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

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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This Court has previously granted stays and preserved the status quo when the constitutional right to abortion was at grave risk, including in prior stages of this case. *See June Med. Servs., LLC v. Gee*, 136 S. Ct. 1354 (2016) (Mem.) (preventing enforcement of Act 620 during appeal of preliminary injunction); *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015) (Mem.) (granting stay to prevent enforcement of portions of H.B. 2 against Texas abortion facilities). Louisiana does not even mention these precedents in its stay opposition, let alone distinguish them. The grounds for a stay here are just as compelling.

The district court found that enforcement of Act 620 would leave "no physician in Louisiana providing abortions between 17 weeks and 21 weeks, six days gestation," *June Med. Servs., LLC v. Kliebert*, 250 F. Supp. 3d 27, 82 (M.D. La. 2017), *rev'd sub nom. June Med. Servs., LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018) ("Dist. Op."), and only one physician to care for all women in Louisiana who seek abortions at earlier stages of pregnancy, *id.* at 79. Such a drastic reduction in abortion providers would lead to "closure of clinics," "longer waiting times for appointments," "increased crowding," and "increased associated health risks." *Id.* at 81.

Louisiana does not seriously dispute that women will suffer these harms if the Fifth Circuit's mandate is not stayed. Nor could it when, as the district court found, only two abortion providers in the entire state of Louisiana hold admitting privileges, and one may stop providing abortions once Act 620 becomes effective out of legitimate fears for his safety. *Id.* at 78-79. Rather, Louisiana contends that the harms about to be unleashed upon women in the state are not attributable to Act 620, but are the

"fault of the abortion providers themselves." Def.'s Obj. to Emergency Appl. for Stay Pending Filing and Disposition of Pet. for Writ of Cert. at 25 ("Def.'s Obj."). This callous assertion rests entirely on the Fifth Circuit's misguided "causation" analysis, which this Court rejected as a matter of law in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*").

Indeed, the brunt of Act 620 is already being felt as clinics, doctors, and patients prepare for the possibility that Louisiana could begin enforcing the law on Monday. Scheduled medical procedures are being cancelled, physicians and clinic staff are preparing to be out of work, and patients seeking to exercise their constitutional right to abortion are being turned away or sent to other states. These harms will only accumulate if this Court does not grant a stay, and the damage for many patients will be irreparable.

Nothing about the self-serving "Notice" by the Louisiana Department of Health ("LDH")—posted to the internet just moments before Louisiana filed its objection to the stay—mitigates these harms. Even if LDH's regulatory process for shutting down clinics will take several weeks, as the Notice contends, Act 620's civil liabilities and criminal penalties kick in as soon as the mandate issues and the injunction barring the law's enforcement dissolves. No law-abiding doctors without privileges will provide abortions in Louisiana once the mandate issues, and no law-abiding clinics will employ them to do so in any event.

Louisiana argues that a stay and grant of certiorari would be "a waste of this Court's resources" because a ruling in this case purportedly would have "no

significance outside" of Louisiana. Def.'s Obj. at 24. What is at stake in this case, however, is not just the constitutional rights of Louisiana women to abortion access. The Fifth Circuit panel majority's decision undermines the rule of law by flouting binding precedent from this Court. Such a ruling has implications for the country and the judicial system as a whole.

I. There Is a Fair Prospect the Fifth Circuit's Decision Will Be Reversed

The Fifth Circuit panel majority found that a Louisiana law that restricts abortion access without furthering any valid state interest is constitutional, in direct conflict with this Court's decision roughly two years ago in *WWH* about an identical Texas law. A grant of certiorari is warranted given this break from recent precedent, and there is a fair prospect of reversal, notwithstanding Louisiana's meritless arguments regarding the lack of a circuit split, factual disputes, and "vehicle" problems.

A. No Circuit Split Is Necessary, But Courts in Fact Are Split

Louisiana stumbles out of the gate by arguing that this Court is unlikely to grant certiorari because there is "no true circuit split on any issues." Def.'s Obj. at 9. A circuit split is not necessary for this Court to grant certiorari. Certiorari is also proper, and necessary to preserve the rule of law, when a decision of a court of appeals directly conflicts with a binding decision from this Court. *See* Sup. Ct. R. 10(c); *see also Wilkinson v. United States*, 365 U.S. 399, 401 (1961) (granting certiorari "to consider the petitioner's claim that the Court of Appeals had misconceived the meaning" of the controlling Supreme Court decision).

