No. _____

In the Supreme Court of the United States

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.,

Applicants,

v.

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

Respondent.

EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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To the HONORABLE CLARENCE THOMAS, Associate Justice of the Supreme Court of the United States, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

INTRODUCTION

The Fifth Circuit has stayed a preliminary injunction that precludes enforcement against Applicants of a Louisiana law requiring physicians that perform abortions to have active admitting privileges at a local hospital. The stay is having an immediate, ongoing, and devastating impact on the availability of abortion services in Louisiana. The law had been preliminarily enjoined as applied to Applicants (clinics that provided abortion services) and their doctors and staff, by the District Court for the Middle District of Louisiana. The injunction was based on evidence showing that after spending approximately a year attempting to obtain admitting privileges to satisfy the law, most physicians providing abortion in Louisiana were unable to obtain such privileges. Because of the Fifth Circuit's stay order, which was based on a demonstrably wrong application of the undue burden standard, all but two doctors in the state have been forced to stop providing abortions and turn away women with scheduled appointments, and one of those will shortly be forced to cease, absent relief from this Court. Louisiana will then be left with only one physician providing abortions.

Because one physician cannot possibly provide all abortions in Louisiana, if the stay entered by the Fifth Circuit is not vacated, women's ability to exercise their constitutional right to obtain an abortion will be lost, and their lives will be permanently and profoundly altered. In addition, absent relief from this Court,

Louisiana will see a continued increase in later-term abortions and in women turning to dangerous and illegal methods of abortion. If the stay is not vacated, the clinics forced to close during the appeals process will likely never reopen, even though ultimately prevailing in the appeal.

In *Whole Woman's Health v. Hellerstedt*, this Court blocked the Fifth Circuit's decision staying as-applied relief under the undue burden standard against a similar Texas admitting privileges law, and then granted certiorari to the plaintiffs challenging the law after the Fifth Circuit ruled against them on the merits. One of the questions on which the Court granted certiorari was whether the Fifth Circuit had incorrectly applied the undue burden standard. Despite the fact that this Court is poised to hear merits arguments in *Whole Woman's Health* in less than a week, the Fifth Circuit has issued an emergency stay that will drastically curtail access to legal abortion in Louisiana under the same analysis that it applied in that case and that is being presently being reviewed by this Court.

To protect the rights and the health of women who will seek abortions in Louisiana during the pendency of this appeal and this Court's final decision in *Whole Woman's Health*, and to ensure that the Court will be able to grant meaningful relief if it ultimately reviews this case, the stay entered by the Fifth Circuit should be vacated. Additionally, the Court should enter interim relief lifting the stay temporarily, to restore the status quo while the Court has an opportunity to review and decide this application.

BACKGROUND

A. The Challenged Requirement

Applicants challenge the portion of Louisiana Act 620 that requires every doctor who provides abortions at a clinic to "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." Act 620 § (A)(2)(a) (codified at La. Rev. Stat. § 40:1061.10(A)(2)(a)) (the "admitting privileges requirement"). "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." *Ibid.*

Applicants include three Louisiana abortion clinics: June Medical Services LLC, d/b/a Hope Medical Group for Women ("Hope"), Bossier City Medical Suite ("Bossier"), and Choice, Inc., of Texas, d/b/a Causeway Medical Clinic ("Causeway" or "Choice"), each suing on behalf of its physicians, staff, and patients; and two individual physicians who provide abortions, each suing on his own behalf and on behalf of his patients.[1]

B. Summary of the Proceedings Below

The district court entered a temporary restraining order ("TRO") barring enforcement of the Act the day before it was to take effect on September 1, 2014.

[1] Applicants Choice, Inc., of Texas and Bossier City Medical Suite are wholly owned subsidiaries of Martin, Martin & Richards, Inc. Applicant June Medical Services has no parent corporation nor any stock owned by a publicly held company.

June Medical Services LLC et al. v. Caldwell, 2014 WL 4296679 (M.D. La. Aug. 31, 2015). The TRO was extended twice, each time with the parties' consent. App., *infra*, 193a; App., *infra*, 176a-177a. It applied to all abortion providers in the state, whether or not litigants. *See* App., *infra*, 187a-189a (affirming TRO's application to all Louisiana abortion clinics that were then before the district court and noting Respondent's consent); App., *infra*, 180a-181a (affirming TRO's ongoing application to all abortion providers, including those who voluntarily dismissed themselves from the litigation).

After a six-day evidentiary hearing held in June 2015, App., *infra*, 53a, the district court made extensive findings of fact and conclusions of law, declared the Act unconstitutional, and issued an as-applied preliminary injunction blocking its enforcement "against the following persons: Doctor John Doe 1; Doctor John Doe 2; June Medical Services, LLC, d/b/a Hope Medical Group for Women, and its physicians and staff; Bossier City Medical Suite, as well as its physicians and staff; Choice, Inc. of Texas, d/b/a Causeway Medical Clinic, and its physicians and staff, including Doctor John Doe 4; and any and all others encompassed by the Parties' stipulations." App., *infra*, 46a-47a; *see* App., *infra*, 48a-159a.[2] Unlike the TRO, the preliminary injunction did not apply to other abortion providers in the state. App., *infra*, 46a-47a, 55a, 159a. Indeed, the district court expressly stated in its opinion that "[a]n order enjoining enforcement of Act 620 against parties other than

[2] This decision was codified and clarified in a Judgment issued February 10, 2016. App., *infra*, 46a-47a.

Plaintiffs herein would be overly broad." App., *infra*, 159a n.69 (citing *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 459 (5th Cir. 2014)).

The district court's opinion provided an extensive analysis of the efforts made by Louisiana's abortion providers to obtain admitting privileges, App., *infra*, 100a-122a, and found that the physicians' inability to obtain privileges was "not related to their competence." App., *infra*, 124a. The court held that Applicants had shown a substantial likelihood of succeeding on their claim that the Act would prevent large numbers of women seeking abortion care in Louisiana from obtaining it; that these women would therefore be forced to forgo obtaining a legal abortion altogether or would turn to dangerous or illegal methods; and that even women able to obtain legal abortions would face unreasonable delays and added health risks. App., *infra*, 128a-132a. The court concluded as a matter of law that the Act would have the effect of placing an undue burden on women seeking abortion in Louisiana, including Applicants' patients. App., *infra*, 148a. It determined that Applicants had also met their burden with regard to the other three preliminary injunction factors. App., *infra*, 156a-158a.

On February 10, 2016, Respondent sought a stay pending appeal in the district court, which was denied in an extensive thirty-page opinion addressing each of her contentions. App., *infra*, 16a-45a. Respondent then sought an "emergency" stay from the Court of Appeals for the Fifth Circuit, requesting a decision within ten days. On February 24, 2016, the Court of Appeals granted the stay. App., *infra*, 1a-15a. In treating the motion for a stay as an "emergency," the Fifth Circuit

disregarded the fact that Respondent chose not to seek the interlocutory appellate relief that was available to her during the year-and-a-half pendency of the present litigation until this month, has repeatedly assented to ongoing injunctive relief *pendent lite*, and has established a policy of non-enforcement of the Act during the case, *see* La. Admin. Code tit. 46, § 4423.

C. The District Court's Findings That the Act Will Severely Curtail Access to Abortion in Louisiana and Therefore Create an Undue Burden on Women's Access to Abortion

The district court found that if enforcement of the Act is permitted, the state of Louisiana will be left with a single abortion provider. App., *infra*, 128a. That lone doctor, working in one clinic, cannot meet the need for approximately 10,000 abortions in Louisiana each year, a need that was previously met by six physicians in five clinics across the state. App., *infra*, 128a-129a. As a result, many women will be unable to exercise their constitutionally protected right to choose abortion at all, and others will face unreasonable delays and therefore increased risks of complications, or will turn to self-performed, unlicensed, or unsafe abortions. App., *infra*, 132a.

1. Louisiana abortion providers

At the time of the hearing, substantially all abortions in Louisiana were performed by five abortion facilities—Applicants Hope, Bossier and Causeway, and non-litigants Delta Clinic ("Delta") of Baton Rouge and Women's Health Care Center ("Women's") in New Orleans—with a total of six doctors—Applicants Does 1

and 2 and non-litigants Does 3-6.[3] App., *infra*, 64a, 67a. Only two doctors had "active admitting privileges" required by the Act. Doe 3 had long maintained admitting privileges in connection with his obstetrics practice, which is his principal employment. App., *infra*, 117a. Doe 5 was able to secure privileges in New Orleans, but not in Baton Rouge, where he is the sole provider at the Delta clinic. App., *infra*, 119a-120a. The evidence showed the following:

Clinic	Abortions / Yr.	Doctors, Status of "Active Admitting Privileges"	% of Clinic's Abortions Performed by Each Doctor
Hope[4] (Shreveport)	"In excess of 3,000"	Doe 1 (no privileges) Doe 3 (privileges)	Approx. 71% Approx. 29%
Bossier[5] (Bossier City)	550	Doe 2 (no privileges)	100%
Causeway[6] (Metairie)	Approx. 1800	Doe 4 (no privileges) Doe 2 (no privileges)	Approx. 75% Approx. 25%
Women's[7] (New Orleans)	Approx. 2375	Doe 5 (privileges in New Orleans) Doe 6 (no privileges)	Approx. 40% Approx. 60%
Delta[8] (Baton Rouge)	Approx. 2000	Doe 5 (no privileges in Baton Rouge)	100%

Doe 2 obtained "limited" privileges at Tulane hospital near one of his two abortion practices, Causeway, which allowed him to admit patients but required

[3] Pursuant to two protective orders issued by the district court in this case, App., *infra*, 190a-192a, 195a-199a, Louisiana physicians providing abortions are referred to using pseudonyms and male pronouns.

[4] App., *infra*, 64a-65a; App., *infra*, 285a.

[5] App., *infra*, 65a, 69a.

[6] App., *infra*, 66a, 68a. The January 26 preliminary injunction, applied "as to the Plaintiffs," App., *infra*, 159a, cast doubt on whether the Act would be enforceable against Doe 4, who is not a litigant. Accordingly, the parties negotiated a stipulation as to him, App., *infra*, 171a-172a, which the district court so-ordered on February 5, App., *infra*, 170a. By then, Causeway had ceased to be able to keep its doors open. It last offered abortions (performed by Doe 2) on January 30, and subsequently suspended operations. A notice of closure was published February 12.

[7] App., *infra*, 33a, 66a.

[8] App., *infra*, 33a, 67a.

him to turn over their care immediately to a member of the hospital's staff and precluded him from providing any care to those patients. App., *infra*, 109a. The district court determined that this limitation prevented him from "provid[ing] diagnostic and surgical services," as required under the Act's definition of "active" admitting privileges. App., *infra*, 114a-115a. The court concluded that "Doe 2 does not have active admitting privileges within the meaning of Act 620." App., *infra*, 116a.

Respondent's predecessor as Secretary of the Louisiana Department of Health and Hospitals, Kathy Kliebert, submitted an affidavit on the eve of trial arguing that she interpreted the Act to the contrary. The district court refused to credit her interpretation, finding that it "is contradicted by [the Act's] plain language," which "expressly and unambiguously" defines "active admitting privileges" to require more than Doe 2's Tulane privileges allow. App., *infra*, 114a. The district court emphatically stated: "[A]s Defendant's own expert testified and as the statute's plain meaning makes clear, the Secretary's interpretation flies in the face of the law's basic text. The words are clear [and] their meaning patent * * * ." App., *infra*, 115a.

As a result of the Act, Does 1, 2, 4, and 6 will not be able to provide abortion services in Louisiana at all, App., *infra*, 126a-127a, and Doe 5 will be able to provide abortions at Women's only, not at Delta, where he provides most of his abortions, App., *infra*, 128a. Doe 3, the last abortion provider in northern Louisiana and hundreds of miles from any other, will stop providing abortions because of a well-

founded fear of being targeted by persons seeking to eliminate abortion from northern Louisiana through violence and intimidation. App., *infra*, 117a, 126a-127a. Doe 3 is also likely to be without a clinic to perform abortions if Act 620 is enforced. That is because Doe 3 provides proportionately very few of the abortions performed at Hope, App., *infra*, 64a-65a, and Hope's primary provider, Doe 1, will not be able to provide any abortions if the Act is enforced. App., *infra*, 126a. As a result, Hope is unlikely to remain viable as a going concern. As the district court found, "the loss of Doe 1 on Hope would be * * * 'devastating' to its operations and viability." App., *infra*, 129a.[9] Thus, if the stay is not lifted, the state will be left with only one abortion provider, Doe 5, offering abortion care at only one clinic, Women's, in New Orleans. App., *infra*, 128a.

2. Louisiana's one remaining abortion provider cannot meet the demonstrated need of women seeking abortion in the State

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. App., *infra*, 128a ("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), "as a logistical matter," Doe 5 cannot serve all 10,000 women seeking an abortion in

[9] During the pendency of proceedings on this Application, Doe 3 is continuing to perform abortions, as he does when Doe 1 is on vacation, App., *infra*, 288a, keeping Hope open in the short term. He will cease to perform abortions if this Application is denied, for the foregoing reasons.

Louisiana each year. App., *infra*, 129a. As the district court explained, it is "the Court's duty to predict the realistic effect of Act 620 * * * [and not] * * * to presume that a party will choose to make the exceptional into the typical * * * or to somehow force a person to abandon their every other professional effort just so as to manufacture a better number." App., *infra*, 34a.

Thus, the district court found that with only one physician practicing in one location, even "putting aside the issue of the distance which would need to be traveled by women in north Louisiana, approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana." App., *infra*, 129a.

3. Act 620 will prevent women from obtaining abortions and will expose women who do obtain abortion to unreasonable risks and delays

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." App., *infra*, 157a; *accord* App., *infra*, 130a, 148a. Many of those women will be forced to forgo abortion altogether and carry an unwanted pregnancy to term, against their will. *See* App., *infra*, 129a-130a, 157a. Other women will turn to "self-performed, unlicensed and unsafe abortions." App., *infra*, 132a. These may be far riskier than legal abortion. App., *infra*, 226a.

Even those women who are still able to obtain an appointment with the State's sole remaining doctor will face "unreasonable and dangerous delays in scheduling abortion procedures," due to the long wait time that will ensue when all women seeking abortion in the State must turn to a single physician. App., *infra*,

157a; *accord* App., *infra*, 132a. This will "caus[e] a higher risk of complications," App., *infra*, 132a, and push many women into the second trimester. Additionally, women outside New Orleans will have to face "the burdens associated with increased travel distances," which in many cases will increase delays still further. App., *infra*, 157a.

The district court also considered alternative scenarios. The district court considered what would occur assuming: (1) Doe 3 continued to perform abortions at Hope, despite his testimony that he would cease to do so if the Act were enforced; and (2) Doe 2 continued to perform abortions at Causeway, although he lacks "active admitting privileges."[10] Even under these scenarios, the district court found that approximately 55% and 45%, respectively, of women seeking abortion in Louisiana would be left "without the ability to get one" due to the Act. App., *infra*, 129a-130a; *see also* App., *infra*, 31a ("[T]he evidence showed" that "two facilities with half their normal staff of physicians" "could not" "serve the entire state."). The court also found that Doe 3 could not expand his abortion care practice due to the demands of his obstetrics practice. App., *infra*, 126a.

[10] As noted *supra* at 7-8, Doe 2 can no longer provide abortions at Causeway, so the latter scenario is impossible at the moment. It is important to note that this does not affect the undue burden analysis underlying the as-applied, preliminary injunction. The injunction is necessary to prevent the capacity of the state's abortion providers from falling well below the level of need, which will occur if the Act takes effect, leaving Doe 5 as the state's only provider. Doe 2's inability to work at Causeway does not change the fact that Doe 5 will be the state's only provider if the Act takes effect.

4. Act 620 provides no medical benefit

The district court also found that "[t]he medical benefits which would flow from Act 620 are minimal," in addition to which, they "are outweighed by the burdens which would flow from this legislation." App., *infra*, 100a.

a. Act 620 will not make abortions safer

The district court found that approximately 10,000 women obtain abortions in Louisiana annually. App. *infra*, 63a. It further found that "[l]egal abortions in Louisiana are very safe procedures with very few complications." App. *infra*, 99a.

The purported benefits of Act 620 include "credentialing" and "continuity of care" in the event of a hospital transfer. App. *infra*, 95a, 115a-116a. But the Act will not actually provide any of its purported benefits. "Credentialing" refers to review of a doctor's credentials and competency by the hospital where he or she is seeking privileges. App., *infra*, 72a. But the district court found that most Louisiana abortion providers will not have their qualifications reviewed by a hospital, for a variety of reasons, including discrimination for which there is no remedy. App., *infra*, 83a, 92a. "[A] hospital, if it chooses to, may discriminate against any abortion provider with no consequence under Louisiana law." App., *infra*, 80a. Likewise, "continuity of care" in the event of a hospital transfer is already addressed by existing Louisiana law, which requires abortion clinics to maintain policies, for the "immediate transfer to a hospital of patients * * * requiring emergency medical care," and which are subject to annual review by Respondent as part of licensing renewal proceedings. La. Admin. Code tit. 48, pt. 1 § 4423(B)(3)(c).

b. Act 620 is inconsistent with medical standards

The medical community opposes admitting privileges laws like Act 620 because they have no medical justification. The American College of Obstetricians and Gynecologists (ACOG) opposes admitting privileges laws because they "do nothing to protect the health of women." App., *infra*, 273a; *see also* App., *infra*, 240a. ACOG and the American Medical Association, writing together with other groups of medical professionals, have stated to this Court that there is "no medical basis" for admitting privileges laws, and that they are "are inconsistent with prevailing medical practice." *See* Brief for Amici Curiae American College of Obstetricians and Gynecologists, et al, *Whole Woman's Health v. Cole*, No. 15-274, at 20 (Jan. 2016).

5. The legal context of Act 620

The district court found "the effect of Act 620 is * * * significantly different from admitting privileges requirements in states" without Louisiana's unique legal context. App., *infra*, 92a. Of particular relevance, Louisiana has a law prohibiting discrimination against individuals refusing to perform abortions, but not against those who perform abortions, and hospitals are expressly permitted by state law to refuse to "accommodate the performance of any abortion in said facility or under its auspices." La. Rev. Stat. § 40:1061.2-4 (formerly cited as La. Rev. Stat. § 40:1299.33); App., *infra*, 92a; *see also* App., *infra*, 80a (hospitals may legally discriminate against "any abortion provider with no consequence under Louisiana law"); App., *infra*, 114a (relying on the testimony of Dr. Robert Marier, "Defendant's expert witness, a physician who helped draft Act 620"). The district court found "an

abundance of evidence * * * demonstrating that hospitals can and do deny privileges for reasons directly related to a physician's status as an abortion provider." App., *infra*, 78a-82a. Indeed, the Governor of Louisiana recently stated in an amicus brief filed in the *Whole Woman's Health* case that "[o]ne of the first steps taken by doctors in the 1970s who wished to drive away their colleagues who performed abortions was to deny them hospital privileges." Brief for Amici Curiae Governors of Texas, et al. at 20, *Whole Woman's Health v. Cole*, No. 15-274 (Feb. 2016).

Furthermore, Louisiana, unlike other states, such as Texas, also lacks a provision of law requiring hospitals to act on a doctor's privileges application within a certain amount of time. App., *infra*, 75a (citing Tex. Health & Safety Code § 241.101 and *Abbott II*, 748 F.3d at 600). Thus, "a hospital can effectively deny a doctor's application of privileges by never acting on it." *Ibid.* The district found concluded that *all* of the Louisiana physicians seeking privileges after the Act had had applications "de facto denied" in this way. App., *infra*, 103a-104a, 107a-108a, 118a, 120a, 122a.[11]

The district court concluded that Act 620 was modeled after laws which had the result of closing abortion clinics in other states, but that it would have a greater impact in Louisiana's legal context, and thus a "purpose of the bill is to make it

[11] Under Louisiana law, the legislature is presumed to know that physicians seeking admitting privileges under the Act will have no legal recourse if their application is never acted on, or if it is denied for discriminatory reasons. *See Theriot v. Midland Risk Ins. Co.*, 694 So. 2d 184, 186 (La. 1997) ("Laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject.").

more difficult for abortion providers to legally provide abortions and therefore restrict a woman's right to an abortion." App., *infra*, 92a, 95a, 97a, 99a.

D. The Fifth Circuit's Rationale for Staying the Preliminary Injunction

As of the date of the district court's opinion, the Act had never been enforced, and the status quo had remained that physicians providing abortions in Louisiana were not required to have active admitting privileges. Twice during the proceedings below, Respondent had agreed to extend the TRO blocking enforcement of the law. App., *infra*, 178a-189a. And Respondent waited nearly three weeks after the preliminary injunction issued to seek relief from the Fifth Circuit. App., *infra*, 162a-163a. Despite Respondent's delays, she filed an "emergency motion" for a stay. Eight days later, on February 24, 2016, a motions panel of the Fifth Circuit granted the stay, allowing immediate enforcement of the Act. App., *infra*, 1a-15a.

The Fifth Circuit held that Respondent was likely to prevail on the merits. App., *infra*, 5a-14a. Notwithstanding that the district court granted only as-applied relief, expressly limiting the scope of the injunction to Applicants and their physicians and staff, App., *infra*, 46a-47a, 159a & n.69, the Fifth Circuit required Applicants to meet the standard for a facial challenge. App., *infra*, 7a-8a & n.9, 13a & n.15.[12] The court therefore assessed whether Applicants had established that the Act would operate as a substantial obstacle to a woman's choice to undergo an abortion in a "large fraction" of the cases in which the Act is relevant, App., *infra*,

[12] To be sure, as the Fifth Circuit observed, Applicants sought a preliminary injunction precluding enforcement of the Act in all of its applications—i.e., facial relief. App., *infra*, 7a n.7. But the district court did not award the requested facial relief. App., *infra*, 46a-47a, 159a & n.4.

8a, and concluded that Applicants were unlikely to prevail, even though the evidence established that, at a minimum, enforcement of the Act would prevent 45% of women seeking abortions in Louisiana from obtaining one. App., *infra*, 130a.

In ruling against Applicants on the large-fraction test, the court reweighed the evidence (without holding that any of the district court's findings of fact, which were well supported by evidence, App. *infra*, 123a-128a, were clearly erroneous), and ultimately disagreed with the district court's determinations of which physicians would be prevented from providing abortions by the Act. App., *infra*, 11a. The Fifth Circuit disagreed with the district court's well-reasoned finding that Doe 3 would close his practice if, due to enforcement of the Act, he is the last provider in the area. *Ibid.* And it rejected the district court's conclusion that Doe 2's limited privileges do not satisfy the Act, even though the Fifth Circuit expressed no disagreement with the district court's legal interpretation of "active admitting privileges" under Louisiana Law. App., *infra*, 11a-12a. On this basis, the court of appeals then rejected the district court's findings about the impact of the law under scenarios in which Does 2 and 3 did not have privileges. App., *infra*, 10a-11a.

The Fifth Circuit also gave no weight to the district court's finding that "if only Does 2, 3, and 5 continue to practice, 45% of women seeking an abortion may lack access," arguing that even assuming it were correct, it would still be insufficient to support the district court's injunction. App., *infra*, 12a. Rather, the Fifth Circuit found that, were all three doctors to remain practicing, "well more

than 90% of Louisiana women will live within 150 miles of two operating clinics." App., *infra*, 12a. The court thus concluded that, regardless of the number of women no longer able to access abortion, the Act does not present an undue burden, solely on account of geography. *Ibid.* (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 415 (5th Cir. 2013) ("*Abbott I*"); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583, 597-98 (5th Cir. 2014) ("*Abbott II*")).

Finally, in a footnote, the Fifth Circuit observed that this Court is presently considering the admitting privileges requirement in *Whole Woman's Health v. Hellerstedt*, No. 15-274. App., *infra*, 13a n.16. The court of appeals tried to distinguish *Whole Woman's Health*, stating that the "questions presented in that case involve the proper role in *Casey*'s undue burden test of the state's *interest and purpose* in promoting health," issues that the Fifth Circuit said "are not implicated here." *Ibid.* (emphasis added). But the court of appeals failed to acknowledge that also at issue in *Whole Woman's Health* is whether that law imposes an undue burden because it has the *effect* of creating a substantial obstacle to a woman's right to access an abortion. Brief for Petitioners at 15-25, *Whole Woman's Health v. Cole*, No. 15-274 (Dec. 28, 2015). That is the very same basis on which the district court issued the as-applied preliminary injunction here. App., *infra*, 148a-153a.

ARGUMENT

"[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals,

may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia J., concurring); *id.* at 508 (Breyer, J., dissenting). Where a district court's decision "is reasoned," "presents novel and important issues," and "is supported by considerations that may be persuasive to the Court of Appeals or to this Court," an order staying that decision may be vacated even if the merits present a "close" question. *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1331-32 (1980) (Powell, J., in chambers).

Vacating the stay is warranted here. It is beyond dispute that the Act creates an undue burden for many women in Louisiana who will seek access to an abortion. As the district court found (and even the Court of Appeals' improper revision of those findings confirmed), thousands of women will be totally denied access to legal abortion services in Louisiana if the Act is enforced. If that is not an undue burden under *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992), then nothing can be. Moreover, as the district court correctly found, the admitting privileges requirement does not serve a valid medical purpose and in fact *harms* women's health by forcing women to delay abortions or to turn to illegal methods, thus increasing health risks. The Fifth Circuit erroneously disregarded

the district court's findings and gave no weight to its credibility determinations. As a result, women are being irreparably harmed in Louisiana every day the stay remains in effect. That stay should be lifted.

I. This Court Should Vacate the Stay to Preserve the Status Quo, as it Did in *Whole Woman's Health*

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until final judgment. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The status quo is "the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Here, the status quo was that safe, legal abortion services were available to women in Louisiana, provided by Applicants' physicians and those at two other clinics. In issuing a preliminary injunction, the district court appropriately awarded relief to maintain that status quo. App., *infra*, 18a ("[P]recedent compels the preservation of the status quo * * * ."); App., *infra*, 157a ("A preliminary injunction will preserve the status quo, and permit the clinics and physicians to continue to provide safe, needed abortion care to their patients.").

The Fifth Circuit's stay has fundamentally altered the status quo, and absent relief from this Court, the harms imposed by the Act will be irreversible. The Act will prevent all but one physician who is currently providing abortion services in Louisiana (including all of Applicant physicians) from continuing to do so, resulting in the closure of all but one of Louisiana's clinics (including Applicant clinics), none of which can survive if shuttered for months or years while litigation continues until a final decision on the merits. Louisiana law provides that abortion clinic licenses

expire annually, La. Admin. Code tit. 48, pt. I, § 4403(D); that "a license shall be immediately null and void if an outpatient abortion facility ceases to operate," *id.* § 4413(B); and that "[o]nce an outpatient abortion facility has ceased doing business, the facility shall not provide services until it has obtained a new initial license," *id.* § 4413(G). Absent this Court's lifting of the stay, Applicant clinics will lose their licenses and shut down, irretrievably altering the status quo.

This would occur even as this Court is scheduled to hear argument in *Whole Woman's Health* in less than a week. *Whole Woman's Health* concerns the Fifth Circuit's application of the undue burden standard to a nearly-identical admitting privileges requirement—the very one that the Act was modeled on. Like this case, *Whole Woman's Health* also involves an injunction issued on the basis of a record, developed after the law's effective date, which demonstrates doctors' inability to obtain privileges and quantifies the resulting harms to women. The Fifth Circuit was wrong to dismiss the issues in *Whole Woman's Health* as "not implicated here." App., *infra*, 13a n.16. Not only are the issues implicated, they are the same.[13] The questions on which this Court granted *certiorari* will control the outcome of this case: whether a court errs in applying the undue burden standard by (1) "refusing

[13] Other federal courts have appropriately recognized that this Court's grant of certiorari in *Whole Woman's Health* warranted pausing litigation turning on the undue burden standard before issuing new orders that could disturb the status quo. *E.g.*, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, ECF No. 45 (M.D. Tenn., Dec. 17, 2015) ("[T]he United States Supreme Court, in *Whole Woman's Health* * * * may address how the lower courts should apply the undue burden standard in * * * *Casey* * * * to abortion restrictions, including those at issue in this case[.] * * * [T]he standards if addressed by the Supreme Court in *Whole Woman's Health* may be critical for developing and evaluating the relevant evidence in this case; and * * * goals of judicial economy and avoidance of unnecessary litigation weigh heavily in favor of a stay pending the Supreme Court's decision in *Whole Woman's Health*."); *Planned Parenthood Cincinnati Region v. Strickland*, No. 1:04-cv-00493-SJD (S.D. Ohio, Oct. 1, 2015) (minute entry "stay[ing] this case pending a decision from the United States Supreme Court on petition for certiorari in the case of Whole Women's [sic] Health v Cole").

to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health," and (2) "concluding that this standard permits [a State] to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health—or any other valid interest." Petition for a Writ of Certiorari at I, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (Sept. 2015).[14]

Moreover, in *Whole Woman's Health*, this Court twice intervened to preserve the status quo. There, as here, the Fifth Circuit granted Texas the extraordinary relief of a stay pending appeal of the district court's as-applied injunction precluding enforcement of Texas's admitting privileges requirement, and this Court intervened to vacate the stay in large part. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014). The Court again intervened to preserve the status quo by staying the mandate after the Fifth Circuit's final judgment upholding the Texas law. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015). The Court should do the same in this case. The Fifth Circuit's order, precipitously allowing a nearly identical law again to take effect during pending litigation, while stating "no guidance can be

[14] For this reason, this case also satisfies the Court's requirement that the Court is likely to grant *certiorari* to review the court of appeals' final disposition of this case. *See W. Airlines*, 480 U.S. at 1305. The Court's grant of *certiorari* in *Hellerstedt* demonstrates, at a minimum, that the overlapping issues presented in this case are worthy of this Court's review. If the Fifth Circuit were to reverse the grant of the preliminary injunction in this case before this Court's decision in *Hellerstedt*, it would be appropriate in this case for this Court to grant the petition, vacate the Fifth Circuit's decision, and remand. To the extent that the Fifth Circuit rules after the decision in *Hellerstedt* issues but does not correctly apply that decision, Supreme Court review in this case would be warranted.

gleaned from the Supreme Court's" two earlier interventions, App., *infra*, 14a n.18, should not be allowed to stand.

II. The Fifth Circuit Erred in Concluding That Respondent Is Likely to Succeed on the Merits of Her Appeal

The Fifth Circuit applied the undue burden standard in a manner that radically departs from this Court's precedents, rendering it a hollow protection for the liberty interest recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *See* 505 U.S. at 851-52. The Act violates the undue burden standard because it drastically reduces women's access to legal abortion services and fails to further the State's asserted interest in women's health. The Fifth Circuit held that the burden the Act imposes is not undue, even though it prevents thousands of women in Louisiana from accessing abortion and provides no offsetting health benefit for abortion patients. This cannot be reconciled with *Casey*.

