No. 17-30397

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge, Case No. 3:14-cv-0525-JWD-RLB, Hon. John W. deGravelles

BRIEF OF PLAINTIFFS-APPELLEES

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October 20, 2017

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs/Appellees	**Counsel Appearing for Plaintiffs/Appellees**
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Dr. Rebekah Gee	Jeff Landry Elizabeth B. Murrill LOUISIANA DEPARTMENT OF JUSTICE S. Kyle Duncan Stephen S. Schwartz SCHAERR DUNCAN LLP

Other Persons or Entities Known to be Interested

Delta Clinic of Baton Rouge
Women's Health Care Center
Dr. John Doe 3
Dr. John Doe 5
Dr. John Doe 6

Plaintiff Hope Medical Group for Women has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Dated: October 20, 2017

/s/ David Brown
David Brown

STATEMENT REGARDING ORAL ARGUMENT

This case involves the straightforward application of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); 833 F.3d 565 (5th Cir. 2016), to an admitting-privileges requirement identical to the one struck down in that case. No oral argument is necessary to affirm the District Court's judgment that this identical law is also unconstitutional.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3)-(4). Appellate jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) ("*WWH*"), which held Texas's admitting-privileges requirement unconstitutional, requires Louisiana's identical requirement also be struck down.

2. Whether the District Court correctly held Louisiana's admitting-privileges requirement fails under the undue-burden analysis because its factual findings that the requirement provides no health benefit, heavily burdens women seeking an abortion, and was enacted for an unconstitutional purpose, were not clearly erroneous.

3. Whether the District Court properly exercised its discretion in enjoining the unconstitutional admitting-privileges requirement.

INTRODUCTION

This Court and the Supreme Court of the United States have already held that a Texas law, which Defendant agrees is identical to the statute challenged here ("Act 620" or "the Act," attached hereto *infra* in the Statutory Addendum), provides no medical benefit and is unconstitutional. *See WWH*, 136 S. Ct. 2292; 833 F.3d 565 (5th Cir. 2016). This binding precedent requires the Act be struck down.

Moreover, as the District Court found, the Act would impose severe burdens. It would drastically reduce the number of abortion providers in the state, which would prevent many women from accessing abortion altogether. Those women able

to obtain legal abortions would face unreasonable delays, overcrowded clinics, and increased travel distances and expenses, leading to increased health risks, later procedures, and other hardships. These facts were supported by overwhelming evidence, are consistent with the conclusions of numerous other courts, and are not clearly erroneous. The District Court properly concluded that Act 620's burdens outweigh its benefits and is therefore unconstitutional under *WWH*. That decision should be affirmed.

STATEMENT OF THE CASE

A. Louisiana Abortion Providers

Plaintiffs Dr. John Doe 1 and Dr. John Doe 3, and non-party physicians Drs. John Doe 2, 5, and 6, provide substantially all of the approximately 10,000 abortions women need annually in Louisiana. ROA.4193, 4197-4201. They do so at Louisiana's three licensed outpatient abortion facilities—Plaintiff Hope Medical Group for Women ("Hope") in Shreveport, and non-parties Delta Clinic of Baton Rouge ("Delta") and Women's Health Care Center ("Women's") in New Orleans. ROA.4194-97.

Doe 1 specializes in family medicine and addiction medicine. ROA.4197. He works five to six days a week, divided roughly equally between his private addiction-treatment practice and Hope. ROA.6772-73. He provides most of Hope's abortion care. ROA.4194.

Doe 2 works occasionally at Hope, filling in when its other two physicians are unavailable. ROA.4198. At the start of litigation, Doe 2 was working at two other licensed abortion facilities: primarily, at Bossier Medical Suite ("Bossier") in Bossier City, where he was the only physician, and secondarily, at Causeway Medical Clinic ("Causeway") in New Orleans. ROA.4198. Both facilities closed during the litigation.[1] ROA.4198.

Doe 3 works nearly full-time at his private OB/GYN practice in Shreveport, in which he provides prenatal care, delivers babies, and practices gynecology. ROA.4199, 4260. Additionally, he provides abortion care one-and-a-half days a week at Hope. ROA.4199.

Doe 5 is the only physician providing abortion care at Delta; he also provides abortion care at Women's. ROA.4200.

Doe 6 is the medical director of both Delta and Women's, and also has a private gynecology practice in New Orleans. ROA.4201, 4263. He is Women's primary provider of abortion care. ROA.4196. Due to the demands of his private practice, and his age, Doe 6 does not travel to Baton Rouge to care for patients at Delta. ROA.4263.

[1] A different physician, Dr. John Doe 4, was Causeway's primary physician; after its closure, he ceased to provide abortion care in Louisiana. ROA.4200, 4265.

B. Act 620

Act 620 was enacted on June 12, 2014, modeled after similar laws that had successfully closed abortion clinics in other states. ROA.4224. On May 5, 2014, the Act's author, Dorinda Bordlee, the Vice-President and Executive Counsel of an anti-abortion advocacy group, sent the bill's primary legislative sponsor, Representative Katrina Jackson, an email regarding a then-recently-enacted statute that had "tremendous success in closing abortion clinics and restricting abortion access in Texas." Ms. Bordlee told Representative Jackson that "[Act 620] follows this model." ROA.4224. Advocacy groups, Louisiana Department of Health ("LDH") officials, and Representative Jackson coordinated their efforts to restrict abortion. ROA.4224-25, 4230-31. The Texas law was struck down by the Supreme Court and permanently enjoined by this Court last year in *WWH*. Defendant agrees it was "identical" to Act 620. Emergency Mot. of Appellant for Stay Pending Appeal ("Em. Mot."), No. 16-30116, *June Med. Servs. v. Gee*, at ii, 20 (5th Cir. Feb. 16, 2016); ROA.1249.

Act 620 requires any physician who performs an abortion or provides abortion-inducing medication in Louisiana to obtain "active admitting privileges" at a hospital "that provides obstetrical or gynecological health care services," located within 30 miles of where the physician performs the procedure or hands the patient the medication. La. Rev. Stat. § 40:1061.10(A)(2)(a) (formerly La Rev. Stat. §

40:1299.35.2(A)(2)(a));[2] *infra*, Statutory Addendum at 2. "'[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*. Additionally, LDH has promulgated an implementing regulation, incorporating the admitting-privileges requirement into the requirements for maintaining an outpatient abortion facility license. 48 La. Admin. Code Pt I, § 4423(B)(3)(e). Violations of the Act are punishable with imprisonment for up to two years, plus fines of up to four thousand dollars, plus several different forms of civil liability. La. Rev. Stat § 40:1061.10(A)(2)(c) (formerly La Rev. Stat. § 40:1299.35.2(A)(2)(c)), *infra*, Statutory Addendum at 2; La. Rev. Stat § 40:1061.29. The implementing regulation additionally provides for penalties including fines and licensure actions applicable to outpatient abortion facilities. 48 La. Admin. Code Pt I, §§ 4415(B), 4417(A), 4401.

The Act's effective date was September 1, 2014.

C. Procedural History

After attempting to obtain active admitting privileges before the Act took effect, *see infra* at 9-10 n.4, on August 22, 2014, Plaintiffs brought this suit, seeking

[2] The Act's sections were renumbered as part of a general statutory renumbering that took effect subsequent to trial; the District Court's opinion generally follows the original citation, *see* ROA.4223.

a declaration of the Act's unconstitutionality and a permanent injunction, as well as interim injunctive relief. The district court entered a temporary restraining order ("TRO") on August 31, 2014. ROA.467-485. The parties then commenced discovery. Subsequently, Defendant made a motion for partial summary judgment, which the District Court, after briefing and argument granted in part and denied in part. ROA.1521-545. During this time, the TRO was extended twice, each time with the parties' consent. ROA.526, 1417-18.

The District Court held a six-day evidentiary hearing in June 2015. ROA.4190.[3] It heard live testimony from twelve expert and fact witnesses and accepted further testimony in the form of declarations and deposition designations. ROA.4182-83. It also admitted 245 exhibits. ROA.27-28. On January 26, 2016, the District Court issued a 112-page opinion making extensive findings of fact and conclusions of law, finding the Act imposed a substantial obstacle in the path of women seeking abortion in Louisiana, declaring the Act unconstitutional, and issuing a preliminary injunction. ROA.3748-3859.

On February 10, 2016, Appellant appealed and sought a stay pending appeal in the district court, which was denied in an extensive thirty-page opinion addressing each of her contentions. ROA.3912-941. Appellant then sought an "emergency" stay

[3]As this occurred while *WWH* was still pending, the District Court heard testimony regarding the Act's medical reasonableness—an issue now foreclosed by Supreme Court precedent, see *infra* 28-32—as well as the Act's burdens.

of the injunction pending appeal from this Court, citing the Act's "important health and safety benefits." Em. Mot. at iv. On February 24, 2016, this Court granted the stay. *June Med. Servs. v. Gee*, No. 16-30116 (5th Cir. Feb. 24, 2016); ROA.3942-957. The Supreme Court vacated it nine days later. *June Med. Servs. v. Gee*, 136 S. Ct. 1354 (2016).

