel misapplied this Court's "undue burden" standard: specifically, that "[t]he panel majority paradoxically defied *WWH* while purporting to apply the 'undue burden' test articulated in that case." App. at 16. But "misapplication of a properly stated rule of law" is not a plausible ground for

[14] The panel majority's view that leaving abortion practice would be Doe 3's own choice, not attributable to Louisiana or Act 620, likewise follows this Court's rule that while government need not remove obstacles to abortion that are "not of [the government's] own creation." *Harris* v. *McRae*, 448 U.S. 297, 316 (1980).

certiorari. *See* S. Ct. R. 10. And the panel both stated and applied the relevant standards correctly.

Plaintiffs' theory is that once the panel concluded that Act 620 provides "minimal" benefits for women's health, it was *per se* bound to enjoin the law. Plaintiffs argue that under *WWH*, "burdens are clearly 'undue' when, as here, the law confers no health or safety benefit at all." App. at 15.[15] That position rewrites the undue burden test, contrary to this Court's precedents. This Court has never treated the undue burden test as a roving license to enjoin abortion regulations with slight health benefits. Repeal of such laws is a *legislative* function, not a judicial one.

That is why only abortion regulations that impose a "substantial obstacle" on the decision to obtain an abortion are invalid. *Casey*, 505 U.S. at 877 (joint opinion). The fact that a law might have "the incidental effect of making it more difficult or more expensive to procure an abortion *cannot* be enough to invalidate it" *unless* the burden amounts to a substantial obstacle. *Id.* at 874 (emphasis added). Considering

[15] In a footnote, Plaintiffs claim that Act 620 should have been invalidated because the district court found it serves the improper *purpose* of limiting abortion. App. at 15 n.11. But the district court also found that "[a] purpose of [Act 620] is to improve the health and safety of women undergoing an abortion," *June Med. Servs.*, 250 F. Supp. 3d at 59, and the panel affirmed. Op. at 27 ("The legislative history of Act 620 plainly evidences an intent to promote women's health."). As the district court acknowledged at one point in the case, the Fifth Circuit follows *Casey* in holding that "an abortion regulation satisfies the purpose prong unless the regulation serves '*no* purpose other than to make abortions more difficult.'" *June Med. Servs., LLC* v. *Kliebert*, 158 F. Supp. 3d 473, 527 (M.D. La. 2016) (quoting *Whole Woman's Health* v. *Cole*, 790 F.3d 563, 586 (5th Cir. 2015) (emphasis added) (itself quoting *Casey*, 505 U.S. at 901)). And besides, if Act 620 does not unduly burden the abortion decision, the abstract question of the legislature's intent cannot possibly be enough by itself to warrant certiorari.

that this Court has upheld laws that serve interests other than women's health, *see id.* at 886; *Gonzales*, 550 U.S. at 157, even laws with *no* health benefit are constitutional if they do not impose a substantial obstacle. Act 620 cannot be invalidated solely on the basis that its proven benefits are small.

Plaintiffs have not pointed to a circuit split on this issue. At least some lower courts agree that a public health benefit is unnecessary to uphold abortion regulations. *E.g.*, *Greenville Women's Clinic* v. *Bryant*, 222 F.3d 157, 169 (4th Cir. 2000). ("[T]here is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself."). There is no likelihood of this Court's review at this time.

Similarly, Plaintiffs argue that the panel failed to "balance 'the burdens a law imposes on abortion access *together with the benefits* those laws confer,' as *WWH* instructs." App. at 16. But the panel acknowledged its obligation to consider Act 620's benefits and burdens together. Op. at 22; *id.* at 23 ("There is no doubt that WWH imposes a balancing test …. It is not reasonable to read the language in *WWH*, quoted above, as announcing anything but a balancing test[.]"). The panel reconciled *WWH* and *Casey* by holding that while *WWH* creates a balancing test, the burden must still be substantial, *id.* at 23, and a one-hour wait does not qualify. To the extent Plaintiffs disagree, they are again quibbling with an alleged "misapplication of a properly stated rule of law." S. Ct. R. 10.

2. Plaintiffs' final purported *WWH* conflict for this Court's review centers on the panel's analysis of their claim for *facial* invalidation of Act 620. App. at 22–23. In

the panel's interpretation of *WWH*, abortion regulations cannot be facially invalidated unless they unduly burden a large fraction of affected women. Op. 21 ("In *WWH*, the Court … adopted the *Casey* plurality's large-fraction framework."). [16] Plaintiffs do not disagree, but argue instead that the majority erred by using "alternative mathematical equations" to estimate how many women would be burdened. App. at 22. Plaintiffs concede the panel stated the correct test, but object that the panel used math when applying it.