A. The Undue Burden Standard

A law imposes an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (joint opinion of O'Connor, Kennedy, Souter, JJ.). "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Ibid.* However, "[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." *Ibid.*

The Fifth Circuit stayed the district court's decision providing as-applied relief under *Casey's* effects prong. To withstand review under that prong, the restriction must advance the State's interest to an extent sufficient to warrant the obstacles it imposes on women seeking abortion. *Id.* at 875 ("[T]he right recognized by *Roe* is a right 'to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added))).[15]

B. The Fifth Circuit Erred in Applying the Large-Fraction Test

The Fifth Circuit improperly applied *Casey*'s "large fraction" test, which is a test for facial relief, to the district court's award of an as-applied preliminary injunction.[16] *C.f.* 505 U.S. at 895; *accord Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). The Fifth Circuit justified this by observing (correctly) that Applicants seek facial relief. But Applicants have not obtained the facial relief they seek. The scope of appellate review is over an "[i]nterlocutory *order*[] of the district court[]," 28 U.S.C. 1292(a) (emphasis added), and not over a party's *claim*. *See also id.* § 2106 (the scope of appellate review is over "any judgment, decree, or order of a court lawfully brought before it for review); 16 Charles A. Wright et al., Fed. Prac. & Proc. Juris. § 3921.1 (3d ed.). It is axiomatic that a party cannot compel a court to tailor

[15] Applicants have also asserted that the Act is invalid under *Casey*'s purpose prong. The district court found it was not at the preliminary injunction stage, App., *infra*, 139a-142a, and that determination is not currently on appeal.

[16] The Fifth Circuit is aware that this test applies only for facial relief and not for an as-applied injunction. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 594 (5th Cir. 2015) (affirming as-applied injunctive relief after finding plaintiffs did not meet large fraction test in facial challenge); *Currier*, 760 F.3d at 458 (granting preliminary injunctive relief "as applied" to plaintiff under *Casey*'s undue burden standard and not applying large fraction test); *see also* App., *infra*, 5a-6a & n.8 (discussing application of large fraction test in *Abbott* but not *Currier*).

relief to its claim rather than the remedy the court determines that the party actually merits. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) ("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") citing *United States v. Nat'l Treasury Emps.*, 513 U.S. 454, 477-78 (1995) (contrasting "a facial challenge" with "a narrower remedy")); *see also 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 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.").

The district court was well within its authority to grant a narrower injunction than that which Applicants sought, and it is only that as-applied injunction that the court of appeals has jurisdiction to review. The district court has "preliminarily enjoined [Respondent] from enforcing LA. R.S. § 40:1299.35.2 *et seq.* against [Applicants]." App., *infra*, 46a. Thus, Applicants' facial challenge is not before the Fifth Circuit in Respondent's appeal, and the large-fraction test is not relevant at this point. It was error for the Fifth Circuit to apply the wrong legal standard. *United States v. Lanier*, 520 U.S. 259, 272 (1997) (vacating judgment and remanding the case for application of the proper standard). That error is even more

glaring here, where the Fifth Circuit, acting on an emergency basis, overturned the longstanding status quo, with the result being that all but one physician in Louisiana will stop providing abortions, preventing most women in the state from obtaining them.

C. The Fifth Circuit Erroneously Disregarded the District Court's Factual Findings in Concluding that the Act Would Not Have the Effect of Creating an Undue Burden

The Fifth Circuit's only rationale for concluding that Respondent is likely to succeed on the merits is that Applicants "have failed to establish an undue burden on women seeking abortions." App., *infra*, 8a. But there can be little doubt of the dramatic, unconstitutional impact of the Act on the ability of women in Louisiana to access abortion services. The district court found that if the Act were to take effect, Applicants would cease providing abortion services, as would every other physician, save one, who currently provides abortions in Louisiana. App., *infra*, 128a. Thus, all women seeking abortions in Louisiana would have to seek abortion care from a single doctor, at the State's only remaining clinic. *Ibid.* Unable to more than triple his current workload, that doctor would be forced to turn most of them away. App., *infra*, 128a-129a. Preventing a woman from legally obtaining an abortion before viability is an undue burden. *Casey*, 505 U.S. at 846, 878. That the Act would do so for 70% of women seeking abortion in Louisiana is an unprecedented imposition on women's right to access abortion, and completely irreconcilable with *Casey*.

The Fifth Circuit usurped the role of the district court by failing to accord any deference at all to its findings of fact. *Contra* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, * * * must not be set aside unless clearly erroneous, and the reviewing court

must give due regard to the trial court's opportunity to judge the witnesses' credibility.") These findings of fact, based in large part on determinations regarding the credibility of witnesses, are entitled to substantial deference on appeal. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); Fed. R. Civ. P. 52(a)(6). But the court of appeals gave no weight to the district court's findings and credibility determinations. As a result, the Fifth Circuit's opinion is replete with factual errors. For example, the Fifth Circuit stated: "[N]either Doe 5 nor the clinic in which he works testified as to his capacity. The district court reached Doe 5's capacity based on the testimony of Doe 3." App., *infra*, 9a n.11. In fact, Doe 5 *did* testify (by designation, App., *infra*, 7 n.5), and the district court *did* rely directly on Doe 5, not Doe 3, for its findings about his capacity, *e.g.,* App., *infra* 129a (citing Doe 5's sworn declaration *see* App., *infra*, 200a-207a). Likewise, the Fifth Circuit's complaint that the district court engaged in "*sua sponte* calculations" is mistaken, because the underlying facts are all in the record, and both parties asked the court in their trial briefs to do just what it did: divide the number of women burdened by the number of women seeking care.[17] *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (deference is owed to the fact finder when findings rest on "inferences from other facts"). The district court's familiarity—and the court of appeals' unfamiliarity—with the record is a key reason why the latter should not

[17] Indeed, this kind of simple arithmetic is *exactly* what the Fifth Circuit did itself in *Cole*. 790 F.3d at 589 ("[u]sing the district court's finding that there were approximately 5.4 million women of reproductive age in Texas, * * * the following percentages and fractions are derived: (1) 7.4% or 1/13 of women of reproductive age faced travel distances of 150 miles or more after the admitting privileges requirement went into effect; and (2) 16.7% or 1/6 of women of reproductive age would face travel distances of 150 miles or more after both requirements went into effect.").

substitute its judgment for the former. *See Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988) (appellate court should defer to district court for questions of fact and mixed questions of law and fact because "the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon.").

In acting as a factfinder, the Fifth Circuit weighed the evidence on its own and disregarded the district court's factual findings, without determining that any of them were clearly erroneous. For example, the Fifth Circuit disregarded the district court's finding that 70% of women would be denied abortions under the Act, or at a minimum (even assuming Does 2 and 3 will continue to provide services), at least "45% of women seeking an abortion may lack access." App., *infra*, 12a. Instead, the court decided that "well more than 90% of Louisiana women will live within 150 miles" of a clinic. *Ibid.* Yet, even while disregarding the district court's factual findings, the Fifth Circuit was forced to acknowledge that thousands of women will be completely deprived of their rights to access abortion services, as even under Respondent's version of the facts, "9.7% of Louisiana women seeking an abortion may lack access under the Act." App., *infra*, 13a.[18]

In concluding that this total deprivation of access to abortion for these women does not constitute an undue burden, the Fifth Circuit completely ignored the balance this Court struck in *Casey*, *Gonzales*, 550 U.S. at 146, which allows states to advance their "legitimate interest[s]" in regulating abortion while preserving "the

[18] This would amount to nearly 1,000 women a year in Louisiana who are denied abortions.

woman's right to make the ultimate decision," *Casey*, 505 U.S. at 875-77. Preventing women from obtaining abortions fails to preserve the right that *Casey* protects. It is more than a *substantial* obstacle, it is a *total* obstacle. As to those women whose ability "to make the ultimate decision" is lost—whether they are "as few [sic] as 9.7% of women seeking abortion," or 70% (the actual percentage found by the district court), or 45% (the minimum, alternate percentage found by the district court)—the Act clearly imposes an undue burden.[19] Thus, the district court's entry of as-applied relief in order to prevent those women from facing the loss of their right was proper. The Fifth Circuit's decision to stay the injunction is wrong in light of *Casey*'s holding unconstitutional a law that imposed that same obstacle on less than 1% of women. 505 U.S. at 894.

Moreover, the Fifth Circuit's "number and location" requirement, App., *infra*, 12a-13a, sets up a hurdle that no litigant could ever satisfy. No expert witness could provide the location of every woman who in the future will become pregnant, seek an abortion, and be turned away. Applicants have shown there will be

[19] This effect also distinguishes the present case from the Fifth Circuit's grant of a stay in *Abbott I*, where the Fifth Circuit determined that there was not evidence in the record showing that women would be unable to obtain abortions. *Abbott I*, 734 F.3d at 415; *see also Abbott II*, 748 F.3d at 598 ("[t]here is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas."). The burdens found undue by the district court in *Abbott I* focused on the effects of increased travel distances and not, as here, around a total lack of access. And, in any event, the injunction appealed in *Abbot* was a facial injunction, and thus the plaintiffs did need to satisfy the large-fraction test on appeal. Thus, the Fifth Circuit's complaint that Applicants "fail to grapple with this court's prior precedent upholding similar admitting-privileges requirements against facial challenges," App., *infra*, 13a, is inapposite because the relief on appeal here is not facial and the large fraction test does not apply.

thousands of such women each year.[20] Without rendering *Casey* meaningless, that is enough to satisfy the undue burden test.

The Fifth Circuit's observation about distance to clinics is also irrelevant. *Casey* does not create a constitutional rule about what distance to a clinic is too far; it protects women's rights to make deeply personal decisions. Those rights are meaningless when a woman lives close to an abortion clinic that cannot serve her. The district court's injunction was based entirely (and properly) on evidence that one physician (or, alternatively, one full-time plus two part-time physicians) could not serve all women seeking abortion in Louisiana.

Furthermore, due to the Act's dramatic reduction in the availability of abortion services, it would bring about "a likely increase in self-performed, unlicensed and unsafe abortions," and even women able to obtain a legal abortion from the state's lone remaining doctor would face "delays in care, causing a higher risk of complications." App., *infra*, 132a. These effects also constitute undue burdens. *See Stenberg v. Carhart*, 530 U.S. 914, 931 (2000) ("[A] State cannot subject women's health to significant risks * * * ."); *accord Gonzales*, 550 U.S. at 161. Yet the Fifth Circuit completely ignored these facts.

Under a proper application of the *Casey* standard, the Fifth Circuit was demonstrably wrong in concluding that Respondent was likely to succeed on appeal.

[20] And, as already noted, the Fifth Circuit's complaint that this figure was not provided by an expert is directly contradictory to its own "*sua sponte*" use of arithmetic in determining that Texas's ASC requirement was not an undue burden in *Cole*. 790 F.3d at 588.

Applicants established that the Act's effects are unconstitutional and that as-applied relief was warranted.

D. The Act's Burdens Are Unjustified in Light of Its Lack of a Health Benefit

Casey requires a court to inquire into whether the State's interest is "reasonably served" by an abortion restriction. *Casey*, 505 U.S. at 885. Because the right to choose abortion is a protected liberty, a court may not rest on rational speculation or defer to unsupported assertions when making that determination. *Id.* at 855 ("*Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence."); *cf. Gonzales*, 550 U.S. at 166 ("Uncritical deference to Congress' factual findings * * * is inappropriate."); *City of Akron v. Akron Ctr. For Reprod. Health, Inc.,* 426 U.S. 416, 465 (1983) (O'Connor, J., dissenting) ("This does not mean that in determining whether a regulation imposes an 'undue burden' on the *Roe* right that we defer to the judgments made by state legislatures.").

Thus, this Court has never upheld a law that limits the availability of abortion services without first confirming that it actually furthers a valid state interest. *E.g., Gonzales*, 550 U.S. at 158 ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives."); *Akron*, 462 U.S. at 434 ("The existence of a compelling state interest in health * * * is only the

beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest.").

The district court here found that "[t]he medical benefits which would flow from Act 620 are minimal and are outweighed by the burdens which would flow from this legislation." App., *infra*, 100a. The court further found that the Act's "effect on restricted access to abortion doctors and clinics would result in delays in care, causing a higher risk of complications, as well as a likely increase in self-performed, unlicensed and unsafe abortions." App., *infra*, 132a.[21]

Although it determined that any minimal medical benefits are outweighed by the burdens created by Act 620, the court did not hold the Act an undue burden for that reason, as it determined that Circuit precedent foreclosed both an inquiry into whether an abortion restriction actually furthers its stated purpose and whether the burden it imposes is justified by an equally important benefit. App.,

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[21] Indeed, every other district court in the nation that has held a trial or evidentiary hearing regarding the constitutionality of an admitting-privileges requirement has also found no medical benefit. *Planned Parenthood of Wis. Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 966-79 (W.D. Wis.); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1363-77 (M.D. Ala. 2014); *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013). Additionally, the district court here found that the state's experts on the issue of the Act's purported medical benefits lacked credibility and experience, App., *infra*, 98a-99a & n.39. The same conclusion has also been reached by every other district court in the nation that has heard live expert testimony in support of an admitting-privileges requirement. *Van Hollen*, 94 F. Supp. 3d at 967 n.16; *Lakey*, 46 F. Supp. 3d at 680 n.3; *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1386-88, 1394 (M.D. Ala. 2014).

infra, 146a & n. 67 (citing *Abbott II*, 748 F.3d at 599-600; *Currier*, 760 F.3d at 454; *Lakey*, 769 F.3d at 293); *see also* App., *infra*, 60a ("under binding Fifth Circuit jurisprudence, the admitting privileges requirement of Act 620 is rationally related to a legitimate State interest"), App., *infra*, 148a ("The rule in the Fifth Circuit * * * [is that t]he Court is not permitted to weigh the benefits of the law against its burdens.").[22]

The Fifth Circuit's improper application of the rational basis test to the undue burden analysis, and its foreclosure of any inquiry into whether the burden it imposes is, in fact, undue, are both issues currently before this Court on certiorari. Brief for Petitioners at 44-52, *Whole Woman's Health v. Cole*, No. 15-274 (Dec. 28, 2015). Every other Circuit and state high court in the country, when confronted with the question, has held that a court must examine the extent to which a law actually promotes women's health in determining whether the burdens it imposes on abortion access are undue. As the Seventh Circuit recently held, "[t]o determine whether the burden imposed by the statute is 'undue' (excessive), the court must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (internal

[22] The Fifth Circuit's assertion that Applicants "do not challenge" this holding, App., *infra*, 8a, *accord* App., *infra*, 13a n.16, fails to mention that it was compelled by binding Circuit precedent, and thus would be futile to challenge before a motions panel. *See, e.g.*, *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001) ("one panel of this Court may not overrule another"). Moreover, Applicants may still assert this as an alternative ground for affirmance in the pending appeal.

quotation marks omitted); *accord Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) ("whether a law is an "[u]nnecessary health regulation[ ]" as that term is used in *Casey* "depends on whether and how well it serves the state's interest") (emphasis omitted) (first alteration in original), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015) ("Like the Seventh and Ninth Circuits, we believe the 'unnecessary health regulations' language used in *Casey* requires us to weigh the strength of the state's justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman's right to terminate a pregnancy is to promote the health of the woman."); *Strange*, 33 F. Supp. 3d at 1337 ("[T]he court must determine whether, examining the regulation in its real-world context, the obstacle is more significant than is warranted by the State's justifications for the regulation.").[23]

The Fifth Circuit's precedents are wrong to ignore the fact that a law's "minimal" benefits are greatly outweighed by its extravagant burdens. Under the Act, most women seeking abortions will be denied them altogether – which is a direct assault on their privacy, autonomy, personal dignity, and power to shape

[23] The Fifth Circuit itself apparently formerly adhered to this view of *Casey*. *See Barnes v. Mississippi*, 992 F.2d 1335, 1339 (5th Cir. 1993) ("[A] regulation that places a burden on the exercise of the [abortion] right is constitutional unless the burden is 'undue.' * * * As long as *Casey* remains authoritative, the constitutionality of an abortion regulation thus turns on an examination of the importance of the state's interest in the regulation and the severity of the burden that regulation imposes on the woman's right to seek an abortion.").

their own destiny. *Casey*, 505 U.S. at 851-52. Additionally, many of those women will be forced to endure the pain and health risks of pregnancy and childbirth against their will. *Supra* at 10; *see also Casey*, 505 U.S. at 852. As legal abortion becomes impossible to obtain in Louisiana, women are likely to be forced into illegal abortion, with its attendant risks. App., *infra*, 132a. And the delays in abortion access faced by those who are still able to obtain abortion impose heavy health and other burdens. *Ibid*. The countervailing benefit to women is immeasurably low. Such burdens are quintessentially "'undue' in the sense of disproportionate or gratuitous." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013). The Fifth Circuit's refusal to inquire whether the Act actually furthers its purpose, and in a manner justifying its burden, is nothing more than the application of rational basis review, which this Court rejected in *Casey*. *See* 505 U.S. at 966 (Rehnquist, J., dissenting) ("States may regulate abortion procedures in ways rationally related to a legitimate state interest.") citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955))).

I. Applicants and Their Patients will Suffer Irreparable Harm if this Court Does Not Vacate the Stay

If the stay is not vacated, and Respondents are allowed to continue enforcement of the admitting privileges requirement, Applicant clinics and their patients will suffer three grave forms of irreparable harm. *See generally* App., *infra*, 157a-158a.

First, and critically, enforcement of the Act would deny most Louisiana women the choice to terminate a pregnancy altogether, depriving them of their

constitutional rights, and forcing them to carry a pregnancy to term. This Court has described the choice to terminate a pregnancy as being among "the most intimate and personal choices a person may make in a lifetime, * * * central to personal dignity and autonomy * * * [and] the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. Depriving numerous women of the liberty to make this choice constitutes profound and irreparable harm. *See Planned Parenthood of Se. Penn. v. Casey* ("*Casey II*"), 510 U.S. 1309, 1310 (1994) (Souter J., in chambers) (imposition of an undue burden on right to abortion, "if proven, would qualify as 'irreparable injury,' and support the issuance of a stay"); *see generally* Charles A. Wright et al., 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved * * * most courts hold that no further showing of irreparable injury is necessary."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Second, the drastic reduction in the number of service providers that would occur under the Act would increase health risks for those women able to obtain abortions. In the district court's words, "the severely restricted access to abortion care by a large fraction of Louisiana women caused by Act 620, and the resulting unreasonable and dangerous delays in scheduling abortion procedures, constitute irreparable harm for Louisiana women seeking abortion. Many Louisiana women will also face irreparable harms from the burdens associated with increased travel distances in reaching an abortion clinic with sufficient capacity to perform their abortions. These burdens include the risks from delays in treatment including the

increased risk of self-performed, unlicensed and unsafe abortions." App., *infra*, 157a. These health risks, once incurred, can never be undone, and thus also constitute irreparable harm.

Third, the abortion clinics forced to close as a result of enforcement of the Act would lose their licenses and, in all likelihood, permanently close. *See* App., *infra*, 128a. This too constitutes irreparable harm. *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) (irreparable harm occurs "where the potential economic loss is so great as to threaten the existence of the movant's business" and collecting cases). This will also prevent a return to the status quo even if Applicants ultimately prevail on the merits. Thus, if the stay remains in place, the availability of abortion services in Louisiana in the long run will be dramatically and permanently reduced, regardless of the final outcome of this case, or the outcome of *Whole Woman's Health*. In essence, unless the stay is vacated, the stay will irreversibly alter the status quo and effectively decide the outcome of the case for at least some of Applicants.

In issuing the stay, the Fifth Circuit followed its earlier opinion in *Abbott I* that a state's inability to enforce a law is *necessarily* irreparable harm,[24] which outweighs any harm Respondents could show and which merges with the public

[24] This rule, which has not been adopted by this Court or any other circuit, short-circuits the traditional irreparable harm inquiry, which requires a clear showing that the specific harm is real and imminent. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); 11A Fed. Prac. & Proc. Civ. § 2948.1. It improperly tips the scales in favor of the state. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (noting that while a state "may suffer an abstract form of harm whenever one of its acts is enjoined," "[t]o the extent that is true * * * it is not dispositive of the balance of harms analysis") (internal quotations and citations omitted). Moreover, with the rule in place, litigants seeking protection from unconstitutional laws will continue to need to seek relief in this Court for vacatur of stays presumptively granted in favor of the state.

interest. App., *infra*, 14a. The Fifth Circuit did not balance the weight of the harms in light of Respondent's policy of waiting to enforce the Act and to forbear seeking available relief for a year and half. App., *infra*, 162a-164a. After accepting the status quo for this extended period of time, Respondent cannot now credibly claim the emergency need for a stay, or that the harm for allowing the injunction to continue in the ordinary course is other than *de minimis*. In contrast, absent an order vacating the stay, Applicants and their patients will suffer grave irreparable harm, and it will be impossible to return to the status quo if Applicants ultimately prevail.

Moreover, unlike in *Abbott*, where the Fifth Circuit found insufficient evidence that the Act would harm women, based on a pre-enforcement record where it was unclear which physicians would ultimately be able to obtain privileges, the record here is clear. All physicians seeking privileges have had their applications denied, except for Doe 5 in New Orleans, and the Act will result in the closure of every abortion clinic in the state save Women's, with the result that 70% of women will be unable to obtain abortions. App., *infra*, 129a. Even under the alternative, counter-factual scenario of Doe 2 and 3 continuing to work, 45% of women would be unable to obtain abortions. App., *infra*, 130a. Based on this record, the district court found that large numbers of women would be unable to obtain abortions or would suffer widespread delay and concomitant health risks. The Fifth Circuit abdicated its duty to weigh the harms, which it is required to do in order to justify such an extraordinary "intrusion into the ordinary processes of administration and

judicial review." *Nken v. Holder*, 556 U.S. 418, 427, 433-34 (2009) (internal quotation marks omitted).

Immediately following the Fifth Circuit's order vacating the stay, the harmful effects of enforcement of the law have become manifest. Delta, Causeway, and Bossier are no longer providing abortion services and are turning away patients. Jessica Williams & Andrea Gallo, *Baton Rouge Clinic No Longer Performing Abortions Because of New Louisiana Law, Will Refer Women to New Orleans Location*, Baton Rouge Advocate (Feb. 25, 2016), http://theadvocate.com/news/neworleans/neworleansnews/14990099-70/baton-rouge-abortion-clinic-no-longer-terminating-pregnancies-referring-women-to-new-orleans-locatio (patients who arrived at Delta for procedures on the day the Fifth Circuit's order issued were turned away). According to the Director of Women's, one of the remaining two facilities still able to provide abortions: "At that point, I know for a fact that we're not going to be able to see everybody. *See See* Campbell Robertson, *Appeals Court Upholds Law Restricting Louisiana Abortion Doctors*, N.Y. Times (Feb. 25, 2016), http://www.nytimes.com/2016/02/26/us/appeals-court-upholds-law-restricting-louisiana-abortion-doctors.html?_r=0. And Hope, while seeing patients on a limited basis, "may not be able to hang on very long." *Ibid.* Every day the stay continues in effect, women are irreparably harmed by the Fifth Circuit's order; this number will increase each further day that the stay remains in effect.

CONCLUSION

For the reasons set forth above, Applicants respectfully request that the stay pending appeal entered by the Fifth Circuit be vacated.

Respectfully submitted,

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FEBRUARY 26, 2016

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 24, 2016

Lyle W. Cayce
Clerk

No. 16-30116

JUNE MEDICAL SERVICES, L.L.C., on behalf of its patients, physicians, and staff, doing business as Hope Medical Group for Women; BOSSIER CITY MEDICAL SUITE, on behalf of its patients, physicians, and staff; CHOICE INCORPORATED OF TEXAS, on behalf of its patients, physicians, and staff, doing business as Causeway Medical Clinic; JOHN DOE 1; JOHN DOE 2,

Plaintiffs – Appellees,

v.

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

Defendant – Appellant.

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

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

June Medical Services, L.L.C., and other plaintiffs sought an injunction against the enforcement of Louisiana's statutory requirement that each physician who performs outpatient abortions must have admitting privileges at a nearby hospital. After a bench trial, the district court held that the admitting-privileges requirement was facially unconstitutional and enjoined enforcement of the law against Plaintiffs. The district court denied Louisiana's requests for a temporary stay and a stay pending appeal, and

Louisiana immediately filed in this court an emergency motion to stay the district court's preliminary injunction pending the resolution of Louisiana's appeal. We GRANT the motion for a stay pending appeal.

I.

On June 12, 2014, the Governor of Louisiana signed into law Act 620, which in relevant part amended Louisiana's abortion laws to require that physicians performing abortions must "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." The Unsafe Abortion Protection Act of 2014 La. Sess. Law Serv. Act 620 (H.B. 388).[1]

The Act was scheduled to go into effect on September 1, 2014. Plaintiffs[2] filed this lawsuit on August 22, 2014, arguing that the Act violated

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[1] The law amended by Act 620 was La. R.S. § 40:1299.35.2, which was subsequently recodified as La. R.S. § 40:1061.10. We refer to the challenged admitting-privileges requirement in all its forms as the Act.

[2] Plaintiffs-Appellees are abortion providers in Louisiana. June Medical Services, L.L.C., doing business as Hope Medical Group for Women (Hope), is an abortion clinic in Shreveport. Bossier City Medical Suite (Bossier) is an abortion clinic in Bossier City. Choice Incorporated of Texas, doing business as Causeway Medical Clinic (Causeway), is an abortion clinic in Metairie. John Doe 1 is a physician in Family Medicine and Addiction Medicine who performs abortions at Hope. Doe 1 has not obtained admitting privileges within thirty miles of Hope. John Doe 2 is an obstetrician-gynecologist who performs abortions at Bossier and Causeway. Doe 2 has not obtained admitting privileges within thirty miles of Bossier but has obtained conditional privileges at a hospital within thirty miles of Causeway.

The other two abortion clinics in Louisiana are Women's Health Care Center, Inc. (WHCC) and Delta Clinic of Baton Rouge, Inc. (Delta), which operate in New Orleans and Baton Rouge, respectively. John Doe 5 is an obstetrician-gynecologist who performs abortions at WHCC and Delta. He has obtained admitting privileges within thirty miles of WHCC but not within thirty miles of Delta. John Doe 6 is an obstetrician-gynecologist who performs abortions at WHCC. Doe 6 has not obtained admitting privileges within thirty miles of WHCC. WHCC, Delta, Doe 5, and Doe 6 filed a separate complaint and motion for preliminary injunction, but voluntarily dismissed their claims after they were consolidated with the instant lawsuit.

The other two physicians in Louisiana who perform abortions have not been part of this lawsuit. John Doe 3 is an obstetrician-gynecologist who is the medical director of Hope

their and their patients' procedural and substantive due process rights and seeking injunctive relief.[3] The district court issued a temporary restraining order which permitted the Act to go into effect but exempted Plaintiffs from being subject to the Act's penalties and sanctions for practicing without the relevant admitting privileges while they continued to seek those admitting privileges.

Ten months later, the district court conducted a six-day bench trial. Seven months thereafter, the district court issued findings of fact and conclusions of law, followed by entry of judgment two weeks later in favor of Plaintiffs.[4] The district court first found that the Act passed rational basis review because it was rationally related to a legitimate state interest.

The district court then applied the two-part undue burden test announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which asks whether a regulation has the purpose or effect of placing an undue burden on a woman's access to abortion. 505 U.S. 833, 877 (1992). As to the first prong, the district court found that Plaintiffs had not established that the Act has an improper purpose under existing precedent. On the second prong, however, the district court concluded that the Act "will have the effect of placing an undue burden on (i.e. placing a substantial obstacle in the path of) a large fraction of Louisiana women of reproductive age seeking an abortion." *June Med. Servs., LLC v. Kliebert*, No. 14-cv-525, 2016 WL

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and performs abortions there. He has admitting privileges at two hospitals within thirty miles of Hope. John Doe 4 is an obstetrician-gynecologist who performs abortions at Causeway, but he does not have admitting privileges within thirty miles of Causeway.

[3] Plaintiffs sued the Secretary of the Louisiana Department of Health and Hospitals in her official capacity, which is another way of suing Louisiana itself. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."). We refer to Defendant-Appellant as Louisiana.

[4] The temporary restraining order was extended through these proceedings and was in effect for approximately eighteen months.

320942, at *48 (M.D. La. Jan. 26, 2016). On the basis of these findings, the district court declared the Act to be unconstitutional and entered a judgment enjoining enforcement of the Act as to Plaintiffs.

The day judgment was entered, Louisiana appealed the injunction and moved the district court to stay its judgment pending appeal and to temporarily stay the judgment. The district court denied the temporary stay that afternoon and denied the motion to stay pending appeal six days later. Louisiana immediately filed in this court an emergency motion to stay the injunction pending appeal. That motion is now before this panel.

II.

We note as a preliminary matter that the physician plaintiffs have standing to assert the rights of their prospective patients. The Supreme Court has held that physicians who perform abortions satisfy the test for third-party standing even when they are not threatened with immediate prosecution under state abortion regulations. *Singleton v. Wulff*, 428 U.S. 106, 117–18 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). At least one of the physicians here—Doe 1—has third-party standing because he has not obtained admitting privileges and may be subject to criminal prosecution for violating the Act;[5] because "doctors who perform abortions share a sufficiently close relationship with their patients"; and because "a pregnant woman seeking to assert her right to abortion faces obvious hindrances in timely . . . bringing a lawsuit to fruition." *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583, 589 (5th Cir. 2014) (citing *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004)). Because Doe 1 has standing to challenge the Act, we need not determine whether Doe 2 or the clinics suffer an "actual or imminent, not 'conjectural' or 'hypothetical'"

[5] La. R.S. §§ 40:1061.10, 40:1061.29.

injury and have standing as well. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted).[6]

We consider four factors in deciding whether to grant a stay pending appeal: "(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." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott I*), 734 F.3d 406, 410 (5th Cir. 2013) (quoting *Nken v. Holder*, 556 U.S. 418, 425–26 (2009)), *application to vacate stay denied*, 134 S. Ct. 506 (2013). "A stay 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Id.* (quoting *Nken*, 556 U.S. at 427).

III.

We begin by considering whether Louisiana has made a strong showing that it is likely to succeed on the merits. We conclude that it has.

A.

We have twice considered facial challenges to a nearly identical admitting-privileges requirement recently enacted in Texas.[7] We first considered whether a stay of the district court's injunction against the requirement was appropriate. Because we concluded that Texas was likely to succeed on the merits by showing the plaintiffs had not proven the requirement placed an undue burden on women seeking an abortion, we stayed the injunction. *Abbott I*, 734 F.3d at 416. When we considered the

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[6] We noted in *Abbott II* that "there may be a point at which the doctor's interests begin to conflict with his patients. For example, the doctor's economic incentives regarding the performance of abortions may not always align with a woman's right to choose to have an abortion." 748 F.3d at 589 n.9.

[7] The Texas law required that a physician performing an abortion have admitting privileges at a hospital within thirty miles of the location the abortion is performed. *Abbott I*, 734 F.3d at 409.

same lawsuit on its merits, we reversed the district court and permitted the law to go into effect because the plaintiffs had not demonstrated that the law placed an undue burden on a large fraction of women. *Abbott II*, 748 F.3d at 590.[8]

The Supreme Court's jurisprudence on abortion regulation is complicated. When the Court first recognized the right to access to abortion, it concluded that the "right of privacy, whether it is founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Casey*, the Court affirmed "the essential holding of *Roe v. Wade*" while rejecting *Roe*'s trimester framework and replacing it with a test based on viability of the fetus. *Casey*, 505 U.S. at 874, 876. After the point in a pregnancy where the fetus is likely viable if born, the state may regulate the provision of abortions to protect its interest "in protecting fetal life or potential life." *Id.* Before viability, the state may regulate abortion provided that the "state regulation [does not] impose[] an undue burden on a woman's ability" to decide whether to carry her child to term. *Id.* at 874. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. In *Gonzales v. Carhart*, the Court added that the state must have a rational basis for its regulation.