Here, this ground for certiorari is clearly met because the panel majority's holding is in direct conflict with *WWH*, and the Fifth Circuit panel majority's articulation of the undue burden test is in direct conflict with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *See June Med. Servs.*, 905 F.3d at 816 (Higginbotham, J., dissenting) ("Dissent *I*") (panel majority "fails to meaningfully apply the undue burden test as articulated in *Casey*"); *see also June Med. Servs., LLC v. Gee*, No. 17-30397, 2019 WL 272176, at *5 (5th Cir. Jan. 18, 2019) (Dennis, J., dissenting) ("Dissent *II*") (panel majority "eviscerates" *WWH*); *id.* at *8 (Higginson, J., dissenting) ("Dissent *III*") ("I am unconvinced that any Justice of the Supreme Court who decided [*WWH*] would endorse [the panel majority] opinion.").

In any event, contrary to Louisiana's contention that no circuit split exists, the Fifth Circuit panel majority's decision reopened the split that this Court *resolved* in *WWH* only two years ago. *Compare June Med. Servs.*, 905 F.3d at 787 ("Fifth Cir. Op.") (holding that a medically unnecessary admitting privileges law that curtails abortion access does not impose an undue burden) *with Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) (holding the opposite), *cert. denied*, 136 S. Ct. 2545 (2016) (Mem.).[1]

Louisiana attempts to obscure the conflict between the Fifth Circuit panel majority's decision and the Seventh Circuit's decision in *Planned Parenthood v. Schimel* by arguing that, in both cases, the courts "considered" whether abortion providers made good faith efforts to obtain admitting privileges. But the cases are in

[1] The panel majority's decision also conflicts with at least one state court of last resort. *Burns v. Cline*, 387 P.3d 348 (Okla. 2016) (striking down admitting privileges law post-*WWH*).

direct conflict on this issue. Whereas the Fifth Circuit panel majority upheld Act 620 because the Doe physicians (in its view) failed to exhaust all avenues to obtain admitting privileges, the Seventh Circuit found that such heightened proof of causation is not required. *Planned Parenthood of Wis.*, 806 F.3d at 916-17. Even though Wisconsin abortion providers did not "exhaust all opportunities" to obtain privileges, the Seventh Circuit declared Wisconsin's analogue to Act 620 unconstitutional. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 987 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

B. The Fifth Circuit's Legal Analysis Directly Conflicts with *WWH*

Louisiana works hard to make this case appear unworthy of certiorari by characterizing all of the conflicts between the Fifth Circuit panel majority's decision and *WWH* as "factual disputes." Def.'s Obj. at 12-16. Indeed, according to Louisiana, "[i]f the panel majority's factual conclusions are correct, then the legal issues may not matter at all." *Id.* at 24. Exactly the opposite is true. If the Fifth Circuit panel majority had applied the correct *legal* standard required by *WWH*, then most of the panel majority's manufactured factual "disputes" would be irrelevant.

In their emergency petition, Plaintiffs-Appellees identified numerous conflicts between the Fifth Circuit panel majority's decision and the Court's decision in *WWH*. All of these are legal errors, not factual ones.

Misinterpretation of the undue burden test. The Fifth Circuit panel majority misinterpreted the undue burden test articulated in *Casey* and *WWH*,

effectively reinstating the previously-abrogated legal test that the Fifth Circuit applied to abortion restrictions before *WWH*.