Despite having sought emergency relief, Defendant then sought a stay of proceedings in her appeal, pending the Supreme Court's ruling in *WWH*, *see June Med. Servs. v. Gee*, No. 16-30116 (5th Cir. Mar. 9, 2016); and then, after the *WWH* decision, a remand for further fact-finding in light of it, *June Med. Servs. v. Gee*, No. 16-30116 (5th Cir. Aug. 24, 2016).

On remand, the parties agreed that the case could be decided on the record developed for the preliminary injunction hearing, with no need for further evidence beyond the status of the licensed abortion facilities that had closed subsequent to the trial, and their physicians. ROA.4078-79. On April 26, 2017, the District Court issued a final judgment in a 116-page opinion, extending its findings of fact and conclusions of law, and permanently enjoining the Act in all of its applications. ROA.4174-4289; 4290-91. Defendant appeals from this judgment.

Plaintiffs have filed a petition for attorneys' fees and costs. ROA.4294-4314; ROA.5851-5975. That petition, along with Defendant's motion to dismiss it,

ROA.5985-92, and Plaintiffs' reservation of a supplemental petition covering the mounting costs of the present appeal, ROA.4299, remains pending.

D. Act 620 Prevents all but One Doctor at One Clinic from Providing Abortion Care.

Of the six abortion providers in Louisiana at the time Act 620 was enacted, only one—Doe 3—already had privileges to admit patients at a local hospital and to provide diagnostic and surgical services. ROA.4199, 4266. He had long maintained such privileges at two Shreveport-area hospitals in connection with his primary practice, which includes performing hospital deliveries and other in-patient obstetrical and gynecological care. ROA.4199.

As soon as the Act passed, the remaining physicians providing abortions in Louisiana sought active admitting privileges near the clinics where they worked. ROA.4244, 4249-250, 4260, 4262, 4264. Together, the five physicians separately inquired into the possibility of obtaining active admitting privileges with seventeen hospitals, and ultimately submitted a total of eleven formal applications, after determining that certain hospitals would not satisfy the Act's requirements or could not extend them an application.[4] By the day before the Act's effective date, none of

[4] While the District Court states that "thirteen" applications were filed, its factual findings reveal eleven formal applications and six additional inquiries. ROA.4244-64. Doe 1 applied to Christus, Minden, and Willis-Knighton Hospitals in the Shreveport area. ROA.4244. Additionally, she contacted University Health and North Caddo Regional Hospitals regarding an application, and obtained

the five physicians had had their applications finally decided—which was a central reason cited by the District Court for granting a TRO. ROA.431-32.

The District Court characterized the hospitals' ensuing reluctance to avoid reaching final decisions, on the doctors' applications as a process akin to Franz Kafka's *The Trial*. ROA.4245. Louisiana, unlike some states, such as Texas, has no law requiring hospitals to act on doctors' privileges applications within any time frame, or at all.[5] As a result, the District Court determined that an application neither granted nor denied after over a year amounted to a "*de facto* denial." ROA.4204-205.

Only one application was expressly rejected, and not for any reason related to the physician's competence, but because the hospital did "not have a need for a satellite primary care physician at this time." ROA.4207. Eight applications were *de*

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information that she would be ineligible to obtain active admitting privileges. ROA.4244-45. Doe 2 applied to Tulane in the New Orleans area and Willis-Knighton in the Shreveport area, and inquired with University Health in Shreveport, which he determined would not grant him privileges. ROA.4248-4251. Doe 4 applied to Ochsner-Kenner in the New Orleans area, and inquired into Touro Infirmary and LSU New Orleans, but did not submit applications at either after determining he would be ineligible. ROA.4260-61. Doe 5 applied to "Hospital C" in New Orleans and to Woman's Hospital, Lane Regional Medical Center, and Baton Rouge General Medical Center in Baton Rouge. ROA.4262. Doe 6 applied to East Jefferson Hospital in the New Orleans area, and inquired with Tulane where he was informed he would not be eligible. ROA.4264.

[5] ROA.4204-05 (citing Tex. Health & Safety Code § 241.101 and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014)).

facto denied. ROA.4247-248, 4251, 4261-62, 4264. Doe 2's application to Tulane was converted to a grant of limited privileges, not permitting him to provide diagnostic or surgical services[6] when, after internal discussions "with our lobbyists," it was determined that Doe 2 was a "low/no provider" in New Orleans-area hospitals and that some doctors "were not comfortable" or were concerned that "Tulane as back up for an abortion clinic might not help our referrals." ROA.4252. Only one application—one of Doe 5's—resulted in a grant of active admitting privileges.[7]

Thus, only Doe 5 was able to secure active admitting privileges, and even then only in New Orleans, where he is the secondary provider at Women's, and not in Baton Rouge, where he is the sole provider at Delta. ROA.4262. Lacking active admitting privileges as defined by Act 620, Does 1, 2, and 6 would be completely prohibited from providing abortion care, and Doe 5 would be prohibited in his primary practice area. ROA.4197-99, 4201, 4244, 4248, 4263, 4268-270.

[6] Defendant's contention that these nevertheless constitute "active admitting privileges," including the District Court's findings in response to this argument, is addressed *infra* 34-37.

[7] Defendant observes both Doe 2's and Doe 5's privileges are called "courtesy privileges," but as was clear from trial, that is irrelevant to whether they are "active admitting privileges" as defined by the Act. Any hospital may name any set of privileges what it wishes. ROA.4203-204; 6959-962. *See also* ROA.4249 (noting that the privileges, called "courtesy privileges," that Doe 5 received at Tulane would be called "consulting privileges" at University Health). Doe 2's "courtesy privileges" allow him to admit patients, but not to provide any diagnostic or surgical services. ROA.4253. Doe 5's "courtesy privileges" permit all three things. ROA.4201, 4262. The name itself has no legal significance.

Additionally, the Act would close Delta and Hope, because they would lose, respectively, their only physician and their primary physician, and thus no longer be able to remain going concerns. ROA.4270-71. Lacking a clinic, Doe 3 would then also have to stop performing abortions. ROA.4285. Doe 3 also testified that he would cease performing abortions if Act 620 forces Doe 1 to stop providing abortions, because he is rationally afraid of being targeted for violence and harassment as the last provider in Northern Louisiana. ROA. 4224, 4268.[8]

E. One Doctor at One Clinic Cannot Care for All 10,000 Women Who Need Abortions in Louisiana Annually.

The District Court found that allowing the Act to take effect would reduce the capacity of Louisiana's abortion providers well below the level required to serve the number of women seeking abortion services in the state. ROA.4270 ("If Act 620 were to be enforced . . . Louisiana would be left with one provider and one clinic. . . . [T]his would result in a substantial number of Louisiana women being denied access to an abortion in this state."). Given that he performed fewer than 3,000 abortions in 2013 (primarily at the clinic where he does not have privileges),

[8] The District Court cited a "mountain of uncontradicted . . . evidence" in explaining the climate of intimidation, harassment, and violence that surrounds the provision of abortion care in Louisiana, affecting both doctors' ability to continue providing care and their admitting privileges applications. ROA.4215; *see also* ROA.4214-19. This includes attacks by assailants wielding Molotov cocktails, acid, and sledgehammers; telephonic threats; trespass; unlawful harassment; and religious persecution. ROA.4214-19.

"as a logistical matter," Doe 5 cannot serve all the roughly 10,000 women seeking an abortion in Louisiana each year. ROA.4270-71. Thus, under the Act, "approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana." ROA.4270-71.

F. Act 620 Provides no Health Benefit and Would Harm Women's Health

The District Court made clear and well-supported findings of fact that the Act "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." ROA.4243.

Expert testimony based on nationwide scientific studies showed abortion is one of the safest medical procedures in the United States, with far lower risk than carrying a pregnancy to term and giving birth. ROA. 4235, 6369, 7439, 10164. In the first trimester, the prevalence of major complications requiring treatment in a hospital is 0.05%. ROA. 4237, 6369, 10843.[9] The risks of abortion remain low through the second trimester, but increase with gestational age. The risk of complication requiring hospitalization in the second trimester is approximately 1.0%. ROA.6369.

[9] About 90% of abortions are performed in the first trimester. OB 59 n.19 (Cites to "OB" are to Appellant's Opening Brief.)

The District Court also found that "Defendant did not introduce any evidence showing that patients have better outcomes when their physicians have admitting privileges." ROA.4240. The evidence showed that if a patient experiences a complication after she leaves the clinic, the standard of care is to advise her to go to the hospital closest to her, which is not necessarily within 30 miles of the clinic. ROA. 4242, 6392, 10169-70. Admitting privileges are neither necessary nor useful for transferring a patient from an outpatient healthcare facility to a hospital for emergency treatment, nor will their absence result in a patient's receiving a lesser standard of care. ROA.6391, 10166-170. They are not required by Louisiana to provide any other form of outpatient care. *See infra* at 27-28. Additionally, extremely few complications from surgical abortion, and by definition none from medication abortion (which takes place at home) occur at the clinic. ROA.4236, 6260-61, 6380.

The District Court also reviewed evidence that the medical community overwhelmingly opposes admitting-privileges laws as lacking any medical justification. The American Medical Association and American College of Obstetricians and Gynecologists state that these requirements have "no medical basis," "are inconsistent with prevailing medical practice," and "do nothing to protect the health of women." ROA.4240-41; *accord WWH*, 136 S. Ct. at 2312

(reviewing medical professional amicus briefs). *See also* ROA.6384-85, 6395, 10253-54, 10922.

