No. 16-30116

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs – Appellees

v.

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

Defendant – Appellant

On Appeal from the U.S. District Court, Middle District of Louisiana
No. 14-cv-525-JWD

EMERGENCY MOTION OF APPELLANT FOR STAY PENDING APPEAL

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RULE 27.3 EMERGENCY CERTIFICATION

On Wednesday, February 10, 2016, the court below entered judgment facially invalidating and preliminarily enjoining Louisiana's Act 620, which requires outpatient abortion providers to have admitting privileges at local hospitals.[1] Appendix ("App.") A; App. B at 111-12.[2] Within an hour of entry of judgment, Louisiana appealed; asked the lower court for a stay pending appeal on or before Friday, February 12, 2016; and asked for a temporary stay pending consideration of its stay motion. Docs. 228, 229, 229-1. During a conference call that afternoon, the court denied a temporary stay. Doc. 231. On February 16, 2016, at 1:13 p.m. central time, the court denied a stay pending appeal, App. K, and Louisiana immediately filed this emergency stay motion. Louisiana respectfully asks the motions panel to act within ten business days, **by 5 p.m. central time on Friday, February 26, 2016**.

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[1] *See* H.B. 388, § (A)(2)(a), 2014 Leg., Reg. Sess. (La. 2014), codified at 42 LA. REV. STAT. § 40:1299.35.2. On January 26, 2016, the lower court entered findings of fact and conclusions of law that were not, however, accompanied by the separate judgment required by Federal Rule of Civil Procedure 58(a). App. B. Moreover, there was doubt regarding which doctors were covered by the injunction, which the court clarified in its separate judgment of February 10, 2016. App. A.

[2] Louisiana has moved to file under seal a separate Sealed Appendix ("Sealed App."), containing documents subject to a protective order below.

The lower court declared Act 620 facially[3] unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and preliminarily enjoined it.[4] The ruling flatly contravenes this Court's decisions in *Abbott I* and *Abbott II*, which facially upheld a Texas privileges requirement identical to Louisiana's.[5] The lower court ruled that Act 620 had the "effect" of impeding abortion for a "large fraction" of Louisiana women, App. B, at ¶374, but it applied a "large fraction" test of its own invention, one that inflates by orders of magnitude the number of Louisiana women allegedly "denied" abortion access. Furthermore, the court's ruling does not mention the unrebutted evidence of Louisiana's expert statistician, who established that the Act would still leave over 90% of Louisiana women within 150 miles of an abortion provider. Under *Abbott I* and *Abbott II*, that unrebutted

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[3] As the lower court observed, plaintiffs "emphatically" denied bringing "an 'as-applied' challenge." App. B, at ¶17 & n.14.

[4] The Act had been in effect until then, with a temporary restraining order barring enforcement only against plaintiffs while their privileges applications were pending. *See* App. B, at ¶6 (explaining that, under August 31, 2014 TRO, "the Act would be allowed to take effect," but was unenforceable against plaintiffs "during the application process"); *id.* at ¶10 ("second clarification" of TRO explaining that "the TRO of August 31, 2014 … remains in effect" until preliminary injunction hearing).

[5] *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 414-16 (5th Cir. 2013) ("*Abbott I*"); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 593-600 (5th Cir. 2014), *reh'g en banc denied*, 769 F.3d 330 (5th Cir. 2014) ("*Abbott II*").

evidence establishes the Act's facial constitutionality as a matter of law. Moreover, the court overrode the determination of the Secretary charged with enforcing Act 620 that an additional doctor had obtained qualifying privileges. By doing so, the court both exceeded its jurisdiction and further skewed its inflated "large fraction" analysis.

Louisiana respectfully asks this Court to enter an emergency order staying the district court's ruling pending Louisiana's appeal, as it did in *Abbott I*. The only difference between the cases is that, in *Abbott I*, the district court entered a pre-enforcement injunction just before Texas's law was to take effect, *see Abbott I*, 734 F.3d at 410, whereas here the district court initially allowed Louisiana's law to take effect but has now issued a post-enforcement injunction against it. It is still possible, however, for the Court to restore the *status quo ante* by acting expeditiously and staying the district court's erroneous ruling. As this Court has observed, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* at 419 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)).