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[8] We also recently considered a lawsuit challenging Mississippi's admitting-privileges requirement. *Jackson Women's Health Organization v. Currier*, 760 F.3d 448 (5th Cir. 2014). In *Jackson Women's Health*, we held only that Mississippi's regulation was "unconstitutional as applied" to the plaintiff clinic, which was the only abortion clinic in Mississippi. 760 F.3d at 450. By contrast, the present challenge seeks, as the challenge considered in *Abbott I* and *Abbott II* sought, facial invalidation.

550 U.S. 124, 158 (2007) (allowing regulations "where [the state] has a rational basis to act, and it does not impose an undue burden").

In our recent cases considering abortion regulations, we acknowledged that states have important interests in protecting the integrity and ethics of the medical profession and in protecting the health of women seeking abortions. *Abbott I*, 734 F.3d at 413. We reiterated the Supreme Court's command that "the fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 413 (quoting *Casey*, 505 U.S. at 874). In *Abbott II*, we made clear that the burden falls on the plaintiffs to show a regulation unduly burdens a large fraction of women. 748 F.3d at 598. At this stage of the litigation, we must consider whether Louisiana is likely to succeed on the merits by showing that Plaintiffs have not met their burden.

B.

Plaintiffs have brought only a facial challenge to the Act.[9] "Such a challenge 'impose[s] a heavy burden upon the part[y] maintaining the suit.'" *Abbott I*, 734 F.3d at 414 (quoting *Gonzales*, 550 U.S. at 167). *Gonzales* recognized "diverging views as to 'what that burden consists of in the specific context of abortion statutes.'" *Id.* at 414 (quoting *Gonzales*, 550 U.S. at 167). In *Barnes v. Mississippi*, we followed "standard principles of constitutional adjudication" that "require courts to engage in facial invalidation only if no possible application of the challenged law would be constitutional." *Abbott II,*

[9] In their complaint, Plaintiffs asked the district court to "declare [the Act] unconstitutional under the Fourteenth Amendment to the United States Constitution." In their proposed findings of fact, Plaintiffs wrote that they "seek a preliminary injunction against [the Act] in all of its applications. In other words, Plaintiffs seek facial relief." Plaintiffs now characterize the district court's injunction order as a grant of as-applied relief, but in that very document the district court wrote, "Plaintiffs state emphatically that they are not making an 'as-applied' challenge and that their only challenge is facial."

748 F.3d at 588 (citing *Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993)); *accord United States v. Salerno*, 481 U.S. 739, 745 (1987) (In a facial challenge, "the challenger must establish that no set of circumstances exist under which the Act would be valid."). In *Casey*, however, the controlling plurality held that an abortion regulation would be invalid if "in a *large fraction of the cases* in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895 (emphasis added). In its most recent consideration of an abortion regulation, the Court recognized both standards and declined to choose between them because the law at issue was permissible under either standard. *Gonzales*, 550 U.S. at 167–68 ("We need not resolve that debate."). As in *Abbott I* and *Abbott II*, we do the same here and "apply the 'large fraction' nomenclature for the sake of argument only, without casting doubt on the general rule." *Abbott II*, 748 F.3d at 588–89; *see also Abbott I*, 734 F.3d at 414. Even assuming *arguendo* that the test from *Salerno* and *Barnes* is not binding on this panel, which we do not suggest, Louisiana has a strong likelihood of success in showing that Plaintiffs have failed to establish an undue burden on women seeking abortions under the less-strenuous large-fraction test.

The district court concluded that the Act has a rational basis and that Louisiana did not have an improper purpose in passing the Act. *June Med. Servs.*, 2016 WL 320942, at *47. We agree and Plaintiffs do not challenge these findings. Louisiana, therefore, need only demonstrate a strong likelihood of success in establishing that Plaintiffs did not prove that the Act has the effect of placing an undue burden on a large fraction of women who could otherwise seek an abortion absent the Act. *See Abbott I*, 734 F.3d at 414. Application of the large-fraction test to the evidence before us supports Louisiana's position that the evidence at trial was insufficient to show that a

large fraction of women seeking abortions would face an undue burden because of the Act.

The district court concluded that the Act imposed an undue burden based on *sua sponte* statistical analyses. First, the district court subtracted the number of abortions performed by physicians who have admitting privileges (5,500) from the total number of women of reproductive age in Louisiana (938,719) and divided the result by the total number of women of reproductive age in Louisiana, concluding that the Act will leave 99% of Louisiana women unable to get an abortion. Second, in the alternative, the court divided the number of abortions performed in clinics that may have to close because the physicians in those clinics do not yet have admitting privileges at a hospital within thirty miles[10] by the total number of abortions performed in Louisiana (9,976). The district court first concluded that only Doe 5 would continue to provide abortions (2,950)[11] in Louisiana and that, as a result, 70% of women would lack access to an abortion. In the alternative, the district court concluded 55% of women would lack access if only Doe 3 (1,500) and Doe 5 continue to provide abortions. Only as a final alternative did it conclude that 45% of women seeking an abortion may lack access if Doe 2 (1,000), Doe 3, and Doe 5 continue to offer abortions. *June Med. Servs.*, 2016 WL 320942, at *38.

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[10] If the district court is correct that the Act's implementation will result in the closure of those clinics where no physician currently has admitting privileges at a hospital within thirty miles, then Bossier and Delta will close. Bossier is located in Bossier City, approximately six miles from the clinic in Shreveport (Hope), which will not be forced to close as a result of the Act. Delta is located in Baton Rouge, approximately seventy-eight miles from the clinic in New Orleans (WHCC), which will not be forced to close as a result of the Act. The clinic in Metairie (Causeway) also will not be forced to close as a result of the Act.

[11] We note that neither Doe 5 nor the clinic in which he works testified as to his capacity. The district court reached Doe 5's capacity based on the testimony of Doe 3. *June Med. Servs.*, No. 3:14-cv-525, 2016 WL 617444, at *9 (M. D. La. Feb. 16, 2016).

Louisiana is likely to succeed in showing that these calculations are neither sufficient nor sufficiently reliable for Plaintiffs to establish an undue burden on a large fraction of Louisiana women. We begin with the district court's conclusion that the Act deprives 99% of Louisiana women of access to an abortion. This calculation is misleading because it does not actually measure the effects of the Act. According to the district court's methodology, 99% of Louisiana women had no access to an abortion before the Act was passed and 99% of Louisiana women will have no access to an abortion after the Act goes into effect.[12] *Abbott I* makes clear that the limited capacity that may exist before a regulation is passed cannot be ascribed to that regulation as part of the large-fraction analysis. 734 F.3d at 415. In prior cases, we have faulted plaintiffs for using an incorrect denominator in their attempts to establish that a large fraction of women are unduly burdened;[13] here the district court erred by using an incorrect numerator. These two errors produce the same absurd outcome—they "always result[] in a large fraction." *Lakey*, 769 F.3d at 299.

We next examine the district court's alternative statistical finding that the Act would deprive 70% of Louisiana women actually seeking an abortion of access to one. The district court reached this percentage by assuming that

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[12] According to the district court's equation, before the Act, 98.937% of women in Louisiana had no access to abortion (because only 9,976 of the 938,719 women of reproductive age in Louisiana received an abortion). After the Act, according to the district court's equation, 99.521% of women in Louisiana would have no access to abortion (because only 5,500 of 938,719 women of reproductive age in Louisiana could receive an abortion). Using this methodology, the Act affects only 0.584% of Louisiana women of reproductive age—certainly not a large fraction.

[13] *See, e.g., Whole Woman's Health v. Lakey*, 769 F.3d 285, 299 (5th Cir.) ("Plaintiffs argue that the appropriate denominator in the large faction analysis consists only of women 'who could have accessed abortion services in Texas prior to implementation of the challenged requirements, but who will face increased obstacles as a result of the law.' To narrow the denominator in this way—to essentially only those women who Plaintiffs argue will face an undue burden—ignores precedent."), *vacated in part*, 135 S. Ct. 399 (2014).

Doe 5 will be the only abortion provider in Louisiana after the Act takes effect. This assumption is contrary to the undisputed evidence that Doe 3 and Doe 2 *already have* admitting privileges that satisfy the Act. The district court erroneously excluded them because Doe 3 suggested, in hypothetical terms, that he might close his practice and because Doe 2 continues to challenge Louisiana's admission that his privileges satisfy the Act. The district court erred by excluding Doe 2 and Doe 3 on these bases. Doe 3's testimony that he may close his practice if he is the last provider in the state is purely hypothetical. Furthermore, Doe 3's hypothetical decision to close his practice would result from his own choice rather than the requirements of the Act. Because he has admitting privileges that satisfy the Act, the district court should not have assumed in its calculations that the Act would cause him to cease providing abortions. *See Abbott II*, 748 F.3d at 599 (describing doctors' decisions to leave Texas for New York and to stop performing abortions out of concern for future legislation as "entirely unrelated to" the challenged abortion regulation); *Abbott I*, 734 F.3d at 415 (noting that the "many factors other than the hospital-admitting-privileges requirement [that] would affect the availability of physicians to perform abortion," including the proximity of several doctors to retirement age, should not be part of the analysis).

When, in the alternative, the district court contemplated only Doe 5 and Doe 3 continuing to practice, the court calculated that 55% of women seeking an abortion may be affected. This calculation, too, is fatally flawed because it presumes that Doe 2's conditional privileges do not satisfy the Act's requirement of "active admitting privileges." La. R.S. § 40:1061.10.

Louisiana has repeatedly conceded that Doe 2's conditional privileges[14] satisfy the Act's requirements. Indeed, Louisiana's Secretary of the Department of Health and Hospitals—the state official charged with enforcement of the Act—has entered an affidavit affirming the validity of Doe 2's privileges. It would be improper for this court or the district court to presume to instruct Louisiana on the proper application of its laws. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t 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."). Because Louisiana confirms that Doe 2's conditional admitting privileges satisfy the Act, we accept for purposes of this motion that Doe 2 can continue to perform abortions. Therefore the district court's conclusion that 55% of women seeking abortions may lack access is baseless.

Finally, we consider the district court's approach assuming that if only Does 2, 3, and 5 continue to practice, 45% of women seeking an abortion may lack access. Plaintiffs did not introduce expert testimony to support the district court's many alternate large-fraction conclusions. Plaintiffs' expert offered no specific testimony as to the number or location of women who would potentially be affected. The actual calculation was performed by the district court based on raw numbers drawn from disparate testimony. Louisiana's uncontroverted expert testimony demonstrates that, even if Does 2, 3, and 5 are the only abortion providers in the state, well more than 90% of Louisiana women will live within 150 miles of two operating clinics. *See, e.g.*, *Abbott I*, 734 F.3d at 415; *Abbott II*, 748 F.3d at 597–98. Louisiana also

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[14] Tulane Medical Center has granted Doe 2 privileges to admit "patients from the physician's clinical practice with complications of first and second trimester abortions with referral of those patients to an attending physician on the Tulane staff credentialed for OB/Gyn privileges who has agreed to provide for such care for the physician's patients." *June Med. Servs.*, 2016 WL 320942, at *29.

contests the district court's conclusions on other grounds, suggesting: (1) the district court incorrectly discounted evidence that the physicians who have admitting privileges can perform substantially more abortions than they currently do; and (2) the district court failed to account for the significant number of women who travel to Louisiana to receive an abortion and may not be relevant to the large-fraction analysis. Louisiana ultimately argues that as few as 9.7% of Louisiana women seeking an abortion may lack access under the Act.[15]

Puzzlingly, in their response, Plaintiffs do not seriously contest Louisiana's criticisms of the district court's *sua sponte* calculations. Likewise, they fail to grapple with this court's prior precedent upholding similar admitting-privileges requirements against facial challenges.[16] This is so even though Plaintiffs sought and were granted additional time to respond. Instead, Plaintiffs argue that the large-fraction test, which is the basis for the injunction they ask us to uphold, is "irrelevant."[17]

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[15] To the extent that Plaintiffs rely on the specific concerns of a subset of Louisiana women seeking abortions, those concerns are more properly the subject of an as-applied challenge. *See Gonzales*, 550 U.S. at 167 ("[An as-applied challenge] is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances [the challenged law would create an undue burden]."); *Abbott II*, 748 F.3d at 604–05 ("Facial challenges impose a '"heavy burden" upon the parties maintaining the suit' because there is often too little evidence to show that a particular condition has in fact occurred or is very likely to occur. That is the case here. We follow in the Supreme Court's footsteps by noting that in an as-applied challenge, which is the proper means of challenging the lack of an exception to the regulations at issue, 'the nature of the medical risk can be better quantified and balanced than in a facial attack.'") (citing *Gonzales*, 550 U.S. at 167).

[16] Plaintiffs emphasize in their brief that the Supreme Court is about to hear oral argument in *Whole Women's Health v. Hellerstedt*, No. 15-274. The questions presented in that case involve the proper role in *Casey*'s undue burden test of the state's interest and purpose in promoting health as they relate to the effects of a law regulating abortions. Those issues are not implicated here, where the district court found—and the parties do not contest on appeal—that Louisiana's interest in protecting women is legitimate and the purpose of the Unsafe Abortion Protection Act is proper.

[17] Plaintiffs argue the large-fraction test is not relevant because the district court ruled on an as-applied challenge. We disagree. Plaintiffs asked for facial invalidation of the

Louisiana is likely to prevail in its argument that Plaintiffs failed to establish an undue burden on women seeking abortions or that the Act creates a substantial obstacle in the path of a large fraction of women seeking an abortion.

IV.

For the same reasons as in *Abbott I*, Louisiana has made an adequate showing as to the remaining factors considered in determining whether to grant a stay pending appeal:

> When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws. As the State is the appealing party, its interest and harm merges with that of the public. While we acknowledge that [Plaintiffs have] also made a strong showing that their interests would be harmed by staying the injunction, given the State's likely success on the merits, this is not enough, standing alone, to outweigh the other factors.

Abbott I, 734 F.3d at 419 (citations omitted). Nor does the existence of a prior temporary restraining order, designed to allow physicians time to obtain admitting privileges while the Act went into effect, undermine the necessity of the stay.[18] *Cf. Abbott II*, 748 F.3d at 600 (upholding admitting privileges

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Act at every stage of this litigation. The district court cited the criteria for facial invalidation of a statute and held "[t]he active admitting-privileges requirement of La. R.S. § 40:1299.35.2 is declared unconstitutional as violating the substantive due process rights of Louisiana women seeking abortions." *June Med. Servs.*, 2016 WL 320942, at *53. Finally, the record does not contain the discrete and specific evidence required to maintain an as-applied challenge. We note that our decision today does not foreclose future as-applied challenges. As we observed in *Abbott II*, "the proper means to consider exceptions [to an abortion regulation] is by as-applied challenge." 748 F.3d at 604 (quoting *Gonzalez*, 550 U.S. at 167).

[18] Plaintiffs also argue that we should deny a stay because the Supreme Court "has twice intervened to prevent Texas from shuttering the majority of its abortion facilities during the pendency of litigation and it will hear arguments in that case in two weeks," from which Plaintiffs draw the conclusion that "[t]here is a substantial likelihood that the Supreme Court would reverse any stay granted in this case, for the same reason." Plaintiffs misinterpret both the facts in our prior abortion cases and the Supreme Court's rulings. In *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014), the Court did not stay our ruling on

requirement but prohibiting its enforcement "against abortion providers who applied for admitting privileges within the grace period . . . but are awaiting a response from a hospital").

We have addressed only the issues necessary to rule on the motion for a stay pending appeal, and our determinations are for that purpose and do not bind the merits panel.

It is ORDERED that Louisiana's emergency motion for a stay pending appeal is GRANTED, and the district court's injunction is STAYED until the final disposition of this appeal, in accordance with this opinion.[19]

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the facial challenge to Texas's admitting-privileges requirement, and for the most part left in place our stay order allowing that requirement to go into effect pending appeal, only vacating our stay as it applied to two clinics. In any event, we have previously explained in regard to this precise order that "no guidance can be gleaned from the Supreme Court's vacating portions of the stay without explanation, as we cannot discern the underlying reasoning from the one-paragraph order." *Cole*, 790 F.3d at 580 (5th Cir. 2015). Moreover, in *Abbott I*, which is the most analogous to the present case, the Supreme Court denied in full the motion to vacate our stay order. *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013).

Under our rule of orderliness, we must follow our own precedent absent an intervening change in the law. *Allen v. Stephens*, 805 F.3d 617, 632–33 (5th Cir. 2015). Under our precedent, Louisiana is entitled to a stay pending appeal.

[19] It is further ORDERED that the parties' unopposed motions to place particular exhibits to its emergency stay motion under seal, pursuant to the stipulated protective order entered by the district court, are GRANTED. The merits panel may wish to revisit whether materials under seal should continue to remain under seal, but that issue is beyond the limited scope of this ruling on Louisiana's emergency motion for a stay pending appeal.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC, *ET AL.*,

Plaintiffs,

VERSUS

KATHY H. KLIEBERT, Secretary, Louisiana Department of Health and Hospitals,

Defendant.

CIVIL ACTION

No. 3:14-00525-JWD-RLB

RULING ON DEFENDANT'S MOTION FOR STAY PENDING APPEAL, FOR EXPEDITED CONSIDERATION, AND FOR TEMPORARY STAY

I. INTRODUCTION

Before the Court is the Defendant's Motion for Stay Pending Appeal, for Expedited Consideration, and for Temporary Stay ("Motion for Stay"), (Doc. 229), as well as the Defendant's Memorandum in Support of Her Motion for Stay Pending Appeal, for Expedited Consideration, and for Temporary Stay ("Supporting Memorandum"), (Doc. 229-1) (collectively, "Defendant's Motions"). These documents were filed by Doctor Rebekah Gee ("Gee," "Secretary," or "Defendant") in her official capacity as Secretary of the Louisiana Department of Health and Hospitals ("DHH"), who has replaced her predecessor, Ms. Kathy H.

Kliebert ("Kliebert").[1] To the request sought in the Motion for Stay and the points made in the Supporting Memorandum, Plaintiffs—June Medical Services LLC, d/b/a Hope Medical Group for Women ("Hope"); Bossier City Medical Suite ("Bossier"); Choice, Inc., of Texas, d/b/a Causeway Medical Clinic ("Causeway");[2] Doctor John Doe 1 ("Doe 1"); and Doctor John Doe 2 ("Doe 2"), (collectively, "Plaintiffs")—have responded with the Memorandum in Opposition to Defendant's Motion to Stay the Preliminary Injunction Pending Appeal ("Opposition"). (Doc. 232; *see also* Doc. 216 at 5, 9.)

So as to win her requested stay, Defendant bore the burden of proving four separate elements: (1) a strong showing that she will likely prevail on the merits, (2) proof that she will be irreparably harmed in a stay's absence, (3) the relative unlikelihood that other parties and persons interested in the proceeding would be substantially injured, and (4) that the public interest favors a stay's issue. Generally, a stay is an extraordinary remedy, and the burden to demonstrate that a stay is warranted is rather heavy, with the need to balance equities paramount. Having evaluated the arguments raised by Plaintiffs and Defendant (collectively, "Parties"), both at the telephonic conference held on February 10, 2016, and in their most recent filings, this Court concludes that Defendant has not shown she is likely to prevail. The Court's application of the undue burden test is amply supported by existing precedent and the weight of the evidence. Her other ground for reversal, that this Court must grant absolute deference to Defendant's statutory interpretation at odds with the plain and unambiguous wording of the statute, is

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[1] This recent change may induce some confusion. Whenever this Ruling refers to the actions of the Secretary prior to Gee's appointment on January 5, 2016, Kliebert was the "Secretary." This Ruling will distinguish between the two women whenever practical.

[2] The three clinics are suing on behalf of themselves and their patients, physicians, and staff. (*See, e.g.*, Doc. 14 at 1–2; *see also* Doc. 232 at 1.) By stipulation, the Ruling covers Doctor John Doe 4. (Doc. 224.)

likewise unlikely to succeed. With her showing on these two points insufficiently convincing, precedent compels the preservation of the status quo, "the last, peaceable, noncontested status of the parties," *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). The harm to all persons and parties will thereby be minimized, substantial injuries to many likely prevented, until a final legal determination regarding the proper application of a well-established constitutional right can definitively be made.

For these reasons, as more fully stated below, this Court DENIES the Defendant's Motion for Stay Pending Appeal, for Expedited Consideration, and for Temporary Stay, (Doc. 232).

II. BACKGROUND[3]

A. RELEVANT FACTS

On January 26, 2016, this Court issued its Findings of Fact and Conclusions of Law ("Ruling"). (Doc. 216.) Briefly put, after reviewing the Parties' extensive evidentiary submissions and six days' worth of testimony, this Court preliminarily enjoined Defendant from enforcing Section A(2)(a) of Act Number 620 ("Act" or "Act 620"), which amended Louisiana Revised Statutes § 40:1299.35.2. (*Id.* at 5.) The Court did so upon finding Act 620 to violate "the substantive due process rights of Louisiana women to obtain an abortion, a right guaranteed by the Fourteenth Amendment of the United States Constitution as established in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) . . ., and pursuant to the test first set forth in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674

[3] Only the facts relevant to the instant dispute are here recapped. An exhaustive summary appears in the Court's Findings of Fact and Conclusions of Law. (Doc. 216.)

(1992), and subsequently refined by the Fifth Circuit." (*Id.* at 8.) The Supreme Court's major cases total three: *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007); *Casey*, 505 U.S. 833; and *Roe*, 410 U.S. 113. The key Fifth Circuit cases number at least five: *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015); *Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014) ("*Abbott II*"); and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) ("*Abbott I*").

On February 10, 2016, upon Defendant's request, "[f]or the reasons stated" in the Ruling (Doc. 216), and pursuant to Federal Rule of Civil Procedure 58,[4] the Judgment ("Judgment") issued. (Doc. 227.) Its second paragraph preliminarily enjoined

> Defendant Kathy H. Kliebert and her successors, as well as any and all employees, agents, entities, or other persons acting in concert with her, . . . from enforcing LA. R.S. § 40:1299.35.2 *et seq.* against the following persons: Doctor John Doe 1; Doctor John Doe 2; June Medical Services, LLC, d/b/a Hope Medical Group for Women, and its physicians and staff; Bossier City Medical Suite, as well as its physicians and staff; Choice, Inc. of Texas, d/b/a Causeway Medical Clinic, and its physicians and staff, including Doctor John Doe 4; and any and all others encompassed by the Parties' stipulations.

(*Id.* at 1–2.)

On that same day, Defendant filed two separate documents. The first—Defendant's Notice of Appeal ("Notice")—simply gave the required notice that the Defendant has appealed the Judgment and the Ruling to the United States Court of Appeals for the Fifth Circuit. (Doc. 228.) The second was the Motion for Stay and the Supporting Memorandum, its requests three in

[4] Unless otherwise noted, any and all references to "Rules" or "Rule []" in this order are to the Federal Rules of Civil Procedure.

number: (1) "for a stay of the Court's judgment (Doc. 227) and ruling (Doc. 216)," pending their appeal; (2) "for expedited consideration" of the Motion for Stay; and (3) "for a temporary stay pending the Court's disposition" of the Motion for Stay and, if denied, "pending disposition of any stay motion filed in the court of appeals." (Doc. 229 at 1.) At the telephonic conference held on February 10, 2016, bearing in mind both Plaintiffs' explicit opposition as well as the expiration of the temporary restraining order—and thus any protection that it afforded any and all parties and persons—upon the Ruling's release, (Doc. 233 at 8–9), this Court denied Defendant's request for a temporary stay pending consideration of the Motion for Stay. (Doc. 231 at 1–2.) In addition, with Defendant's consent, this Court authorized Plaintiffs to more formally respond to the Motion for Stay and the Supporting Memorandum on or before February 12, 2016, (*Id.* at 2), effectively denying Defendant's second request for a ruling on its recent motions on or before that date, (Doc. 229 at 1).

Following the hearing, one issue, the subject of this order, remained: whether this Court should stay its own Ruling and Judgment. (*See, e.g.*, Doc. 229-1.)

B. PARTIES' ARGUMENTS

1. Defendant's Points

The Defendant correctly states the four factors which must be considered in determining whether a stay should issue —"(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 & n.10 (internal

quotation marks omitted)—and now maintains that all four favor her request. (Doc. 229-1 at 5–14.)

Initially, Defendant contends reversal of the Ruling and Judgment on "either of two grounds" is "likely." (*Id.* at 6.) First, as she has read the Ruling and this circuit's precedent, this "Court's 'large fraction' analysis departs from the Fifth Circuit's 'large fraction' analysis." (*Id.* at 6.) In making this conclusion, Defendant describes this Court's two alternative methods for calculating large fraction in the following terms. At first, the Court took the annual number of abortions provided in 2013 by the four Louisiana-based doctors who have yet to obtain the admitting privileges required by Act 620, divided by the total number of abortions provided in Louisiana in 2013 ("Method 1"). As an additional calculation, this Court then took the number of Louisiana women of reproductive age, minus the number of abortions performed in 2013 by non-privileged Louisiana doctors, divided by the Louisiana reproductive-age women ("Method 2"). (*Id.* at 7–8.) The controlling standard, by Defendant's reckoning, mandated that this Court "determine[] the fraction of women burdened by an admitting privileges law by (1) taking the number of women who must travel significantly farther to reach a qualified provider, and (2) dividing by all women of reproductive age in the state." (*Id.* at 6 (citing to *Abbott I*, 734 F.3d at 415, and *Abbott II*, 748 F.3d at 598, 600).

Defendant discerns fatal flaws in the Court's two methods. (*Id.*) In her view, this Court's Method 1 employed an "incorrect" numerator as well as an "incorrect" denominator. (*Id.* at 8.) The numerator should not have incorporated the actual and documented number of abortions provided by the relevant doctors in 2013. (*See* Doc. 216 ¶¶ 308, 311, at 82.) Instead, it should have used the number of abortions that these doctors could theoretically provide while working "at a considerably higher rate" and at a "higher capacity." (Doc. 229-1 at 8.) Next, the

denominator should not have been the total number of abortions provided in Louisiana. (*See* Doc. 216 ¶¶ 308, 311, at 82.) Rather, the number of abortions provided to non-Louisiana women in every Plaintiff clinic should have been subtracted. (Doc. 229-1 at 8.) Such a subtraction, she argues, would have necessarily led to a "significantly lower" denominator. (*Id.*) As to Method 2, Defendant contends it exhibits one defect. In Defendant's words, "[t]he numerator should have been the number of Louisiana women required to travel significantly farther to reach a qualified provider," (*Id.* at 7), not the number of women of reproductive age, (*See* Doc. 216 ¶ 311, at 82). In sum, Defendant concludes that reversal is likely "because the Court's analyses used incorrect numbers that significantly inflated the percentages of Louisiana women allegedly denied abortion access." (Doc. 229-1 at 8.)

Moving beyond the large fraction test, Defendant adds that she is likely to prevail due to this Court's incorrect application of administrative law's pendent principle. In her words, this Court "legally erred in disregarding the Secretary's determination that Doe 2 had qualifying privileges at Tulane" and "exceeded its jurisdiction" by doing so. (*Id.* at 9.) In support of this second "likely" ground, Defendant makes three points.

First, because the Secretary determined that one doctor, Doe 2, could continue legally providing abortions" at one of the three party clinics, this Court overstepped its rightful bounds. (*Id.*) Thus, even as she denies the applicability of this body of law's seminal case, *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), describing any "*Chevron* analysis"[5] as "inappropriate," (Doc. 229-1 at 9, 10), she maintains that her interpretive decision "should have settled the question of the Act's impact on

[5] The Supporting Memorandum leaves it unclear whether this phrase is being used as a shorthand for all forms of agency deference, a fact noted by this Court in the Ruling. (*See* Doc. 216 ¶ 236, at 64.)

Doe 2's ability to continue providing abortions." (*Id.* at 9–10.) In other words, the law's "indisputable" practical effect resolved any constitutional issues, for the then-Secretary, "the state official charged with enforcing the Act, made a sworn declaration that Doe 2's privileges were satisfactory and allowed him to continue providing abortions at Causeway." (*Id.* at 9 (referring to JX 191 ¶ 6).) Even while this decision merited deference as the official charged with enforcing Act 620, then, this case did not present the classic scenario suitable for the application of a "*Chevron*-type analysis": "[A]ggrieved plaintiffs challeng[ing] an agency's interpretation of a law as exceeding the agency's statutory authority." (*Id.* at 9 & n.2 (citing to *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439, 189 L. Ed. 2d 372 (2014), and *Women's & Children's Hosp. v. State*, 2007-1157 (La. App. 1 Cir. 02/08/09); 984 So. 2d 760, 762, 766).)

Second, Defendant contends that this Court should have still accepted her interpretation of the law as incontestable and unreviewable, her interpretive declaration obviating this Court's authority to review Act 620's constitutionality. This is so, Defendant argues, because "[a] federal court lacks independent authority to interpret state law or to bind state officials to its interpretation of state law." (*Id.* at 10 (quoting *Pennhurst v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 911, 79 L. Ed. 2d 67 (1984)), 10 n.3 (citing for support *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1039 (5th Cir. 1998)); *Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995); and *Hughes v. Savell*, 902 F.2d 376, 378 & n.2 (5th Cir. 1990)). Concededly, "a federal court has limited authority to interpret state law in a diversity case," but, "[i]n a federal question case like this one, . . . a federal court has no authority to tell a state official how to interpret state law, even if the court would reach a different conclusion on its own." (*Id.* (citing to *Lelsz v. Kavanaugh*, 807 F.2d 1243, 1252 (5th Cir. 1987)).) By not accepting the Secretary's interpretation of Act 620 in preliminarily adjudicating its apparent

unconstitutionality, Defendant contends that this Court therefore defied the rule set forth in *Pennhurst*.

Third, Defendant argues that this Court lacked any jurisdiction because Doe 2 himself has no standing to challenge the Secretary's application of Act 620 and even benefitted from her then chosen construction. (*Id.* at 10–11.) Doe 2 "merely speculated that a future Secretary might change her mind. . . . [, b]ut plaintiffs lack standing to challenge unknowable future applications of a law." (*Id.* at 11 (citing to *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 185 L. Ed. 2d 264 (2013)). Like Doe 2, she argues, this Court "lacked jurisdiction to enjoin the Act based on speculation about how future Secretaries might apply it [to Doe 2 as well as other doctors]—especially on a facial challenge." (*Id.* at 10–11.) To summarize, the Court's alleged error was not to "accept[] as fact the Secretary's approval of Doe 2's . . . privileges" as consistent with Act 620's mandate or treat her construction of a plain law, as encapsulated in a single declaration, (*Id.* at 9), as that statute's singularly binding and conclusive reading. (*Id.* at 11.)

Thereupon, Defendant contends that the other three factors required for a stay pending appeal, when set against this professed likelihood, militate in her favor. As to the second—whether she will be irreparably harmed—she insists no reasonable doubt about this possibility can be raised, as "[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 12 (citing *Abbott I*, 734 F.3d at 419).) As to the fourth—the public's interest—Louisiana's "interest and harm" has "merge[d] with that of the public," by implication rendering any other public concern irrelevant. (*Id.* (quoting *Abbott I*, 734 F.3d at 419).) She explicitly discounts the pertinence of the third factor—

"whether the issuance of a stay will substantially injure the other parties interested in the proceeding"—based on her perceived likelihood of appellate success.[6] (*Id.*)

2. Plaintiffs' Opposition

Filed on February 12, 2016, pursuant to this Court's order, (Doc. 231), the Opposition counters Defendant's every point with Plaintiffs' own ten reasons for why a stay must not be allowed, "[n]one of the relevant factors, nor consideration of equity, weigh[ing] in favor of a stay." (Doc. 232 at 2.)