Louisiana argues that certiorari is not warranted when a court of appeals properly states a legal rule, even if the rule is misapplied. Def.'s Obj. at 16-17. But the Fifth Circuit panel majority did not state the rule correctly. As Judge Dennis explained in dissent, rather than consider the law's burdens and benefits "together," the Fifth Circuit panel majority articulated a two-step test in which a court first considers the law's burdens, without regard to its benefits, and only proceeds to "weigh" the burdens and benefits if the law imposes a "substantial obstacle." Dissent *II* at *5. Under this two-step formulation of the undue burden test, a law that restricts abortion access, but which provides no or minimal benefits, is insulated from constitutional scrutiny, provided the court determines that the laws burdens are not substantial. This "eviscerates" the balancing required by *WWH*. *Id.*

Holding the opposite of *WWH*. *WWH* held that laws that restrict abortion access without furthering any valid state interest are unconstitutional and found that the Texas admitting privileges requirement, which is identical to Act 620, was such a law because it did not actually promote women's health. *WWH*, 136 S. Ct. at 2310-14.

The Fifth Circuit panel majority did not disturb the district court's factual findings that Act 620 provides no medical or safety benefit. Among other things, the district court found:

- "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." Dist. Op. at 64.

- The law "provides no benefits to women and is an inapt remedy for a problem that does not exist." *Id.*

- "[Louisiana] did not introduce any evidence showing that patients have better outcomes when their physicians have admitting privileges." *Id.*

- "Nor did [Louisiana] proffer evidence of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment." *Id.*

The Fifth Circuit panel majority also found that Act 620 would limit abortion access, albeit to a lesser degree than the district court found. Fifth Cir. Op. at 814-15.

Act 620's lack of health benefits, together with its burdens on abortion access, render the law unconstitutional under *WWH*. Indeed, as Judge Higginbotham noted in dissent, it is unfathomable after *WWH* that an admitting privileges law with "no medical benefit that is likely to restrict access to abortion can be considered anything but 'undue.'" Dissent *I* at 829. Judge Dennis similarly found that "Louisiana's Act 620 . . . *has no medical benefit* and will restrict access to abortion. Such a restriction is surely undue." Dissent *II* at *5 (emphasis added). Yet the Fifth Circuit panel majority held the opposite.

Louisiana asserts in footnotes throughout its objection that the Fifth Circuit panel majority actually did find that Act 620 confers medical benefits. This is not accurate. In fact, the Fifth Circuit panel majority concurred in the district court's determination that Louisiana failed to prove that even a single woman would benefit from an admitting privileges requirement. *See* Fifth Cir. Op. at 806 n.56. While it did find that Act 620 provides a "minimal" benefit in terms of physician credentialing,

the Fifth Circuit panel majority did not find—and no evidence in the record suggests—that the purported credentialing function of Act 620 actually results in better patient care or outcomes. *See* Dissent *I* at 818 ("The majority concedes this lack of evidence, and aptly refuses to credit a purported health benefit.").

Imposition of a higher causation standard. The Fifth Circuit panel majority's decision, and its analysis of Act 620's burdens in particular, rests on a heightened causation standard that *WWH* rejected.

WWH struck down Texas's admitting privileges requirement based on evidence that not all physicians would be able to obtain or maintain admitting privileges for reasons unrelated to their competence, including because some hospitals have a minimum number of admission requirements or require physicians to be on the hospital's staff. *WWH*, 136 S. Ct. at 2312-13. The Court did not conduct an individualized assessment of each physician's particular efforts to obtain privileges. Even so, this Court had no trouble finding that the admitting privileges requirement caused the "closure of half of Texas' clinics." *WWH*, 136 S. Ct. at 2313.

The Fifth Circuit panel majority did not hold Plaintiffs-Appellees to the "but-for" causation standard applied in *WWH*. If it had done so, causation clearly would have been satisfied because there is no dispute that "but-for" Act 620, all of the Doe physicians would continue to provide abortions. The Fifth Circuit panel majority applied a much higher causation standard, which Judge Dennis explained in dissent was clear legal error:

> 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, . . . [the Fifth Circuit] impose[d] a more demanding, individualized standard of proof than [this Court] did in *WWH*. . . . Raising the bar beyond what the Supreme Court has required in analyzing an almost identical law is simply wrong . . . . [and it] obscures the real question [when it comes to causation]: Whether Act 620 would cause doctors to lose their ability to perform abortions at certain clinics, thereby leading those clinics to close.

Dissent *II* at *7.

Louisiana defends the Fifth Circuit panel majority's causation standard by arguing that, if the rule were otherwise, abortion providers could "unilaterally manufacture 'burdens' by acting in *bad* faith." Def.'s Obj. at 14. That is not remotely what happened here.