Louisiana is aware that the U.S. Supreme Court is currently reviewing this Court's *Cole* decision, which largely upheld Texas's HB 2. *See Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *as modified*, 790 F.3d 598 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 499 (U.S. Nov. 13, 2015). This case, however, is not controlled by *Cole* but by *Abbott I* and *II*. Louisiana's case is a facial challenge (as in *Abbott I* and *II*), not an as-applied challenge (as in *Cole*).[6] Moreover, *Cole* involves ambulatory surgical center regulations in addition to privileges, *id.* at 566, whereas Louisiana's case involves privileges only. And even if the Supreme Court's *Cole* decision (whenever it is issued) affects Louisiana's appeal, that is no reason to leave Act 620 blocked in the interim by an injunction that plainly contradicts two binding Circuit precedents—precedents *not* under Supreme Court review. *See id.* at 577 (noting that in *Abbott II* "[t]he time for seeking certiorari from the . . . Supreme Court passed, and no petition was filed").

Underscoring the emergency nature of this motion, this Court has already found that privileges laws like Louisiana's have important

[6] *See Cole*, 790 F.3d at 576 (noting this Court "addressed an earlier facial challenge to [HB2] in *Abbott II*); *id* at 577 (noting plaintiffs' "as-applied" challenge to HB2's privileges requirement).

health and safety benefits for women seeking abortion. In *Abbott II*, this Court concluded that Texas's privileges law furthers the "protection of abortion patients' health," helps "prevent[ ] patient abandonment," and "reduces the risk that abortion patients will be subjected to woefully inadequate treatment." *Abbott II*, 748 F.3d at 594-95. Thus, far from harming women, allowing the Act to remain in effect pending appeal will protect them from the risk of injury.

Given the emergency presented by the facial invalidation of Act 620, Louisiana respectfully asks the Court to act within ten business days, by 5 p.m. central time on Friday, February 26, 2016. This is more time than was required to resolve the emergency motion in *Abbott I* (two business days, without oral argument), but less time than in *Cole* (about a month, with oral argument). Louisiana needs a stay as soon as possible, but submits this is a reasonable time to allow the parties to brief the issues and the motions panel to consider them. While the record below is large (including the transcript of a six-day bench trial, numerous exhibits, and voluminous briefing), this stay motion presents discrete legal issues that involve only a small portion of the record, available in the appendices to this motion. Additionally, because oral

argument will aid the motions panel in resolving this stay motion (as it did in *Cole*), Louisiana respectfully requests oral argument.

Undersigned counsel certifies that the facts supporting emergency consideration of this motion are true and correct.

s/ *S. Kyle Duncan*

S. Kyle Duncan
Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS

June Medical Services LLC, et al. v. Dr. Rebekah Gee, No. 16-30116

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	Plaintiffs' Counsel
1. June Medical Services LLC d/b/a Hope Medical Group for Women 2. Bossier City Medical Suite 3. Choice, Inc., of Texas d/b/a/ Causeway Medical Clinic 4. John Doe 1, M.D.; John Doe 2, M.D. (physicians at plaintiff clinics, proceeding anonymously)	1. MORRISON & FOERSTER LLP; Dimitra Doufekias; David Scannell 2. RITTENBERG, SAMUEL & PHILLIPS LLC; William E. Rittenberg 3. CENTER FOR REPRODUCTIVE RIGHTS; Ilene Jaroslaw; David Brown; Zoe Levine

Defendant	Defendant's Counsel
1. Dr. Rebekah Gee, Secretary of the Louisiana Department of Health and Hospitals 2. Kathy Kliebert (previous DHH Secretary) 3. LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS	1. Jeff Landry, Attorney General of Louisiana; LOUISIANA DEPARTMENT OF JUSTICE 2. SCHAERR | DUNCAN LLP; S. Kyle Duncan 3. KITCHENS LAW FIRM, APLC; J. Michael Johnson (below) 4. ALLIANCE DEFENDING FREEDOM; Steven H. Aden; Natalie Decker (below) 5. Charlotte Bergeron (below)

s/ *S. Kyle Duncan*

S. Kyle Duncan

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Statement of the Case

On August 22, 2014, the plaintiffs challenged Act 620's admitting privileges requirement.[7] Plaintiffs (noted in bold) are three of the five Louisiana abortion clinics, and two of six doctors practicing there:

Clinic	Doctor(s)[8]	Location
Hope Medical Group ("Hope")	**Doe 1**, Doe 3	Shreveport
Bossier Medical Suite ("Bossier")	**Doe 2**	Bossier City
Causeway Medical Clinic ("Causeway")	**Doe 2**, Doe 4	Metairie
Women's Health Care ("Women's Health")	Doe 5, Doe 6	New Orleans
Delta Clinic ("Delta")	Doe 5	Baton Rouge

They claimed the Act was facially unconstitutional because it failed rational basis review and violated *Casey*'s "purpose" and "effect" tests. App. B, at ¶¶17, 322; *see Casey*, 505 U.S. at 877 ("undue burden" exists if law "has the purpose or effect of placing a substantial obstacle in the

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[7] Plaintiffs sued the State ("Louisiana") through the Secretary of the Louisiana Department of Health and Hospitals ("Secretary"), who enforces the Act. App. B, at ¶2; La. Rev. Stat. §§ 36:253; 36:254(A)(2).

[8] Over Louisiana's objection, the doctors were allowed to proceed anonymously. Docs. 19, 20, 24.

path of a woman seeking [a pre-viability] abortion").[9] Plaintiffs brought only a facial challenge and "emphatically" denied bringing an as-applied challenge. App. B, at ¶17 & n.14; *see also* Doc. 202, at ¶159 (plaintiffs' proposed findings stating they "seek facial relief"). On May 12, 2015, the court granted Louisiana summary judgment on the rational basis claim, but denied it as to the purpose claim. App. B, at ¶12. From June 22-29, 2015, the court conducted a six-day bench trial.

On January 26, 2016, the district court publicly[10] issued a ruling rejecting plaintiffs' "purpose" claim, but accepting their "effect" claim. *Id.* at ¶¶372-73. Specifically, the court found the Act would reduce the number of Louisiana abortion providers from six to two—leaving only Doe 3 in Shreveport (who had privileges before Act 620) and Doe 5 in New Orleans (who obtained privileges after the Act passed). *Id.* at ¶¶250, 267-68, 305, 310-11. This reduction in providers, the court reasoned, would render abortion "unavailable" to a "large fraction" of

[9] On September 19, 2014, the two other clinics (Women's Health and Delta) and doctors (Does 5 and 6) filed a separate lawsuit, which was consolidated with the original lawsuit. App. B, at ¶7. On December 5, 2014, that second lawsuit was voluntarily dismissed. *Id.* at ¶10.

[10] One day earlier, the court issued a sealed draft ruling to allow the parties to review whether the ruling adhered to the protective order in the case. Doc. 214.

Louisiana women—"approximately 55% of women seeking abortion in Louisiana and over 99% of women of reproductive age." App. B, at ¶374.

The court used two different calculations to derive those figures. It calculated 55% by taking (1) abortions performed in 2013 by the four non-privileged doctors (5,500), and dividing by (2) total abortions in Louisiana in 2013 (9,976). *Id.* at ¶¶305-311. It calculated 99% by taking (1) Louisiana reproductive-age women, minus abortions performed by non-privileged doctors in 2013 (933,219), and dividing by (2) Louisiana reproductive-age women (938,719). *Id.* Based on those calculations, the court declared the Act facially unconstitutional and granted a preliminary injunction. *Id.* at 111-12.

It was not until February 10, 2016, however, that the court entered a separate judgment clarifying the scope of its injunction. App. A (clarifying injunction applies to Doe 4 as well as Does 1 and 2). That same day, Louisiana appealed and sought a stay in the district court on or before February 12, 2016, and a temporary stay in the interim. Later that afternoon, the district court denied a temporary stay, Doc. 231, and subsequently denied a stay pending appeal on February 16, 2016. App. K. Louisiana immediately sought an emergency stay in this Court.

Legal Standards

The factors governing a stay are: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Abbott I*, 734 F.3d at 410 (quoting *Nken v. Holder*, 556 U.S. 418, 425-26 (2009)). The first two are "the most critical." *Nken*, 556 U.S. at 434.