The first five deal with the validity of this Court's large-fraction analyses. First, Plaintiffs argue that, since "this Court need[ed] only find that the challenged statute imposes an undue burden on the women whom Plaintiff serves," the large fraction test "need not even be met in order for the Fifth Circuit to affirm this Court's injunctive relief." (*Id.* at 3.) For this reason, Defendant's attack, (Doc. 229-1 at 6–8), on this Court's two mathematical computations, (*See* Doc. 216 ¶¶ 305–15, at 81–83), "misses the mark." (Doc. 232 at 2.) Second, regardless of the foregoing, Plaintiffs contend that this Court properly applied the large fraction test. While Defendant "argues that the 'large fraction' test requires an analysis of distance traveled by women to reach an abortion provider," (*Id.* at 3 (construing Doc. 229-1 at 6)), she has "mistaken[ly]" construed this test, since "a substantial obstacle in the undue burden analysis can take different forms." (*Id.* at 3.) Rather, *Casey* "had nothing to do with driving distances." (*Id.* at

[6] The Supporting Memorandum's final substantive paragraph states the reasons for the Motion for Stay's expedited consideration. (Doc. 229-1 at 12.) Though this order was not issued by Friday, February 12, 2016, as requested, it was issued on the first business day thereafter so as to allow Plaintiffs to respond in the interest of fairness and justice. *Cf.* FED. R. CIV. P. 1. Regardless, the reasons summarized therein have no bearing on the Motion for Stay's substantive merits, as analyzed in this order. *See infra* Part III.B.

3–4 (construing *Casey*, 505 U.S. at 887–95).) As the Fifth Circuit has recognized, "*Casey* counsels against striking down a statute *solely* because women may have to travel long distances to obtain abortions," (*Id.* at 4 (emphasis added) (quoting *Abbott II*, 748 F.3d at 598).)

Third, Plaintiffs characterize "Defendant's assertion that a 'large fraction' of women who seek abortions from Louisiana" will not be impacted when one doctor, rather than six, can legally provide such operations as "def[ying] common sense." (*Id.* at 4–5.) Fourth, the Court's calculations (and related findings) "were supported by substantial record evidence." (*Id.* at 5.) Fifth, Plaintiffs address Defendant's argument that this Court should have excluded non-Louisiana women from its calculations by stressing *Casey*'s focus on "women for whom the law is a restriction, not *women of a particular state* for whom the law is a restriction." (*Id.* (emphasis in original)) *Casey* did not even "mention[] the residency of the women affected by the challenged requirements." (*Id.* (construing *Casey*, 505 U.S. at 894).) Thus, because "Act 620 restricts the rights of all Americans seeking an abortion in the state of Louisiana" and because the large fraction test "contains no residency test," Defendant's reading lacks any legal support. (*Id.*) As further support for this proposition, Plaintiffs note that the Constitution forbids a state from infringing on the fundamental rights of out-of-state residents. (*Id.* (citing U.S. CONST. art. IV, § 2, and *Corfield v. Coryell*, 6 F. Cas. 546, (C.C. E.D. Pa. 1823)).) Defendant has essentially asked this Court to treat such women as "having no weight" for ascertaining the constitutionality of a restriction on a fundamental right, (*Id.*), though "[a] law that deprives out-of-state women of their constitutional rights is flatly unconstitutional," (*Id.* (citing *Doe v. Bolton*, 410 U.S. 179, 200, 93 S. Ct. 739, 751–52, 35 L. Ed. 2d 201 (1973)).)

The next two reasons concern Defendant's second argued ground for reversal. While Defendant insists that this Court should have given "due deference" to the Secretary's "opinion,"

which would have in turn diminished its large fractions, Plaintiffs first recount the nature of this opinion. (*Id.* at 6.) The declaration came only "one business day before the [relevant] evidentiary hearing," and the Secretary later testified that she had "limited knowledge and understanding of the hospital admitting privileges process, including what type of hospital admitting privileges meet Act 620's requirements." (*Id.* (referencing Doc. 191 at 202–07).) In fact, argue Plaintiffs, Defendant's own expert contradicted her construction. (*Id.* at 7.) Second, pursuant to well-established principles of administrative law and statutory interpretation,[7] this Court was bound to construe Act 620 according to "its plain meaning" and, if it found the law to be both plain and unambiguous, this alone determines its constitutionality. (*Id.*) Because the Court did so, Plaintiffs maintain that precedent did not compel this Court to "uncritically defer to Secretary Kliebert's flawed interpretation of the law" or to disregard its terms "solely on the basis of . . . [her] assertions." (*Id.*) For these two reasons, the perception that this Court exceeded its jurisdiction is "frivolous." (*Id.* at 8.)

Plaintiffs' last three arguments focus on the remaining three elements for a stay's issue,[8] Plaintiffs holding that "Defendant cannot establish that *any* of these factors weigh in her favor." (*Id.* (emphasis in original).) Frist, Defendant has not hinted at any "damage" that would follow from the injunction's imposition.[9] (*Id.* at 9 (citing to Doc. 216 ¶ 408, at 110).) Second, regardless of the harm to Defendant effected by the Ruling, a stay of the injunction would harm numerous

[7] These principles are discussed below, *see infra* Part III.B.2, as well as in the Ruling, (Doc. 216 ¶¶ 235–49, at 64–69).

[8] Plaintiffs also disparage Defendant's attempt to address these issues in "two desultory sentences." (Doc. 232 at 8.)

[9] This statement is somewhat inaccurate. While Defendant did not prove any type of damages at trial, she does now maintain that she will suffer a form of irreparable harm. (Doc. 229-1 at 12.) Whether that form of harm outweighs others' injuries or the totality of the public interest is an entirely separate question. *See infra* Part III.B.2–5.

parties and persons, including the Plaintiffs, their physicians, and their patients. (*Id.* (citing to Doc. 216 ¶¶ 403–06, at 109–10).) Third, even as Defendant states that the public interest has merged with the Secretary's own and "offers a circular complaint," "the public interest is *best* served by not enforcing an unconstitutional state law." (*Id.* (emphasis added) (citing to Doc. 216 ¶ 409, at 111).)

As Plaintiffs ultimately conclude, with only compelling circumstances sufficient to support a stay, Defendant's purported failure to make a "strong showing that she is likely to succeed on the merits" and "to meaningfully address the remaining factors" compels denial of the Motion for Stay. (*Id.* at 9–10.)

III. DISCUSSION

A. GOVERNING STANDARD

Pursuant to Federal Rule of Appellate Procedure 8(a)(1)(A), "[a] party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal." FED. R. APP. P. 8(a)(1)(A); *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 95 (1st Cir. 2003). The district court must thereupon consider four factors in deciding whether to grant such a stay: "(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 & n.9 (relying on, among others, *Nken v. Holder*, 556 U.S. 418, 425–26, 129 S. Ct. 1749, 1756, 173 L. Ed. 2d 550 (2009)); *see also, e.g.*, *Wilde v. Huntington Ingalls, Inc.*, 616 F. App'x 710, 712 (5th Cir. 2015) (quoting *id.*); *Woodfox v. Cain*, 789 F.3d 565, 568–69 (5th Cir. 2015) (same). The movant bears the burden of

showing each and every circumstance, and a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 433–34; *see also, e.g.*, *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (citing *id.*). Although a particularly strong likelihood of success may negate the need to prove extensive harm, "an adequate showing" as to all factors must still be made. *Abbott I*, 734 F.3d at 419; *cf. Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1119 (9th Cir. 2008) ("[T]he standard for granting a stay is a continuum." (internal quotation marks omitted)).

Like the injunctive remedy that it so resembles, a stay is "always an extraordinary remedy." *Bhd. of Ry. & S.S. Clerks, etc. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966); *accord, e.g.*, *Nabers v. Morgan*, No. 3:09-cv-00070-CWR-FKB, 2011 U.S. Dist. LEXIS 28408, at *3, 2011 WL 830217, at *3 (S.D. Miss. Mar. 4, 2011) (quoting *id.*). The burden upon the movant is accordingly a heavy one. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006); *see also, e.g.*, *Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, No. 04 Civ. 4991 (RJH), 2004 U.S. Dist. LEXIS 24079, at *8, 2004 WL 2734562, at *2 (S.D.N.Y. Nov. 29, 2004); *U.S. v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1995). In the course of this analysis, imperfectly and roughly, equities must be balanced. *See, e.g.*, *Winter v. NRDC, Inc.*, 555 U.S. 7, 23, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008) ("Even if plaintiffs have shown irreparable injury . . . , any such injury is outweighed by the public interest and the [balance of the equities]."); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (denying motion for stay when "the petitioners . . . failed to establish that they have a substantial case on the merits, and . . . further failed to demonstrate that the balance of equities or the public interest strongly favors the granting of a stay").

B. APPLICATION

1. Likely Success on the Merits

(a) Likelihood of Reversal for Failure to Apply Defendant's Version of the Undue Burden Test

For Defendant to merit a stay on this first ground, she must prove that the Court's application of the standard set forth in *Roe*, *Casey*, and their Fifth Circuit descendants was in error. Under that precedent, the ultimate question for the Court was whether a likely effect of Act 620 is to place an undue burden or substantial obstacle in the path of women's right to an abortion. As noted above, *see infra* Part II.B.1, Defendant reduces the relevant test to a single formulation: "the Fifth Circuit determines the fraction of women burdened by an admitting privileges law by (1) taking the number of women who must travel significantly farther to reach a qualified provider, and (2) dividing by all women of reproductive age in the state." (Doc. 229-1 at 6 (citing to *Abbott I*, 734 F.3d at 415).) Her entire brief as to the probability of success on this first ground depends upon the incontestable soundness of this particular construction.

When *Roe*, *Casey*, *Abbott* I, *Abbott* II, and other recent cases are examined in toto, however, one conclusion follows: Defendant has read too narrowly the Fifth Circuit's test for determining whether the burden is "undue" or the obstacle "substantial" by arguing that the *sole* method for determining undue burden or substantial obstacle rests on the distance a woman must travel to reach a qualified provider. (Doc. 229-1 at 6.) While it is true that the Fifth Circuit's recent jurisprudence considered distance travelled as *a* factor, *see, e.g.*, *Abbott I*, 734 F.3d at 415; *Abbott II*, 748 F.3d at 597–98, these cases do not hold or suggest that this is the only way that undue burden can be measured, *see, e.g.*, *Currier*, 760 F.3d at 457–58 (holding that where the effect of the law is to remove all access to abortions within a state, the law is unconstitutional).

Instead, since *Casey*, whether an undue burden exists has always been more than just a question of miles traveled. *See, e.g.*, *Casey*, 505 U.S. at 878 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."). The full panoply of "effects within the regulating state" must be considered; distance is only one salient factor. *See Currier*, 760 F.3d at 457, 458.

Here, the critical issue is not distance but availability and access. In this case, the evidence showed that the effect of implementing Act 620's admitting privileges requirement would be to eliminate altogether the ability at least four of Louisiana's six abortion providers to perform abortions in Louisiana. (Doc. 216 ¶¶ 305–21, at 405–06.)[10] Of the two remaining doctors able to perform abortions, one would be unable to do so at one of the two facilities where he now performs abortions. (*Id*.)

Further, no fewer than three of Louisiana's five abortion facilities would be left without any provider and therefore would likely close. (*Id*.)[11] This would leave, at most, two facilities with half their normal staff of physicians to serve the entire state which, the evidence showed, could not be done. (*Id*.) This would result, regardless of the distances to be travelled, in a large fraction of women being unable to get an appointment at a Louisiana abortion facility *at all.* This would cause significant and potentially dangerous delays for women seeking an abortion which, in turn, would cause an increased health risk for the patient. (*Id*.) It would also result in an

[10] In its Ruling, the Court found as a matter of fact that Act 620 would cause the loss of five of Louisiana's six abortion physicians. (Doc 216 ¶¶ 298–302 at 78–80, ¶ 305 at 81.) However, because the reasons given by Dr. Doe 3 for discontinuing his abortion practice cannot be considered under Fifth Circuit precedent, Doe 3's likely departure from abortion practice was not considered. (*Id*. ¶ 363, at 98.)

[11] If Doe 3's likely departure could be considered, four of five of Louisiana's six abortion facilities would close. (Doc. 216 ¶¶ 305–21, at 81–85.) However, for reasons stated above, it was not.

increased risk of self-performed, unlicensed and unsafe abortions. (*Id*.) These are but some of the deleterious effects likely to flow from Act 620's enforcement, all of which must be borne in mind pursuant to *Casey*'s clear terms.

In sum, the Court rejects Defendant's suggestion that distance travelled is the sole criteria for gauging undue burden. Regardless of the issue of travel distance, Act 620's admitting privileges requirement would place a substantial obstacle in the path of a large fraction of women seeking an abortion in Louisiana. *Casey* itself, as Plaintiffs persuasively stress, (*See* Doc. 232 at 5), did not make distance the sole lodestar for measuring an undue burden; even in highlighting the usefulness of distance in this limited regard, neither has the Fifth Circuit. As such, Defendant's first argument seems unlikely to prevail on appeal.

(b) Viability of Defendant's Proposed Numerator and Denominators

Without citing to a single case so holding, (*See* Doc. 229-1 at 7–8), Defendant next argues that comparing the number of women no longer able to get an abortion in Louisiana (because of the probable loss of two thirds of the abortion physicians in Louisiana) to either the number of women seeking abortions in Louisiana or the number of women of reproductive age is not an "analysis prescribed by circuit law." (*Id.* at 7.) As this Court explained in the Ruling, (Doc 216 ¶¶ 35–58), in determining whether a law has caused a substantial obstacle to be placed in the path of a large fraction of women seeking an abortion, the Fifth Circuit's "binding precedent" requires that the number of women of reproductive age be used as the denominator. *Cole*, 790 F.3d at 589 (citing *Abbott I*, 734 F.3d at 414; *Abbott II*, 748 F.3d at 598; and *Lakey*, 769 F.3d at 299). But, because there is some suggestion that the denominator can consist only of women

"seek[ing] an abortion," *Cole*, 790 F.3d at 589 (quoting *Lakey*, 769 F.3d at 299), this Court used both numbers, the results equally unconstitutional.

Defendant begins with criticism of the numerator used by the Court: the number of patients who would no longer have ready access to an abortion because of the severely reduced number of available physicians and clinics. (Doc. 229-1 at 7–8). This number was calculated by subtracting the number of women being treated by doctors who would no longer be able to provide abortions because of Act 620, from the number of women who seek abortions in Louisiana annually. Alternatively, the Court subtracted that number of women from the total number of women of reproductive age in Louisiana.

The first basis for Defendant's attack is factual: Defendant's contention that "undisputed testimony" shows that the two doctors unaffected by Act 620, Doctors John Doe 3 ("Doe 3") and John Doe 5 ("Doe 5"), could have performed more abortions than they were actually performing. (*Id.* at 8.) This, argues Defendant, "significantly inflate[s]" the percentage of women denied access to abortion. (*Id*. at 7.) The Court is unpersuaded by this argument.

The source for the Court's finding that Doe 5 performed 2,950 abortions in 2013, (Doc. 216 ¶ 308, at 82), was Doe 3's Declaration, (JX 110 ¶ 7), in which he stated that he performed approximately 2,000 abortions at Delta Clinic and 950 abortions at Woman's Clinic. (JX 110 ¶ 7). The testimony cited by Defendant is not inconsistent with this conclusion. Doe 5 testified that, "in a typical week" he performed between 40 to 60 surgical abortions and 20 to 30 chemical abortions. (Doc 168-6 at 8.) At another point of his testimony, he lowered his estimate to 40 to 60 procedures per week "on average." (*Id*. at 15.) Given the fact that it is likely that Doe 3 is not performing abortions 52 weeks per year, the estimated ranges given in his deposition are consistent with the *yearly* estimate given in his Declaration. The Court carefully weighed the

evidence on this point and concludes that this number used in the Court's calculation is well supported in the record.

Doe 3 has an active general obstetrical practice in addition to his abortion practice. (Doc. 216 ¶ 56, at 22.) In his abortion practice, he testified that he sees approximately 20-30 abortion patients per week. This testimony was the basis for the Court's conclusion that, (assuming a 50 week work year), Doe 3 was seeing approximately 1,000 to 1,500 patients per year (*Id.* ¶ 58, at 22.) Defendant points to Doe 3's testimony that "there have been occasions at Hope when you've provided between 40 and 50 abortions in one day []," (Doc. 190 at 155), to argue that the Court's conclusion was in error. However, to base Doe 3's yearly abortion rate on an aberrational single day number, as Defendant suggests, would fly in the face of the weight of the evidence, contravene both common sense and reality, and unrealistically deflate the number of women denied access to abortion. It is the Court's duty to predict the realistic effect of Act 620 on the right of women to obtain an abortion in Louisiana. It is not for the Court (or for the Defendant) to presume that a party will choose to make the exceptional into the typical or to somehow force a person to abandon their every other professional effort just so as to manufacture a better number. Rather than indulging in speculation, the Court carefully weighed the evidence on this point and concludes that its calculation is well supported by the record.

Defendant thereafter contends that the Court erred in its alternative use of the total number of abortions performed in Louisiana in calculating the numerator because this population includes some patients from outside Louisiana. (Doc. 229-1 at 8.) Defendant points to evidence that non-Louisiana residents make up 31% of the patient population at one of the six clinics, (Hope in Shreveport). (Doc. 216 ¶ 31, at 18.) The cogency of this ground is undermined by three facts.

The first two are evidentiary. First, Defendant herself provided no additional evidence as to what percentage, if any, the other clinics' patients are from out of state, her present argument predicated on extrapolation. Relatedly, 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. Certainly, neither logic nor law compel this Court to pretend that such visits both do not happen and do not affect the ability of the clinics to provide abortion services to women *in* Louisiana as well as the women *of* Louisiana. *Cf. Cole*, 790 F.3d at 597–98 (describing it as "wholly inequitable to ignore . . . reality"). Second, even if one were to remove non-residents from the large fraction analysis, the percentage of Louisiana women denied access to an abortion remains the same, roughly 55%.[12] Mathematically, a fraction greater than 50% is still a large one.

Third (and more importantly), Defendant provides no legal support for her contention that non-residents must be excluded in the large fraction analysis, *Casey* holding to the contrary. As the Supreme Court there observed, "[l]egislation is measured for consistency with the

[12] For this analysis, the Court accepts Defendant's premise that 31% of the total annual patient population for all abortion facilities were nonresidents. This means that 69% of the total annual patient population for all abortion facilities were Louisiana residents. The total annual patient population for all abortion facilities was 9,976. 69% of this number is 6,883. The total number of women obtaining an abortion by Does 3 and 5 after Act 620 is enacted is 4,500. Critically, the same 31/69% ratio must be applied again at this point; this is critical because Louisiana women would have to compete with non-residents for the limited number of available abortion physicians, and access would likely be in the same proportion as with the total patient population. This means that 69% percent of women obtaining an abortion after Act 620 is implemented are Louisiana residents, and this total (69% of 4,500) is 3,105. Thus, the total number of women denied access to abortions after Act 620 - that is, 3,105 (total number of Louisiana women obtaining abortions after the Act) divided by 6,883 (total number of Louisiana women obtaining abortions before the Act) - is about 55%. 55% is, by any reasonable measure, a large fraction.

Constitution by its impact on those whose conduct if affects"; as it explicitly stated, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction." *Casey*, 505 U.S. at 894. Similarly telling language appears in *Lakey*. *See Lakey*, 769 F.3d at 299 (emphasizing that the appropriate denominator includes "includes *all* women affected by these limited options," as the relevant requirement "applie[d] to every abortion clinic in the State, limiting the options for all women *in* Texas who seek an abortion" (emphases added)). Not to be understated, this understanding of the inviolability of a constitutional right can be partly justified by the Constitution's Privileges and Immunities Clause. U.S. CONST. art. IV, § 2, cl. 1; *see, e.g.*, *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 281 n.11, 105 S. Ct. 1272, 1277, 84 L. Ed. 2d 205 (1985) ("The Court has never held that the Privileges and Immunities Clause protects only economic interests." (citing *Doe v. Bolton*, 410 U.S. 179 (1973) (concluding that a Georgia statute permitting only residents to secure abortions violated the Privileges and Immunities Clause))); *Bach v. Pataki*, 408 F.3d 75, 90 (2d Cir. 2005) ("The Supreme Court has never held that the Privileges and Immunities Clause protects only economic interests." (internal quotation marks omitted)). In fact, *Cole* itself cited to *Doe*, 790 F.3d at 569 n.5, in which the Supreme Court forbade a state from restricting the abortion access of out-of-state residents on the basis of this clause, *Doe*, 410 U.S. at 200.

For these reasons, this Court does not find that Defendant has made the strong showing of likely success on the merits as to this issue required for a stay to be granted.

(c) Likelihood of Reversal on Basis of Non-deference

Lastly, this Court finds that Defendant's administrative law argument is not a likely ground for reversal. In Defendant's view, the fact that she has once declared her intent to

interpret Act 620 in a way that minimizes its effects upon Doe 2 "settle[s] the question of the Act's impact," her authority to enforce the law affording her discretion to do so, and has deprived this Court of the power to deem the law as written to be unconstitutional. (Doc. 229-1 at 9–10.) To do otherwise, Defendant argues, is to impermissibly "bind state officials to . . . [a federal court's] interpretation of state law." (*Id.* at 10.)

Defendant's first point, however, cannot be squared with the binding principle that "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442; *see also, e.g.*, *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 336 (6th Cir. 2014) (rejecting an agency interpretation as contrary to the statutory language as interpreted). As this Court stressed in the Ruling, "no deference is owed to an opinion contrary to . . . [a] law's unambiguous and plain meaning." (Doc. 216 ¶ 236, at 64.) Under both Louisiana and federal law, deference is hence only given when the statute is truly "ambiguous" regarding the precise "question at issue" and if the agency's interpretation is a "reasonable" and hence "permissible construction of the statute" at hand. (*Id.* ¶¶ 237–38, at 65–66.) In other words, if the law's certain meaning can be discerned via the standard array of interpretive tools, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997), an administrative actor cannot imbue its text with any other meaning by exercising its supposed discretionary prerogative, *see, e.g.*, *Doctors Hosp. of Augusta v. Dep't of Health & Hosps.*, 2013 1762 (La. App. 1 Cir. 09/17/14); 2014 La. App. Unpub. LEXIS 481, at *19–20, 2014 WL 4658202, at *7. Despite the rise of the administrative state, then, what was said in 1803 remains equally true today: "It is the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803), an agency accorded deference solely when a law's plain and unambiguous import is not susceptible to

definite derivation, *see Salazar-Regino v. Rominski*, 415 F.3d 436, 448 (5th Cir. 2005) (citing this maxim in the context of weighing the reasonableness of an agency's particular interpretation). Plainly and unambiguously, Act 620 does not recognize Doe 2's privileges as sufficient. Notwithstanding the Secretary's assessment, that plain meaning must control when a court must classify a physician's so-called "admitting privileges" for its purposes, a fact that depletes Defendant's second ground of its essential likelihood.

Defendant's second claim, meanwhile, misconstrues the modest effect of the Ruling and Judgment. In deeming the Secretary's interpretation unpersuasive due to its inconsistency with the Act's express text, her own expert's statements, and her less than clear testimony, this Court did not order her to conform to its own view of state law, as *Pennhurst* and its progeny forbid, *see, e.g.*, *Pennhurst*, 465 U.S. 89. Whether she would or would not act as the statute plainly commands was not relevant to whether Act 620, as written and enacted, imposed an undue burden upon the exercise of a recognizable constitutional right. As such, this Court did not order the Secretary to adhere to a particular state law or enforce its own construction of that statute. Subject to a later trial, it preliminarily held the admitting privileges requirement to be unconstitutional. The result of such a determination—that the Secretary cannot enforce an unconstitutional state law—does not mean she was ordered to enforce it in accordance with this Court's own terms, as no enforcement was actually demanded.

In addition, Defendant has misread *Pennhurst*. In this seminal case, the Supreme Court held that the Eleventh Amendment bars federal injunctive relief against a state official if (1) "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act," and (2) "if the conduct to be restrained is within the scope of

authority delegated to the official by state law." *Pennhurst*, 465 U.S. at 101 n.11, 102 (internal quotation marks omitted). Thus, in other circumstances, federal jurisdiction over a claim based on the existence of a federal question is not barred under *Pennhurst* even when "the resolution of . . . constitutional issues . . . requires this court to ascertain what state law means." *Coalition of N.J. Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 673 (D.N.J. 1999). For this very reason, in soundly rejecting an argument akin to Defendant's own, the Third Circuit has observed—"The ascertainment of state law is an everyday function of the federal court"—and clarified: "[A]scertaining state law is a far cry from compelling state officials to comply with it." *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985); *cf., e.g., Okpalobi v. Foster*, 190 F.3d 337, 349 (5th Cir. 1999) ("We are convinced that Article III does not require a plaintiff to plead or prove that a defendant state official has enforced or threatened to enforce a[n abortion-related] statute in order to meet the case or controversy requirement when that statute is immediately and coercively self-enforcing."), *superseded on other grounds*, 244 F.3d 405 (5th Cir. 2001). No less and no more was done by this Court in the Ruling when it rejected Kliebert's construal, embodied in a single declaration lacking in the formal trappings of the most considered agency interpretations.

Three more observations are in order. First, even as she makes a plea for deference based on her role as Secretary of DHH, Defendant simultaneously demands to be released from the obligations to earn such deference. As emphasized above, as a matter of state and federal law, such deference can only come when the law in question has a meaning neither plain nor unambiguous. (*See also* Doc. 216 ¶ 236, at 64 (collecting the relevant cases).) The Secretary, however, has insisted upon such deference without meeting a single predicate; more colloquially put, she wishes to have her cake and eat it too. Second, no exercise of discretion can suddenly

transform an unconstitutional law into a constitutional stricture, and no administrative agent can insulate a plain law from constitutional scrutiny by demanding that a court forsake its duty under Article III. *Cf., e.g., Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 818 (5th Cir. 1979) (noting that "there is clear Supreme Court authority that the probability of enforcement is not relevant to a court'' jurisdiction over an anticipatory challenge" to a statute). Due to this reason, the extent to which the Secretary's interpretation benefitted Doe 2 is irrelevant, as is his possible lack of standing to sue her. Regardless of her opinion, his privileges still do not satisfy the law as naturally construed, and as this Court is bound to apply the law's plain and unambiguous meaning, the beneficent effects of her construction cannot justify disregarding Act 620's language. Just as surely, the questionable claim that Doe 2 may lack standing to sue the Secretary[13] does not mean he was not impacted by Act 620's passage or enforcement,[14] and the fact that Kliebert's successor could change her mind about how to enforce the law does not deprive this Court of the power to declare it unconstitutional. *Cf., e.g., Virginia v. Am.*

[13] "[W]here the plaintiff faces a credible threat of enforcement," standing exists. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 907 (10th Cir. 2012); *cf. Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 99 S. Ct. 2301, 2308, 60 L. Ed. 2d 895 (1979) (finding standing where "a realistic danger of sustaining a direct injury as a result of a statute's operation *or* enforcement" existed (emphasis added)). In these situations, a plaintiff is typically "not . . . required to await and undergo [enforcement] as the sole means of seeking relief." *Consumer Data Indus. Ass'n*, 678 F.3d at 907; *see also, e.g., Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 9 (1st Cir. 2012) ("[T]he Supreme Court has made clear that when a plaintiff alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." (internal quotation marks omitted)); *R.I. Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 2002) ("[T]he Supreme Court repeatedly has found standing to mount pre-enforcement challenges to laws that had never been enforced.").

[14] In fact, that possibility strengthens the argument for denying deference to the Secretary's decision. To wit, if he could not "challenge the Secretary's application of the Act under *Chevron*," (Doc. 229-1 at 10–11), whatever it is, the legal foundation for her exercise of discretion should be clearly defined. Otherwise, injury with impunity may follow though both Louisiana and federal law bar "arbitrary" and "capricious" administrative action.

Booksellers Ass'n, Inc., 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (holding that the injury-in-fact requirement was met, in part, because "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them"); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) ("[I]t is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). That variability is irrelevant when the plain meaning leaves no other course open. Finally, even as it is still unclear what kind of deference the Secretary would like this Court to give her, her opinion appears in a single declaration submitted to this Court shortly before a hearing as a tool of litigation.[15] (*See* Doc. 232 at 6.) Even putting aside its dubiousness in light of the Secretary's subsequent questioning, it simply does not resemble the kind of formal agency opinions to which the greatest deference is owed. *See United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L. Ed. 2d 292 (2001) (explicating the various forms of agency deference).

When controlling principles are applied, it is clear that Act 620, as drafted and signed, does "pose[]" a "present barrier to Doe 2's abortion practice in the New Orleans area," (Doc. 229-1 at 11), an interpretation consistent with that of Defendant's own expert, (*See, e.g.*, Doc. 193 at 94, 123; Doc. 216 ¶¶ 241–42, at 67), and not strongly alleviated by her one declaration. While well-established law compels this result, binding precedent clinches it: as the Fifth Circuit itself has written, "[t]o determine the constitutionality of a state law, we ask whether the Act, *measured by its text* in this facial attack, imposes a substantial obstacle to . . . previability[] abortions." *Lakey*, 769 F.3d at 293 (alteration in original) (emphasis added) (internal quotation

[15] The relevant declaration was submitted on June 19, 2015, (Doc. 154), and her entire opinion is embodied in a single paragraph, (*Id.* ¶ 6, at 3).

marks omitted). Hence, upon careful scrutiny, this final purported error thus does not form a likely ground for reversal.

2. Irreparable Harm to the Appellant

On this issue, the law is clear. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Abbott I*, 734 F.3d at 419; *see also, e.g.*, *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014). The second element for a stay pending appeal has thus been suitably shown.

3. Injury to Others

Yet, as the Ruling makes clear, Plaintiffs and other persons will also endure great harm if Act 620 is enforced and thus if the Motion for Stay is granted. (Doc. 216 ¶¶ 364–91 at 99–106, ¶¶ 404–06 at 110.) The plaintiff clinics will face nearly insurmountable hurdles and may find themselves without a doctor able to provide abortions to a single woman, operations so sharply curtailed as to possibly prompt their closure; logically, their medical and administrative staff will suffer derivative yet equally harmful effects. *See, e.g.*, *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013), *aff'd in part*, 760 F.3d 448. Most significantly, the women of Louisiana will face irreparable harms from the burdens associated with finding an abortion clinic with sufficient capacity to perform their abortions; "unreasonable and dangerous delays in scheduling abortion procedures" will likely follow from a decrease in the total number of available doctors. (Doc. 216 ¶¶ 404–06 at 110.) Crucially, "the deprivation of [any and all] constitutional rights," whether arising from the First, Second, or Fourteenth Amendment, has always "constitute[d] irreparable harm as a matter of law." *Cohen v. Coahoma Cnty., Miss.*, 805

F. Supp. 398, 406 (N.D. Miss. 1992) (citations omitted); *see also, e.g.*, *Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Consequently, as with Act 620, the issuance of a stay will likely inflict an array of substantial injuries on the sundry parties interested in this proceeding, likely subjecting many to economic and physical injury and thousands of women to harm as irreparable as Defendant's own.[16] These are harms to which Defendant has given no persuasive response, (*See* Doc. 232 at 8–9), no "adequate" demonstration of this factor made, (*See* Doc. 229-1 at 12).