Plaintiffs cite no authority for this objection. Nor do they cite any split in lower court authority. In fact, the Eighth Circuit has agreed with the panel that while precision may not be *required*, the large fraction standard is not "freewheeling," and that identifying "amorphous groups" of allegedly burdened women is not enough. *Planned Parenthood of Ark. & E. Okala.* v. *Jegley*, 864 F.3d 953, 959–60 (8th Cir. 2017).

Nor is the panel's approach inconsistent with *WWH*. *See* 136 S. Ct. at 2320. The need for mathematical precision never arose in *WWH* because this Court found *all* women seeking abortions in Texas would be burdened by "fewer doctors, longer waiting times, and increased crowding." *Id.* at 2313. *WWH* did not impliedly forbid a lower court from using mathematical estimates in cases where the proportion of affected women matters. Plaintiffs thus do not establish any reason why the panel

[16] If anything, the panel's approach *favored* Plaintiffs by adopting the "large fraction" formulation. *See WWH*, 136 S. Ct. at 2343 n.11 ("The proper standard for facial challenges is unsettled in the abortion context.") (Alito, J., dissenting).

majority's effort to define the relevant numbers carefully could have been "'improper.'" App. at 23.

At most, Plaintiffs argue that the large-fraction standard is met in this case because, on one of the panel's alternative approach to the test, a slightly longer wait time might result for up to 30% of women seeking abortions. App. at 23. Plaintiffs cite no circuit split on this issue either. As explained above, *WWH* is of no help to them. Neither is *Casey*'s invalidation of the spousal notification requirement, *id.* at 23 n.15, which hinged on a holding that *all* married women who did not wish to notify their spouses would be burdened. *See Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). Nor do Plaintiffs engage with the majority's explanation of why 30% is not sufficiently large to facially invalidate Act 620. Op. at 42–44 (citing *Cincinnati Women's Servs., Inc.* v. *Taft*, 468 F.3d 361, 373–74 (6th Cir. 2006)). None of this suggest a legal issue likely to receive this Court's review.

Moreover, this case does not squarely present Plaintiffs' chosen issue. Recall that the women the panel believed might be affected by Act 620 face only the possibility of an hour-long wait. Op. at 40. The question whether 30% is a large fraction is academic because the possibility of a one-hour delay is not a "substantial obstacle" sufficient to invalidate Act 620. *Gonzales*, 550 U.S. at 146. If the meaning of a "large fraction" needs to be resolved, this Court should do so in a case where the answer might affect the case's outcome. This is not such a case.

4. Plaintiffs' remaining theories are unlikely to be reviewed.

Plaintiffs' sole remaining legal argument is that the panel majority applied too strict a standard of review to the district court's factfinding. Plaintiffs argue that in so doing the panel violated the rule that "courts of appeals generally 'may not reverse' a district court's factual findings, especially where those 'findings are based on determinations regarding the credibility of witnesses.'" App. at 24 (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574–75 (1985)). In other words, Plaintiffs disagree with the panel's review of the district court's factfinding. But this Court's role is hardly to police whether courts of appeals are too stringent in their application of clear-error review.

In any event, Plaintiffs demonstrate no factual mistakes by the majority. App. at 24. Some objections merely repeat issues Plaintiffs raise elsewhere, like their insistence that Act 620 serves no "credentialing" function. Plaintiffs also claim that the majority credited an expert the district court found biased, *id.* at 24, but the district court *also* credited that expert on the same topic, namely, hospital privileging. *Compare* Op. at 28, *with June Med. Servs.*, 250 F. Supp. 3d at 44, 61. Besides, the majority based its conclusions primarily on other evidence — most notably, *the words of Louisiana abortion providers themselves*. Plaintiffs' other arguments involve no direct conflict between the district court and the majority, do not accurately state the majority's findings, or relate to the majority's ultimate conclusions, not underlying facts. App. at 24–25.

That Plaintiffs conclude with a naked attack on the majority's integrity — that the majority was not genuinely "reviewing facts for clear error" but "striving" towards

a favored outcome, *id.* at 25 — confirms that Plaintiffs have little to say regarding the majority's record review or its legal conclusions. There is nothing that would warrant this Court's review.