ARGUMENT

I. The district court's legal conclusion rests on a new "large fraction" test that contradicts this Court's governing test in *Abbott I* and *Abbott II*.

Dispositive errors in the district court's "large fraction" analysis leave no serious doubt that Louisiana will likely prevail on the merits. An admitting privileges law imposes an undue burden if its effect is to "'place a substantial obstacle in the path of a woman seeking [a pre-viability] abortion.'" *Abbott I*, 734 F.3d at 413 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007)). In a facial challenge, plaintiffs bear a "heavy burden" to show that the law is constitutional in "*no* set of circumstances," or, at a minimum, that it is unconstitutional "in a large

fraction of the cases in which the admitting privilege is relevant." *Abbott I*, 734 F.3d at 414 (citations and internal quotes omitted).

This Court has explained how to calculate the "fraction" in a privileges case. The numerator is the number of women whose abortion access is burdened because they must travel significantly farther to reach a qualified provider. *Abbott I*, 734 F.3d at 415 ("An increase in travel distance of less than 150 miles for some women is not an undue burden[.]"). The denominator is "all women of reproductive age." *Cole*, 790 F.3d at 589 (citing *Abbott I* and *II*). Thus, if a privileges law lowers the number of providers, but leaves over 90% of reproductive-age women still within some 150 miles of a provider, "[t]his does not constitute an undue burden in a large fraction of the relevant cases." *Abbott II*, 748 F.3d at 598 (internal quotes omitted).

The lower court did not apply this Circuit's large fraction analysis. Instead, the court used as a numerator the number of abortions provided in 2013 by the four non-privileged Louisiana doctors; as a denominator, it used the total number of Louisiana abortions in 2013. This gave the 55% figure. App. B, at ¶¶308, 311, 374. Alternatively, the court used a different numerator (the number of Louisiana

reproductive-age women, minus abortions provided in 2013 by the non-privileged doctors) and divided it by a different denominator (Louisiana reproductive-age women). This gave the 99% figure. *Id.* ¶¶309, 311, 374.

As explained below, there are two major problems with the lower court's large fraction analysis. First, it is not the one used in *Abbott I* or *Abbott II*. Had the court used *that* analysis, Louisiana's unrebutted expert evidence would have given the same answer as in those cases, namely that over 90% of Louisiana reproductive-age women still live within 150 miles of a provider. *See infra* I.A. Second, even assuming the validity of the court's large fraction analysis, the court used numbers grossly inflating the percentages of women allegedly denied access. Had the court used the correct numbers (which were undisputed), its percentages would have been far lower. *See infra* I.B.

A. Under this Court's large fraction test, the undisputed evidence shows over 90% of Louisiana women would still live within 150 miles of an abortion provider.

Louisiana's statistics expert, Dr. Tumulesh Solanky[11]—relying on U.S. Census data showing the parish distribution of Louisiana women age 15-44—calculated the "weighted" average distance those women

[11] The district court accepted Dr. Solanky as an expert in mathematics and statistics. App. D, at 146.

would have to travel to obtain abortions under various hypotheticals. *See* App. C (expert report), at ¶¶8-16; *id.* Table 1 (distances); *id.* Ex. B (population tables); App. D (testimony), at 134-43, 160-63. As Dr. Solanky explained, the "weighted" average distance factors in the geographical distribution of reproductive-age women in Louisiana. App. D, at 141-43, 162. The plaintiffs did not offer any evidence to rebut Dr. Solanky's analysis or data. *See* App. F, at 163 (plaintiffs' expert offered in sociology, not statistics or mathematics)

Dr. Solanky offered calculations addressing the scenario where the only remaining providers were in Shreveport and New Orleans. App. C, at 8 (¶16(iii)); App. D, at 162-63. This is precisely the scenario the district court found. App. B, at ¶305-11, 374. Under that scenario, Dr. Solanky testified that the weighted average distance Louisiana women age 15-44 would have to travel to reach a provider would be 82 miles. *See* App. C, at 8 (¶16(iii)); App. D, at 162-63. Furthermore, Dr. Solanky's population data plainly showed that, under this scenario, over 90% of Louisiana women age 15-44 would still live within 150 miles of a provider in Shreveport or New Orleans. *See* App. C, at Ex. B (parish population distribution); App. E at Exs. B & C (maps).