In light of the lopsided evidence regarding any health benefit from an admitting-privileges requirement, the District Court concluded the Act "does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana." ROA.4240.

Conversely, after hearing testimony from both sides' experts, the Court found admitting privileges would be particularly hard for abortion providers to obtain and to keep. "[S]urgical privileges are meant for providers who plan to perform surgeries at the hospital." ROA. 4212, 7029-030, 7503. Because abortion patients so rarely need hospital admission, hospitals are not likely to renew abortion providers' privileges, as they are not admitting patients. ROA. 6339, 6821-22, 7498. As the record in this case demonstrates, physicians are sometimes denied privileges, "explicitly or de facto, for reasons unrelated to competency." ROA.4283-84. The evidence showed that some hospitals did not want to be publicly associated with abortion. *See supra* at 11, *infra* at 25 n.14. Unlike in some states, denying privileges to doctors who perform abortions on this basis is not prohibited under Louisiana law. *Compare* TEX. OCC. CODE § 103.002(b).

Based on physicians' testimony, the District Court found that with a single provider remaining, women seeking abortion in Louisiana will be prevented in great

numbers from reaching an abortion clinic with sufficient capacity to perform their abortions, with significantly deleterious health consequences. ROA.4270-72. Many would be forced to forgo abortion altogether and carry a pregnancy to term, contrary to their constitutional right to have an abortion. ROA.4270-72. Women would 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. ROA.6394-395.

The District Court did not limit its findings just to those women denied legal abortion altogether. The evidence showed "*[a]ll 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." ROA.4274 (emphasis added). The evidence also showed that delays caused by the Act even for women able to access legal abortion would contribute to their seeking abortion at a later gestational age, which increases the risks, expenses, and other burdens of the procedure, ROA.6370-71, 6393-94, 10175. Additionally, women outside New Orleans would have to face "the burdens associated with increased travel distances," which in many cases will increase delays still further, contributing to later abortions or an inability to obtain services altogether. ROA.4287.

The District Court also found that "[i]n 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." ROA.4287. Among others, the District Court, on hearing all of the evidence, determined in great detail that the Act's heaviest burdens "would fall disproportionately upon poor women." ROA.4275-77; *see also* ROA.6565-6601, 10189-10214 (expert evidence describing increased burdens specific to poor women).

"Based on all of the evidence, the Court [made] 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" the second trimester. ROA.4277-78. "In short," the District Court concluded, "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." ROA.4278. "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." ROA.4278.

G. The District Court Made Alternative Findings

The District Court also made alternative findings under scenarios, proposed by Defendant, in which the inability by Does 2 and 3 to perform abortions either does not occur or cannot be considered as a matter of law. (As discussed, *infra* at 34-38, the record does not support either conclusion, and the District Court correctly rejected both). Even under the State's alternative facts, Louisiana would still lose one of its three clinics, and have overwhelming capacity reductions at the remaining two, given the loss of the primary physician at each and Doe 2's total inability to provide abortion care, since he lacks privileges within 30 miles of the only clinic at which he works. ROA.4271-72. Accordingly, the District Court found that 55% of women would be totally unable to obtain abortions were Doe 3 to remain working. ROA.4274.[10] Also, the Court found that, even among the remaining women, many would still face substantially increased travel distances because Hope would not have the capacity to meet Northern Louisiana's regional need for abortion care after losing its primary physician and the next-nearest clinic, Delta, would be closed. ROA.4276, 4285. The Court found, under Defendant's proposed scenarios, that the statewide burdens due to delay, clinic crowding, increased travel distances, and other

[10] The District Court also heard testimony from Plaintiff physicians that, due to their already-full work schedules, and the demands of their non-abortion practices, they are not able to massively increase their provision of abortions. *E.g.*, ROA.6281-284, 6774-76, 6865.

obstacles associated with significantly reducing the number of abortion providers in the State, including increased health risks and increased unlawful abortion, would only be reduced, but not eliminated, given that the already critically-low number of providers and clinics in the state would still be further reduced. ROA.4276, 4285.

SUMMARY OF THE ARGUMENT

Under *WWH*, the Act serves no medical purpose and is unconstitutional in all of its applications. Further, the District Court's findings after trial that the Act serves no health benefit and would impose numerous burdens—including depriving most women of access to legal abortion altogether in Louisiana; imposing unreasonable delays, clinic crowding, increased travel distances, and increased expenses even on those women who still have legal abortion access; and concomitantly increasing health risks and other burdens on all Louisiana women needing abortion—are not clearly erroneous. The Act's burdens and lack of benefits render it unconstitutional under the undue burden standard. The District Court's injunction of the Act in all of its applications properly applied that precedent, and there is no legal basis to reverse its conclusion.

STANDARD OF REVIEW

A district court's legal conclusions are reviewed *de novo*, and its findings of fact for clear error. *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015). Factual determinations will stand so long as they are

plausible—even if the Court of Appeals is "convinced that we would or could decide the case differently." *Id.* Clear error review "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id*. at 574. "The clearly erroneous standard of review following a bench trial requires even 'greater deference to the trial court's findings when they are based upon determinations of credibility.'" *Guzman*, 808 F.3d at 1036 (quoting *Anderson*, 470 U.S. at 574, and citing Fed. R. Civ. P. 52(a)(6)). "[I]t is not proper for this court to retry factual issues where there is evidence to sustain the findings below." *Hallberg v. Hilburn*, 434 F.2d 90, 91 (5th Cir. 1970).

ARGUMENT

I. The Undue Burden Standard is a Fact-Based Standard

In *WWH*, the Supreme Court affirmed that states cannot limit access to abortion for pretextual reasons and that abortion restrictions are unconstitutional when the burdens they impose outweigh the benefits they confer. 136 S. Ct. at 2309-10. Where an abortion restriction's burdens outweigh its benefits, the burdens are "undue" and unconstitutional. *Id.* "[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.* at 2300, 2309. Because of the fundamental liberty interest at stake, the undue burden standard demands close judicial scrutiny. *Id.* at 2309. In balancing benefits against burdens, a court may not uncritically defer to the state's articulation of its interest, but rather "place[s] considerable weight upon evidence and argument presented in judicial proceedings." *Id.* at 2310.

II. The District Court's Finding that the Act Provides No Health Benefit Is Consistent with Precedent and Is Not Clearly Erroneous

In reviewing a state's restrictions on the fundamental constitutional right to abortion, the standard laid out by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and reaffirmed just last year in *WWH* "asks courts to consider whether any burden imposed on abortion access is 'undue'" in light of the evidence and weighed against the restrictions' benefits. *WWH,* 136 S. Ct. at 2310. Such a restriction must actually further a legitimate state interest, through permissible means. *Id*. at 2309.

WWH held that the Texas admitting-privileges requirement, which the State acknowledges is "identical" to Act 620, Em. Mot., at ii, 20, is unconstitutional in all of its applications. *WWH*, 136 S. Ct. at 2313; 833 F.3d at 567. The Supreme Court affirmed that this identical law provided no medical benefit to abortion patients. 136 S. Ct. at 2311. Its conclusion was based on expert testimony regarding abortion safety and healthcare practices, as well as amicus briefs from national medical

organizations reflecting reliable scientific data. *See id*. at 2311-14 (reviewing expert testimony and amicus briefs).

The Supreme Court's opinion held that an admitting-privileges requirement has no medical basis. *Id*. Here, the District Court's finding that Louisiana's also has no medical benefit was not clearly erroneous. Both parties put on evidence regarding the Act's purported medical benefits. The District Court considered all of the evidence before it, and "found the expert testimony of the Plaintiffs' experts to be reasoned and supported," while Defendant's case was unconvincing and the Court had "serious concerns" about her experts' credibility. ROA.4232-33.[11] The Court considered expert testimony, from highly qualified OB/GYNs, that admitting privileges:

- are not routinely employed in the transfer of patients' care between physicians, and have been shown neither to be necessary nor beneficial

[11] One of Defendant's two medical experts, Dr. Cudihy, an OB/GYN, was directly contradicted by the expert treatises on which he purported to rely, ROA.7243-47, 7275-76, 7299-304, and offered numerous opinions he acknowledged had no basis in scientific evidence, ROA.7272, 7275, 7277, 7280-81, 7299-304, 7306, nor in his personal experience, ROA.7272, including opinions based on the testimony of an expert who had been discredited in other admitting-privileges cases, ROA.4233, 7310-11; the District Court also found him evasive and biased. ROA.4232-33. The other expert, Dr. Marier, did not purport to have any expertise related to OB/GYN care, and so the District Court did not credit his testimony regarding the Act's purported benefits, ROA.4234; it also found him biased, ROA.4234.

for good patient outcomes; ROA.4241-42, 6294-95, 6388, 6390-91, 6411-13, 6430-31, 6435, 6454-55, 6479-80, 7435-36, 7486;

- are typically irrelevant to abortion patients' care, because the few complications that occur do so almost entirely outside the clinic, and in such an event, a patient should go to a hospital near *her*, not her physician; ROA.4242, 6260-61, 6296-97, 6392; and
- are opposed by the medical community and out-of-step with contemporary medical practice; ROA.6385, 10253-54, 10891-0928.
- The Court also considered the total lack of "evidence showing that patients have better outcomes when their physicians have admitting privileges." ROA.4240.