4. Public Interest

In addressing the final factor, Defendant maintains that its interest in enforcing Act 620 "merge[s] with that of the public." (Doc. 229-1 at 12 (citing *Abbott I*, 734 F.3d at 419).) True, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012). But the public interest, for purposes of ordering a stay, is never so monolithic. In declaring its apparent desire, no state entity, whether legislature or governor or both, annuls the countervailing concerns and rights of a state's every citizen. If so, this final factor will always favor the issuance of a stay when a state law, though found to be likely unconstitutional, is

[16] Thus, the Defendant misapplies *Abbott I* when she says that "[g]iven the State's likelihood of success on the merits, *any* showing of harm plaintiffs might make is not enough, standing alone to outweigh the other factors." (Doc. 229-1 at 12 (emphasis added) (citing *Abbott I*, 734 F.3d at 419).) First, Defendant has failed to show a likelihood of success on the merits. Further, in *Abbott I*, the Fifth Circuit expressly stated that the appellant had "adequate[ly]" shown every other factor, including "whether issuance of the stay will substantially injure the other parties interested in the proceeding." 734 F.3d at 419. The Fifth Circuit did not suggest that a strong likelihood of success, even if found, somehow made "any showing of harm" irrelevant. (Doc. 229-1 at 12.) It simply stated the "strong harm" shown by a plaintiff was not itself enough considering defendant's sufficient showing of every other factor. (*Id.*)

challenged, no further analysis ever required. As case law well shows, however, the public interest to be weighed is broader than a state's asserted claim. Indeed, as the Fifth Circuit has noted, "it is always in the public interest to prevent the violation of a party's constitutional rights," *Currier*, 760 F.3d at 458 n.9 (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)), and not too much forbearance is required when the relevant law has never gone into effect, *cf. R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 303 (D.R.I. 1999). Thus, two different public interests here exist and must be set against each other, the state's asserted claim but one amidst many equally viable others.

5. The Balance

As the foregoing shows, the balance of factors clearly calls for the denial of the Motion for Stay. Defendant has failed to make the required strong showing of a likelihood of success on the merits, and thus the first factor favors denial. Per binding precedent, the second factor favors Defendant, but the third favors Plaintiffs as the injuries which others will endure with a stay's granting are likely to be substantial in comparison to Defendant's lone form of irreparable injury. As to the fourth factor, while there are competing public interests involved, preventing the violation of a constitutional right, in this case, prevails, especially since denying the Motion for Stay merely maintains the status quo.

IV. CONCLUSION

For the foregoing reasons, the overall balance of factors and justice counsels against a stay of the Ruling and Judgment. Based on the Supporting Memorandum, Defendant's probability of success is too low relative to the likely harms that will be inflicted upon Plaintiffs

(and others) and in light of the public interest, fully and holistically considered. Accordingly, **Defendant's Motion for Stay Pending Appeal, for Expedited Consideration, and for Temporary Stay, (Doc. 229), is DENIED**.

Signed in Baton Rouge, Louisiana, on February 16, 2016.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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

CIVIL ACTION

VERSUS

NO. 14-CV-00525-JWD-RLB

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

JUDGMENT

For the reasons stated in this Court's Findings of Fact and Conclusions of Law, (Doc. 216), and consistent with the Joint Stipulation and [Proposed] Order Regarding the Court's January 26, 2016 Findings of Fact and Conclusions of Law, (Doc. 224), and Joint Motion to Dismiss Mark Dawson, in His Official Capacity as President of the Louisiana State Board of Medical Examiners, (Doc. 110),

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant Kathy H. Kliebert and her successors, as well as any and all employees, agents, entities, or other persons acting in concert with her, are preliminarily enjoined from enforcing LA. R.S. § 40:1299.35.2 *et seq.* against the following persons: Doctor John Doe 1; Doctor John Doe 2; June Medical Services, LLC, d/b/a Hope

Medical Group for Women, and its physicians and staff; Bossier City Medical Suite, as well as its physicians and staff; Choice, Inc. of Texas, d/b/a Causeway Medical Clinic, and its physicians and staff, including Doctor John Doe 4; and any and all others encompassed by the Parties' stipulations. This injunction will remain in effect until further notice from this Court or the United States Court of Appeals for the Fifth Circuit.

Signed in Baton Rouge, Louisiana, on February 10, 2016.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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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.

CIVIL ACTION

VERSUS

NO. 14-CV-00525-JWD-RLB

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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OVERVIEW

I. Introduction

Before the Court is Plaintiffs' Application for Temporary Restraining Order and Motion for Preliminary Injunction ("Application"), filed by five persons: June Medical Services LLC, d/b/a Hope Medical Group for Women ("Hope" or "Hope Clinic); Bossier City Medical Suite ("Bossier" or "Bossier Clinic"); Choice Inc., of Texas, d/b/a Causeway Medical Clinic ("Choice" or "Causeway") (collectively, "Plaintiff Clinics"); including two natural persons, Doctor Doe 1 ("Doe 1")[1] and Doctor Doe 2 ("Doe 2") (collectively, "Plaintiff Doctors") (collectively, "Plaintiffs"). (Doc. 5.) The Application sought to bar enforcement of Section A(2)(a) of Act Number 620 ("Act" or "Act 620"),[2] amending Louisiana Revised Statutes § 40:1299.35.2.[3] Although Plaintiffs sought a temporary restraining order and a preliminary injunction in this single document, this Court issued the requested temporary order on August 31, 2014, and deferred ruling on their conjoined motion for a preliminary injunction ("TRO"), (Doc. 31 at 1–2), a distinction subsequently clarified by this Court's later order, (Docs. 57, 84). This Ruling and

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

[2] A copy of the final bill appears as a joint exhibit, (JX 115), and in other filings, (*See, e.g.*, Doc. 168-10 at 39–43). As the statute was subsequently codified, and as a statute's language need not be evidenced to be known, this Court will cite to Act 620 as codified. *See infra* note 3. The Court does so throughout this opinion unless it is recounting, as it later does, *see infra* Part VI, Act 620's pre-enactment's history.

[3] In this Ruling, any and all references to "Section []" or "§ []" are to Act 620 as codified in Louisiana Revised Statutes. Act 620 also amended Sections 1299.35.2.1 and 2175.3(2) and (5). *See infra* Part VI.

Order ("Ruling") now addresses this latter request ("Motion for Preliminary Injunction"). Also before the Court is Defendant's Motion to Reconsider Rulings on Summary Judgment and Motion *in Limine* ("Motion for Reconsideration"), (Doc. 144), filed by Ms. Kathy Kliebert ("Defendant," "Kliebert," "Secretary," or "Secretary Kliebert"), who is being sued by Plaintiffs in her official capacity as then Secretary of Department of Health and Hospitals of the State of Louisiana ("DHH").[4]

The hearing on the Motion for Preliminary Injunction was held from June 22, 2015, through June 29, 2015. (Docs. 163–64, 166, 169, 174.) At the hearing, the Court received evidence in the form of live witness testimony, exhibits, stipulations, and designated deposition testimony agreed by Plaintiffs and Defendant (collectively, "Parties") to be received in lieu of certain witness' live testimony. Plaintiffs presented live testimony from the following witnesses:

- Doe 1;
- Doe 2;
- Doe 3;
- Ms. Kathaleen Pittman ("Pittman"), June's administrator; and
- Kliebert; and
- Three experts, specifically:
    - Doctor Christopher M. Estes ("Estes"), Chief Medical Officer of Planned Parenthood of South Florida and the Treasure Coast, (PX 92);

[4] As permitted by precedent, *Ex parte Young*, 209 U.S. 123, 152, 28 S. Ct. 441, 451, 52 L. Ed. 714 (1908); *accord Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 530 n.24 (1st Cir. 2009), Plaintiffs sue for injunctive relief against Kliebert in her official capacity, (Doc. 1 at 5). To wit, the true defendant here is Louisiana, not Kliebert or even DHH. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989).

- Doctor Sheila Katz ("Katz"), an assistant professor at the University of Houston, (JX 91); and
- Doctor Eva Karen Pressman ("Pressman"), the Henry A. Thiede Professor and Chair of The Department of Obstetrics and Gynecology at The University of Rochester, (PX 94).

Defendant presented live testimony at trial from the following witnesses:

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

A record of the exhibits admitted into evidence was filed. (Doc. 165.) A record of the deposition testimony designated by the Parties and offered into evidence was also docketed. (Doc. 168.[5]) In

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

addition, the Parties submitted proposed findings of fact and conclusions of law, (Docs. 196, 200), and responses to each other's proposed findings and conclusions, (Docs. 201, 202).

In making the following findings of fact and conclusions of law, the Court has considered the record as a whole. The Court has observed the demeanor of witnesses and has carefully weighed their testimony and credibility in determining the facts of this case and drawing conclusions from those facts. All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed.[6] Likewise, any conclusions of law more appropriately considered a finding of fact shall be so classified.[7]

After having considered the evidence, briefing, and record as a whole, for the reasons which follow, Defendant's Motion for Reconsideration, (Doc. 144), is DENIED. The active admitting privileges requirement of Section A(2)(a) of Act 620 is found to be a violation of the substantive due process right of Louisiana women to obtain an abortion, a right guaranteed by the Fourteenth Amendment of the United States Constitution as established in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) ("*Roe*"), and pursuant to the test first set forth in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) ("*Casey*"), and subsequently refined by the Fifth Circuit, *see infra* Part XI. Act 620 is therefore declared unconstitutional, its enforcement constitutionally barred. As such, the Motion for Preliminary Injunction is GRANTED IN PART, and any enforcement of § 40:1299.35.2 is enjoined as to Does 1 and 2, Hope, Bossier, and Causeway.

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

[7] *Id.*

Furthermore, because applications for "active admitting privileges"[8] by several doctors technically remain "pending," the Court orders Plaintiffs to provide to the Court and Defendant with a written notification of any changes in the status of these applications on a monthly basis, beginning on March 1, 2016. Should the status of any application change, the Parties are free to request any other relief that they may deem appropriate. Finally, so as to discuss any outstanding issues and schedule this case's course, the Court will hold a telephonic status conference with counsel for all Parties on January 29, 2016, at 11:30 a.m.

FINDINGS OF FACT

II. Background and Procedural History

1. Plaintiffs are:

- Hope, a licensed abortion clinic located in Shreveport, Louisiana, suing on behalf of its physicians, staff and patients;
- Bossier, a licensed abortion clinic located in Bossier City, Louisiana, suing on behalf of its physicians, staff, and patients;
- Choice, a licensed abortion clinic suing on behalf of its physicians, staff, and patients;
- Doe 1, a physician licensed to practice medicine in the State of Louisiana and board-certified in Family Medicine and Addiction Medicine, suing on his own behalf and that of his patients; and
- Doe 2, a physician licensed to practice medicine in the State of Louisiana and

[8] For a definition of this term, see *infra* Part V.D.

board-certified in OB/GYN, suing on his own behalf and that of his patients.

2. Kliebert, the Secretary of DHH.[9] Pursuant to § 40:2175.6, Kliebert "has the authority to revoke or deny clinics' licenses for violation of this or any other law."(Doc. 109 at 5 (citing LA. R.S. § 40:2175.6).)[10]

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

4. Act 620 has been codified at an amended Section 40:1299.35.2. LA. R.S. § 40:1299.35.2. Section A(2)(a) requires every doctor who performs abortions in Louisiana to have "active admitting privileges" at a hospital within 30 miles of the facility where abortions are performed. *Id.* § 40:1299.35.2A(2)(a). While the Act contains other requirements, this provision is the only one being challenged. (Doc 5-1 at 8 n.1.) Act 620 was signed into law by the Governor

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[9] In the original Complaint, Plaintiffs sued Mr. James David Caldwell ("Caldwell") in his official capacity as Louisiana's Attorney General and Doctor Jimmy Guidry ("Guidry") in his official capacity as the State Health Officer of Louisiana and Medical Director of DHH. (Doc. 1 at 1.) The Court dismissed both Caldwell and Guidry. (Doc. 31.) Kliebert was added as a defendant in an Amended Complaint for Declaratory and Injunctive Relief. (Doc. 14.) Doctor Mark Henry Dawson, President of the Louisiana State Board of Medical Examiners ("Board"), was sued because Act 620 purports to make the Board an enforcement arm of the Act. LA. R.S. § 40:1299.35.2.1(E). In addition, the Board has the authority to take disciplinary action against any physician, LA. R.S. § 37:1263 *et seq.* (Doc. 109 at 6.) However, Dawson was subsequently dismissed at the Parties' joint request. (Docs. 110, 111.) As a part of the joint motion, the Board agreed to be bound by any injunction issued by the Court regarding Act 620. (Doc. 110 ¶ 1(b) at 1.)

[10] In accordance with *The Bluebook: A Uniform System of Citation*, the documents filed in this case's docket, but not later submitted as exhibits at the June hearing, will be cited by document number alone, e.g. Doc. 109. Conversely, the evidence introduced by the Parties, either individually or jointly, as exhibits will be identified by their precise exhibit number even if later filed as a document on this case's docket, *see* Doc. 196. For example, joint exhibit 10 will be cited as "JX 10," Defendant's exhibit five as "DX 5," and Plaintiffs' exhibit six as "PX 6."

of Louisiana, the Honorable Piyush "Bobby" Jindal ("Jindal" or "Governor"), on June 12, 2014. (Doc. 138 at 2; *see also, e.g.*, H.B. 388, 2014 Leg., Reg. Sess. (La. 2014) (signed by Governor, June 12, 2014).) Its effective date was set as September 1, 2014. (*See, e.g.*, Doc. 5-1 at 8; Doc. 5-2 at 6.)

5. Hope, Bossier, and Choice are three of five licensed abortion clinics in Louisiana. (*See, e.g.*, Doc. 109 at 4–5; Doc. 14 ¶ 10 at 3.) They are located in Shreveport, Bossier City, and Metairie, respectively. (Doc. 109 at 4–5; *see also, e.g.*, Doc. 14 ¶¶ 11–13 at 3–4.) Does 1 and 2 are two of six physicians performing abortions in Louisiana. (Doc. 109 at 5; *see also, e.g.*, Doc. 14 ¶¶ 14–15 at 4.) Doe 1 performs abortions at Hope; Doe 2 performs abortions at Bossier and Choice. (Doc. 109 at 5; *see also, e.g.*, Doc. 14 ¶¶ 14–15 at 4.)

6. The Court issued the TRO on August 31, 2014, enjoining enforcement of Act 620 "until a hearing is held for the purpose of determining whether a preliminary injunction should issue." (Doc. 31 at 18.) Per this order, Plaintiffs were expected to continue seeking admitting privileges at the relevant hospitals. (*Id.* at 1–2.) Thus, the Act would be allowed to take effect, but the Plaintiffs would not be subject to its penalties and sanctions for practicing without the relevant admitting privileges during the application process. (*Id.* at 2, 18.) The Plaintiff Clinics were allowed to operate lawfully while the Plaintiff Doctors continued their efforts to obtain privileges. (*Id.*)

7. On September 19, 2014, three other plaintiffs–Women's Health Care Center, Inc. ("Women's Health" or "Women's Clinic"); Delta Clinic of Baton Rouge, Inc. ("Delta"); Doctor John Doe 5 ("Doe 5"); and Doctor John Doe 6 ("Doe 6") (collectively, "Women's Health Plaintiffs")–filed the Complaint for Declaratory and Injunctive Relief, thereby initiating a

separate case, and a Motion for Preliminary Injunction. (Docs. 1, 5, No. 3:14-cv-00597-JWD-RLB.) On that same day, these parties tendered a motion to consolidate their case with this earlier proceeding. (Doc. 2, No. 3:14-cv-00597-JWD-RLB.) By this Court's order, these two cases were consolidated on September 24, 2014. (Doc. 8, No. 3:14-cv-00597-JWD-RLB.)

8. All the Parties agreed in briefs and orally at a status conference held on September 30, 2014, that significant discovery would need to be done to prepare for the hearing; therefore, the Court set the preliminary injunction hearing for March 30, 2015. (Doc. 45.) A Joint Proposed Scheduling Order was submitted by the Parties on October 8, 2014, (Doc. 49), and adopted as this Court's order on October 21, 2014, (Doc. 56).

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

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

11. On February 16, 2015, Defendants filed the Motion for Partial Summary

Judgment ("Partial MSJ"), (Doc. 87), which was opposed, (Doc. 104). On February 24, 2015, Defendants filed an Unopposed Motion to Set Oral Argument on Motion for Partial Summary Judgment (Doc. 90.) On March 3, 2015, the Court granted that motion, (Doc. 92), and oral argument was set and heard on March 19, 2015, (Docs. 128, 137).

12. On May 12, 2015, the Partial MSJ was granted in part, finding that under binding Fifth Circuit jurisprudence, the admitting privileges requirement of Act 620 is rationally related to a legitimate State interest. (Doc. 138 at 125.) In all other respects, the motion was denied. (*Id.*)

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

14. On April 1, 2015, oral argument was heard on motions in limine filed by the Parties. (Docs. 136, 151.) In the ruling issued that same day, the Court denied Plaintiffs' Motion in Limine to Preclude Expert Testimony of Dr. Tumulesh Solanky, (Doc. 96), and Defendant's Motion to Exclude Expert Testimony of Sheila Katz, Ph.D., (Doc. 99). (Doc. 136.) Plaintiffs' Motion in Limine to Preclude Expert Testimony of Dr. McMillan, (Doc. 97), was denied as moot. (Doc. 136.) Because of their connection to the Partial MSJ, Defendant's Motion in Limine to Exclude Irrelevant Evidence ("Defendant's Motion in Limine"), (Doc. 95), and Plaintiffs' Motion in Limine to Preclude Evidence of DHH Deficiency Reports and Related Evidence, (Doc. 98), were taken under advisement. (Doc. 136.) These two motions were ultimately denied. (Docs. 139,

140.)

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

16. Trial on the Motion for Preliminary Injunction began on June 22, 2015, and ended on June 29, 2015. (Docs. 163, 164, 166–69, 174). The Redacted Transcript[11] of the trial was later docketed.[12] (Docs. 190–95.)

III. Contentions of the Parties

17. In broad terms,[13] Plaintiffs contend that Act 620 is facially[14] unconstitutional first, because the Act places an undue burden on the right of Louisiana women seeking an abortion by

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

[12] Each of the six volumes of testimony corresponds to the trial day in which the evidence was received: Document 190 is Volume I, June 22; Document 191 is Volume II, June 23; Document 192 is Volume III, June 24; Document 193 is Volume IV, June 25; Document 194 is Volume V, June 26; and Document 195 are Volume VI, June 29. Document 190 (or Volume I) contains the testimony of Pittman, Doe 3, and Estes; Document 191 (or Volume II), that of Doe 2, Katz, and Kliebert; Document 192 (or Volume III), that of Doe 1 and Castello; Document 193 (or Volume IV), that of Marier and Solanky; Document 194 (or Volume V), that of Cudihy; Document 195 (or volume VI), that of Pressman.

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

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

placing substantial obstacles in their path, (*See, e.g.*, Doc. 202 at 46–53);[15] second, because the purpose of the Act is to create those obstacles, (*See, e.g.*, *id.* at 53–58) and third, because Act 620 does not further a valid state interest, (*See, e.g.*, *id.* at 58–65).

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

19. Defendant counters broadly that Act 620 places no substantial burden on a woman's right to seek an abortion in Louisiana, (*See, e.g.*, Doc. 200 at 59–66), and that the Act serves a valid purpose, (*See, e.g.*, *id.* at 66–74). Further, Defendant argues that this Court has already ruled that Act 620 serves a valid state interest and has a rational basis. (*See, e.g.*, *id.* at 6–7.)

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

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

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

IV. The Factual Issues

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

(A) What is the purpose of Act 620?

(B) Is Act 620 medically necessary and reasonable?

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

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

23. Whether these factual issues and their resolution are relevant under the applicable legal standard, and whether they play a role in this Court's ruling, is discussed in the Conclusions of Law section. *See infra* Parts XI–XII.

V. Abortion in Louisiana

A. Generally

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

25. Nationally, approximately 42% of women who have abortions fall below the federal poverty level, and another 27% fall below 200% of that level. (JX 124 at 480; Doc. 191 at 190–91.)[16] That number is likely significantly higher for Louisiana women seeking abortions. (*Id.*) The expert and lay testimony on this issue are consistent. (*See, e.g.*, Doc. 190 at 34

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

(Testimony of Pittman) (testifying that 70% to 90% of patients at Hope are below the federal poverty level).)

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

27. Due to this notification and waiting period, patients who wish to obtain an abortion must make two trips to the clinic: the first to receive the ultrasound and state-mandated counseling, and the second to obtain the sought abortion. (JX 109 ¶ 19.)

B. The Clinics

28. There are currently five women's reproductive health clinics in Louisiana that provide abortion services. (*E.g.*, Doc. 109 at 4; JX 109 ¶ 13.)

(1) Hope

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

30. Hope provides medication abortions through eight weeks and surgical abortions through 16 weeks, six days LMP.[17] (Doc. 190 at 35, 119, 132.) Hope employs two doctors who perform abortions, Does 1 and 3. (*Id.* at 21.) Doe 1 performs approximately 71% of the abortions

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

provided by Hope, and Doe 3 performs the remaining 29%. (Doc. 190 at 21; JX 116 ¶ 5.)

31. 69% of Hope's patients are Louisiana residents, but the remainder travel from outside the state to Hope. (JX, 116 ¶ 10; Doc. 190 at 19, 34.)

(2) Bossier

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

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

34. Bossier employs one doctor, Doe 2, who performs first and second trimester surgical procedures as well as medication abortions. (Doc. 191 at 21; JX 117 ¶ 5.) Doe 2 is the only doctor in Louisiana who performs abortions after 16 weeks, six days LMP. (JX 187 ¶ 4; Doc. 191 at 21–22.)[18]

35. Bossier's patients are primarily from Louisiana, but also travel to the clinic from surrounding states. (Doc. 191 at 20.)

[18] There is testimony that Doe 5 has also performed abortions up to 18 weeks although it is unclear whether he is referring to the present or what he has done in the past. (Doc. 168-6 at 7–8.) The resolution of this issue is not critical to the Court's ruling.

(3) Causeway

36. Causeway is a women's reproductive health clinic located in Metairie, Louisiana, and has provided abortion and reproductive health services since 1999. (Doc. 109 at 2–5; Doc. 14 ¶ 13.) Causeway is a licensed abortion clinic suing on its own behalf and that of its physicians, staff, and patients. (Doc. 14 ¶ 14).

37. Causeway offers surgical abortions through 21 weeks, six days LMP, and does not offer medication abortions. (JX 117 ¶ 4.)

38. Causeway employs two doctors who perform abortions, Does 2 and 4. (*See, e.g.*, Doc. 168-5 at 8.) Doe 2 performs approximately 25% of the abortions provided at Causeway, and Doe 4 performs the remaining 75%. (JX 117 ¶ 5.)

(4) Women's Health

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

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

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

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

abortions. (*Id.* at 55.)[20]

(5) Delta

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

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

44. Delta provides surgical abortions for women through 16 weeks LMP, and medication abortions through eight weeks. (Doc. 168-4 at 13–14, 19.)[21]

45. The northern part of Louisiana is served by Hope in Shreveport and by Bossier Clinic in Bossier City. (Doc. 191 at 17; Doc. 190 at 110.) The southern part of this state is served by Causeway in Metairie, Delta in Baton Rouge, and Women's Health in New Orleans. (JX 110 ¶ 1; JX 114 ¶ 1; JX 109 ¶ 13.)

C. The Doctors

46. There are currently six doctors who perform all abortions in Louisiana. (Doc. 109 at 4; *see also, e.g.*, JX 109 ¶ 14.)

(1) Doe 1

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

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[20] *See* supra note 18.

[21] *Id.*

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

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

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

(2) Doe 2

51. Doe 2 is a board-certified obstetrician-gynecologist and is one of two clinic physicians at Causeway and the only clinic physician at Bossier who provides abortion services. (Doc. 109 at 5.) He is the medical director of Causeway and Bossier. (*Id.*)

52. Doe 2 has been performing abortions since 1980. (Doc. 191 at 13-14.) Doe 2 performs medication abortions through eight weeks and surgical abortions up through the state's legal limit of 21 weeks, six days LMP. (Doc. 191 at 22–23, 55–56; JX 187 ¶ 4.) He performs medication and surgical abortions at Bossier Clinic, but only surgical abortions at Causeway Clinic. (*Id.* at 21–23.) Last year, Doe 2 performed approximately 550 abortions at Bossier and 450 abortions at Causeway Clinic. (*Id.* at 17–18.)

53. Doe 2 performs first and second trimester surgical abortions through 21 weeks, six

days LMP, and is the only one of two physicians in Louisiana to offer abortion after 16 weeks, six days LMP. (*Id.* at 21–22.)[22]

54. Doe 2 has been unsuccessful in getting active admitting privileges within 30 miles of Bossier and has been able to obtain only limited privileges, which do not meet the requirements of Act 620, within 30 miles of Causeway. (*See, e.g.*, *id.*)

(3) Doe 3

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

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

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

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

59. Doe 3 currently has admitting privileges at Willis-Knighton Hospital in Bossier ("WKB") and at Christus Highland Medical Center in Bossier ("Christus"), both of which are

[22] *Id.*

within 30 miles of Hope Clinic. (*Id.* at 21–22, 120, 148–49.) Doe 3's current privileges at Christus require him to admit approximately 50 patients per year. (*Id.* at 150–52; JX 59.)

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

(4) Doe 4

61. Doe 4 is a board-certified obstetrician-gynecologist and one of two clinic physicians at Causeway. (Doc. 109 at 5.)

62. Doe 4 obtained his license to practice medicine in Maryland in 1959 and has been practicing medicine for 56 years and in Louisiana since 1965. (Doc. 168-5 at 5–6.) He served as an assistant professor or assistant instructor in obstetrics and gynecology for seventeen years at Earl K. Long Hospital. (*Id.* at 12.)

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

64. Doe 4 performs abortions at Causeway in Metairie. (Doc. 109 at 5; *see also, e.g.*, Doc. 168-5 at 8.) He does not currently have and has been unable to get admitting privileges at a hospital within 30 miles of Causeway. (Doc. 191 at 18; *see also, e.g.*, Doc. 168-5 at 16.)

(5) Doe 5

65. Doe 5 is a board certified obstetrician-gynecologist. (Doc. 109 at 5; *see also* Doc. 168-6 at 4–5.) He is one of two clinic physicians at Women's Clinic and the only clinic physician at Delta Clinic. (Doc. 109 at 5; *see also* Doc. 168-6 at 4, 13–14, 22.)

66. Doe 5 has been licensed to practice medicine in Louisiana since 2005. (Doc. 168-6 at 5.) He provides surgical abortions at Delta Clinic and Women's Health through 16 weeks LMP. (*Id.* at 20; *see also* JX 110 ¶ 1.)[23]

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

(6) Doe 6

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

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

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

[23] *Id.*

D. Admitting Privileges in Louisiana

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

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

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

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

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

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

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

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

79. There is no state or federal statute which governs the rules for the granting or denial of hospital admitting privileges in Louisiana.[24] *Cf. Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) ("The criteria for granting admitting privileges are multiple, various, and unweighted."). Rather, partly as a consequence of this absence, these rules vary from hospital to hospital and are governed by each one's distinct by-laws.[25] (*See, e.g.*, Doc. 193 at 12,

[24] While one statute, commonly known as the Church Amendment, does impose a type of germane privileges requirement on hospitals accepting federal funds, 42 U.S.C. § 300a-7(c)(1)(B), this statute was not shown to apply to the hospitals involved in this case, *see infra* note 32.

[25] *Cf.* AM. MED. ASS'N, OPINION 4:07 - STAFF PRIVILEGES (June 1994) ("Privileges should not be based on numbers of patients admitted to the facility or the economic or insurance status of the patient. . . . Physicians who are involved in the granting, denying, or termination of hospital privileges have an ethical responsibility to be guided primarily by concern for the

15; Doc. 195 at 28.)

80. Specifically, there is no state or federal statute which defines or sets uniform standards for the categories of admitting privileges a hospital may grant. (Doc. 193 at 11–12.) Like other rules, these are therefore set by each hospital's by-laws. (*Id.*; *see also, e.g.*, Doc. 195 at 28; JX 81 at 1798.) To make matters more confusing, the terms used to describe those categories (e.g. "active admitting privileges", "courtesy admitting privileges", "clinical admitting privileges") vary from hospital to hospital. (*See, e.g.*, Doc. 190 at 167; Doc. 191 at 104; Doc. 193 at 11–12; Doc. 195 at 28.)

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

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

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

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welfare and best interests of patients in discharging this responsibility."). The evidence presented in this case shows that these aspirational goals are not reflected in the by-laws of the Louisiana hospitals whose rules and practices are before the Court.

84. Unlike some states,[26] there is also no statute or rule in Louisiana which sets a maximum time period within which a physician's application for admitting privileges must be acted upon. Thus, unless there is such a time limit in the hospital's by-laws, a hospital can effectively deny a doctor's application of privileges by never acting on it, a decision on any one doctor's application permanently delayed without a consequence being effected or a reason being given. A definite decision stays unreached–but, with his or her request suspended, the relevant doctor's privileges remain, as a matter of fact and law, nonexistent. In this Ruling, the Court uses the term "de facto denial" of privileges to describe this circumstance.[27]

85. At some hospitals in Louisiana, there are suggested time frames in which hospitals should review admitting privileges applications. (JX 72 at 1320–23; *see also, e.g.*, JX 67 at 857–58; JX 76 at 1444–47.) However, those guidelines are not requirements, and there is no legal

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

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

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

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

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

88. Defendant argues: "When Louisiana hospitals decide whether to grant a physician staff membership, privileges to admit patients, or privileges to perform particular procedures, hospital by-laws indicate that they may make such determinations based on the physician's prior and current practice, and indicia of the physician's clinical competence."[28] (Doc. 200 ¶ 114 at 38 (citing to JX 2873; JX 1838; JX 1542–43; JX 852–53).)

89. The Court finds that this is only partly true because both by virtue of by-laws and how

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

privileges applications are handled in actual practice, hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency. Examples include the physician's expected usage of the hospital and intent to admit and treat patients there, the number of patients the physician has treated in the hospital in the recent past, the needs of the hospital, the mission of the hospital, or the business model of the hospital. Furthermore, hospitals may grant privileges only to physicians employed by and on the staff of the hospital. And university-affiliated hospitals may grant privileges only to faculty members. These possible variances in causes and justification for any particular denial are attested to by this case's evidentiary submissions and testimony. (*See, e.g.*, Doc. 195 at 25–26; Doc. 190 at 123, 168–70; Doc. 193 at 82–83; JX 109 ¶¶ 27–28; JX 110 ¶ 10; JX 168 ¶¶ 11–13, 17; Doc. 168-5 at 6, 23.)

90. An apparently benign example of such a non-competency based, business driven reason for denying privileges is the denial of Doe 1's application to the Minden Medical Center ("Minden"). (JX 50 at 318; Doc. 192 at 50–51.) In declining his application for staff membership and clinical privileges, Minden's Medical Staff Coordinator wrote to Doe 1: "Since we do not have a need for a satellite primary care physician at this time, I am returning your application and check." (JX 50 at 318; *see also* JX 72 at 1323.)