Had the district court used this Circuit's analysis, Dr. Solanky's unrebutted evidence would have led inevitably to the conclusion that Act 620 does not unduly burden a "large fraction" of Louisiana women. Yet nowhere does the lower court's ruling even mention Dr. Solanky's testimony, his calculations, or his data. Nor did the plaintiffs introduce any evidence to rebut Dr. Solanky's conclusions. Indeed, their expert, Dr. Sheila Katz—offered in sociology of poverty and gender, not statistics—repeatedly testified she could offer no opinion about the percentage of Louisiana women who would be deprived of abortion access by Act 620. *See* App. F, at 180-81, 184-90.

The district court's use of a large fraction test different from this Court's is obvious legal error likely to be reversed on appeal.

B. Even under its erroneous test, the lower court grossly inflated the percentage of Louisiana women allegedly denied abortion access.

Even were the lower court's large fraction test correct, the court grossly inflated the percentage of Louisiana women allegedly denied abortion access.

First, take the 99% figure. To calculate that percentage, the court used as a numerator 933,219, representing the number of Louisiana

reproductive-age women (938,719), minus abortions provided by non-privileged Louisiana doctors in 2013 (5,500). The court divided that number by the number of Louisiana reproductive-age women (938,719), to conclude that Act 620 would deny access to "over 99% of women of reproductive age in Louisiana." App. B, at ¶309. That cannot be right. If it were, it would mean that *regardless* of Act 620, 99% of Louisiana reproductive-age women would *always* be "denied" abortion access.[12] Thus, under the court's analysis, Act 620 would make no difference in the fraction of Louisiana women "denied" access—the fraction would *always* be 99%. The court's analysis thus says nothing meaningful about the central point of the large fraction analysis.

The court appeared to recognize the problems with its 99% figure, *see* App. B, at ¶356 n.64, but held itself bound by Circuit precedent to use the number of reproductive-age women as the denominator. *Id.* The problem, however, was not the court's denominator but its *numerator*, which used a wildly inflated number that could not conceivably

[12] For instance, the analysis would find 98.9% of Louisiana women were "deprived" of access in 2013, before Act 620 became law. The numerator would be reproductive-age women (938,719) minus abortions provided in 2013 (9,976), or 928,743, and divided by reproductive-age women (938,719), resulting in 98.9%. Similar figures would also show a 99% "deprivation" of access in 2012, 2011, and 2010. *See* LA. DEP'T OF HEALTH & HOSP., INDUCED TERMINATION OF PREGNANCY DATA, http://dhh.louisiana.gov/index.cfm/page/709 (last visited Feb. 15, 2016).

represent the number of Louisiana women burdened by Act 620. Rather, as this Court has explained, that number is best captured by the number of women who, due to a privileges law, must travel significantly farther to reach a qualified provider. *See Abbott II*, 748 F.3d at 598 (citing *Abbott I*, 734 F.3d at 415). The *only* evidence of that number was provided by Louisiana's expert statistician, whose unrebutted data and calculations showed that—even assuming the Act left only two providers—over 90% of Louisiana reproductive-age women would still live within 150 miles of a provider. That should have settled the issue as a matter of law. *See supra* I.A.

Second, take the 55% figure. To calculate that percentage, the court's denominator was the number of abortions reported in Louisiana in 2013, or 9,976. App. B, at ¶308. But that number included significant numbers of abortions provided to women from *outside* Louisiana. That undisputed fact came from testimony by the doctors and clinic administrators themselves, one of whom put the number of out-of-state abortions at 31%.[13] Consequently, since the lower court sought to

[13] *See* App. B, at ¶31 (finding 31% of Hope patients travel from outside Louisiana); App. H, at 20 (Doe 2 testifying that "a good number of patients" travel from Texas, Arkansas, Mississippi, and Alabama); App. G, at 155 (Doe 3 testifying that patients travel from other states); *see also, e.g.,* JX116, ¶¶9-10 (Hope administrator

identify the fraction of *Louisiana* women denied abortion access, its denominator should have been significantly lower than 9,976. Even putting the percent of out-of-state abortions at a conservative 30%, the court's denominator should have been about 6,984, not 9,976.