B. This is a poor vehicle to address the issues Plaintiffs present.

As shown above, the panel decision's conclusions flowed from a large and detailed record specific to this case, to the abortion providers and clinics involved, and to the circumstances of abortion practice in Louisiana. In petitioning for certiorari, Plaintiffs will have no choice but to ask this Court to perform its own analysis of an extensive factual record and second-guess the panel's thorough treatment of complex, case-specific factual issues. The chance of certiorari review is remote.

1. The panel's fact-intensive analysis is not suitable for certiorari review.

As the panel majority perceived, *WWH* required a "fact-intensive," "in-depth analysis" of this case's factual record, which in this case was "more developed" than the *WWH* record. Op. at 26. The bulk of the panel's analysis thus delves into factual issues. *Id.*. at 5–19, 26–30, 31–40, 42–45. And the panel's ultimate conclusions hinged on two factual questions, both of which it answered based on the record: The first was *why* several Louisiana abortion doctors had not obtained admitting privileges. (Answer: because most of them had not made good-faith efforts to comply with the law. *Id.* at 35.) The second was *how* the failure of Doe 1 to obtain admitting privileges after a good-faith effort would affect women seeking abortions at the Plaintiff clinic. (Answer: very little, if at all. *Id.* at 42–45.) The panel's decision rested on the district court's multiple clear errors on those factual matters, *see id.* at 26–27, 31, 32, 34–35,

36, 37, 45, at least as much as on its legal holdings. Any petition for certiorari will necessarily be dependent on those fact-intensive, case-specific questions.

And the factual issues essential to the panel's holding are not even the only ones that this Court would have to grapple with if certiorari were granted. To take one example, the majority discounted Louisiana's showing that in at least two known cases, Doe 3's admitting privileges aided in ensuring prompt emergency care for abortion patients suffering from complications. ROA.7660:14–23, ROA.7662:9–21, ROA.7695:17–25, ROA.7696:1–13; *see* Op. at 29 n.56. That evidence had no parallel in *WWH*, and it shows that Act 620 promises greater health benefits than even the panel acknowledged.

Unlike direct review by courts of appeals, certiorari review is not ordinarily used for error correction. S. Ct. R. 10. Rather, it serves the principal purpose of resolving questions of importance, such as conflicts of law and issues of wide applicability. By definition, the Fifth Circuit's resolution of factual questions based on the district court record does not give rise to any circuit split or conflict in authority.

Nor is this Court the right forum for nit-picking a lower court's factual conclusions on clear-error review of a case- and state-specific record. *E.g.*, *N.L.R.B.* v. *Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing, as improvidently granted, a cross-petition that "presented primarily … a question of fact, which does not merit Court review"). And here, certiorari review would require this Court to reconsider issues as granular as Doe 2's and Doe 6's

reasons for failing to apply to particular hospitals, Op. at 33, 35, Doe 5's failure to find a "covering doctor" at Woman's Hospital in Baton Rouge, *id.* at 34, and how many abortions Doe 3 can provide per day, *id.* at 38–40.

2. The facts prevent this case from cleanly presenting any legal issues that might be present.

If the panel majority's factual conclusions are correct, then the legal issues may not matter at all. The failure of several Louisiana abortion providers to undertake good-faith efforts to obtain admitting privileges, together with the capacity of doctors at the Plaintiff clinic to serve patient demand, would likely lead to affirmance anyway. There is a significant possibility that the writ of certiorari would be dismissed as improvidently granted should the Court undertake review.

Moreover, the Court would find that the legal issues Plaintiffs present involve mere applications of law to the unique factual issues in this case. Given that record, these issues may have no significance outside of Act 620's effects in Louisiana; indeed, they may never arise again in the same form. The importance of the factual record thus renders this case a poor vehicle to review any legal issues Plaintiffs might raise. *See Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (issues must rise "beyond the academic or the episodic" to deserve certiorari review, "especially … where the issues involved reach constitutional dimensions"). Certiorari review would be a waste of this Court's resources.