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

92. Another example of a non-competency based application criteria is that some hospitals

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

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

94. For instance, Doe 1 contacted the director of the Family Medicine Department at University Health Hospital in Shreveport ("University" or "University Health")[29] where he had done his residency in family medicine. Dr. Doe 1 was initially told that he would be offered a job as a faculty member teaching sports medicine which would "take care of the admitting privileges

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

thing." (Doc. 192 at 45.) Doe 1 was told that the application forms for admitting privileges would be forwarded to him. (*Id.*)

95. When Doe 1 did not get the application forms and inquired, he was told by the director of the department that he would not be offered a position because "there was some objection from certain staff about [Doe 1] coming to work there because of where [he] work[ed], at Hope Medical." (*Id.* at 45–46.)[30]

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

97. There is no Louisiana statute which prohibits a Louisiana hospital or those individuals charged with credentialing responsibilities from declining an application for admitting privileges based on the applicant's status as an abortion provider.[31]

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

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[30] This testimony was objected to as hearsay, which objection was overruled. (Doc. 192 at 46.) It was overruled for two reasons. First, the ordinary rules of admissibility are relaxed in a preliminary injunction hearing and hearsay may be admitted. *E.g.*, *Fed. Savings & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987); *Sierra Club, Loan Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993); *see also* 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949 (3d. 2015). Second, as this testimony was presented so as to explain Doe's failure to make formal application for privileges at University, the testimony was not offered to prove its truth and was thus, for this limited purpose, not hearsay. FED. R. CIV. P. 801(c)(2).

[31] Texas law, in contrast, "specifically prohibits discrimination by hospitals or health care facilities against physicians who perform abortions." TEX. OCC. CODE § 103.002(b). Texas law further provides a private cause of action for an individual to enforce this non-discrimination clause. *Id.* § 103.003, *cited in Abbott II*, 748 F.3d at 598 & n.13; *accord Whole Woman's Health v. Cole*, 790 F.3d 563, 596 n.44 (5th Cir. 2015) (per curiam), *modified by* 790 F.3d 598 (5th Cir. 2015), *stayed by* 135 S. Ct. 2923, 192 L. Ed. 2d 920 (2015), *cert. granted*, 136 S. Ct. 499, 193 L. Ed. 2d 364 (2015).

damaged because of any refusal to permit or accommodate the performance of any abortion in said facility or under its auspices." LA. R.S. § 40:1299.32.[32]

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

100. Section 40:1299.33(C) states: "No hospital, clinic, or other medical or health facility, whether public or private, shall ever be denied government assistance or be otherwise discriminated against or otherwise be pressured in any way for refusing to permit facilities, staff or employees to be used in any way for the purpose of performing any abortion." LA. R.S. § 40:1299.33(C).[33]

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

102. There are ways in which the hospital staff's and/or the general public's hostility to abortion and abortion providers can be injected into the credentialing process. For instance, many

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

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

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

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

104. For example, Doe 5 has applied for admitting privileges at three hospitals in the Baton Rouge area: Woman's Hospital in April or May of 2014 and Lane Regional Medical Center and Baton Rouge General Medical Center in July of 2014. (Doc. 168-6 at 11.) Doe 5 has been unable to find a local physician who is willing to provide coverage for him when he is not in Baton Rouge, which all three hospitals require. (JX 109 ¶¶ 32–33; JX 110; Doc. 51; Doc. 168-6 at 11–12.)[34] Doe 3 also has had difficulty finding physicians to cover for him due to the animosity

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

towards him as an abortion provider. (Doc. 190 at 11–13.) While Doe 2 ultimately got limited privileges at Tulane, (JX 183), the evidence therefore demonstrates that staff physicians who oppose abortion present a real obstacle, *see infra* Part VIII.B.

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

106. As one example, hospitals often grant admitting privileges to a physician because the physician plans to provide services in the hospital. (*See, e.g.*, Doc. 195 at 24–25; Doc. 193 at 66.) In general, hospital admitting privileges are not provided to physicians who never intend to provide services in a hospital. (Doc. 195 at 23–25, 27, 74–75; Doc. 193 at 66–67.)

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

108. Because their abortion practice is not hospital based, neither doctor can possibly comply with that requirement. In the case of Doe 1, since he formally responded to a hospital's request for more information regarding his history of admitting patients during the preceding twelve months, saying he had no such information, he has never again heard from the hospital - there being neither a denial nor an approval of his application. (Doc. 192 at 75–78.) Similarly, when Doe 2 gave the hospital the only information in his possession, he received formal notice

that this was insufficient and "[w]ithout that [additional] information, your application remains incomplete and cannot be processed." (JX 89 at 1950.) Doe 2 could do nothing else, explaining, "I'm in a Catch-22 basically. I can't provide information I don't have." (Doc. 191 at 79–80.)

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

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

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

112. The efforts made by Does 1–6 to comply with the admitting privileges requirement of Act 620, and the result of those efforts, is reviewed in another section of this Ruling. *See infra* Part VIII.

E. The Climate

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

harassment and danger.

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

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

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

117. In addition to the harassment and violence, as was discussed briefly in the previous section and will be discussed in more detail in the section reviewing the doctors' efforts to gain admitting privileges, the personal and/or religious feelings against abortion by the public, some members of the medical profession and hospital administrators has had a negative effect on the doctors' efforts to gain admitting privileges. (*See, e.g.*, Doc. 168-6 at 12; Doc. 190 at 53; Doc. 191 at 24–26; Doc. 192 at 45–46; JX 109 ¶¶ 28, 30, 39.)

118. Indeed, after reviewing Plaintiffs' motion to allow the Plaintiff doctors to use pseudonyms as well as their supporting affidavits, the United States Magistrate Judge concluded:

"The Court is satisfied that the potential for harassment, intimidation and violence in this case, particularly recent instances of such conduct, both nationwide and in Louisiana, justifies the unusual and rare remedy of allowing the individual Plaintiffs to proceed anonymously." (Doc. 24 at 3; *see also* Doc 190 at 108; Doc. 191 at 12; Doc. 192 at 6.) A similar order was signed when Does 3–6 were added as parties. (Doc. 55.)

119. Also recognizing these legitimate safety concerns, Defendant joined with Plaintiffs in a Joint Consent Motion Regarding Confidential Trial Procedures, (Doc. 158), granted on June 23, 2015, (Doc. 161). These procedures included allowing Does 1–3 to testify from behind a screen.[35] (Doc. 158 at 1.)

120. The security concerns even went beyond the Parties, however. A request for anonymity was made on behalf of a hospital which had granted privileges to Doe 5 and the non-party doctors who assisted in the privileges request. No objection was made by any party and the Court ordered this hospital to be called "Hospital C" and the doctor involved for that hospital," Dr. C." (*Id.*) Other doctors involved in granting the limited privileges to Doe 2 were ordered to be called "Dr. A" and "Dr. B." (*Id.*)

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

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

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

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

124. Hope Clinic in Shreveport has been the subject of three violent attacks: once by a man wielding a sledgehammer, once by an arsonist who threw a Molotov cocktail at the clinic, and once by having a hole drilled through the wall and butyric acid poured through it. (Doc. 190 at 23; JX 116 ¶ 8.)

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

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

127. After Doe 5 recently acquired privileges at a local hospital (Hospital C), anti-abortion activists began sending threatening letters to that hospital causing him to fear that he might lose

the privileges that he acquired. (JX 110 ¶ 20; *see also* JX 109 ¶ 39.)

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

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

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

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

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

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

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

135. Doe 3 fears that, if the other Louisiana abortion providers are not able to obtain admitting privileges, he will become an even greater target for anti-abortion violence. (JX 113 ¶¶

6–7.) He specifically testified that "all [these individuals] have to do is eliminate [him] as they have Dr. Tiller and some of the other abortion providers around the country" to eliminate abortion entirely in northern Louisiana. (Doc. 190 at 174.)

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

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

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

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

140. Anti-abortion activists have targeted at least one physician who agreed to provide emergency care for abortion complications, even though he did not provide abortions himself. (Doc. 168-6 at 11, 24–25; JX 110 ¶ 20.)

VI. Act 620

A. Text of Act 620 and Related Provisions

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

142. Act 620 amended Louisiana Revised Statutes § 40:1299.35.2(a), 1299.35.2.1, and

2175.3(2) and (5). (*Id.*)

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

144. Act 620 provides that every physician who performs or induces an abortion shall "have active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." LA. R.S. § 40:1299.35.2A(1).

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

146. Regulations connected to the Act and promulgated after the commencement of this litigation by DHH use the same definition of "active admitting privileges." LA. ADMIN CODE tit. 46, § 4401.[36] These regulations note that federal litigation is pending on the issue of admitting privileges and that licensing provisions regarding admitting privileges will only be enforced pursuant to an order, judgment, stipulation, or agreement issued in this case. *Id.* § 4423.

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

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

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

149. In addition, discipline by the Board is made an enforcement provision in Act 620. *Id.* § 40:1299.35.2.1E. The Board has the authority to take disciplinary action against any physician. *Id.* § 37:1261 *et seq.* The Board has the authority to investigate physicians for violations of law, such as Act 620. *Id.* § 40:1299.35.2E. By violating this law, physicians could be subjected to fines or other sanctions, including the suspension or revocation of the physician's license to practice medicine. (Doc. 168-10 at 12, 14–15; *see also* Doc. 31 at 4 n.4.)

B. Louisiana's Policy and Other Legislation Regarding Abortion

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

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

LA. R.S. § 40:1299.35.0; *see also State v. Aguillard*, 567 So. 2d 674, 676 (La. Ct. App. 1990) (observing that "the Louisiana legislature has expressed its disfavor for abortion" with this provision).

151. Consistent with this explicit statement of legislative intent, as shown below, Louisiana has enacted other laws that place restrictions on women seeking abortion in the state,

and doctors and clinics who perform abortions.

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

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

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

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

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

157. The legislature has passed laws prohibiting insurance coverage of abortion in state

exchanges under the Affordable Care Act. *Id.* § 22:1014. Louisiana does not allow women to obtain insurance coverage for abortion even when a woman's life is endangered or when the pregnancy is a result of rape or incest. *Id.*

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

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

160. The effect of Act 620 is thus significantly different from admitting privileges requirements in states where physicians are protected from discrimination. *See, e.g.*, *Cole*, 790 F.3d at 563; *see also Abbott II*, 748 F.3d at 598 n.13.

C. Drafting of Act 620

161. Act 620 was modeled after similar laws which have had the result of closing abortion clinics in other states. On May 5, 2014, Ms. Dorinda Bordlee ("Bordlee"), the Vice President and Executive Counsel of the Bio Ethics Defense Fund, an anti-abortion advocacy group, sent the draft's primary legislative sponsor, Representative Katrina Jackson ("Jackson"), an email regarding a similar statute passed in Texas that had "tremendous success in closing abortion clinics and restricting abortion access in Texas." (Doc. 191 at 200; Doc. 196-5 at 2; Doc. 196-10 at 1.)[37] Bordlee told Jackson that "[Act 620] follows this model." (Doc. 191 at 200; Doc. 196-5 at

[37] Many of the Joint Exhibits mentioned in this section, including email exchanges to and from pro-life advocacy groups and others participating in the drafting of what came to be Act 620, were the subject of Defendant's Motion in Limine, (Doc. 95). Defendant argues that this

2; Doc. 196-10 at 1.)

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

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

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

(PX 174 at 1.)

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

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

166. The talking points prepared for Secretary Kliebert by Representative Jackson's office stated that DHH was "firmly committed to working with Representative Jackson and the

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evidence is legally irrelevant to the purpose of Act 620. For reasons stated in its ruling, (Doc. 138), and reiterated in this Ruling's Conclusions of Law, *see infra* Parts XI–XII, the Court denied the motion. The Court finds that while this evidence is insufficient under Fifth Circuit jurisprudence for Plaintiffs to meet their burden under the purpose prong of the undue burden test, it is nonetheless relevant and admissible.

Legislature to continue to work to protect the safety and well-being of Louisiana [women] and the most vulnerable among us, unborn children." (Doc. 191 at 222–23; *see also* JX 24 at 2–4.)

D. Official Legislative History of Act 620[38]

167. Act 620 (at the time known as HB 388) was considered by the House Health and Welfare Committee on March 9, 2014, and the Senate Health and Welfare Committee on May 7, 2014. The House and Senate Committees heard extensive testimony regarding the purposes of proposed statute. (DX 119 at 1–30, 39–67.)

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

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

- Abortion carries the risk of serious complications that could require immediate hospitalization. (*Id.* at 3, 5.)
- Women who experience abortion complications frequently rely on the care of emergency room physicians, who often must call on the assistance of a specialist in obstetrics or gynecology. (*See id.* at 4, 5, 8.)
- "[M]ost emergency departments lack adequate on-call coverage for medical and

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

surgical specialists, including obstetricians and gynecologists." (*Id.* at 48.)

- The history of health and safety violations by Louisiana abortion clinics raises concerns about the potential for serious abortion-related complications. (*Id.* 119 at 10.)
- Requiring outpatient abortion providers to have admitting privileges benefits the safety of women seeking abortion and also enhances regulation of the medical profession. (*Id.* at 3, 48.)
- For instance, the admitting privileges requirement improves the "credentialing process" for physicians by "provid[ing] a more thorough evaluation mechanism of physician competency than would occur otherwise." (*Id.* at 48.)
- The requirement also "acknowledges and enables the importance of continuity of care" for an abortion patient. (*Id.*)
- Additionally, the requirement "enhances inter-physician communication and optimizes patient information transfer and complication management." (*Id.*)
- Finally, the requirement "supports the ethical duty of care of the operating physician to prevent patient abandonment." (*Id.* at 3, 48.)
- A virtually identical admitting privileges requirement in Texas had recently been upheld by the U.S. Fifth Circuit as a reasonable measure for achieving these health and safety goals. (*Id.* at 48.)
- There was no obstacle preventing abortion providers from obtaining admitting privileges at Louisiana hospitals. (*Id.* at 9 (testimony that one Louisiana abortion provider already had admitting privileges).)

- Louisiana hospitals grant or deny admitting privileges "based entirely on [the applicant's] medical training and experience." (*Id.* at 50.)
- Louisiana hospitals have recognized categories of staff membership to accommodate physicians who are expected to admit low numbers of patients for a variety of reasons. (Id. at 50.)

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

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

- The Act was intended to bring outpatient abortion facilities in line with "the standard that is currently in place for [ASCs] as set forth in Louisiana Administrative Code, Chapter 45 … Section 4535." (*Id.* at 4.)
- The Act intended to "close a loophole" in Louisiana regulation by requiring outpatient abortion providers to have privileges comparable to those required for physicians performing outpatient surgery in ASCs. (*Id.* at 41–42.)
- The Act's requirement of admitting privileges is consistent with requiring surgical privileges for ASC physicians. (*Id.* at 49 (explaining that "the effect is the same

both in terms of … the credentialing process itself and in the application of the standards by the state").)

- In both cases, the privileges requirement is based on the "well-established principle … that a provider should not undertake a procedure unless he is qualified and able to take care of whatever complications there might be." (*Id.* at 49.)

172. The full House and Senate heard statements in support of HB 388 explaining that it was intended to protect "the safety of women" and ensure that "every physician performing any surgery, including abortions, does so in a prudent manner and with the best interest of each woman's health in mind," (*Id.* at 34–35), and also that it was intended to safeguard "the lives and safety of pregnant women who may experience short-term risk[s] of abortion, which can include hemorrhaging, uterine perforation, or infection," (*Id.* at 48).

173. The full House was informed that the proposed law tracked the Texas admitting-privileges law, HB 2, which had been upheld as constitutional by the U.S. Fifth Circuit Court of Appeals a week earlier. (*Id.* at 34–35 (referring to *Abbott II*).)

174. The Senate approved one amendment to the proposed statute, concerning the definition of admitting privileges, and rejected another amendment that would have eliminated the 30-mile radius requirement. (*Id.* at 69–70.)

175. The proposed statute passed both chambers, with 85 House members and 34 Senators voting in favor, and 88 House members concurring in the Senate amendment. See https://www.legis.la.gov/legis/ViewDocument.aspx?d=887948 (House final passage); https://www.legis.la.gov/legis/ViewDocument.aspx?d=903997 (Senate final passage); https://www.legis.la.gov/legis/ViewDocument.aspx?d=903981 (Senate amendment);

https://www.legis.la.gov/legis/ViewDocument.aspx?d=906861 (House concurrence) (all legislative websites last visited Aug. 24, 2015).

VII. The Purpose and Medical Need for and Reasonableness of Act 620

176. The evidence introduced to show the purpose of Act 620 came in several forms. The Plaintiffs offered: (1) press releases, public statement, emails, and similar evidence produced by public officials, lobbyists, advocacy groups and others involved or interested in the drafting and passage of Act 620; (2) the testimony of some of those involved in these communications; (3) Louisiana's legislatively stated "longstanding policy . . . to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court . . . .," La. R.S. § 40:1299.35.0; and (4) expert testimony purporting to show two things: first, there is no medical need for Act 620 because legal abortion is safe, and second, that Act 620 is medically unreasonable in that Act 620 does not advance the health and safety of women undergoing abortions.

177. In support of her position, Defendant offered: (1) the text and legislative history of the Act, including testimony considered during the legislature's deliberations, and (2) expert testimony at trial purporting to show that the admitting privileges requirement is needed because of potential complications from abortions and that the Act is medically necessary and beneficial for the health and safety of a woman undergoing an abortion.

178. The Court carefully considered all the evidence introduced on this issue and makes the following findings of fact:

(A) A purpose of the bill is to improve the health and safety of women undergoing an

abortion.[39]

(B) Another purpose of the bill is to make it more difficult for abortion providers to legally provide abortions and therefore restrict a woman's right to an abortion.[40]

(C) There is a dispute medically and scientifically as to whether Act 620 serves a legitimate medical need and is medically reasonable.[41]

(D) Legal abortions in Louisiana are very safe procedures with very few complications.[42]

(E) The vast majority of women who undergo abortions in Louisiana are poor. (*See, e.g.*, JX 124 at 2480; Doc. 191 at 190–91; Doc. 190 at 34.) As a result of that poverty, the burden of traveling farther to obtain an abortion would be significant,

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[39] The Court relies primarily on the legislative history of the statute, (DX 119 at 1–30, 39–67), for this finding. While the Court had serious concerns about the credibility and bias of defense expert Dr. Damon Cudihy and Marier's expertise as it pertained to the subject of abortion practice, the Court forgoes a detailed analysis of this testimony for one simple reason. Pursuant to binding jurisprudence, the Court must find that Act 620 meets the purpose prong of the undue burden analysis based on the Court's finding that there is medical uncertainty as to the health benefits of the legislation. *See infra* Parts XI–XII.

[40] The Court forgoes a detailed discussion of this evidence since, under Fifth Circuit law, Act 620 would fail the purpose prong of the undue burden test only if Act 620 "serve[s] *no* purpose *other than* to make abortions more difficult." *Cole*, 790 F.3d at 586 (emphasis added) (quoting *Casey*, 505 U.S. at 900–01). Since the Court has found that one purpose of the Act is to promote the health and safety of women seeking an abortion, it need go no further.

[41] Plaintiffs and Defendant presented conflicting expert testimony on this issue. It is unnecessary to resolve this conflicting testimony since, under Fifth Circuit jurisprudence, the Court must find that Act 620 meets the purpose prong of the undue burden analysis given the evidence showing medical uncertainty on the merits of the legislation. *See infra* Parts XI–XII.

[42] The Court was impressed with the expertise and credibility of Plaintiffs' experts, Estes and Pressman, most especially Pressman. However, the Court foregoes a detailed discussion of the testimony since, under Fifth Circuit jurisprudence, the Court must find that Act 620 meets the purpose prong of the undue burden analysis given the evidence showing medical uncertainty on the merits of the legislation. *See infra* Parts XI–XII.

fall harder on these women than those who are not poor and cause a large number of these women to either not get an abortion, perform the abortions themselves, or have someone who is not properly trained and licensed perform it. (*See, e.g.*, JX 124 at 2480; Doc. 191 at 190–91; Doc. 190 at 34.)

(F) The medical benefits which would flow from Act 620 are minimal and are outweighed by the burdens which would flow from this legislation.[43]

179. The relevance and weight of these factual findings in the context of the prevailing Fifth Circuit test is discussed in more detail in this Ruling's final substantive sections. *See infra* Parts X–XI.

VIII. Efforts of Doctors to Comply With Act 620 and the Results of Those Efforts

A. Doe 1

180. For over a year prior to his trial testimony on June 24, 2015, Doe 1 has been trying, in various ways, to gain active admitting privileges at a hospital within 30 miles of Hope where he performs abortions and thereby comply with Act 620. (Doc. 192 at 42–44.)

181. The Court finds that Doe 1 is a well qualified physician and a credible witness. (*See, e.g.*, Doc. 192 at 7–14; JX 111 ¶ 1; 116 ¶ 5.)

182. The Court finds that despite his good faith efforts to comply with Act 620, Doe 1 has failed to get active admitting privileges at five different hospitals for reasons unrelated to his

[43] The burdens which would flow from Act 620 are discussed in more detail below. *See infra* Part IX. The Court forgoes a discussion weighing these burdens against the benefits of the Act since such a weighing is not legally relevant under Fifth Circuit jurisprudence. *See infra* Parts XI–XII.

competence. (*See, e.g.*, JX 116 ¶ 27.)

183. Doe 1 has attempted to get privileges at five separate nearby hospitals and, despite his efforts and his qualifications, has not been given active admitting privileges at any of these hospitals, including University Health, Minden, North Caddo Regional ("North Caddo"), Christus, and Willis-Knighton. (*See, e.g.*, Doc. 192 at 47–51.)

184. Doe 1 contacted the director of the Family Medicine Department at University Health in Shreveport where he had done his residency in family medicine. Doe 1 was initially told that he would be offered a job as a faculty member teaching sports medicine which would "take care of the admitting privileges thing." Doe 1 was told that the application forms for admitting privileges would be forwarded to him. (*Id.* at 45; *see also* JX 186 ¶ 7.)

185. When Doe did not get the application forms and inquired, he was told by the director of the department that he would not be offered a position because "there was some objection from certain staff about [Doe 1] coming to work there because of where [he] work[ed], at Hope Medical." (Doc. 192 at 44–45; *see also* JX 186 ¶ 7.)[44]

186. The director suggested that he try with the OB/GYN Department but when that route was explored, Doe 1 was advised by email that it would be "inappropriate" to have a family medicine doctor on the OB/GYN staff. (Doc. 192 at 47.)

187. Based on these communications, Doe 1 did not file a formal application for admitting privileges to University. (*Id.*)

188. When Pittman, Hope's Administrator, made inquiries about admitting privileges to

[44] This testimony was objected to as hearsay, (Doc. 192 at 46), which objection was overruled for the reasons summarized above. *See supra* note 30.

North Caddo on behalf of Doe 1, she was told that they did not have the capacity for and could not accommodate transfers. (JX 116 ¶ 22; *see also* Doc. 192 at 49.) Therefore, Doe 1 did not file a formal application. (Doc. 192 at 49; *cf.* JX 116 ¶ 22.)

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

190. While the Court, like Doe 1, does not understand the meaning of the stated reason for declining the application, it is clear that the denial of privileges is unrelated to the qualifications and competence of Doe 1. (*See* Doc. 192 at 51.)

191. Doe 1's efforts to get admitting privileges at Christus reads like a chapter in Franz Kafka's *The Trial*. (*See, e.g.*, JX 71; Doc. 192 at 52–66.)

192. Doe 1 submitted his application for courtesy privileges to Christus on July 25, 2014, on a form provided by Christus. (JX 132 at 2772; JX 116 ¶ 23; Doc. 192 at 52.) Courtesy privileges gives a physician with such privileges the ability to admit patients. (Doc. 192 at 52–53.)

193. On August 25, 2014, Christus asked for additional information, (JX 71 at 1254; *see also* Doc. 192 at 54–55), which he provided on September 17, 2014, (JX 71 at 1267; JX 133; Doc. 192 at 55–56).

194. Via a letter dated October 14, 2014, yet more information was sought from Doe 1 by Christus, (JX 71 at 1268; *see also, e.g.*, Doc. 192 at 58–59), which he supplied on October 20, 2014, (JX 71 at 1273; Doc. 192 at 59–60), and October 25, 2014, (JX 134 at 2802–03).

195. When Pittman called Christus to make an appointment for Doe 1 to get an identification badge, also a requirement of the application process, an appointment was refused because, Pittman was told, Doe 1 had submitted the wrong kind of application and that he should be submitting a "non-staff care giver" application. (Doc. 192 at 62; *cf.* JX 71 at 1268, 1270, 1276.)

196. On December 17, 2014, Doe 1 then received a letter stating that his application was incomplete because Doe 1 hadn't gotten the badge (the same badge Christus would not give him an appointment to get) and because more than 90 days had elapsed since his application was submitted, the application was "deemed withdrawn." (JX 71 at 1279; Doc 192 at 63.)

197. In a follow up conversation initiated by Doe 1 and in a subsequent email from Christus, Doe 1 was told that he needed to file an application for non-staff care giver privileges, a type of privilege that would not allow him to admit patients and therefore would not qualify as "active admitting privileges" under Act 620. (JX 190 at 3662; Doc. 192 at 63–66.)

198. While there was never a formal denial of Doe's application, Christus's delays and failure to formally act, as outlined above, constitutes a de facto denial of his application for the privileges required by Act 620.

199. Doe 1's experience was similar when he applied for courtesy privileges at Willis-Knighton beginning on June 15, 2014. (JX 53; JX 116 ¶ 27; Doc. 192 at 67–78.) These privileges would have allowed Doe 1 to admit patients. (Doc. 192 at 68–69.)

200. Because of his Board Certification in addiction medicine and because Willis-Knighton has an addiction recovery center, Doe 1 filed his application for privileges as an addiction medicine specialist. (*Id.* at 70.)

201. Doe 1's application was denied because he had not undergone a residency program in addiction medicine, despite his board certification in addiction medicine and even though there was no residency program available when he got his board certification. (JX 51 at 508; Doc. 192 at 72–73.)

202. On February 1, 2015, Doe 1 re-submitted an application, this time as a Family Practice specialist. (JX 97 at 2069–2117; Doc. 192 at 73–74.)

203. On March 11, 2015, Willis-Knighton requested information regarding documentation of "hospital admissions and management of patients 18 years old of age or older in the past 12 months." (JX 128; Doc. 192 at 75–76.)

204. On March 24, 2015, Doe 1 provided the requested information. (JX 189; Doc. 192 at 77–78.) Because of the nature of his practice, he had not admitted any patients in the last 12 months, but he did provide detailed information about his training and procedures done during that same time period. (*Id.*)

205. Despite the lapse of more than eight months since his second application and more than five months since he provided the information requested in support of that application, Willis-Knighton has neither approved nor denied his application. (*See, e.g., id.* at 78.) Under these circumstances, the Court finds that this application has been de facto denied.

B. Doe 2

206. Currently, Doe 2 performs abortions at Bossier and Causeway Clinics. (Doc. 191 at 17; JX 112 at 2216.)

207. The Court finds Doe 2 to be a well qualified and competent physician and a credible

witness. (*Id.* at 13–17; JX 112 ¶ 1; *see also infra*.)

208. Doe 2 does not currently have active admitting privileges at a hospital within 30 miles of Bossier Clinic. (Doc. 191 at 19.)

209. Doe 2 has been unsuccessful in his good faith efforts to get admitting active admitting privileges within 30 miles of the Bossier Clinic. (*See, e.g.*, Doc. 191.)

210. Doe 2 worked as an Assistant Clinical Professor of Medicine at LSU Medical School, now known as University Health, at various times for approximately 18 years total, leaving LSU in 2004. (*Id.* at 14–15.)

211. While he was on staff at University and during the years in which he engaged in a general OB/GYN practice, Doe 2 had admitting privileges at various hospitals. (*Id.* at 24, 95.)

212. When he left the University staff in 2004, Doe 2 was given consulting privileges, which allow him to consult but not to admit patients. (Doc. 191 at 23–24, 84–88; JX 79 at 1708–09; JX 185.)[45]

213. Following the passage of Act 620, Doe 2 attempted to upgrade his privileges at University to allow him to admit patients in order to comply with the requirements of the Act. (Doc. 191 at 24–25.)

214. When he spoke to Dr. Lynne Groome ("Groome"), the head of the OB/GYN Department at University, about upgrading his privileges, he was told this would not happen because of his abortion practice. (*Id.* at 25–26; *cf.* JX 116 ¶ 27.)

215. In his testimony before this Court, he thusly described his communication with

[45] While Doe 2 initially thought that these were called "courtesy privileges," he corrected his mistake on cross examination. (Doc. 191 at 23, 81–87; JX 185.)

Groome:

> Q. What's your understanding of why you were not able to upgrade your privileges at LSU?
>
> A. Well, Dr. Groome told me that he was reluctant to even consider that, because it was such a controversial topic, but he would take it to the Dean and ask, which he did and he essentially said that you're not going to go beyond your [clinical] privileges.
>
> Q. Were you surprised by that response?
>
> A. No.
>
> Q. Why weren't you surprised?
>
> A. Just because of the political nature of what I do and the controversy of what I do.

(*Id.* at 25–26.)[46]

216. During the summer of 2014, Doe 2 also applied for privileges at WKB. (*Id.* at 26–27.)

217. On August 11, 2014, the Department of OB/GYN and Pediatrics Performance Peer Review Panel ("PPRP") at WKB wrote to Doe 2 asking for additional information: "In order for the Panel to sufficiently assess your clinical competence, you will need to submit documentation, which should include operative notes and outcomes, of cases performed within the last 12 months for the specific procedures you are requesting on the privilege request form." (JX 144 at 3445–46; *see also, e.g.*, Doc. 191 at 29.)

[46] This testimony was objected to as hearsay. (Doc. 191 at 25.) For the same reasons summarized above, *see supra* note 30, the objection was overruled.

218. After Doe 2 made information regarding his prior outpatient operations available to WKB, (Doc. 191 at 30), he received another letter from WKB dated November 19, 2014, stating in pertinent part:

> The data [you] submitted supports the outpatient procedures you perform, but does not support your request for hospital privileges. In order for the panel to evaluate and make recommendations for hospital privileges [,] they must evaluate patient admissions and management, consultations and procedures performed. Without this information your application remains incomplete and cannot be processed.

(JX 89 at 1950; *see also* Doc. 191 at 30–31.)

219. Because of the nature of his non-hospital based practice, Doe 2 was and is unable to provide the requested information. (*See, e.g.*, Doc. 191 at 29–31.) Thus, while Defendant is correct in arguing that Doe 2's application has not been formally denied, (Doc. 201 at 11), Doe 2's application cannot and will never be approved according to WKP's own letter, (JX 89; *see also, e.g.*, JX 144 at 3445–46).

220. As explained by Doe 2, "You know, they haven't formally denied me. . . . I'm in a Catch-22 basically. I can't provide information I don't have." (Doc. 191 at 79–80.)

221. This situation mirrors Doe 1's experience with three other Willis-Knighton-branded entities. Specifically, the Court also notes that although Doe 1, in response to a similar letter from WK Medical Center, WK South, and WK Pierremont, (JX 128), formally responded showing he had not had any hospital admissions in the last 12 months, (JX 189 at 3579; Doc. 192 at 77–78), WK still has not denied or approved his application, (Doc. 192 at 78).

222. The Court finds that, under these circumstances, Doe 2's inability to gain privileges at WKB are unrelated to his competence and that his application to WKB has been de facto

denied.

223. While Defendant argues that Willis-Knighton's inaction is related to Dr. Doe 2's competence because, due to the nature of his practice, he cannot demonstrate "current clinical competence" (Doc. 201 at 11), the Court is not persuaded. The reality is different. Doe 2, a Board Certified OB/GYN who spent many years as an Assistant Clinical Professor at LSU Medical School and who, by Willis-Knighton's admission, has demonstrated his ability regarding outpatient surgeries, is in what he correctly describes a "Catch-22" created by a combination of the Act's requirement and the nature of his practice as an abortion provider.