The record on which the District Court relied here included the same kind of scientific evidence as was before the District Court in *WWH*, 46 F. Supp. 3d at 685 (reviewing evidence); *see also* 136 S. Ct. at 2311-12 (same).

Defendant does not argue that any of the District Court's findings based on the scientific evidence (or lack thereof) are clearly erroneous. Rather, she argues that this Court should simply ignore those findings and consider only two facts: that Doe 3, who has admitting privileges, has used them (twice in a thirty-year career) and that some review of credentials may occur as part of awarding privileges. Defendant also points to no evidence in the record that supports her contention that the rate of

abortion complications simply must be higher than shown by the evidence presented to the District Court.

The District Court heard expert testimony, reviewed affidavits, and learned treatise excerpts from both sides, ultimately finding the Plaintiffs' evidence persuasive. The weight that the District Court chose to give this evidence is not the issue before this Court. *See, e.g.*, *Guzman*, 808 F.3d at 1036; *United States v. Simpson*, 645 F.3d 300, 306 (5th Cir. 2011) ("It is our not our task, as an appellate court, to relitigate the battle of the experts"); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1154 (5th Cir. 1990) ("The credibility determination of witnesses, including experts, is peculiarly within the province of the district court. We cannot say the district court committed clear error in accepting the testimony of other experts over that of [Defendant's] . . . .").

Furthermore, the two facts Defendant points to here do not demonstrate clear error. Defendant's select presentation of the evidence regarding Doe 3's use of his privileges does not provide any scientific evidence that an admitting-privileges requirement makes abortion safer. They do not even show that Doe 3's privileges resulted in better outcomes for those two patients.[12] Courts in other admitting-

[12] In fact, there was evidence presented that the plaintiff physicians had obtained emergency treatment for patients when needed without using admitting privileges—and did so frequently, in the particular case of one, who had previously worked as a rural emergency doctor. ROA.4238, 6763-65. ("Q During the time you

privileges cases likewise have not found this sort of anecdotal evidence to demonstrate a medical benefit. *See Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 973 (W.D. Wis.) (rejecting two hospital admission anecdotes as dispositive in the face of contrary expert evidence). Defendant has not, and cannot on the record below, demonstrate that absent the admitting privileges requirement, patients are receiving inferior care from hospital physicians.

Similarly, Defendant's argument about credentialing does not demonstrate any benefit from an admitting-privileges requirement. This very argument was considered and rejected in *WWH*, on a substantially similar record, which also showed (as Defendant concedes, OB 32)[13] that physicians providing abortion have privileges applications denied for reasons that have nothing to do with their professional ability. 136 S. Ct. at 2312-13 (reviewing numerous reasons abortion providers have difficulty obtaining and keeping admitting privileges, including that they admit almost no patients, because of discrimination,[14] and due to varying

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were a[rural hospital] emergency physician, . . . you didn't have privileges at the larger hospitals that you would transfer patients to? A No. . . . Q So did one of these larger hospitals, like LSU, ever . . . reject a patient you were transferring to them because you didn't have privileges? A No. Q And to your knowledge, was such a hospital ever unable to treat a patient because you didn't have privileges? A No. Q did a patient you were transferring ever suffer harm because you didn't have admitting privileges? A No.").

[13] Cites to "OB" are to Appellant's Opening Brief.

[14] The District Court found an "abundance of evidence" demonstrating that hospitals can and do deny privileges because of a physician's status as an abortion

hospital business models). *Compare* ROA.4206-14. Further, Defendant again fails to point to any evidence showing that any "credentialing function" actually leads to safer abortions.

Furthermore, Defendant's contention—that the true number of patients needing hospital care for an abortion complication is unknown—contradicts evidence heard and evaluated by the District Court. *See* OB 44-46. The rate of such complications was established through credible expert testimony. *See supra* at 13.[15] Defendant's own expert admitted at trial, "complications are rare." ROA.7245-50. In addition, the complication rate alone does not demonstrate that requiring admitting privileges makes abortion safer.

Furthermore, Defendant does not argue that the Court improperly ignored the evidence she points to regarding Act 620's supposed health benefit. The Court

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provider. ROA.4207-08. These included, among others, the explicit refusal of Woman's Hospital in Baton Rouge, to retain Doe 5 on staff because he is an abortion provider, ROA.4217; explicit statements from Tulane (documented in emails), ROA.4251-53, and University Health, ROA.4208-09, refusing to grant Does 1 and 2 active admitting privileges because they are abortion providers; and a Louisiana law, La. Rev. Stat. § 40:1061.3-4 (formerly § 40:1299.32-33), permitting hospitals to discriminate against abortion providers.

[15] The Court received these figures from Plaintiffs' experts, Drs. Estes and Pressman, citing published, peer-reviewed, scientific studies. ROA.6368-69, 7449, 7482-83, 7502, 10164, 11210. The District Court found both experts credible. ROA.4232. Defendant puts in no contrary evidence. This is surprising; every Louisiana physician who treats an abortion complication must report it to Defendant, and she is required to publish an annual statistical report based on this data, La. Rev. Stat. §§ 40:1061.21(B), (D), so she could have introduced this report at trial.

considered it, *see* ROA.4237 (complication rates); ROA.4238-39 (hospital transfers); ROA.4202, 4207-08, 4209, 4234 (credentialing), and did not find it persuasive when viewed in light of all the evidence in the record, including the lopsided expert evidence regarding Act 620's lack of benefit, *see supra* at 12-13.

Defendant also misleadingly argues that the Act "close[s] a loophole in Louisiana law that allow[s] outpatient abortion providers alone to operate without the privileges requirement applicable to all other outpatient surgical procedures." OB 4, 54. (citing 48 La. Admin. Code § 4535(E)(1) (Mar. 2017);[16] ROA.6904-06. Again, this is an argument that the District Court heard and, in light of the evidence presented below, rejected. There is no Louisiana law requiring providers of outpatient surgical procedures to have admitting privileges. *See* 46 La. Admin. Code Pt XLV, §§ 7305(A)(1), 73509(A)(2) (requiring physicians to obtain admitting privileges for office-based surgery only if (i) practicing outside the field of their residency training *and* (ii) not "using only local, topical or regional anesthesia or those using a single oral dose of a sedative or analgesic"[17]). The provision Defendant mis-cites is a regulation of licensed *facilities*, not of *procedures*. *See* 48 La. Admin. Code § 4541 (regulation of ambulatory surgical centers); *see also* ROA.6982-83

[16] Last month this paragraph was recodified, without relevant alteration, as 48 La. Admin. Code § 4541(B). *See* 43 La. Reg. 1742.

[17] This definition precisely describes surgical abortion. ROA.4236. Medication abortion, of course, is by definition not a procedure at all. ROA.4236-37.

("Well, office-based surgery is in Title 46. . . . And the others are for ambulatory surgical centers and outpatient abortion facilities and those are, as I said, in Title 48."). Whether a physician chooses to perform a particular procedure at a licensed facility, such as an ambulatory surgical center, or in his or her own office, which is not subject to licensure and thus not subject to any admitting-privileges requirement, *see* ROA.6930-37, is left to his or her individual medical discretion—except where that procedure is abortion. *See* La. Rev. Stat. §§ 40:2175.3(5), 2175.4(A). Even Louisiana medical expert conceded that he did not need admitting privileges to perform a dilation and curettage for miscarriage management.[18] ROA.7285-86 ("Q So you're not required by any Louisiana law or regulation to have admitting privileges in a hospital to perform a D&C after a natural miscarriage; is that right? A I can't -- I don't know the law thoroughly enough to say that with absolute certainty, but that -- that sounds reasonable. . . . Q so there is no such law? A To my knowledge, no."). In any event, an argument that an abortion restriction is constitutional because it forces abortion facilities to meet ambulatory surgical facility standards is squarely foreclosed by *WWH*, which holds that requiring abortion clinics to meet ambulatory surgical center standards provides no medical benefit and is unconstitutional. 136 S. Ct. at 2318.

[18] A dilation and curettage is performed to empty the uterus for reasons other than to terminate a pregnancy, and is "nearly identical" to a surgical abortion. ROA.7204-05.

The District Court's conclusion that the Act has no health benefit is not clearly erroneous. Defendant does not show that all the evidence submitted by both sides in this case leads to only one permissible view of the facts. Indeed, the state Attorneys General litigating admitting-privileges lawsuits in federal court at the time *WWH* was decided conceded this point. As the Attorney General of Alabama stated, "[b]ecause Alabama's law is identical in all relevant respects to the law at issue in [*WWH*], **there is now no good faith argument that the law is constitutional under controlling precedent**." *Planned Parenthood Se. v. Strange*, No. 16-11867, Mot. to Dism. App. at 1 (11th Cir. July 15, 2016) (emphasis added). *Accord Adams & Boyle P.C. v. Slatery,* No. 3:15-cv-00705 ECF No. 60 (M.D. Tenn. Apr. 14, 2017) ("[I]n light of the current case law as set forth in [*WWH*], 136 S. Ct. at 2300, as Tennessee's . . . Admitting-Privileges Requirement [is] similar to the provisions struck down in [*WWH*] *v. Hellerstedt,* the parties are in agreement that to avoid the expense and utilization of resources on continued litigation . . . permanent injunctive relief regarding enforcement of . . . the Admitting-Privileges Requirement . . . is appropriate"); *Jackson Women's Health Org. v. Currier,* 3:12-CV-00436-DPJ-FKB (S.D. Miss. Mar. 17, 2017) ("Defendants 'acknowledge that the [*WWH*] *v. Hellerstedt* opinion is binding on both this Court and the Fifth Circuit" and "cannot identify any meaningful distinction between the Texas admitting privileges law. . . . and [Mississippi's] admitting privileges requirement.'") (citation omitted).