In fact, of the Doe physicians without admitting privileges, all pursued privileges. Dist. Op. at 66-77. The district court concluded that these were sufficient good-faith efforts to find, as a matter law, that Act 620 would cause burdens to the Doe physicians and their patients. Although the Fifth Circuit found (contrary to evidence) that they could have tried harder, the Doe physicians' persistent efforts to obtain privileges over many months under the close supervision of the district court can hardly be characterized as bad faith or "self-inflicted."

Improper "Large Fraction" Analysis. The Fifth Circuit panel majority's conclusion that Act 620 is facially valid relied upon a legally improper "large fraction" analysis. Louisiana contends that even if *WWH* does not require courts to perform the rigid mathematical calculations that the Fifth Circuit panel majority relied upon, this Court has never said such calculations are improper. But *WWH* did, in fact, reject the proposition that the large fraction analysis can be reduced to a

mathematical formula. *WWH* vacated the Fifth Circuit's decision that expressly faulted the district court for not quantifying the fraction of women burdened by the law. *Whole Woman's Health v. Cole*, 790 F.3d 563, 588 (5th Cir. 2015), *rev'd and remanded sub nom. WWH*, 136 S. Ct. 2292. Then, *WWH* determined that the Texas law was invalid on its face because it would restrict abortion statewide without furthering a valid state interest. *WWH*, 136 S. Ct. at 2320. That is precisely the case with Act 620.

C. *WWH* Is Not Factually Distinguishable

Louisiana argues that the different outcome between *WWH* and the Fifth Circuit panel majority's opinion is attributable to factual differences. But Act 620 is not factually distinguishable from Texas's admitting privileges requirement. As Judge Higginson observed in dissent, the laws are "equivalent in structure, purpose, and effect." Dissent *III* at *8.

Act 620 serves no *relevant* credentialing benefit. Louisiana contends that, "[u]nlike in *WWH*," evidence was presented in this case that the admitting privileges requirement "performs a real, and previously unaddressed, credentialing function." Def.'s Obj. at 5. However, contrary to Louisiana's contention, Texas did proffer evidence that its admitting privileges requirement served a "credentialing function." Brief for Respondent at 32-33, *WWH*, 136 S. Ct. 2292 (No. 15-274).

Despite Texas's evidence that hospitals in that state consider physicians' credentials as part of the application processes, this Court held that Texas's admitting privilege requirement did not serve a "*relevant*" credentialing function because hospitals in Texas routinely deny privileges for reasons having nothing to do

with physicians' competence. *WWH*, 136 S. Ct. at 2313 (emphasis added). The district court found the same is true in Louisiana:

- "As the record in this case demonstrates, physicians are sometimes denied privileges, explicitly or de facto, for reasons unrelated to competency." Dist. Op. at 87.
- "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 . . . ." *Id.* at 50.
- "Admitting privileges also do not serve 'any relevant credentialing function' . . . ." *Id.* at 87 (quoting *WWH*, 136 S. Ct. at 2313).

The district court also found that admitting privileges are an "inapt" means of ensuring that Louisiana doctors are adequately credentialed because several of the Doe physicians were denied privileges for reasons completely unrelated to their credentials or competency. Dist. Op. at 64. For this reason, the State of Louisiana does not rely on admitting privileges to ensure physicians are competent and adequately credentialed. "The Louisiana State Board of Medical Examiners ensures physician competency through licensing and discipline." *Id.* at 87.[2]

The Fifth Circuit panel majority found that Act 620 serves a "minimal" credentialing function because Louisiana hospitals examine physicians' credentials to a greater extent than abortion clinics. Fifth Cir. Op. at 805-07. Judge Higginbotham noted in dissent the "district court made no such finding." Dissent *I* at 818. But more importantly, the Fifth Circuit panel majority did not dispute the

[2] Louisiana's attempt to save its admitting privileges law based on the supposed critical role of hospitals in performing physician background checks, Def.'s Obj. at 5, is entirely meritless: the Louisiana State Board of Medical Examiners conducts rigorous background checks, including criminal record checks, of all physicians seeking licensure to practice in the state. *See Background Check*, Louisiana State Board of Medical Examiners, https://www.lsbme.la.gov/content/ background-check (last visited Feb. 1, 2019).

district court's finding that, like Texas hospitals, hospitals in Louisiana routinely deny privileges for reasons unrelated to credentials or competence. Under *WWH*, the credentialing function of admitting privileges in Louisiana, whatever it may be, is not "relevant" to Act 620's constitutionality.