The court calculated the numerator by taking the 2013 Louisiana abortion total and subtracting abortions annually provided by Doe 3 and Doe 5, which the court placed around 4,500 (1,000-1,500 for Doe 3 and 2,950 for Doe 5). App. B, at ¶¶308, 311. But the court overlooked uncontradicted testimony that those doctors have previously provided abortions at considerably higher rates. Doe 5 testified he has done about 60-90 surgical and medical abortions per week, Sealed App. A, at 26, 64, meaning he can do between 2,800 and 4,300 per year even working only 48 weeks a year (an average of about 3,500 abortions per year). Doe 3 testified he can do 40-50 abortions per *day* and has seen over 60 patients per week when his colleague, Doe 1, is absent. App. G, at 118, 154-55. While Doe 3 said he provides abortions only 1½ days per

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testifying that patients travel from out-of-state, and that "[i]n 2013, about 69.9% of Hope's patients were Louisiana residents"); JX117, ¶7 (Bossier/Causeway administrator testifying that patients come from Texas, Mississippi, and Arkansas); Doc. 192, at 35 (Doe 1 testifying that "a lot" of patients travel from East Texas, Arkansas, and south Louisiana).

week, his own testimony showed capacity on those days well beyond 1,000-1,500 abortions per year—something closer to 2,800 if he provides abortions only 48 weeks per year (at 1½ working days per week). The court did not consider this evidence of greater capacity, which would have significantly lowered its numerator.

In sum, had the court used more accurate numbers for its large fraction analysis, the result would have been far lower than 55%. Even taking a conservative view of the numbers, Does 3 and 5 are capable of providing some 6,300 abortions per year (3,500 for Doe 5 plus 2,800 for Doe 3). Taking a conservative estimate of the abortions provided to *Louisiana* women in 2013 (about 70% of the total, or 6,984), the percent of Louisiana women "deprived" of access under the lower court's analysis would be about 9.7%—far lower than the court's 55% figure—and squarely within the range this Court's decisions hold is *not* a large fraction as a matter of law. *See Abbott I*, 734 F.3d at 415; *Abbott II*, 748 F.3d at 598 (approximately 10% not a "large fraction").

II. The lower court exceeded its jurisdiction by substituting its own interpretation of state law for the Secretary's.

Louisiana will also likely prevail because the lower court exceeded its jurisdiction by overriding the Secretary's determination that another provider, Doe 2, obtained qualifying privileges.

On February 24, 2015, Doe 2 obtained privileges to admit his patients to Tulane Medical Center. Sealed App. B, at 3650, 3652-2. The Secretary did not receive the documents delineating those privileges until shortly before trial in June, however. App. I, at ¶4. She immediately reviewed them to assess whether the privileges satisfied the Act. *Id.* at ¶¶4-6. The privileges included a "limitation" allowing Doe 2 to admit patients but then "refer" them to the hospital's ob/gyn staff. Sealed App. B, at 3652-2, 3652-3. Nonetheless, the Secretary found the privileges satisfactory, because Doe 2 could admit patients and thereby obtain any required treatment. App. I, at ¶¶4-6. The Secretary filed a sworn declaration to that effect, stating without reservation that "the admitting privileges granted to Dr. John Doe #2 are sufficient to comply with the Act." *Id.* at ¶6. In a puzzling turn of events, however, Doe 2 contested her determination, suggesting that a future Secretary might apply the Act more restrictively. App. H, at 66.

Instead of accepting the Secretary's determination as to Doe 2, the lower court performed a *Chevron*-type analysis and concluded the Secretary had misinterpreted the Act. App. B, at ¶235-244. Specifically, the court concluded that the limitation on Doe 2's privileges contradicted the Act, and that Doe 2 therefore lacked qualifying privileges. *Id.* at ¶249. The court thus attributed to the Act the fact that Doe 2 would no longer provide abortions in the New Orleans area.