Numerous courts have also ruled that *WWH* bars relitigation of whether an admitting-privileges requirement provides a medical benefit. *See Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:16-CV-04313-HFS, 2017 WL 1407656, at *2-*3 (W.D. Mo. Apr. 19, 2017) ("For me to accept new material, copies of studies and expert opinions . . . would be impermissible judicial practice. Lower court judges are bound by Supreme Court precedent. . . . *Hellerstedt*'s factual conclusions were not confined to Texas."); *Burns v. Cline*, 387 P.3d 348, 353 (Okla. 2016) ("Defendants argue the impetus for this legislation was to advance and protect women's health. This same argument was considered and rejected in *Hellerstedt*. The national scientific evidence presented in *Hellerstedt* disputed such claims."). *See also Capital Care Network of Toledo v. State of Ohio Dep't of Health*, 58 N.E.3d 1207, 1217 (Ohio Ct. App. 2016), *appeal allowed*, 71 N.E.3d 297 (Ohio 2017) (enjoining requirement to enter into a written transfer agreement contract with a local hospital, noting "[o]ur undue burden finding is fully in agreement with the conclusion reached in *Hellerstedt*."). *Cf. United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981) ("Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally;" a district court commits no error by accepting legislative facts.)[19]

[19] The Supreme Court's conclusion that an admitting-privileges requirement has no medical benefit is the same as that of every other court (save the present in

It is a common understanding that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . [R]espect for precedent is, by definition, indispensable." *Casey*, 505 U.S. at 854 (majority opinion). As Defendant once argued in this litigation, "**the reasonableness of a privileges law exactly like Louisiana's has already been settled by binding . . . precedent**." ROA.764. Her position that precedent is now "of little relevance here," OB 49, is inconsistent. This Court has a proud history of rejecting such arguments from states. *See, e.g.*, *Poindexter v. Louisiana Fin. Asst. Comm'n*, 296 F. Supp. 686, 687-89

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the pre-Supreme Court phase of the *WWH* litigation) that had considered the question under the undue burden standard. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 912-16 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016); *June Med. Servs. LLC v. Kliebert*, 158 F. Supp. 3d 473, 506 (M.D. La. 2016); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 973-83, 994 (W.D. Wis. 2014), *aff'd*, 806 F.3d 908; *WWH v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1365-1377 (M.D. Ala. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013). The Eighth Circuit's recent decision in *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017), *mandate stayed*, No. 16-2234 (Oct. 13, 2017), is not to the contrary. That case remanded a preliminary injunction for more detailed factfinding regarding the burdens of an admitting-privileges requirement for medication abortion providers (with the added provision that the provider may contract with a third physician who has admitting privileges). It did not revisit the district court's conclusion that the requirement had no demonstrable benefit. *Id*. at 960 ("We find it unnecessary to reach the issue of the contract-physician requirement's benefits."). As discussed *infra* 48, *Jegley* also legally erred in this regard: where an abortion restriction has no benefit, by definition any demonstrated burden renders it unconstitutional under the *WWH* balancing test, *see* 136 S. Ct. at 2309-10, and no further factfinding is required. This may explain the panel's unusual step of staying its own mandate.

(E.D. La. 1968) (Wisdom, J.) (enjoining Louisiana's final attempt to maintain Jim Crow schools fourteen years after *Brown v. Board*, because although "the scheme became more subtle, the language more sophisticated," the challenged law shared "the purpose of its predecessors."), *aff'd*, 393 U.S. 17 (1968); *United States v. Jefferson Cty. Bd. of Educ*. 380 F.2d 385, 389 (5th Cir. 1967) (en banc). Louisiana's law cannot be distinguished from the admitting-privileges requirement held unconstitutional just one year ago, and other requirements enjoined across the nation. Just as in those other cases, the evidence here strongly supports the District Court's finding of no medical benefit.

III. The District Court's Findings that the Act Imposes Numerous, Heavy Burdens Are Not Clearly Erroneous

Most of Defendant's brief is taken up with arguments for why the District Court should have adopted her analysis and all of her proposed factual conclusions as to the Act's burdens. OB 18-39. But none of her arguments shows any clear error in the District Court's findings. She argues primarily that the District Court erred in finding that Act 620 would prevent four of the five doctors currently performing abortion from doing so, and that the correct number is only two of the five. OB 18-21. Further, she argues that the remaining doctors could make up for the loss of their colleagues by finding additional employment and working harder. OB 21-24. As a result, either no women or "only" ten percent of women seeking abortions in Louisiana would be totally denied access to abortion in Louisiana. OB 24. Defendant

does not take issue with any of the District Court's findings about Act 620's burdens, other than absolute loss of access to abortion, *see infra* at 40-45.

To reach these conclusions, Defendant makes three legally improper requests of this Court. First, she asks this Court to apply a construction of Act 620 in contravention to its plain text. Second, she asks the Court to assume facts not in the record, or contradicted by the record, despite clear-error review. Finally, she asks the Court to disregard all the burdens imposed by Act 620 except total loss of access within a certain arbitrary distance—in violation of the *WWH* standard.

One business day before trial, Secretary Kliebert filed a declaration taking the position, for the first time after nearly two years of litigation, that the Act's requirement that "active admitting privileges" include "the ability to provide diagnostic and surgical care to a patient," does not apply to the physician's privileges, consistent with the Act's plain language, but rather to the hospital at which the privileges are obtained. ROA.3666-70. Therefore, according to Defendant, Doe 2's privileges in New Orleans, which allow him to admit patients but not provide diagnostic or surgical services, satisfy the Act's requirements. ROA.3668. Defendant further argues that a federal court is bound to accept without question the litigation position of a state official interpreting a law she enforces. OB 19-20.

Defendant's argument is misplaced. It is undisputed that Doe 2's privileges are in New Orleans, where he does not work. Whether he is legally able to provide abortions hundreds of miles from his home and employer is not relevant to whether he would be prevented from providing abortions in Louisiana under the Act; it cannot change anything about the burdens the Act would impose.

Even were Defendant's arguments relevant, the District Court was right to reject them. The District Court considered Secretary Kliebert's declaration, as well as much other evidence, all of which Defendant omits from her brief:

- Ms. Kliebert's live testimony, in which she evinced confusion about how the Act actually works, *e.g.*, ROA.6642-46 ("Q. Secretary Kliebert, you're not aware of what types of hospital admitting privileges will meet Act 620's requirements, are you? A No."), and conceded her construction is not binding, ROA. 6706-07. *See* ROA.4259.[20]
- The live testimony of Defendant's expert, who helped write Act 620, who flatly contradicted Ms. Kliebert's affidavit. ROA.4257 ("And I understood you to say that the doctor, in order to meet Act 620 . . .

[20] This alone is grounds to reject Defendant's argument. *See Van Houten v. City of Fort Worth*, 827 F.3d 530, 533 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 600 (2016) (rejecting unquestioning deference to Texas Attorney General's construction of a state law where his interpretation would not be binding on Texas courts)

would have to perform some diagnostic and surgical services. Did I understand that correctly?" "Yes. Yes, Your Honor.").

- The live testimony of Cecile Castello, the Director of the Health Standards Section of LDH, responsible for the licensing and regulatory compliance for healthcare facilities, including abortion clinics, who also directly contradicted Secretary Kliebert ROA.6880, 6907-09, 6945-46.
- The fact that, under Secretary Kliebert's interpretation, the Act would not further the purpose Defendant argues it serves, because it would not require that physicians be able to treat patients in the hospital. ROA.4258.
- LDH's practice of taking inconsistent legal positions during litigation. ROA.4259 n.47.
- The Act's plain text, which is not ambiguous. ROA.4243-44, 4257-58.

Defendant's brief yet again takes the inconsistent positions that admitting privileges benefit patients by allowing physicians to treat complications in the hospital, and yet the Act does not require privileges that allow this. Defendant cannot have it both ways—a definition of "active admitting privileges" that changes depending on whether she is trying to demonstrate benefits or lack of burdens.

The District Court's opinion that Act 620's definition of "active admitting privileges" means what it says, notwithstanding Ms. Kliebert's affidavit, is both correct and unremarkable. It is black letter law that an agency's unsupported, countertextual interpretation of a regulation it administers does "does not merit deference." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014); *see also, e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 397 (1988). (A federal court may only apply a construction to which a provision is "readily susceptible," and may "not rewrite a state law to conform it to constitutional requirements."); *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (deference is not required when state agency's interpretation "conflict[s] with the statutory text."); *Doctors Hosp. of Augusta v. Dep't of Health & Hosps.*, 13-1762, 2014 WL 4658202, at *7 (La. Ct. App., Sept. 17, 2014), (rejecting LDH's incorrect interpretation of its own regulation as an abuse of discretion), *writ denied*, 153 So. 3d 444 (La. 2014).