224. Because Doe 2 also practices at Causeway Clinic in Metairie, he applied for admitting privileges at Tulane, within 30 miles of Causeway. (*See, e.g.*, Doc. 191 at 32–35, 230; JC 180.)

225. While Defendant has argued that the admitting privileges requirement is only about insuring competency of doctors who perform abortions and the process of gaining admitting privileges is neutral and devoid of considerations of the political, religous and social hostility against abortion, the email exchanges between Doe 2 and Dr. A at Tulane demonstrate a very different reality, even in a metropolitan, university-based hospital. (JX 169–78;[47] *see also* Doc. 191 at 49–54.)

226. In this exchange, Dr. A first feels the need to discuss Doe 2's request for privileges "with our lobbyists." (JX 169.) Because Doe 2 is a "low/no provider" in hospitals in the New Orleans area, Dr. A states: "This is truly a rock and a hard place." (JX 172.) When Doe 2 expresses frustration with the lack of success in the application process, Dr. A states: "This is just

[47] These exhibits, being jointly submitted, were admitted into evidence. (Doc. 191 at 54.)

ridiculous. I can't believe the state has come to this." (JX 174; *cf.* JX 170.) Dr. A continues: "I am working on an approach where you would get admitting privileges only for your patients . . . ." (JX 175.) When a proposed solution is found and Doe 2 expresses doubt that this will meet the requirements of the law, Dr. A responds: "Technically, you will have admitting privileges. Isn't that what the law says?" (JX 177). When discussing the need for a covering physician, Dr. A clarifies some of the problems surrounding Doe 2's application: "There were a few faculty who were not comfortable with covering; they were also concerned that 'Tulane as back up for an abortion clinic might not help our referrals.' Given this concern, Dr. B will cover for you formally." (JX 178.)

227. When privileges were finally granted by Tulane, Doe 2 was notified by Dr. A that the proposed privileges would have "the following limitations: 'Admissions of patients from the physician's clinical practice with complications of first and second trimester abortions with referral of those patients to an attending physician on the Tulane staff credentialed for OB/Gyn privileges who has agreed to provide for such care for the physician's patients.'" (JX 181; *see also* Doc. 191 at 57, 60–61.)

228. Consistent with this email, Tulane's formal grant circumscribed Doe 2's privileges in these terms: "Admission of patients from the physician's clinical practice . . . with referral of those patients to an attending physician on staff at [Tulane Medical Center] credentialed for Ob/Gyn privileges who has agreed to provide care for the physician's patients at TMS." (JX 183 at 3652–3; *see also* Doc. 191 at 33, 55–58.)

229. The Parties disagree as to whether these admitting privileges qualify as "active admitting privileges" within the meaning of Act 620. (*Compare* Doc. 200 at 46–47, *with* Doc. 196

at 19–20.)

230. Defendant has filed an affidavit in which she states that the admitting privileges granted to Dr. Doe 2 by Tulane "are sufficient to comply with the Act." (JX 191 at 3668; *see also* Doc. 196 at 20; Doc. 200 at 48.)

231. Plaintiffs argue:

> Although Secretary Kliebert has taken the position that Dr. John Doe 2's privileges at Tulane satisfy Act 620, Dr. John Doe 2 has concerns that her position is inconsistent with the plain language of the Act, which requires that 'the physician is a member in good standing of the medical staff of a hospital . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient.' . . . Based on Tulane's letters, Dr. John Doe 2 cannot provide diagnostic and surgical services to patients admitted to Tulane as required by the plain language of the statute.

(Doc. 196 ¶ 47 at 20 (citing to Doc. 193 at 123; Doc. 191 at 38–40).)

232. Plaintiff further argues:

> Dr. John Doe 2 has concerns that the position Secretary Kliebert has taken regarding his privileges at Tulane during the course of this litigation may change at a later date. As a result, he will not risk his medical license by performing abortions in Metairie if Act 620 is allowed to take effect.

(*Id.* ¶ 48 at 20 (citing Doc. 191 at 38–40; JX 191).)

233. Defendant makes two counters:

> Plaintiffs' 'concerns' about the Defendant's determination that Dr. Doe 2's privileges at Tulane satisfy the Act are legally irrelevant, because Defendant is the state official charged with interpretation and enforcement of the Act. Furthermore, Plaintiffs' assertions regarding the nature of Dr. Doe 2's privileges at Tulane Medical Center are clearly wrong because they are contradicted by the overwhelming weight of the evidence.

(Doc. 201 ¶ 47 at 12.)

234. Defendant further argues:

> Plaintiffs' 'concerns' that the Defendant's determination that Dr. Doe 2's Tulane privileges satisfy the Act "may change at a later date" are legally irrelevant. Plaintiffs have produced no evidence indicating that any such "change" in position by Defendant with respect to Dr. Doe 2's Tulane privileges is likely to occur. The evidence therefore does not show that the Act or the Defendant pose any credible, concrete threat to Dr. Doe 2's ability to continue his practice at Causeway clinic. If Dr. Doe 2 voluntarily ceases to perform abortions at Causeway because of his fears that the Defendant (or some future Secretary) will change her position, that cessation would be attributable to Dr. Doe 2 alone and not to the Act itself.

(*Id.* ¶ 48 at 12.)

235. In light of Defendant's argument, so as to resolve this dispute and determine whether Doe 2 has "active admitting privileges" at Tulane, the Court must first determine whether it is bound by the interpretation given by Defendant and, if not, compare the privileges granted by Tulane with Act 620's definition of "active admitting privileges."

236. Whatever discretion the Secretary may have in a law's enforcement, no deference is owed to an opinion contrary to the law's unambiguous and plain meaning. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442, 189 L. Ed. 2d 372 (2014) (observing that "an agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole . . . does not merit deference" (alteration in original) (citations omitted) (internal quotation marks omitted)); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 131 S. Ct. 2254, 2260–61, 180 L. E.d 2d 96 (2011) (reaffirming the interpretive principle that only "[i]n the absence of any unambiguous statute or regulation" does a court turn to an agency's interpretation"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997) (emphasizing that a court's inquiry "must cease if the statutory language is unambiguous and the statutory scheme is

coherent and consistent" and explaining that"[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" (internal quotation marks omitted)). Quite simply, if the legislative intent is clear, as evidenced by the use of an unambiguous word, "that is the end of the matter; for the court, as well as the agency, must give effect to th[at] unambiguously expressed intent." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984) ("*Chevron*"); *see also Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1363 (5th Cir. 1993) (quoting *id.*).

237. If the relevant statute is ambiguous, however, at least some deference is owed. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S. Ct. 2688, 2699, 162 L. Ed. 2d 820 (2005). But such deference is only accorded if the statute is truly "ambiguous" regarding the precise "question at issue" and if the agency's interpretation is a "reasonable" and hence "permissible construction of the statute" at hand. *Orellana-Monson v. Holder*, 685 F.3d 511, 517 (5th Cir. 2012); *see also, e.g., Siew v. Holder*, 742 F.3d 603, 607 n.27 (5th Cir. 2014) (citing *id.*); *United States v. Baptiste*, 34 F. Supp. 3d 662, 670 (W.D. Tex. 2014) (same). Thus, even if the pertinent statute is ambiguous, an agency's interpretation may be denied "controlling weight" if "arbitrary, capricious, or manifestly contrary to the statute." *Rodriguez-Avalos v. Holder*, 788 F.3d 444, 449 (5th Cir. 2015) (quoting *Orellana-Monson*, 685 F.3d at 517).

238. Critically, as federal courts are bound to "interpret a state statute as that state's courts would construe it," *Newman*, 305 F.3d at 696, the same type of measured deference is afforded to agency interpretations by this state's courts. *Compare Silva-Trevino v. Holder*, 742 F.3d 197, 199–200 (5th Cir. 2014), *with Zeringue v. State Dep't of Public Safety*, 467 So. 2d 1358, 1361

(La. Ct. App. 1985). Like their federal counterparts, Louisiana state agencies are "entitled to deference regarding . . . interpretation and construction of the rules and regulations that . . . [they] promulgate[]." *Women's & Children's Hosp. v. State*, 2007 1157 (La. App. 1 Cir. 02/08/08); 984 So. 2d 760, 768–69; *see also Oakville Cmty. Action Grp. v. La. Dep't of Envtl. Quality*, 2005 1365 (La. App. 1 Cir. 5/5/06); 935 So. 2d 175, 186 (La. Ct. App. 2006) ("A state agency is charged with interpreting its own rules and regulations and great deference must be given to the agency's interpretation.")

239. However, as with *Chevron*, the statute itself must be ambiguous for such respect to be accorded. *Clark v. Bd. of Comm'rs*, 422 So. 2d 247, 251 (La. Ct. App. 1982) ("[A]lthough an agency's interpretation of a statute under which it operates is entitled to some deference, such deference is constrained by the court's obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history."); *cf. Comm-Care Corp. v. Bishop*, 96-1711 (La. 07/01/97); 696 So. 2d 969, 973 ("The meaning and intent of a law is to be determined by consideration of the law in its entirety and all other laws on the same subject matter, and a construction should be placed on the provision in question which is consistent with the express terms of the law and with the obvious intent of the lawmaker in enacting it.").

240. Moreover, again as with a federal statute, "agency[] interpretations" lose any persuasive value, forfeiting any right to judicial deference, if "arbitrary, capricious or manifestly contrary to its rules and regulation." *In re Recovery I*, 93-0441 (La. App. 1 Cir. 04/08/94); 635 So. 2d 690, 696; *see also, e.g., Doctors Hosp. of Augusta v. Dep't of Health & Hosps.*, 2013 1762 (La. App. 1 Cir. 09/17/14); 2014 La. App. Unpub. LEXIS 481, at *19–20, 2014 WL 4658202, at *7 (refusing to accord any deference to an interpretation by the same agency here, deeming it "an

abuse of discretion" that effectively rewrote the relevant statute); *Bowers v. Firefighters' Ret. Sys.*, 2008-1268 (La. 03/17/09); 6 So. 3d 173, 176 ("Under the arbitrary and capricious standard, an agency decision is entitled to deference in its interpretation of its own rules and regulations; however, ***it is not entitled to deference in its interpretation of statutes*** and judicial decisions." (emphasis added)).

241. The Court finds that Defendant's interpretation of Act 620 is contradicted by its plain language. Expressly and unambiguously, the statute defines "active admitting privileges" to include "the ability to admit a patient and to provide diagnostic and surgical services to such patient consistent with the requirements of Paragraph (A)(1) of this Subsection [requiring a physician performing abortions to be licensed and have completed or be enrolled in an OB/GYN or family residency program]." LA. R.S. § 40:1299.35.2A(2)(a).[48]

242. Because the validity of Defendant's interpretation arose during trial, the Court asked the following question to Marier, Defendant's expert witness, a physician who helped draft Act 620, (Doc. 193 at 94): "And I understood you to say that the doctor, in order to meet Act 620 would have to - - would not have to be able to perform all diagnostic and surgical services, but *would have to perform some diagnostic and surgical services*. Did I understand that correctly?" (Doc. 193 at 123 (emphasis added).) To this question, Marier answered: "Yes. Yes, Your Honor." (*Id.*)

243. Because Doe 2's privileges are limited to "admission of patients" with the obligation to refer his patient to a "Tulane staff Ob/Gyn" for surgery and other kinds of treatment as well as

[48] As already noted, *see supra* note 2, the text of Act 620 can be found in a joint exhibit. (JX 115.)

diagnostic services, this arrangement does not allow Doe 2 to perform any (let alone "some") diagnostic, surgical or other kinds of treatment himself. Regardless of that fact that Tulane has chosen to label him an "admitting physician," (JX 184), he cannot "provide diagnostic and surgical services," and Act 620 expressly defines "active admitting privileges" as encompassing the ability to do so, LA. R.S. § 40:1299.35.2A(2)(a). Hence, Doe 2's privileges do not and cannot meet the plain language of Act 620.

244. Here, as Defendant's own expert testified and as the statute's plain meaning makes clear, the Secretary's interpretation flies in the face of the law's basic text. The words are clear, their meaning patent, and, under these circumstances, the Defendant's interpretation is not entitled to deference. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803); *see, e.g.*, *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009-1916 (La. 05/11/10); 41 So. 3d 438, 449 ("Although courts may give due consideration to the administrative construction of a law, we are certainly not bound by them."); *Salazar-Regino v. Rominski*, 415 F.3d 436, 448 (5th Cir. 2005) (citing this maxim in the context of weighing the reasonableness of an agency's particular interpretation); *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 336 (6th Cir. 2014) (rejecting an agency interpretation as contrary to the statutory language as interpreted).

245. The Court also notes that the Defendant's interpretation allowing (and, in the case of Dr. Doe 2 and Tulane, requiring) the abortion provider to turn over the actual care of the patient to another doctor, flies in the face of one of Act 620's main purposes and purported medical benefits: "continuity of care," the ability of a the abortion provider to *treat* his patient in the

hospital if admission to the hospital is necessary. (*See, e.g.*, Doc. 193 at 21–23; Doc. 200 ¶¶ 91 at 98–101.)

246. While Defendant is correct that Secretary Kliebert is the person charged with enforcing this provision, it is also true that the Secretary of DHH often changes every few years.[49] (Doc. 191 at 198–99, 195–96.)

247. It is also true that the new Secretary may disagree with her predecessor and reverse course on her current interpretation of Act 620.[50]

248. The Court finds that Doe 2 has legitimate concerns about relying on the declaration of Defendant to practice as an abortion provider if Act 620 were to go into effect.

249. More importantly, the Court finds that Doe 2 does not have active admitting privileges within the meaning of Act 620 at a hospital within 30 miles of Causeway Clinic.

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[49] Indeed, in the wake of the recent gubernatorial election, Doctor Rebekah Gee has become DHH's new head.

[50] At the time, Kliebert did not even say she will bind herself to this interpretation during her time in office. While not directly relevant to this matter, the Court notes that in a recent case, this same agency has submitted multiple inconsistent declarations and abruptly changed legal positions without much explanation. *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 15-cv-00565-JWD-SCR, 2015 WL 6551836, at *8–9, *33, 2015 U.S. Dist. LEXIS 146988, at *27–29, *109–10 (M.D. La. Oct. 29, 2015). Though these inconsistencies do not appear in this case, this Court may take judicial notice of its own public docket. FED. R. EVID. 201; *see, e.g.*, *EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1049 (C.D. Cal. 2013); *Richardson v. Monaco (In re Summit Metals, Inc.)*, 477 B.R. 484, 488 n.1 (Bankr. D. Del. 2012); *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 8 (1st Cir. 1999).

C. Doe 3

250. Doe 3 currently has admitting privileges at the WKB and Christus, both of which are within 30 miles of Hope Clinic where he performs abortions. (Doc. 190 at 21–22, 120, 148–49; JX 188 ¶ 6; JX 116 ¶ 18.)

251. The Court finds that Doe 3 is a well qualified physician and a credible witness. (*See, e.g.*, JX 188 ¶ 1; Doc. 190 at 109–11.)

252. Doe 3's current privileges at Christus require him to admit approximately 50 patients per year. (Doc. 190 at 150–52; JX 59.)

253. Doe 3 has had admitting privileges at Christus since the 1990's and at WKB since late 1997 or early 1998. (Doc. 190 at 120–21.)

254. Doe 3 uses his admitting privileges primarily in connection with his busy obstetrics practice delivering babies and, to a lesser extent to his private practice in gynecology, not because of his work at Hope Clinic. (*Id.* at 124, 147; *see also* JX 188 ¶ 7.)

255. As a result of his fears of violence and harassment, Doe 3 has credibly testified that if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions. (Doc. 190 at 174–76; *see also, e.g.*, JX 188 ¶¶ 10–11.)

D. Doe 4

256. Doe 4 performs abortions only at Causeway in Metairie. (*See, e.g.*, JX 114 ¶ 1; Doc. 168-5 at 8.)

257. He does not currently have admitting privileges at a hospital within 30 miles of that clinic. (Doc. 191 at 18.)

258. Doe 4 testified by deposition, (Doc. 168-5), and so the Court did not have the opportunity to directly measure his demeanor. However, the Court finds that Doe 4 is a well qualified physician, (*See, e.g.*, JX 114 ¶ 1; Doc. 168-5 at 5–6, 9, 12), and that his testimony is credible and consistent with the other testifying doctors who perform abortions.

259. On August 6, 2014, Dr. John Doe 4 applied for admitting privileges at Ochsner-Kenner Medical Center ("Ochsner"). (JX 57 at 762–808; *see also* Doc. 168-5 at 16–17.)

260. Doe 4 chose to apply to Ochsner because he knew a physician there who agreed to provide coverage for him. (Doc. 168-5 at 17.) Ochsner was the only hospital where Doe 4 knew a physician who would cover for him and who met the hospital's criteria to be a covering physician. (*Id.* at 85, 109–10.)

261. Ochsner requested additional information, which Doe 4 provided, (JX 98 at 2118; Doc. 121 at 3–4; JX 60 at 824), but he has not received a response at this time. (Doc. 168-5 at 17.)

262. Doe 4 did not apply for admitting privileges at Touro Infirmary or LSU New Orleans because both hospitals required Doe 4 to find an OB/GYN to cover for him, which Doe 4 has been unable to do. (*Id.* at 23.)

263. The Court finds that, despite a good faith effort to gain admitting privileges at a hospital within 30 miles of where he performs abortions, and given the fact that it has been well over a year since he applied for privileges with no response, the Court finds that Doe 4's inability to meet the requirements of Act 620 is unrelated to his competence and his request for privileges has been de facto denied.

E. Doe 5

264. Doe 5 performs abortions at two facilities: Woman Health's in New Orleans and Delta in Baton Rouge. (*See, e.g.*, Doc. 168-6 at 4; JX 109 ¶ 7.)

265. Like Doe 4, Doe 5 testified by deposition, and this Court hence did not have the opportunity to directly measure his demeanor. However, in reviewing his deposition and related documentation, (*See, e.g.*, Doc. 168-6; JX 109), the Court finds the testimony to be credible and consistent with the other testifying doctors who perform abortions.

266. The Court finds that Doe 5 has active admitting privileges at Hospital C, a hospital within 30 miles of the Women's Clinic in New Orleans, but that he has been unable to get admitting privileges within 30 miles of Delta. (*See, e.g.*, JX 109 ¶ 32–5.)

267. On July 24, 2014, Doe 5 received admitting privileges at Hospital C, which is within 30 miles of Women's Clinic where he performs abortions. (Doc. 168-4 at 25–26; Doc. 168-6 at 11; JX 109 ¶ 34.)

268. The Parties have stipulated that Doe 5's privileges at Hospital C are "active admitting privileges" as defined in Act 620. (Doc. 176; Doc. 168-4 at 26; Doc. 168-6 at 11–13.)

269. Doe 5 does not currently have admitting privileges at a hospital within 30 miles of Delta in Baton Rouge. (*See, e.g.*, Doc. 168-6 at 22; JX 109 ¶ 23.)

270. Doe 5 has applied for admitting privileges at three hospitals in the Baton Rouge area: Woman's Hospital in April or May of 2014 and Lane Regional Medical Center and Baton Rouge General Medical Center in July of 2014. (Doc. 168-6 at 11; JX 109 ¶¶ 32–33.)

271. Doe 5 has been unable to find a local physician who is willing to provide coverage for him when he is not in Baton Rouge, which all three hospitals require. (JX 109 ¶¶ 32–33; Doc. 51; Doc. 168-6 at 11–12.)

272. The Court finds that Doe 5, despite good faith efforts to meet the requirements of Act 620, has been unable to do so in the Baton Rouge area for a period of well over a year for reasons unrelated to his competence. Under these circumstances, while his applications have not been finally acted upon and are therefore technically "pending," the Court finds that they have been de facto denied.

F. Doe 6

273. Doe 6 is a Board Certified OB/GYN with 48 years of experience who is the Medical Director of Woman's Clinic in New Orleans and Delta Clinic in Baton Rouge. (JX 168 ¶ 1; *see also* JX 109 ¶ 8.)

274. Doe 6 provided his testimony by declaration, (JX 168), and so the Court did not have the opportunity to directly measure his demeanor. However, in reviewing his Declaration, the Court finds the testimony to be credible and consistent with the other testifying doctors who perform abortions in Louisiana.

275. While Doe 6 is Medical Director at both Women's and Delta, "[d]ue to [his] age and the demands of traveling back and forth between New Orleans and Baton Rouge, along with [his] private gynecology practice in New Orleans, [he is] no longer able to provide abortion[s] in Baton Rouge." (JX 168 ¶ 3; *see also* JX 109 ¶ 8.)

276. As a result, Doe 6 ceased performing abortions at Delta in Baton Rouge in April of 2012, leaving only Doe 5 performing abortions at that facility. (JX 168 ¶ 3; *see also* JX 109 ¶ 9.)

277. Doe 6 does not currently have admitting privileges at a hospital within 30 miles of Women's Clinic or Delta Clinic. (JX 168 ¶¶ 15, 21.)

278. From approximately 1973 to 2005, when he had an OB/GYN practice, Doe 6 had admitting privileges at various hospitals in New Orleans. (*Id.* ¶ 13.) As his private practice became solely a gynecology practice, and due to the low rate of abortion complications, he was unable to meet the hospitals' requirements to admit a minimum number of patients each year. (*Id.*) Doe 6 also did not need admitting privileges because he was not admitting patients to the hospital. (*Id.*) Consequently, when his admitting privileges expired, he did not apply to renew them. (*Id.*)

279. Doe 6 contacted Tulane about the possibility of obtaining admitting privileges and was told not to bother applying because he would not be granted privileges, as he had not had admitting privileges at any hospital since 2005. (JX 168 ¶ 12.)[51] Defendant argues that this testimony is inconsistent with that of Doe 2, who was able to get courtesy privileges at Tulane. (Doc. 201 at 14.) Especially given Doe 6's age and other differences in the professional circumstances of these two doctors, (*Compare* JX ¶ 8, *and* JX 168 ¶ 13, *with* Doc. 191 at 14–16, 22–23), this assertion is not supported and unpersuasive. In addition, Doe 6's limited privileges, like Doe 2's, do not meet the requirements of Act 620, read and construed as enacted. (*See supra* Part VIII.)

[51] While Defendant argues that this testimony is hearsay, (Doc. 201 at 14), Defendant did not make this objection prior to or at trial. Even if the objection would have been made, it would have been overruled for the same reasons as her other similar objections. *See supra* note 30.

280. Prior to September 1, 2014, Doe 6 applied for admitting privileges at East Jefferson Hospital in New Orleans, which is within 30 miles of Women's Clinic. (JX 109 ¶¶ 31–33; JX 168 ¶ 15.) On September 17, 2014, East Jefferson requested additional information, which he then provided. (Doc. 51 at 2.) Since that time, no action has been taken. (*Id.*; *see also, e.g.*, JX 168 ¶ 15.) That application, now pending for over a year, is considered by the Court to have been de facto denied.

281. Doe 6 testified that he did not apply to other hospitals within 30 miles of Women's Clinic because, due to the nature of his practice as an abortion provider, he did not admit a sufficient number of patients to receive active admitting privileges. (JX 168 ¶ 11.)

G. Post-Hearing Updates

282. On September 17, 2015, the Court requested that Plaintiffs update the Court on or before September 24, 2015, on the status of the admitting privileges of the doctors and, if there were any changes, to provide the details of same. (Doc. 206.)

283. By letter of September 25, 2015, the Plaintiffs informed the Court and Defendants that, after making inquiries, they were unaware of any material changes in the status of the applications of Does 1–6. (Doc. 209.)

284. At a telephone status conference of September 28, 2015, this letter was received into evidence without objection as JX 193. (Doc. 210.)

IX. Effects of Act 620

A. The Effect of Act 620 on Does 1-6

285. The number and location of doctors and clinics providing abortions varies widely from state to state. The effect of an admitting privileges requirement on those providers and the concomitant effect on women's right to an abortion has also varied state to state.[52]

286. Before the passage of Act 620, doctors performing abortions in Louisiana were not required to and, for their practices, did not need to have admitting privileges at any hospital, let alone a nearby hospital, in order to safely provide services for their patients. (Doc. 190 at 25, 36–37, 39, 127, 197–98; Doc. 191 at 46; Doc. 195 at 32; JX 135 at 2804; JX 110 ¶ 7; JX 168 ¶ 8.)

287. As summarized above, at the time Act 620 was passed, only one of the six doctors performing abortions, Doe 3, had admitting privileges at a hospital and he maintained these admitting privileges for years in order to facilitate his general OB/GYN practice which was and is unrelated to that portion of his practice performing abortions at Hope.

288. Since the passage of Act 620, all five remaining doctors have attempted in good faith to comply with Act 620. All five have attempted to get admitting privileges at a hospital within 30 miles of where they perform abortions. All five have made formal applications to at least one nearby hospital and three of the five doctors have filed applications at multiple hospitals within thirty miles.

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[52] *Compare, e.g., Jackson Women's Health v. Currier*, 760 F.3d 448 (5th Cir. 2014) ("*Currier*") (where the admitting privileges statute was found to place an undue burden on the constitutionally protected right to an abortion), *petition for cert. filed*, No. 14-997 (filed February 19, 2015), *with Cole*, 790 F.3d at 563 (where, at least as to the facial challenge, the plaintiffs were found to have failed to establish a constitutional violation).

289. Two of the doctors, Does 2 and 5, perform abortions in two separate cities and thus, each had to apply at hospitals in two different locales.

290. Based on a careful review of the evidence, the Court finds that, notwithstanding the good faith efforts of Does 1, 2, 4, 5 and 6 to comply with the Act by getting active admitting privileges at a hospital within 30 miles of where they perform abortions, they have had very limited success for reasons related to Act 620 and not related to their competence.

291. The five doctors have filed thirteen separate formal applications at nearby hospitals. In only one of those cases–Doe 5 at Hospital C[53]–were active admitting privileges granted. In another case, that of Doe 2 at Tulane, he was given admitting privileges that do not comport with the plain language of Act 620.

292. Of the thirteen formal applications filed, only one has been frankly denied, the application of Doe 1 at Minden.

293. The remaining ten applications have never been finally acted upon because the doctor applying, given the nature of his practice as an abortion provider, either cannot provide the information required or the information has been provided and the application remains in limbo for undisclosed reasons. In almost every instance, more than a year has passed since the original applications were filed.[54]

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[53] It is noteworthy that Hospital C, a hospital in a major metropolitan area and not a party to this action, is so concerned about the ramifications of having its identity publically revealed, that it requested that it be named only through a pseudonym and, with the consent of all the Parties, this was allowed. *See supra* Part V.E.

[54] As of September 25, 2015, the status of "pending" applications is unchanged. (Doc. 209.)

294. Defendant argues that where these applications are "pending," the applications have not been denied and therefore Plaintiffs have failed to prove that Act 620 has caused the failure of these doctors to get admitting privileges.

295. The Court disagrees. Because Louisiana has no statutorily prescribed time limit within which a hospital must act on a physician's application, *see supra* Part V.D, a hospital can effectively deny the application by simply not acting upon it. Given the length of time involved in these applications, the Court finds that this is precisely what has occurred here.

296. Doe 3 has been threatened as a result of his work at Hope Clinic. (*See, e.g.*, JX 113 ¶ 3.) Last year, anti-abortion activists from outside Louisiana left fliers on neighbors' mailboxes calling him an abortionist and saying they wanted to convert him to Jesus. (Doc. 190 at 108–09; *see also* JX 113 ¶ 3.)

297. These individuals also approached Doe 3's regular medical practice patients as they tried to enter his office, requiring the building security officers to escort the activists off the premises. (Doc. 190 at 109; *see also* JX 113 ¶ 3.) These individuals told Doe 3's patients that he killed babies and that they should not see him. (Doc. 190 at 109.)

298. Doe 3, the only abortion doctor who had privileges at the time Act 620 was passed, (*See, e.g.*, JX 116 ¶ 18), fears that, if the other Louisiana abortion providers are not able to obtain admitting privileges, he will become an even greater target for anti-abortion violence. (*See, e.g.*, JX 113 ¶¶ 3–7.) He specifically testified that "all [these individuals] have to do is eliminate [him] as they have Dr. Tiller and some of the other abortion providers around the country" to eliminate abortion entirely in Northern Louisiana. (Doc. 190 at 174–75.)

299. Doe 3 is also concerned that such individuals could "cause a lot of other . . . problems that would affect [his] ability to perform the rest of [his] practice." (*Id.* at 174–75; *cf.* JX 113 ¶ 8.)

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

301. Dr. Doe 3 testified that, as a result of his fears, and the demands of his private OB/GYN practice, if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions. (*Id.* at 174–76; *see also* JX 116 ¶ 19.) The Court finds his testimony credible and supported by the weight of other evidence in the record.[55]

302. To summarize,

- If Act 620 takes effect, Doe 1 will no longer be allowed to provide abortions in Louisiana because he does not have admitting privileges pursuant to the Act within 30 miles of Hope.
- If Act 620 takes effect, Doe 2 will no longer be allowed to provide abortions in Louisiana, because he does not have active admitting privileges pursuant to the Act within 30 miles of Bossier. His privileges at Tulane are limited such that they do not comply with Act 620 so that he does not have active admitting privileges within 30 miles of Causeway Clinic.

[55] The issue of whether this fact is legally relevant to the undue burden analysis is discussed in this Ruling's Conclusions of Law. *See infra* Parts XI–XII.

- If Act 620 takes effect, Doe 3, who does have admitting privileges pursuant to the Act within 30 miles of Hope, will no longer provide abortions in Louisiana because of well-founded concern for his personal safety.[56]
- If Act 620 takes effect, Doe 4 will no longer be allowed to provide abortions in Louisiana because he does not have admitting privileges pursuant to the Act within 30 miles of Causeway.
- If Act 620 takes effect, Doe 5 will be able to provide abortions at Women's Clinic, in New Orleans, where he has admitting privileges pursuant to the Act but, in all likelihood, Doe 5 will be the only physician available to provide abortion care in all of Louisiana.
- However, Doe 5 will not be able to provide abortions at Delta in Baton Rouge because he does not have admitting privileges pursuant to the Act within 30 miles of Delta and, despite good faith efforts to get same, has been unable to do so.
- If Act 620 takes effect, Doe 6 will no longer be allowed to provide abortions in Louisiana because he does not have admitting privileges pursuant to the Act within 30 miles of Women's Clinic.

303. The Court finds that the inability of Does 1, 4 and 6 to get active admitting privileges at any hospital is directly related to the requirements of Act 620 as they apply in concert with existing Louisiana law and the Louisiana rules and practices for getting admitting privileges.

304. The Court finds that the inability of Doe 2 to get active admitting privileges within 30 miles of Bossier and only limited privileges (not "active admitting privileges") within 30 miles

[56] *Id.*

of Causeway as well as Doe 5's inability to get active admitting privileges within 30 miles of the Delta are also directly attributable to the requirements of Act 620 as they apply in concert with the rules and practices for getting admitting privileges in Louisiana.

B. The Effect of Act 620 on the Clinics and Women of Louisiana

305. If Act 620 were to be enforced, four of the six doctors–Doe 1, 2, 4, and 6–would not meet the requirements of Act 620. If Doe 3 quits the abortion practice, as he has testified he will, Louisiana would be left with one provider and one clinic. As is analyzed in more detail below, this would result in a substantial number of Louisiana women being denied access to an abortion in this state.[57]

306. If Act 620 were to be enforced, four of the five clinics–Hope, Bossier, Delta, and Causeway– would have no abortion provider, with the one remaining clinic (Woman's) without one of the two doctors that normally serves its patients.