A. The lower court lacked authority to override the Secretary's interpretation of state law.

The lower court lacked authority to second-guess the Secretary's application of the Act under a *Chevron*-type analysis. In state or federal court, a *Chevron* analysis is called for when aggrieved plaintiffs challenge an agency's interpretation of law as exceeding the agency's authority.[14] This case did not present that scenario. Here, the plaintiffs "emphatically" did not challenge the Secretary's application of the Act. App. B, at ¶17 n.14. Rather, they facially challenged the Act, claiming it would burden abortion access by preventing doctors from obtaining privileges. As to Doe 2, however, the Act's effect was indisputably the

[14] *See, e.g., Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014) (*Chevron* review of EPA greenhouse gas standards under Clean Air Act); *Women's and Children's Hosp. v. State*, 2007-1157 (La. App. 1 Cir. 02/08/09); 984 So.2d 760, 762, 766 (challenge to DHH Medicaid reimbursement rate-setting methodology).

reverse: the state official charged with enforcing the Act made a sworn declaration that Doe 2's privileges satisfied the Act and allowed him to continue providing abortions in the New Orleans area. App. I, at ¶6. That should have ended the matter.

Not only was a *Chevron* analysis inapt, but by substituting its view of state law for the Secretary's, the lower court exceeded its jurisdiction. Federal courts lack independent authority to interpret state law. *See, e.g., Pennhurst v. Halderman*, 465 U.S. 89, 106 (1984) (federal courts cannot "instruct[ ] state officials to conform their conduct to state law").[15] To be sure, a federal court has limited authority to interpret state law in a diversity case. *See, e.g., Keen v. Miller Envt'l Grp., Inc.*, 702 F.3d 239, 243 (5th Cir. 2012) (in diversity case, court makes "an *Erie* guess as to how the [state supreme court] would decide the question"). A federal court, however, never has authority to tell a state official how to interpret state law, even if the court disagrees with her interpretation. *See, e.g., Lelsz v. Kavanaugh*, 807 F.2d 1243, 1252 (5th

[15] *See also Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995) (noting "*Pennhurst*'s central concern of having a federal court instruct[ ] state officials on how to conform their conduct to state law") (internal quotes omitted); *Hughes v. Savell*, 902 F.2d 376, 378 & n.2 (5th Cir. 1990) (federal courts may not instruct state officials to follow state law, "including statutory enactments and state common law").

Cir. 1987) (observing "'it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law'") (quoting *Pennhurst*, 465 U.S. at 106). Yet that is exactly what the lower court did. *See* App. B, at ¶249 (stating "the Court finds that Doe 2 does not have admitting privileges [at Tulane] within the meaning of Act 620").

Moreover, the Court lacked jurisdiction for an additional reason: Doe 2 would have had no standing to contest the Secretary's application of the Act. *See, e.g., Texas v. United States*, 497 F.3d 491, 495-99 (5th Cir. 2007) (examining standing to bring *Chevron* challenge to agency action). Far from being *injured* by the Secretary's interpretation, Doe 2 was *benefited* by it. He therefore had no Article III injury. *See, e.g., Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (standing requires "injury in fact"). In response to the Secretary's favorable interpretation, Doe 2 merely speculated that a future Secretary might change her mind. App. H, at 66. But plaintiffs lack standing to challenge unknowable future applications of a law. *See, e.g., Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1147 (2013) (injury must be "concrete, particularized, and actual or imminent"). For the same

reason, the Court lacked jurisdiction to enjoin the Act based on speculation about how future Secretaries might apply it—especially on a facial challenge. Instead, the Court could adjudge only whether the Act would impede abortion access by preventing Doe 2 from continuing to practice. The record showed indisputably that the Act poses no present barrier to Doe 2's New Orleans practice. App. I, at ¶6.

B. Even assuming a Chevron *analysis was called for, the Secretary acted within her discretion in applying the Act to the ambiguous terms of Doe 2's privileges.*

Even assuming a *Chevron*-type analysis was called for, the district court erred by failing to defer to the Secretary. The issue was not, as the court thought, whether the Act was ambiguous. App. B, at ¶237-39. Rather, the issue was how the Act applied to the "referral" condition on Doe 2's privileges, something the Act does not address. The Secretary reasonably found that condition did not disqualify Doe 2's privileges.