The burdens on Louisiana women are the same as in Texas, if not worse. Louisiana also contends that Act 620's burdens are factually distinguishable from the burdens imposed by Texas's admitting privileges requirement. But the district court found:

- "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." Dist. Op. at 81.

- "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 . . . ." *Id.* at 82.

- "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." *Id.*

- "The heaviest burdens of Act 620 would fall disproportionately upon poor women." *Id.*

Contrary to these findings, the Fifth Circuit panel majority found that Act 620's burdens would be limited to longer wait times for some women seeking abortions. Fifth Cir. Op. at 815. This finding, however, rests on the panel majority's improper conclusion that (with the exception of Doe 1) the Doe physicians did not try hard enough to obtain admitting privileges, and, therefore, the harms resulting from their inability to provide abortions do not "count." Dissent *I* at 830. Correcting for

this legal error, the burdens imposed by Act 620 are devastating in all respects found by the district court.

If anything, Act 620's burdens are worse than those inflicted by Texas's unconstitutional admitting privileges requirement. When the admitting privileges law took effect in Texas, about 20 clinics remained able to provide abortion services, including at least one clinic in every major metropolitan area. *WWH*, 136 S. Ct. at 2301, 2312. Louisiana currently has only three clinics, and the district court found that Act 620 would close at least two of them. Dist. Op. at 80-82. Women in every city in Louisiana except New Orleans would be left without a clinic in their communities. *Id.*

Moreover, *WWH* credited the district court's finding that it "stretches credulity" to suggest that "seven or eight providers" (i.e., the number of facilities left after Texas's admitting privileges and surgical center requirements went into effect) could serve "between 7,500 and 10,000 patients per year" in Texas. *WWH*, 136 S. Ct. at 2302. The district court in this case found that Act 620 would leave Louisiana with just *one* provider to serve approximately 10,000 patients per year. *See* Dist. Op. at 80; Dissent *II* at *4. Any suggestion that one provider could meet the needs of all Louisiana women does not stretch credulity; it shatters it.

D. There Are No "Vehicle" Problems

Finally, Louisiana argues that the prospects for certiorari are "remote" because the Fifth Circuit panel majority's analysis was so "fact-intensive" that this Court would be required to "perform its own analysis of an extensive factual record and second-guess the panel's thorough treatment of complex" fact issues. Def.'s Obj. at

22. The Fifth Circuit panel majority's de novo review of the factual record, however, is a compelling reason why certiorari should be granted, not denied. As it has done for other courts of appeals in the past, this Court must remind the Fifth Circuit that it is the "obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015).

Granting certiorari also would not require this Court to dive headlong into the factual record as the Fifth Circuit did. Indeed, because this case is on all fours with *WWH*, this Court could grant certiorari and summarily reverse. *See* Sup. Ct. R. 16.1 (the Court may issue an order that is a "summary disposition on the merits"); *see also White v. Wheeler*, 136 S. Ct. 456, 458 (2015) ("[The Circuit's] ruling contravenes controlling precedents from this Court, and it is now necessary to reverse the Court of Appeals by this summary disposition."). Or this Court could simply do what the Fifth Circuit panel majority ought to have done: accept the district court's well-supported factual findings. This Court routinely applies that standard of review in cases just as complex. *See, e.g.*, *WWH*, 136 S. Ct. at 2310-11 (reversing Fifth Circuit decision after finding adequate "factual support for the District Court's conclusion" that Texas's admitting privileges law imposed an undue burden).

II. Irreparable Injury to Women in Louisiana Is Likely and Imminent

Louisiana argues that Plaintiffs-Appellees cannot meet the irreparable harm requirement for a stay because the harms are "self-inflicted" and mitigated by LDH's last-minute "announce[ment]" that it "envisions" a protracted regulatory process for

ensuring compliance with Act 620. Def.'s Obj. at 2, 14, 25. Both contentions are meritless, and Louisiana fails to identify any concrete harms to the state from a stay.