Defendant's argument would call into question every holding of this Court declining to apply a state official's interpretation of a law which she enforces. *See, e.g., Van Houten v. City of Fort Worth*, 827 F.3d 530, 533 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 600 (2016). It flies in the face of decades of precedent, in which a federal court must "make an *Erie*[*Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)] guess and determine, in [its] best judgment, how [the Louisiana Supreme Court] would resolve the issue if presented" with it. *In re Katrina Canal Breaches Litig.*,

495 F.3d 191, 206 (5th Cir. 2007). The District Court did so. ROA.4253-59. Defendant nowhere suggests that the Louisiana Supreme Court would be required to blindly defer to Secretary Kliebert's interpretation of the Act, which would be erroneous under Louisiana law. *See Bowers v. Firefighters' Ret. Sys.*, 6 So. 3d 173, 176 (La. 2009) (agency is not entitled to deference in interpreting statutes); *Doctors Hosp. of Augusta*, 2014 WL 4658202, at *7. Her argument must be rejected.[21]

This Court must also reject Defendant's assertions that Does 2 and 3 would either continue to provide abortions notwithstanding the Act or that the Court cannot consider the Act as the cause of their ceasing to do so. Each requires assuming facts not in the record which, under the fact-based undue-burden standard, would itself be clearly erroneous. First, the District Court's refusal to assume that Doe 2 would start working at Women's is proper.[22] The record shows that he is not employed there. Defendant does not point to anything in the record that even suggests this could change by virtue of the Act taking effect. *WWH* specifically rejected Texas's unsupported argument that "facilities could simply hire additional providers." 136

[21] Defendant's reliance on *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), OB 19, is misplaced. *Pennhurst* held only that federal courts may not award injunctive relief against state officials on the basis of state law. 465 U.S. at 106, 124-25. It did not bar federal courts from interpreting state law (even where opposed by state officials) which of course this Court has continued to do in the decades since it was decided. *See, e.g.*, *Van Houten*, 827 F.3d at 533.

[22] As discussed *supra* 33-37, whether Doe 2 could theoretically work at Women's is also irrelevant because he does not have active admitting privileges.

S. Ct. at 2317. The undue burden standard requires determining the *actual* effects of an abortion restriction, not hypothetical ones favoring the State. *Id*.; *see also id*. at 2309 (rejecting application of rational basis test and requiring fact-based review).

There is equally no basis on which to reverse the District Court's conclusion that the Act would also prevent Doe 3 from providing abortions. The District Court correctly found the Act to be the but-for cause of his ceasing to provide abortion care, for two reasons: his justified fear of being assassinated were the Act to leave him as Northern Louisiana's only abortion provider, ROA.4267-68 ("'[A]ll [they] have to do is eliminate [me] as they have Dr. Tiller and some of the other abortion providers around the country to eliminate abortion entirely in Northern Louisiana."), and because the abortion facility where he works would close due to losing its primary doctor, Doe 1, who does not have privileges, ROA.4271, 4285. Although both findings are adequately supported by the record, *see supra* 12, 12 n.8, 38, Defendant only takes issue with the first. Even if her claim of error were correct, which under *WWH*'s fact-based standard it is not, it would be irrelevant.

Defendant also improperly takes issue with the District Court's calculation of the number of women who would be denied abortion altogether under Act 620, which it found would be about 7,000 per year (or, even giving credence to Defendant's incorrect arguments regarding Does 2 and 3, about 5,500). ROA.4271-72. She advances two arguments having no basis in law.

First, she improperly asks this Court to apply a limitation on the undue burden test: that it applies not to actual women seeking abortions in a state, but to hypothetical women who are state residents seeking abortion in the state, and therefore excludes burdens on out-of-state residents. *See* OB 21-24. This would lead to absurd results: any state law completely depriving non-residents of their rights would be deemed constitutional. It would violate the Privileges and Immunities clause, which prohibits discrimination against out-of-state residents in the protection of constitutional rights. *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (striking down ban on providing abortions to out-of-state residents); *Slaughter-House Cases*, 83 U.S. 36, 77 (1872) ("[W]hatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."). Americans' constitutional rights do not change depending on the state in which they reside. "A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights." *United States v. Jefferson Cty. Bd. of Educ*., 372 F.2d 836, 873 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (en banc); *id.* ("[T]reatment which violates . . . constitutional rights in one area of the country, also violates such constitutional rights in another area. . . . Basically, all . . . must be

given the same constitutional protection. Due process and equal protection will not tolerate a lower standard.").

Further, Defendant's test is invented out of whole cloth. *WWH* did not apply a residency test: it considered the effect of the challenged laws on "women seeking abortions in Texas," not Texas women seeking abortions in Texas. *WWH*, 136 S. Ct. at 2319. No other case has applied a residency limitation on the undue burden test either. Additionally, Defendant's invented test would require this Court to imagine Plaintiffs turning away out-of-state residents as patients for the sole purpose of making Defendant's numbers work, although there is no basis in the record from which to infer that Plaintiffs would behave so unethically.

Second, Defendant asks this Court to ignore the record and hold that it was clearly erroneous for the District Court to: (i) reject her conclusion that the three doctors she says would remain in the state would be able to double the number of abortions they provide, essentially by working as hard as they possibly can, OB 23-24;[23] and (ii) find that this would be impossible in light of their other professional responsibilities and personal commitments. The District Court was correct to conclude that it would be "implausible" for physicians to work seven days a week

[23] The Court found, and Defendant does not dispute, that the three doctors she argues would continue working provided about 50-55% of the approximately 10,000 abortions needed annually in Louisiana. ROA.4272 (Doe 3 sees "1,000 to 1,500" patients annually), ROA.4271 (Doe 5 provides about 2,950 abortions), ROA.4198 (Doe 2 provided about 1,000 abortions before Causeway and Bossier closed).

providing abortions. ROA.4284. Also, since Doe 3 retains his privileges in connection with his OB/GYN practice, if he devoted himself entirely to providing abortions, he would, ironically, lose his privileges. ROA.6317. The District Court considered the evidence, and credited the physicians' testimony that they are already at or near their maximum capacity to provide abortion care.[24] This determination was not clearly erroneous. Once again, *WWH* forecloses the argument Defendant makes here, holding that it defies "common sense" and record evidence to assume surviving clinics could massively increase capacity. 136 S. Ct. at 2316-18.[25] Accordingly, it cannot have been clearly erroneous for the District Court to conclude that the few Louisiana doctors who do have active admitting privileges cannot make up the shortfall for those who do not.

Furthermore, *WWH* makes clear that the theoretical possibility of cramming more women into fewer, farther-between clinics can never satisfy the undue burden standard where the purpose of doing so would be to, as here, enforce a sham health law that has no benefit:

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[24] E.g., ROA.6865 ("60 patients is an awful lot of patients. . . . Q: So you don't believe that at your current capacity that you could sustain that number on a regular basis? A: On a daily basis, no."); *see also* ROA.6281-84, 6674-76.

[25] The record evidence here is, if anything, stronger than it was in Texas. *See* Transcript of Oral Argument, at 16, 32, *WWH*, 136 S. Ct. 2292 (2016) (No. 15-274) ("JUSTICE ALITO: . . . [Y]our co-counsel put in - - is also litigating a case like this in Louisiana. And in that case, the plaintiffs were able to put in evidence about the exact number of abortions that were performed in all of the facilities. . . . [I]f we look at the Louisiana case, we can see that it's very possible to put it in.").

> [F]undamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities.

136 S. Ct. at 2318. Thus, even were Defendant's capacity argument correct, it would be irrelevant, in light of the undisputed fact that the Act would reduce the available number of clinics and physicians, without providing any health benefit.

Finally, Defendant also improperly requests this Court to look at only one burden imposed by the Act—complete loss of lawful abortion access within the arbitrary distance of 150 miles—stating that 90% of women would not bear this burden. OB 24-25. The Court should not consider this argument because it is completely unsupported by admitted evidence. Defendant's citations, which she incorrectly calls "unrebutted testimony," are not to testimony at all, but rather to a pair of charts attached to an expert's report, which neither state nor imply the 90% claim. *See* OB 24-25, 27, 50, 58. Defendant's expert tried to offer the 90% figure at trial, but the District Court disallowed it *because it was not included in his report*, in violation of Fed. R. Civ. P. 37(c)(1). ROA.7100-07. Defendant does not appeal this ruling.

Even if Defendant's argument were not an end run around the rules, it should still be rejected because it incorrectly assumes, citing randomly to *WWH*'s

discussion of the impact of Texas's admitting-privileges requirement on women's distance to the nearest surviving clinic, that there is a bright-line rule that any restriction that would leave at least one clinic within 150 miles is not a burden.[26] She calls this the "geographical impact" analysis. OB 24.