In seeking privileges, Doe 2 communicated with Tulane to specify the required privileges. *See* Sealed App. B, JX169-184. As a result, Doe 2 was appointed to Tulane's staff, granted privileges to admit patients, and granted clinical privileges in "core" ob/gyn. *Id.* at 3652-2, 3652-3. The "condition" on his privileges was that, having admitted patients, he

would "refer" them to ob/gyn staff. *Id*. His communications with Tulane clarify that he would be the admitting physician and would "consult" with other physicians. *Id*. at 3552, 3559, 3560, 3563.

To qualify under the Act, a physician must be a "member in good standing of [a hospital's] medical staff" and have "the ability to admit a patient and to provide diagnostic and surgical services to such patient." La. Rev. Stat. § 40:1299.35.2(A)(2)(a). The Act does not address the situation where a doctor may admit patients but then "refer" or "consult" with other doctors for their care. Contrary to the lower court, the Act's "plain language" does not settle whether such privileges qualify. App. B, at ¶241. The Secretary took a flexible view of the Act, under which an admitting doctor can provide patient care as part of a team. Louisiana's expert, Dr. Robert Marier, testified that the Act was drafted with this kind of flexibility in mind. App. J, at 110-113. Indeed, when asked a hypothetical corresponding to Doe 2's Tulane privileges, Dr. Marier stated they would meet the Act. *Id*. at 110-111.[16]

[16] The lower court clearly erred by overlooking this testimony. Instead, it relied on Dr. Marier's general agreement that the Act requires an admitting physician to be able to perform "some" patient services. App. B, at ¶242. But that overlooks Dr. Marier's clarification that the Act accommodates the "routine" situation where an admitting physician consults with other physicians. App. J, at 111-12.

Moreover, as the lower court found, privilege terminology varies from hospital to hospital, and thus whether particular privileges satisfy the Act "entirely depends upon the specific definition, requirements and restrictions imposed by a given hospital in a given circumstance." App. B, at ¶83. In other words, the question is fact-dependent. In light of that, the Secretary's application of the Act here did not "fl[y] in the face of the law's basic text," *id.* at ¶244, as the lower court thought. Rather, the Secretary took a reasonable view of how the Act applied to this ambiguous situation—a view, moreover, that *benefited* Doe 2 by allowing him to continue providing abortions in New Orleans. Even assuming a *Chevron* analysis was apt (which it was not), the lower court erred by reading the Act too narrowly and failing to defer to the Secretary. And again, that error is especially obvious in a facial challenge, which requires plaintiffs to show a law is invalid under *no* set of fact*s*, not merely some conceivable set of facts.

III. The remaining stay factors favor Louisiana.

Because Act 620 has been enjoined, Louisiana "necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws," and its "interest and its harm merges with that of the

public." *Abbott I*, 734 F.3d at 419. Given Louisiana's likelihood of success, any harm plaintiffs might show "is not enough, standing alone to outweigh the other factors." *Id.* Finally, the Court has already concluded that an identical privileges law "protect[s] . . . abortion patients' health," helps "prevent[ ] patient abandonment," and "reduces the risk . . . [of] woefully inadequate treatment." *Abbott II*, 748 F.3d at 594-95. Thus, far from harming women, allowing the Act to remain in effect pending appeal will protect women from the risk of injury.

CONCLUSION

Louisiana respectfully requests an emergency stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 16, 2016, I filed the foregoing with the Court's CM/ECF system, and additionally sent copies of the motion and all accompanying appendices to plaintiffs' counsel via electronic mail.

s/ *S. Kyle Duncan*

S. Kyle Duncan
Counsel for Appellant

CERTIFICATE OF CONFERENCE

On February 16, 2016, undersigned counsel attempted to contact plaintiffs' counsel by telephone to notify plaintiffs that this motion would be filed, and left a voicemail message to that effect.

As a result, undersigned counsel cannot represent to the Court whether this stay motion is opposed or unopposed.

However, given that plaintiffs opposed the motion to stay pending appeal filed by Appellant in the district court, undersigned counsel reasonably believes that this motion will be opposed as well.

s/ *S. Kyle Duncan*

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