A. Act 620's Harms to Louisiana Women Cannot Be Blamed on Abortion Providers

Louisiana does not seriously contest any of the irreparable harms identified in Plaintiffs-Appellees' emergency stay application. Rather, in a twisted application of the Fifth Circuit panel majority's flawed causation logic, Louisiana contends that these harms, when they occur, will not be caused by Act 620 but are the "fault of the abortion providers themselves" for not obtaining admitting privileges. Def.'s Obj. at 25.

Louisiana's contention that Act 620's harms are caused by the Doe physicians' failure to obtain privileges should be rejected for the same reasons that the state's flawed causation arguments are wrong. *See* supra pp. 8-9. But more fundamentally, Louisiana ignores the fact that a stay is necessary in this case to preserve the status quo and prevent irreparable harm to *Louisiana women* of reproductive age. Louisiana women did nothing to inflict or invite these harms upon themselves, and the entire focus of the undue burden inquiry under the constitution is on the obstacles that laws impose on women's path to choose abortion. It would be cruel and absurd to deny Louisiana women the protections of a stay, or to treat Louisiana women merely as collateral damage to Act 620's enforcement, because the Doe physicians purportedly could have tried harder to obtain admitting privileges.

B. LDH's Last-Minute "Notice" Does Nothing to Mitigate Act 620's Harms

Just prior to filing its objection to the stay petition, Louisiana hastily posted to the internet a one-page "Notice" outlining a 45-day procedure that LDH purportedly intends to use to verify that abortion clinics have complied with Act 620. Def.'s Obj. at 25. This "Notice" does nothing to mitigate Act 620's harms.

According to the Notice, clinics will have 45 days to submit documentation to LDH that they have complied with Act 620, and LDH will then proceed to verify that the clinics' physicians have admitting privileges that meet the law's requirements. But even if LDH adheres to this 45-day-plus "verification" process, liability for violating Act 620—which includes civil liability for clinics, as well as civil, criminal, and professional liability for physicians—is triggered as soon as the mandate issues and Act 620 is no longer enjoined. *See, e.g.*, La. Rev. Stat. §§ 1061.10(a)(2)(c), 1061.10(d)(5), 1061.29; *see also* 48 La. Admin. Code Pt I, §§ 4401, 4415(B), 4417(A), 4423(B)(3)(e). Nothing in LDH's "Notice" suggests otherwise.

Given the number and severity of the law's penalties, no clinic or doctor without admitting privileges will continue to provide abortions once Act 620 becomes enforceable. Irreparable harm to women in Louisiana, therefore, is imminent.

C. Louisiana Identified No Concrete Harms Resulting From a Stay

The balance of hardships in this case weighs overwhelmingly in favor of staying the Fifth Circuit's mandate. In fact, the only "harm" that Louisiana claims it will suffer is the state's purported frustration in not being allowed to enforce a duly enacted statute. "Individual justices, in orders issued from chambers, have expressed

the view that a state suffers irreparable injury when one of its laws is enjoined. . . . No opinion for the [Supreme] Court adopts this view." *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014).

Moreover, in this case, Louisiana is particularly hard pressed to argue that the state's interests would be frustrated. Act 620 has been enjoined for more than four years, without any demonstrable harm to patients or the public. The district court found that Act 620 is not necessary to ensure the health and safety of women seeking abortions in Louisiana. And, even accepting the Fifth Circuit panel majority's conclusion that Act 620 serves a credentialing benefit, the panel majority itself characterized this benefit as "minimal," and enforcement of Act 620 against any of the Doe physicians would not provide any credentialing benefit. The district court already found that the Doe physicians are adequately credentialed and well-qualified to provide abortions. Dist. Op. at 66-77.

CONCLUSION

For the reasons set forth above, and in their emergency petition for a stay, Plaintiffs-Appellees respectfully request that the Court stay the Fifth Circuit's mandate pending the filing and disposition of a petition for a writ of certiorari.

Dated: February 1, 2019

Respectfully submitted,

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