The Supreme Court has never established a 150-mile rule or a geographical impact test, and *WWH* explicitly instructs courts to look at "any burden," 136 S. Ct. at 2310, and to balance those burdens against the benefits (if any) of the restriction. In *WWH*, increased distances to clinics were but one "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*, . . . supports the District Court's 'undue burden' conclusion." 136 S. Ct. at 2313 (emphasis added). The Supreme Court's conclusion, and its underlying analysis, would be impossible if there were some burdens courts could not consider. Thus, Defendant's extended discussion of testimony regarding the percentage of women who would live more than 150 miles from an abortion clinic under Act 620 misses the mark. The District Court properly considered *all* the evidence of burden—including the risks from increased self-performed, unlicensed, or unsafe abortions, the health and other burdens imposed by

[26] Defendant's brief neglects to state that the Supreme Court considered the proportion of women whose distance to the nearest abortion clinic would increase beyond 50, 100, and 200 miles, as well as 150. *WWH*, 136 S. Ct. at 2296, 2302, 2313.

unreasonable delays, increased clinic crowding, increased travel distances and expenses, and the special burdens imposed on low-income women, among others—in determining the Act's burdens. ROA.4270-78.

Defendant's remaining objections regarding the District Court's burden analysis are easily rejected. Defendant complains about the admission of two hearsay statements regarding discrimination against two abortion providers. The Court overruled the objections because the evidence was admitted not for the truth of the matter asserted, but rather for explaining the physicians' understanding of why it would be futile for them to seek privileges at certain hospitals. Further, the Court relied on other evidence—*see supra* 25 n.14—in support of its finding that discrimination is a contributing factor to physicians' inability to obtain active admitting privileges, so even if the Court's ruling was erroneous, exclusion of the hearsay would not affect its findings. At all events, the ultimate issue is whether physicians were able to obtain privileges, or if they faced obstacles, unrelated to their abilities, that prevented them from doing so. The record is replete with evidence on this point, even putting aside the issue of discrimination entirely. ROA.4244-64.

Defendant also argues that the District Court should not have considered factors unique to Louisiana that shape the Act's impact on women. These include excessive government regulation of abortion, above-average poverty rates, and a history of violence and harassment aimed at abortion providers, which has greatly

limited access to abortion in Louisiana. ROA.4214-19, 4221-23, 4273-78. The local legal environment was significant in its impact on the physicians' attempts to obtain admitting privileges unfolded. As discussed, Louisiana—unlike other states, such as Texas—lacks any law requiring hospitals to act on doctors' privileges applications within a certain amount of time, and does not prohibit hospitals from denying abortion providers admitting privileges because they are provide abortions. *Supra* at 15. This helped to account for the physicians' lack of success. *See supra* 12 n.8. The District Court's consideration of the interplay between the Act and other Louisiana laws or social conditions is nothing more than the straightforward application of fact-based scrutiny that *WWH* requires. *See* 136 S. Ct. at 2302 (considering social conditions); *id*. at 2314-15 (considering Texas laws interacting with laws subject to challenge). An undue burden claim is not limited to an arbitrary subset of the challenged restrictions' burdens, nor does it free a court to consider an abortion restriction hypothetically, as if free of influence from any local conditions. It was not clearly erroneous under *WWH* for the Court to consider these—in fact, it was required.

Because Defendant does not show that all of the evidence submitted by both sides in this case leads to only one permissible view of the facts, the District Court's findings regarding the Act's burdens are not clearly erroneous. Defendant's appeal should therefore be denied.

IV. The District Court's Finding of the Act's Unconstitutional Purpose was Correct

The District Court was also correct to find that a "purpose of the [Act] is to make it more difficult for abortion providers to legally provide abortions and therefore restrict a woman's right to an abortion." ROA.4230. Defendant's appeal does not take issue with this finding, which provides an independent basis for affirming the Act's unconstitutionality. *See WWH*, 136 S. Ct. at 2309. The evidence showed that the Act's anticipated effect was to close clinics and prevent abortions. ROA.4224-25. It also demonstrated (through testimony and numerous emails) coordination among advocacy groups, Representative Jackson, and LDH to pass Act 620, knowing that it would force abortion providers to cease practicing. ROA.6638-41, 6650-52, 6654-55, 6659-60, 8898-99, 8909-17, 8927, 8932, 8937-45, 8999-9003. The evidence also showed that the Act provided physicians inadequate time (only eighty-one days) to come into compliance, especially in light of the absence Louisiana law regulating admitting privilege applications, *supra* at 15. *See Planned Parenthood of Wis., Inc. v. Schimel*, , 806 F.3d 908, 915-16 (7th Cir. 2015) (admitting-privileges law's purpose is unconstitutional where inadequate is allowed time for compliance).

V. The District Court's Balancing of Burdens and Benefits Was Proper

Given its findings, the District Court's application of the standard in this case was correct. After trial, the court concluded that the Act provided no medical benefit,

ROA.4240-43, *supra* 21-32, but imposed significant burdens on Louisiana women, including not only a total loss of access to abortion for *most* women, but also a variety of other burdens on *all* women. ROA.4274-78; *supra* 32-45. These burdens include significantly increased health risks due to delays in accessing care and increases in illegal abortion, and increased crowding, delay, travel distance, expense, and disruption, even for those women ultimately able to lawfully obtain an abortion. ROA.4274-78.

The District Court applied the undue burden test to the evidence before it correctly. It determined the facts, weighed the benefits and burdens, and found, as every other court has found, *see supra* 29-30, 30 n.19, that the burden imposed by the admitting-privileges requirement would be undue. ROA.4282-86. In light of the unanimity among factfinders that an admitting-privileges requirement imposes heavy burdens and provides no health benefits, *supra* 29-30, 30 n.19, it could not be improper for the District Court here to have reached the same conclusion.

Defendant's arguments that the Court erred in applying the *WWH* balancing test are all just paragraph-length summaries of her preference, discussed *supra* 21-45, for the District Court to have made more findings favorable for her—on the "geographical impact" test, on clinic capacity, on "courtesy privileges," on evidence of a health benefit, on lack of burdens, and so on, including a repeat of her misleading argument that admitting privileges are required for performing other outpatient

procedures in Louisiana. OB 49-55. These arguments need not be addressed again here.

Throughout her brief, Defendant describes the Act as "milder," "less onerous," or "less severe" than the Texas law to which it is identical, OB. 9, 15, 50, as if *WWH* were limited to its facts, and she could survive Constitutional review by showing slightly fewer burdens. *WWH* holds that where an abortion restriction's resulting burdens on access outweigh their benefits (if any) in furtherance of a legitimate state interest, it is unconstitutional. 136 S. Ct. at 2309-10. This is one reason why Defendant's attempt to distinguish *WWH* on the basis that that the Act would prevent 40% of the state's doctors from performing abortion, *see* OB 7,[27] which she asserts is "less onerous" than in Texas, OB 50-51, is unavailing. Given the Act's "absence of *any* health benefit," ROA.4286 (emphasis added) (quoting *WWH*, 136 S. Ct. at 2313), *any* burden it imposes renders it unconstitutional. Even were Defendant correct that the Act's impact is less onerous than its Texas twin, given its evident burdens, ROA.4270-78, 4284-85, or even just the burdens Defendant concedes, *see* OB 7, 50-51; *infra* at 32, there still could be no doubt of its unconstitutionality.

[27] Which is factually incorrect, *see supra* 9-11, 33-38.

VI. The District Court's Remedy Is Proper

The District Court properly enjoined the Act in all of its applications, because it would impose burdens, but no benefits. This is the same conclusion—and the same remedy—the Supreme Court and this Court awarded in *WWH*. 136 S. Ct. at 2313, 2318; 833 F.3d at 567.

Defendant nevertheless argues that the District Court's remedy was too broad because the Act is constitutional as applied to physicians with active admitting privileges. OB 57-58. She further argues that, under the facts as she would have preferred the court to find them—relying on evidence not admitted, applying her invented geographical impact test, and ignoring the Act's other burdens—at most 10% of Louisiana women are burdened, which she says is not a "large fraction." OB 58-60. She also argues that the District Court "never quantified" the number of women would face unique burdens because of factors such as poverty, extreme distance, or need for a second-trimester abortion. *Id*.

WWH forecloses these arguments. The Supreme Court struck down the challenged requirements—both admitting-privileges and ambulatory surgical center standards—in all of their applications, because they imposed burdens but no benefits. 136 S. Ct. at 2313, 2318. See also *WWH*, 136 S. Ct. at 2321 ("laws like H.B. 2 that "do little or nothing for health, but rather strew impediments to abortion cannot survive judicial inspection.") (citation omitted) (Ginsburg, J., concurring).

This Court then ruled that Texas's identical admitting-privileges requirement, "along with its implementing regulations, . . . is unconstitutional and may not be enforced." 833 F.3d at 567. Relying on "the Supreme Court's decision and the Fifth Circuit's mandate," the District Court entered final judgment declaring the admitting privileges requirement and its implementing regulations "unconstitutional on their face." *WWH v. Hellerstedt*, No. 1:14-CV-00284-LY, ECF No. 269 (W.D. Tex. Oct. 11, 2016). *WWH* did not rule that the admitting privileges-requirement was constitutional either as to some women or as to some physicians. *Id*. Indeed, this Court had entered an as-applied injunction based on driving distances, see *Whole Woman's Health v. Cole*, 790 F.3d 563, 594 (5th Cir. 2015), and the Supreme Court rejected it.