II. THERE IS NO LIKELIHOOD OF IRREPARABLE INJURY.

Plaintiffs' failure to establish "a reasonable probability" that certiorari will be granted or "a significant possibility of reversal" dooms the Application, regardless of

any alleged harms from Act 620's enforcement. *Barefoot*, 463 U.S. at 895. Plaintiffs' Application can be denied for that reason alone. But Plaintiffs also cannot show "likelihood that irreparable harm will result if th[e] decision is not stayed." *Id.*

All of Plaintiffs' allegations of irreparable harm assume Act 620 will cause Louisiana abortion doctors and clinics to cease providing abortion services. App. at 26–30. That is not what the record reflects. As the panel majority concluded, Doe 2, Doe 5, and Doe 6 did not try in good faith to comply with Act 620, and Doe 3's threat to stop providing abortions cannot be attributed to the law. In other words, the harms Plaintiffs allege are the fault of the abortion providers themselves. That cannot be the kind of harm that justifies a stay. *See Precision Instrument Mfg.*, 324 U.S. at 814 (discussing "unclean hands").

Plaintiffs' allegations of irreparable harm also appear to assume that when the mandate issues, Louisiana abortion providers will immediately be forced to cease operations, with dire consequences. But the Louisiana Department of Health ("LDH") recognizes that implementing Act 620 is a sensitive regulatory process that should begin in an orderly way. Today, LDH announced its procedures for implementing Act 620. *See* Jan. 31, 2019 LDH Notice to Licensed Outpatient Abortion Facilities (available at https://tinyurl.com/LDHAct620Notice).

Physician staffing at the three Louisiana clinics has changed since the record closed — unsurprising, given that the trial in this case ended more than three years ago — and the hospital affiliations of the doctors may have changed as well. The first step, therefore, will be to collect accurate, current information. LDH intends to begin

by giving Louisiana abortion clinics 45 days to document the admitting privileges of their physicians who perform abortions. *Id.* § 1. LDH will then work to verify the information provided. *Id.* § 2. LDH recognizes that physician affiliations vary from hospital to hospital, so it is prepared to make "individualized determinations as to whether a given physician's privileges meet the requirements of Act 620." *Id.* § 3.

Should a clinic fail to respond, or should LDH be unable to verify a doctor's privileges, LDH will issue a statement of deficiencies to the clinic. *Id.* § 4. But the clinic will then have the opportunity to submit a plan of correction for LDH approval. *Id.* § 4(a). LDH "*may*" issue sanctions for deficiencies in compliance with Act 620, *id.* § 4(c) (emphasis added), but any revocation of a clinic's license gives rise to state-law review and remedies, beginning with LDH administrative appeals. *Id.* § 4(d). Importantly, administrative appeals from license revocations are "suspensive" appeals that stay the license revocation while they are pending. *Id.* § 4(d)(ii); *see* La. R.S. § 40:2175.6(G).

What LDH plans, in other words, is an administrative process characterized by mutual communication among doctors, hospitals, and the state agency, with administrative remedies in the event of adverse licensing actions — not the abrupt descent into chaos Plaintiffs foresee. Plaintiffs' contrary predictions are too speculative to show a likelihood of irreparable harm. *See Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction."). And if the state's abortion providers apply for

privileges in good faith, there is every reason to expect the "harm" to the Plaintiff clinic's patients will be, at most, a one-hour delay in obtaining an abortion.

Conversely, staying the Fifth Circuit's order and Louisiana's enforcement of its duly-enacted law causes irreparable harm to the state. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (explaining that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury"); *accord Maryland* v. *King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 571 U.S. 1061, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). Louisiana and its citizens have already suffered some four years of irreparable injury as a result of the district court's erroneous injunctions against Act 620. Those injunctions have prevented the state "from effectuating [a] statute[] enacted by representatives of its people." *New Motor Vehicle,* 434 U.S. at 1351. And unless stayed by this Court, the panel's decision will bring that irreparable injury to an end.

In sum, a stay would exacerbate and perpetuate the irreparable injury already imposed by the district court without meaningfully curtailing the Plaintiffs' ability to provide — or Louisiana women's ability to choose — the abortions that Plaintiffs wish to perform. This is an independent ground for denying the Application.

CONCLUSION

The emergency application for a stay should be denied.

Respectfully submitted,

s/ Elizabeth B. Murrill

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No. 18A774

In the Supreme Court of the United States

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

v.

DR. REBEKAH GEE,
Respondent.

CERTIFICATE OF SERVICE

I, Elizabeth B. Murrill, a member of the Supreme Court Bar, hereby certify that:

(1) this opposition was filed through the Court's electronic filing procedures, by electronic mail to the Clerk, and by delivering an original and 2 copies on January 31, 2019 to a third-party commercial carrier for next-day delivery to the Clerk; and

(2) one copy of the same opposition was served by delivering it on January 31, 2019 to a third-party commercial carrier for next-day delivery, and delivered by electronic mail, to the following:

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