Notably also, the District Court here did not find that the Act would burden only some women. Rather, "[a]ll 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." ROA.4274 (emphasis added). A remedy arbitrarily focused only on some subset of these women would not cure the constitutional violation, and it certainly would not eliminate the burdens caused by the statewide doctor shortage—so no such injunction would even be workable, let alone consistent with the Constitution. See *Texas v. United States*,

809 F.3d 134, 187-88 (5th Cir. 2015) (affirming the entry of a nationwide preliminary injunction where the regulatory scheme at issue applied in a uniform manner nationwide). *Cf.* ROA.3931 ("unless Louisiana somehow intends to bar its borders to out-of-state residents, Hope's capacity (and that of the other clinics) will remain practically circumscribed by its (and their) total number of patients, whether they come from within or without this state.")

Further, *WWH* did not apply the Defendant's proposed "quantification" requirement as to the particular burdens that would affect certain sub-groups of women—it affirmed, without comment, the District Court's finding that the challenged "requirements erect a particularly high barrier for poor, rural, or disadvantaged women," 136 S. Ct. at 2302, including them among the various burdens that the admitting-privileges requirement imposes, *see id*. at 2313.

Finally, Defendant is wrong to argue the fraction of women burdened by the Act is not "large." OB 28. As discussed *supra* at 43, Defendant's contention that only up to 10% of women would be "burdened" by the Act is incorrect. But furthermore, " 'large fraction' . . . refer[s] to 'a large fraction of cases in which [the

[28] Defendant erroneously states that "[t]here is an unresolved issue over whether facial challenges to abortion laws must meet the *Salerno* standard or a less stringent "large fraction" standard," and then even more bizarrely argues that "[i]n this Circuit, . . . it is settled that the [*United States v.*] *Salerno*[, 481 U.S. 739, 745 (1987)] standard governs facial challenges to abortion laws." OB 56 n.16. *WWH* governs. It does not apply the *Salerno* standard. To the extent Fifth Circuit law is inconsistent, it is by definition overruled.

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.'" *WWH*, 136 S. Ct. at 2320 (citing Casey, 505 U.S. at 894-95). The burdens properly assessed by the District Court—crowding, delays, health risks, increased expense, increased travel distances, increased risk of unlawful abortion—would be relevant to many more than 10% of Louisiana abortion patients. Casey held that the challenged law—which would be "relevant" to the approximately 1% of women seeking abortion who were married and determined not to tell their husbands—was unconstitutional because it would impose a substantial obstacle on a large fraction of that 1%—the cases in which women risked violence, intimidation, retaliation, or withdrawal of spousal support from their husbands. *Casey*, 505 U.S. at 887-95. Under that standard, it is beyond dispute that the thousands of women whom the Act would burden constitute a "large fraction of the women for whom the restriction is relevant."[29]

[29] Defendant's argument that for reversal because Plaintiffs did not bring an as-applied challenge is also erroneous. See OB 55-56. The remedy sought in a complaint cannot control the relief a court awards—such a rule would improperly cede courts' authority to litigants. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (noting that the distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"); *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2458 (2015) (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting) ("[T]he effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing

CONCLUSION

The District Court's judgment and injunction should be affirmed.

Dated: October 20, 2017

Respectfully submitted,

/s/ David Brown

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of it . . . . I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is.").

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 20, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 20, 2017 /s/ David Brown

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), counsel for Plaintiffs June Medical Services L.L.C., John Doe 1, and John Doe 2, hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, including serifs, using Microsoft Word, in Times New Roman 14-point font.

Dated: October 20, 2017 /s/ David Brown

FED. R. APP. P. 28(f)
STATUTORY ADDENDUM

Louisiana Act 620 of 2014

ENROLLED

ACT No. 620

Regular Session, 2014

HOUSE BILL NO. 388

BY REPRESENTATIVES KATRINA JACKSON, ADAMS, ARMES, BARRAS, BARROW, STUART BISHOP, BROADWATER, BURFORD, HENRY BURNS, TIM BURNS, BURRELL, CARMODY, CHAMPAGNE, CHANEY, CONNICK, COX, DANAHAY, GEYMANN, GISCLAIR, GREENE, GUINN, HARRIS, HARRISON, HAVARD, HAZEL, HENRY, HENSGENS, HILL, HODGES, HOFFMANN, HOLLIS, HOWARD, IVEY, JOHNSON, KLECKLEY, LEBAS, LORUSSO, JAY MORRIS, ORTEGO, PEARSON, PONTI, POPE, PYLANT, REYNOLDS, ROBIDEAUX, SCHRODER, SEABAUGH, SIMON, STOKES, THOMPSON, WHITNEY, PATRICK WILLIAMS, AND WILLMOTT AND SENATORS CROWE, JOHNS, LONG, NEVERS, AND THOMPSON

AN ACT

To amend and reenact R.S. 40:1299.35.2(A), 1299.35.2.1, and 2175.3(2) and (5), relative to abortion; to provide for requirements of physicians who perform abortions; to require delivery of certain information concerning health care facilities and services to a pregnant woman prior to abortion; to provide relative to penalties; to provide regulations for the practice of inducing an abortion through use of drugs or chemicals; to provide for definitions of terms in the Outpatient Abortion Facility Licensing Law; to provide for penalties; to provide for application of laws; to provide for legislative intent; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 40:1299.35.2(A), 1299.35.2.1, and 2175.3(2) and (5) are hereby amended and reenacted to read as follows:

§1299.35.2. Abortion by physician; determination of viability; ultrasound test required; exceptions; penalties

A.(1) Physician ~~requirement~~ 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 enrolled in or has completed a residency 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, non-renewed, or revoked by the Department of Health and Hospitals in accord with R.S. 40:2175.6.

(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.

(b) Provide the pregnant woman with all of the following before the abortion is performed or induced:

(i) A telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or facility at which the abortion was performed or induced, who has twenty-four hours per day access to the woman's relevant medical records so that the woman may request assistance related to any complication that arises from the performance or induction of the abortion, or to ask health-related questions regarding the abortion.

(ii) The name and telephone number of the hospital nearest to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

(c) Whoever violates the provisions of Subparagraph (2)(a) of this Paragraph shall be fined not more than four thousand dollars per violation.

* * *

§1299.35.2.1. Drugs or chemicals used; penalties

A. When any drug or chemical is used for the purpose of inducing an abortion as defined in R.S. 40:1299.35.1, the physician who prescribed the drug or chemical shall be in the same room and in the physical presence of the pregnant woman when the drug or chemical is initially administered, dispensed, or otherwise provided to the pregnant woman.

B. The drug or chemical shall not be administered, dispensed, or otherwise provided to the pregnant woman by a physician or any person acting under the physician's direction, whether in a licensed outpatient abortion facility, private medical office or any other facility, unless the physician has obtained the voluntary and informed consent of the pregnant woman pursuant to the provisions of R.S. 40:1299.35.6 and the requirements set forth in that Section.

C. If a physician prescribes, dispenses, administers, or provides any drug or chemical to a pregnant woman for the purpose of inducing an abortion as defined in R.S. 40:1299.35.1, the physician shall report the abortion to the Department of Health and Hospitals as provided in R.S. 40:1299.35.10.

D. In addition to the requirements of reporting complications to the Department of Health and Hospitals pursuant to R.S. 40:1299.35.10, if the physician knows that the woman experienced a serious adverse event, as defined by the MedWatch Reporting System, during or after the administration or use of the drug, the physician shall also report the event to the United States Food and Drug Administration through the MedWatch Reporting System not later than the third day after the date the physician learns that the event occurred.

E. The Louisiana State Board of Medical Examiners may take disciplinary action as authorized in R.S. 37:1261 et seq. or any other applicable provision of law against a physician who violates any provision of this Section.

~~B.~~ F. Any person not under the direct and immediate supervision of a physician who knowingly performs or attempts to perform an abortion ~~without complying with the requirements of~~ using chemicals or drugs in violation of this Section shall be subject to penalties pursuant to R.S. 40:1299.35.19. No penalty may

be assessed against the woman ~~upon whom~~ who undergoes the abortion ~~is performed or attempted to be performed~~.

* * *

§2175.3. Definitions

For purposes of this Part, the following definitions apply:

* * *

(2) "First trimester" means the time period ~~from six~~ up to fourteen weeks after the first day of the last menstrual period.

* * *

(5) "Outpatient abortion facility" means any outpatient facility, other than a hospital as defined in R.S. 40:2102 or an ambulatory surgical center as defined in R.S. 40:2133, in which any second trimester or five or more first trimester abortions per ~~month~~ calendar year are performed.

* * *

Section 2.(A) This Act shall be known as the "Unsafe Abortion Protection Act".

(B) It is the intent of the legislature that each physician who performs an abortion as defined in R.S. 40:1299.35.1, whether the abortion is surgical or drug-induced, shall follow the long-established procedure of reporting anonymous, aggregate abortion statistics and health complications to the Department of Health and Hospitals, subject to all state and federal privacy protections, for the purpose of providing anonymous and accurate public health and safety data regarding abortion and its impact on women's health.

(C) Nothing in this Act shall be construed or interpreted to apply to emergency contraceptives or any other drugs or chemicals that do not cause abortion as defined in R.S. 40:1299.35.1.

Section 3. The legislature intends that every application of this statute to every individual woman shall be severable from each other. In the unexpected event that the application of this statute is found to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of the statute to those women shall be

severed from the remaining applications of the statute that do not impose an undue burden,

and those remaining applications shall remain in force and unaffected.

Section 4. This Act shall be effective on September 1, 2014.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF

LOUISIANA APPROVED: _____