307. Women's Clinic would have only Doe 5 to handle not only all patients at that facility but the patients at the other four. According to Cochran, the Administrator at Women's Health, Doe 6 provided 60% of the abortion services at this center. As she testified, "[e]ven if Dr. Doe 5 were to commit all of his time to serving patients at Women's Clinic, I do not see how we could serve all of the patients who [would] be coming to our doors once Delta Clinic closes . . . ." (JX 109 ¶ 37.)

[57] The question of whether this substantial number translates into a "large fraction" for purpose of the undue burden analysis is discussed later in this Ruling. *See infra* Parts XI–XII.

308. Furthermore, since Women's Health would be the only clinic to serve all the women of Louisiana, it clearly could not perform that task as a logistical matter. Doe 5 performed a total approximately 2,950 abortions in the year 2013 at Delta and Women's. (JX 110 ¶ 7.) Given the 9,976 abortions performed in Louisiana in that same year,[58] and putting aside the issue of the distance which would need to be traveled by women in north Louisiana, approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana.

309. Given that the total number of women of reproductive age in Louisiana is 938,719 according to Defendant expert mathematician and statistician, Solanky, (DX 148; DX 151; Doc. 193 at 138–39),[59] this would mean that over 99% of women of reproductive age in Louisiana, regardless of location or distance to the physician, would be without any physician within the actual borders of this state to perform an abortion.

310. Even if one were to conclude that Doe 3 will not quit or that his quitting is legally irrelevant, Act 620's will nonetheless result in the inability of a substantial number of Louisiana to obtain an abortion in this state. Just the loss of Doe 1 on Hope would be, according to Pittman, Hope's administrator, "devastating" to its operations and viability. (Doc 190 at 29.)

311. Doe 3 sees about 20 to 30 abortion patients per week, or roughly 1,000 to 1,500 per year. (*Id.* at 118.) This would leave roughly 5,500 Louisiana women seeking an abortion (or 55%) without the ability to get one. When one uses women of reproductive age as the denominator, the percentage of Louisiana women unable to get an abortion is still over 99%.

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[58] This data is taken from the affidavit of Defendant's expert, Solanky, who, in turn, took it from DHH's website. (DX 148 at 5.)

[59] This represents Louisiana women between the ages of 15 and 44. (DX 148 at 28–29.)

312. Even if one additionally assumes that Defendant's interpretation of Doe 2's privileges at Tulane is correct, so that he meets the requirements of Act 620 at Tulane, the Act's negative impact upon a woman's right to abortion in Louisiana would still be significant. Doe 2 performed a total of approximately 1,000 abortions last year at the two clinics where he worked. (Doc. 191 at 17–18.) Thus, if you combine his procedures with those of Does 3 and 5, there would still be some 4,500 women seeking an abortion (or about 45% of women seeking an abortion in a given year) who would otherwise be able to get abortion and who could not do so upon Act 620's enforcement. Utilizing the women of reproductive age as the denominator, that percentage would rise to over 99%.

313. Even if Doe 3 continued to practice and Doe 2's limited privileges at Tulane met the requirements of Act 620, two of Louisiana's five abortion clinics–Bossier and Delta–would be without an abortion provider.

314. The remaining three–Hope, Causeway and Woman's–would each be without one of the two providers who normally perform abortions, an insufficient number to service the patients in the region, let alone the number of patients who might come from other parts of the state because of similar insufficient capacity.

315. Analyzed regionally, if Act 620 were to be enforced, the Baton Rouge and Shreveport areas would have no facility, and the New Orleans area would have only one provider, rather than the two who currently work there. If, as Defendant argues, Doe 3's quitting is legally irrelevant and the Defendant's interpretation of Doe 2's privileges at Tulane is correct, Baton Rouge would be left with no facility, Shreveport with one (Hope) and New Orleans with two

(Causeway and Woman's). But each remaining facility would have only half the previous number of providers.

316. Abortion clinics in Louisiana routinely make efforts to recruit doctors to work at the clinics, such as placing advertisements throughout the state and working with reproductive health specialists to identify potential candidates. (Doc. 190 at 22, 24–25, 33, 87; Doc. 168-8 at 7–8.)

317. The anticipated admitting privileges requirement of Act 620 has made it difficult to recruit new doctors. (Doc. 190 at 24.) In Pittman's words, "It definitely has." (*Id.*)

318. For example, Hope recently identified an interested doctor, but this potential physician ultimately proved to be an unviable candidate as a result of Act 620's admitting privileges requirement. (*Id.* at 24–25.)

319. In addition, doctors who appear to be good candidates consistently express reluctance to be hired in Louisiana because of the numerous restrictions placed on abortion providers by Louisiana's existing laws and regulations. (*See id.* at 22–25.)

320. For the same reasons that Does 1, 2, 4, 5, and 6 have had difficulties getting active admitting privileges, reasons unrelated to their competence, the Court finds that it is unlikely that the effected clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges. A significant contributing factor to that inability is Act 620 and the difficulties it creates for a doctor with an abortion practice gaining active admitting privileges in the context of Louisiana's admitting privileges rules and practices.[60]

[60] While there was credible testimony that the hostile environment against abortion providers in Louisiana and nationally is another factor making recruiting difficult, (Doc. 190 at 22–25; JX 110 ¶¶ 16, 23 n.1; JX 109 ¶ 14), the Court did not consider this factor as being legally relevant under Firth Circuit jurisprudence. *See infra* Parts XI–XII.

321. The Court finds that the enforcement of Act 620 and the concomitant effect on restricted access to abortion doctors and clinics would result in delays in care, causing a higher risk of complications, as well as a likely increase in self-performed, unlicensed and unsafe abortions. (*See, e.g.*, *id.* at 222–24; Doc. 191 at 157–62.)

CONCLUSIONS OF LAW

X. Summary of Legal Arguments

322. Plaintiffs challenge Act 620 as unconstitutional on three broad grounds. First, under the rational review prong of the *Casey* test, Act 620 does not serve a legitimate state interest. (Doc. 102 at 5–7; Doc. 196 ¶¶ 322–34). Second, the effect of Act 620 is to place an undue burden on the right of Louisiana women to have an abortion. (Doc. 102 at 7–16; Doc. 196 ¶¶ 297–307). And third, the purpose of Act 620 is to create a substantial obstacle to a Louisiana woman's right to an abortion. (Doc. 102 at 16–19; Doc. 196 ¶¶ 308–21).

323. In her Partial MSJ, (Doc. 87), Motion for Reconsideration, (Doc. 144), and post-trial briefs, (Docs. 200–01), Defendant argues that three issues should be eliminated as a matter of law: (1) whether Act 620 serves a legitimate state interest under the *Casey* rational review test; (2) whether Act 620 imposes a medically unreasonable requirement; and (3) whether Act 620 has the improper purpose of placing an undue burden on abortion access in Louisiana.

324. The essence of Defendant's argument is that all three issues were decided as a matter of law in five recent Fifth Circuit decisions which are binding on this Court and require the granting of Defendant's motion for partial summary judgment. These decisions include: *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013)

("*Abbott I*"); *Abbott II*, 748 F.3d 583; *Currier*, 760 F.3d 448; *Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014) ("*Lakey*"), *vacated in part*, 135 S. Ct. 399, 190 L. Ed. 2d 247(2014); and *Cole*, 790 F.3d 563. Further, in the alternative, Defendant argues that Plaintiffs failed on the merits to offer admissible and relevant evidence in support of their position that Act 620 has an improper purpose.

325. In addition, Defendant argues that the above cited cases set the legal standard for determining whether and to what extent Plaintiffs have shown that an undue burden exists and, as that standard is properly applied in this case, Plaintiffs have failed to meet their burden of showing either improper purpose or undue burden.

326. The essence of Plaintiffs' response is that: (1) *Currier*, *Abbott I* and *II*, *Lakey*, and *Cole* do not bind this Court on rational review because that analysis is fact-specific and must be evaluated in the context of this specific statute as applied in this specific state; (2) that the medical need and reasonableness of Act 620 are relevant to the issue of the statute's alleged undue burden; and (3) that medical need and reasonableness of Act 620 are relevant to the statute's purpose, an issue related to but separate from rational basis or the statute's effect, and one not addressed in these Fifth Circuit cases or at least not addressed in the context of the specific facts of this case.

327. Both sides agree that the question of whether the effect of Act 620 is to create an undue burden was properly ripe for the preliminary injunction hearing. Plaintiffs argue that, under the proper standard, Plaintiffs have shown both improper purpose and undue burden. Defendant argues they have proven neither.

XI. Test for Determining the Constitutionality of Act 620

328. "[F]or more than 40 years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion." *Currier*, 760 F.3d at 453 (citing *Roe*, 410 U.S. 113).

329. The test to be applied in this circuit to determine the constitutionality of a law which arguably restricts a woman's right to an abortion is set out in five recent cases: *Currier*, *Abbott I*, *Abbott II*, *Lakey* and *Cole*. All five cases dealt, in part, with an admitting privileges requirement very similar to Act 620 as written and enacted. *Compare* LA. R.S. § 40:1299.35.2, *with, e.g.*, H.B. 2, 83d Legis., 2d Spec. Sess. (Tex. 2013); H.B. 1390, 2012 Legis., Reg. Sess. (Miss. 2012).

330. In order to be deemed unconstitutional, a statute restricting a woman's right to abortion must fail at least one of two different tests: the "rational basis" test or the "undue burden" test. *Currier*, 760 F.3d at 453 ("In addition to creating no undue burden, an abortion restriction must pass a rational basis test." (relying in part on *Gonzales v. Carhart*, 550 U.S. 124, 158, 127 S. Ct. 1610, 1633, 167 L. Ed. 2d 480 (2007) ("*Carhart*")); *see also Cole*, 790 F.3d at 576, 576 (citing the "trio of widely-known Supreme Court decisions [which] provide[] the framework for ruling on the constitutionality" of an abortion law–*Roe*, *Casey*, and *Gonzalez*–and distinguishing between the rational basis and undue burden tests).

331. In making this dual analysis, the Court must use a "two-step approach," first making a rational basis inquiry followed by an analysis of whether the statute creates at undue burden. *Lakey*, 769 F.3d at 293, 297.

A. Rational Basis Review

332. "The first-step of the analysis of an abortion regulation . . . is rational basis review, not *empirical* basis review." *Abbott II*, 748 F.3d at 596 (emphasis in original) (citing *Carhart*, 550 U.S. at 158).[61]

333. A statute passes the rational basis test if it "is rationally related to a legitimate state interest [and, in deciding if it is], we do not second guess the legislature regarding the law's wisdom or effectiveness." *Lakey*, 769 F.3d at 294 (citing *Abbott II*, 748 F.3d at 594).

334. Crucially, while the Parties introduced a great deal of evidence on the effects of Act 620, that evidence is not relevant in the rational basis review. "[T]here is 'never a role for evidentiary proceedings' under rational basis review." *Abbott II*, 748 F.3d 596 (quoting *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995)). "[L]egislative choice is not subject to courtroom fact-finding." *Id*. at 594 (quoting *F.C.C. v. Beach Commnc'ns, Inc*., 508 U.S. 307, 315, 113 S. Ct. 2096, 2102, 124 L. Ed. 2d 211, (1993) (citing cases)). In applying this part of the test, a district court is not to relitigate the facts that led to the passage of the law. *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 2462, 125 L. Ed. 2d 257 (1993)).[62]

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[61] In *Currier*, the Fifth Circuit acknowledged that there is disagreement as to whether the rational review test is independent from and precedes the undue burden test but found it unnecessary to resolve the dispute. 760 F.3d at 454. *Lakey*, however, clearly reaffirmed *Abbott II* in what it calls the Fifth Circuit's "two-step approach: first determining whether the law at issue satisfies rational basis, then whether it places a substantial obstacle in the path of a large fraction of women seeking abortions." *Lakey*, 769 F.3d at 297 (citing *Abbott II*, 748 F.3d at 593, 597).

[62] It is interesting, however, that the Fifth Circuit did discuss testimony and other evidence introduced at the trial in connection with its conclusion that the law passed rational review by serving a medical purpose and that the thirty mile geographic restriction requirement also passed rational review. *Abbott II*, 748 F.3d at 595 ("There is sufficient evidence here that

335. Rather, "the rational basis test seeks only to determine whether there is any conceivable basis for the enactment." *Id.* (citing *Beach Commc'ns*, 508 U.S. at 313). "A law 'based on *rational speculation* unsupported by evidence or empirical data' satisfies rational basis review." *Id.* (emphasis added) (quoting *Beach Commc'ns*, 508 U.S. at 315).

B. Undue Burden Test - Generally

336. Even if the law regulating abortion has a rational basis, it can still be unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877; *see also, e.g.*, *Lakey*, 769 F.3d at 294; *Cole*, 790 F.3d at 572, 576.

337. Whether the law's "purpose" is to create an undue burden, or its "effect" does so unintentionally, are two different inquiries and are to be considered separately. *See Lakey*, 769 F.3d at 294 (emphasizing that this inquiry looks to whether the provision has " either 'the *purpose or effect*' of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (emphasis in original)); *cf. Jane L. v. Bangerter*, 102 F.3d 1112, 116 n.5 (10th Cir. 1996) (commenting that "[n]either the district court nor the [s]tate has focused on the fact that under *Casey*, a law is invalid if either its purpose or effect is to place a substantial obstacle in the path of a woman seeking to abort a nonviable fetus").

338. Unlike the rational basis test, proof is not only allowed, but is required, in order to satisfy the two prongs of the undue burden test. *Lakey*, 769 F.3d at 294–95 (reversing the district

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the geographic restriction has a rational basis."); *see also Cole*, 790 F.3d at 584 (in which the Fifth Circuit noted that Texas supported the rational basis of Texas H.B. 2 with evidence at trial).

court's finding that the admitting privilege requirement had an improper purpose because the court "cited no record *evidence* to support its determination that [this] provision was enacted for the purpose of imposing an undue burden on women seeking abortions, nor did it make any *factual finding* regarding an improper purpose" (emphasis added)); *Abbott II*, 748 F.3d at 597 ("[P]laintiffs offered no *evidence* implying that the State enacted the admitting privileges provision in order to limit abortions . . . ." (emphasis added)); *Cole*, 790 F.3d at 585 ("Plaintiffs bore the burden of proving . . . an improper purpose . . . [and] failed to proffer competent *evidence* contradicting the legislature's statement of a legitimate purpose." (emphasis added) (citation omitted)).

339. Therefore, two issues central to the undue burden test are (1) what *kind* of evidence is admissible to satisfy the purpose and effect prongs and (2) by what standard is this evidence to be measured in determining if the plaintiffs have met their burden?

340. As a threshold matter, the Court observes that the answer to these two questions is dramatically different depending on the circuit in which the issue is considered. In utilizing this measure, some require the regulation to be examined in a "real-world context." *Planned Parenthood Se., Inc. v. Strange* , 33 F. Supp. 3d 1330, 1337 (M.D. Ala. 2014) ("*Strange*"); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 963 & n.14 (W.D. Wis. 2015) ("*Van Hollen*") (specifically rejecting the conclusion that the Fifth Circuit's reasoning in *Abbott II* is consistent with *Casey* and emphasizing that the Seventh Circuit, as well as the Ninth, favor "balancing of benefits and burdens"), *aff'd*, 806 F.3d 908 (7th Cir. 2015). As explained by one court, this kind of "careful, fact-specific analysis" focuses on "how the restrictions would impede women's ability to have an abortion, in light of the circumstances in their lives." *Strange*,

33 F. Supp. 3d at 1338 (quoting the earlier *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1285 (M.D. Ala. 2014)); *see also, e.g.*, *Planned Parenthood of Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W. 2d 252, 268–69 (Iowa 2015) (holding undue burden test must be "context-specific"); *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014) (criticizing the Fifth and Sixth Circuit approaches for not being context-specific).

341. Under this approach, "real-world" factors must be considered by the court, including the role of poverty in creating increased obstacles for poor women who seek abortions, and the negative effects of violence against abortion providers on the granting of admitting privileges and recruiting of doctors. *See, e.g., Strange*, 33 F. Supp. 3d at 1351–53, 1356–58; *Van Hollen*, 94 F. Supp. 3d at 965, 976.

342. Under the Fifth Circuit approach, however, poverty related issues, e.g. increased challenges for poor women to get an abortion far from their home caused by lack of availability of child care, unreliability of transportation, unavailability of time off from work, etc., cannot be considered in the undue burden analysis because these issues were not caused by or related to the admitting privileges requirement. *See Cole*, 790 F.3d at 589.

343. Similarly, the Fifth Circuit has found "fear [of] anti-abortion violence" to be unrelated to the abortion regulation at issue; such fears are therefore legally irrelevant. *Abbott II*, 748 F.3d at 599.

344. This Court, therefore, has not considered the evidence presented on these "real world" issues in reaching its decision.

345. A second major difference in the approach taken by the circuits in applying the undue burden test is the standard by which the evidence is measured. The Seventh and Ninth Circuits as

well as a district court in the Eleventh Circuit have applied a test whereby "the extent of the burden a law imposes on a woman's right to abortion" must be compared to and weighed against "the strength of the state's justification for the law." *Humble*, 753 F.3d at 912; *see also, e.g.*, *Planned Parenthood of Wisconsin, Inc.*, 738 F.3d at 798; *Iowa Bd. of Med.*, 865 N.W.2d at 264; *Strange*, 33 F. Supp. 3d at 1337.

346. The Fifth Circuit has specifically rejected this balancing or weighing test: "[O]ur circuit does not incorporate a balancing analysis into the undue burden analysis." *Lakey*, 769 F.3d at 305; *accord, e.g.*, *Abbott II*, 748 F.3d at 593–94; *Cole*, 790 F.3d at 587 n. 33; *see also, e.g.*, *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 513 (6th Cir. 2012) (Moore, J., dissenting in part) (noting that "a 'substantial obstacle' has never been defined as a total obstacle" and that "in evaluating the impact of restrictions, rarely do courts rely exclusively on percentages"); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170 (4th Cir. 2000) ("In making this undue-burden assessment, the Supreme Court has repeatedly emphasized that the focus must be aimed more directly at the ability to make a decision to have an abortion as distinct from the financial cost of procuring an abortion." (emphasis in original)).

347. Rather, the Fifth Circuit has adopted another test which is detailed below. This Court has used the Fifth Circuit test in reaching its decision.

C. Undue Burden - Purpose Prong

348. *Casey* suggests that one challenging the statute's purpose must show that the statute "serve[s] no purpose other than to make abortions more difficult." 505 U.S. at 901; *accord Cole*, 790 F.3d at 585–86; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865,

1866–67, 138 L. Ed. 2d 162 (1997) (per curium) (stressing that "[w]e do not assume unconstitutional legislative intent even when statutes produce harmful results" and faulting plaintiff for not offering at least "*some* evidence of that improper purpose" (emphasis in original)).

349. While Defendant argues that evidence of the purpose prong should be limited to the statute's text and official legislative history, (Doc. 87-1 at 18–22), the Court disagrees. In *Okpalobi v. Foster*, the Fifth Circuit found that a district court is "not to accept the government's proffered purpose if it is a mere 'sham.'" 190 F.3d 337, 354–56 (5th Cir. 1999) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586–87, 107 S. Ct. 2573, 2579, 96 L. Ed. 2d 510 (1987) (specifying the requirements for a law's analysis under the Constitution's Establishment Clause)), *superceded on other grounds*, 244 F.3d 405 (5th Cir. 2001); *see also, e.g., Croft v. Perry*, 624 F.3d 157, 166 (5th Cir. 2010) ("[W]e do review to ensure that the alleged secular purpose is the actual purpose[.]"); *cf. Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 841 (10th Cir. 2014) ("[T]he Supreme Court has considered legislative motive or purpose in assessing whether a statute is valid under the Establishment Clause and the Equal Protection Clause."). As stated by the Supreme Court in its most recent abortion case, a court should not "place dispositive weight on [legislative] factual findings . . . where constitutional rights are at stake." *Carhart*, 550 U.S. at 165; *see also Latta v. Otter*, 771 F.3d 456, 469 (9th Cir. 2014) ("Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court."), *cert. denied*, 135 S. Ct. 2931 (2015). Instead, all federal courts "retain[] an independent constitutional duty to review . . . [those] findings, (*Id.*), for "the judicial

power of the United States," a power wielded by all Article III judges, "necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function," *Crowell v. Benson*, 285 U.S. 22, 60, 52 S. Ct. 285, 296, 76 L. Ed 598 (1932), *cited in Carhart*, 550 U.S. at 165. As such, "[u]ncritical deference to . . . [a legislature's] factual findings in these cases is inappropriate." 550 U.S. at 166; *see also Bowen v. Kendrick*, 487 U.S. 589, 601, 108 S. Ct. 2562, 2570, 101 L. Ed. 2d 520 (1988) (commenting that "in the course of determining the constitutionality of a statute, referred not only to the language of the statute but also to the manner in which it had been administered in practice"); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 332 (6th Cir. 2007) (citing *Carhart*, 550 U.S. at 166).

350. Therefore, in searching for a law's purpose as a part of the undue burden analysis, a court can look to "various types of evidence, including the language of the challenged act, its legislative history, and the social and historical context of the legislation or other legislation concerning the same subject matter as the challenged measure." *Okpalobi*, 190 F.3d at 354–56; *see also, e.g.*, Roy G. Speece, Jr., *The Purpose Prong of Casey's Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its Progeny*, 33 WHITTIER L. REV. 77, 99 (2011) (where, reviewing *Okpalobi* and other cases, the author lists a "broad array of factors" considered by courts to determine purpose, including "a bill's social and historical context").

351. However, the Fifth Circuit in *Cole* ruled that evidence that the statute has no health benefits does not prove that the statute "must have had an invalid purpose." 790 F.3d at 585 (quoting *Mazurek*, 520 U.S. at 973). Furthermore, evidence that shows "medical and scientific

uncertainty" about the statute's health benefits, "does not lead to the conclusion that a law is unconstitutional." *Id.* (citing *Carhart*, 550 U.S. at 163).

352. Under the Fifth Circuit standard, an abortion regulation satisfies the purpose prong unless the regulation serves "no purpose other than to make abortions more difficult." *Id.* at 586 (quoting *Casey*, 505 U.S. at 901); *see also, e.g.*, *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 607 (6th Cir. 2006) (quoting this same language from *Casey*).

D. Undue Burden - Effect Prong

353. In order for the plaintiffs to prevail under Fifth Circuit jurisprudence, they must prove, "at a minimum," that a "***large fraction***" of women of reproductive age in Louisiana have a substantial obstacle to an abortion placed in their paths as a result of the challenged law. *Cole*, 790 F.3d at 586, 588–89 (emphasis added) (relying on *Lakey*, 769 F.3d at 296, and *Abbott II*, 748 F.3d at 600); *see also, e.g.*, *Gonzales*, 550 U.S. at 167–68; *Casey*, 505 U.S. at 895.

354. This test begs two critical questions: what is a "large fraction"? And what is a "substantial obstacle"?

355. The Fifth Circuit has not provided a definition of the term "large fraction." Rather, its guidance comes by how that term has been applied.

356. As to the proper denominator, the Fifth Circuit's "binding precedent" requires this Court to use "all women of reproductive age or women who might seek an abortion . . . ." *Cole*, 790 F.3d at 589 (citing *Abbott I*, 734 F.3d at 414; *Abbott II*, 748 F.3d at 598; and *Lakey*, 769 F.3d at 299). However, language quoted from *Lakey* and relied upon by *Cole* suggests that the proper denominator might be the number of women who *actually* seek abortions, not the number who

"might" seek one, i.e. the entire population of women of reproductive age.[63] In any event, this Court has considered both.[64]

357. In *Cole*, the Court found that neither 16.7% nor 7.4% of Texas women of reproductive age constituted a large fraction. *Id.* at 588. *Abbott II* found that 10% did not. *See* 748 F.3d at 598. *Lakey* found that 17% was insufficient. 769 F.3d at 298 & n.13. *Currier* involved the closure of Mississippi's only abortion clinic, resulting in 100% of Mississippi women being adversely affected. 760 F.3d at 458–59. This was found sufficient. Thus, this Court has no specific mandate from the Fifth Circuit as to what percentage between 17% and 100% qualifies as a "large fraction."

358. In *Casey*, the Court also used the phrase "significant number" in describing the number of women who must be unduly burdened in order to render the statute unconstitutional. 505 U.S. at 894 ("The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion.").[65] *Cole* suggests that the two terms were used

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[63] "Here, the ambulatory surgical center requirement applies to every abortion clinic in the State, limiting the options for *all women in Texas who seek an abortion*. The appropriate denominator thus includes all women affected by those limited options." *Lakey*, 769 F.3d at 299 (emphasis added), *quoted in Cole*, 790 F.3d at 589.

[64] This Court agrees with *Cole's* holding that the denominator should not be the population of women upon whom an undue burden is placed (as urged by the *Cole* plaintiffs) because this, as the Court points out, is a tautology and guarantees that 100% of women so described will be adversely affected. *Cole*, 790 F.3d at 589. However, it seems to this Court that the most appropriate denominator would be the number of women who typically seek abortions; in Louisiana, that number is about 10,000 per year, (DX 148 ¶ 11). Regardless, "[h]owever much a district court may disagree with an appellate court, . . . [it] is not free to disregard the mandate or directly applicable holding of the appellate court." *Cole*, 790 F.3d at 581 (citing *United States v. Teel*, 691 F.3d 578, 582–83 (5th Cir. 2012)).

[65] Judge Stephen A. Higginson's concurring and dissenting opinion in *Lakey* notes that *Casey* used both terms, invalidating the spousal notification statute because it would prevent a "significant number" as well as a "large fraction" of women from obtaining an abortion. 769

synonymously, *Casey* stating that "significant number" amounted to a "large fraction." 790 F.3d at 586 n. 30 (citing *Casey*, 505 U.S. at 895). Unfortunately, neither term is defined. Nonetheless, this Court has considered both in the Ruling.

359. If the law results in the inability of all women of a given state to get an abortion within that state, the law has created a substantial obstacle, and the law is unconstitutional, even if those women can get an abortion in an adjoining state. *See Currier*, 760 F.3d at 457–58 (so holding, but cautioning that "[n]othing in this opinion should be read to hold that any law or regulation that has the effect of closing all abortion clinics in a state would inevitably fail the undue burden analysis"). *Cole* creates an exception to that rule where the out of state abortion facility is in "the same metropolitan area [as the closed facility], though separated by a state line." 790F.3d at 597. A further complication arises from the first of the two concluding observations in *Currier*: "Whether . . . [a s]tate . . . regulation would impose an undue burden . . . is not a question that can be answered without reference to the ***factual context*** in which the regulation arose and operates." *Currier*, 760 F.3d at 458 (emphasis added).

360. In measuring "substantial obstacle", the recent Fifth Circuit cases have primarily considered the increased travel distance required for a woman to get an abortion caused by the closure or anticipated closure of abortion facilities within the state. For instance, the court in *Cole* focused on "women who would face travel distances (one way) of over 150 miles in light of *Abbott II's* holding that 'an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*.'" *Cole*, 790 F.3d at 588 (quoting *Abbott II*, 748 F.3d at 598).

F.3d at 308 (Higginson, J., concurring in part and dissenting in part) (citing *Casey*, 505 U.S. at 893-95).

361. However, *Cole* "recognize[d] that any statement of 'how far is too far' will involve some imprecision." *Id.* at 594. *Cole* also suggested that "no distance, standing alone, could be too far." *Id.* at 594 (citing *Abbott II*, 748 F.3d at 598 (so reading *Casey*)). In holding the ambulatory surgical center provision unconstitutional as applied to a clinic in McAllen, Texas, *Cole* held that the 235 mile distance to the nearest clinic, *combined with* the "difficulties" and "practical concerns"[66] of McAllen women after the closure of that clinic, was a sufficient basis for finding the statute unconstitutional. *Cole*, 790 F.3d at 593–594, 585 n.29, 594 n.42.

362. Fifth Circuit jurisprudence does not allow this Court to consider the poverty of many Louisiana women and its effect in creating additional burdens and obstacles to utilizing an abortion facility farther away from their home. *Cole*, 790 F.3d 589 (citing *Lakey*, 769 F.3d at 299, and *Abbott I*, 734 F.3d at 415 (holding that "obstacle[s] that are unrelated to the hospital-admitting-privileges requirement" are irrelevant to the undue-burden inquiry in a facial challenge)).

363. This same jurisprudence, moreover, does not allow the Court to consider the very real violence and threats of violence towards abortion providers and its effect in the decision of Doe 3 to quit his abortion practice if Act 620 becomes effective. *Abbott II*, 748 F.3d at 599. Nor can the Court consider the very real difficulties this violence creates on the ability of abortion clinics to recruit new doctors. *Id.*

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[66] These "difficulties" and "practical concerns" included evidence that some women would be unable to make the trip from McAllen to San Antonio or Houston to obtain an abortion and, further, that the closure of the McAllen clinic would result in an increase in self-attempted abortions. *Cole*, 790 F.3d at 593; *see also supra* Part V. The Fifth Circuit provided no more guidance as to what other kinds of difficulties and practical concerns might properly be considered.

XII. Analysis

A. Rational Basis

364. Plaintiffs argue that Act 620 does not further a valid state interest. (Doc. 196 ¶¶ 322–27; Doc. 202 ¶¶ 153–57.) This issue was disposed of in the Court's earlier ruling on Defendant's Partial MSJ. (Doc. 138.)

365. In particular, this Court there held:

> The admitting privileges requirement of Act 620 is substantially similar to both Texas H.B. 2 and Miss. H.B. 1390. To the extent that Plaintiffs contend that Act 620 is not rationally related to a legitimate state interest because it is medically unreasonable or unnecessary, this Court is bound by the Fifth Circuit's previous rulings in *Abbott II*, *Currier* and *Lakey*. . . . [These cases] make clear that the admitting privileges provision of Act 620 passes rational basis review. *Abbott II*, 748 F.3d at 599-600; *Currier*, 760 F.3d at 454; *Lakey*, 769 F.3d at 293.

(Doc. 138 at 17.)

366. In *Cole*, the Fifth Circuit reaffirmed its position on this issue, as summarized by this Court. 790 F.3d at 584.

367. Therefore, this Court holds (again) that Act 620 passes rational basis review.[67]

B. Undue Burden - Purpose of Act 620

368. Plaintiffs argue that the true purpose of Act 620 is to eliminate or unduly burden Louisiana women's access to abortions by imposing a medically meaningless requirement that

[67] However, in its argument on this point, (Doc. 201 at 3–4), Defendant mischaracterizes this Court's earlier ruling. The Court did not, as suggested by Defendant, "reject Plaintiffs' claim that Act 620 imposes a medically unreasonable requirement that fails to protect women's health." (*Id.*) Rather, using the non-evidence-based "rational speculation" standard, the Court found that Act 620 meets rational basis review without regard to evidence on this issue. (Doc. 138 at 17–21.)

most, if not all, abortion doctors can not meet for reasons which are unrelated to their competency. Thus, Plaintiffs argue, the statute violates the purpose prong of the undue burden test and is unconstitutional.

369. Plaintiffs argue that the Court is not required to accept at face value Act 620's official purpose as stated in the legislation and that its true and improper purpose was proven at trial by a) public statements by the Governor and the author of the bill which demonstrate that the true purpose of the legislation is to eliminate, not regulate, abortion; b) evidence that those participating in the drafting of the bill are associated with groups dedicated to the elimination of abortion; c) evidence that Act 620 is medically unnecessary and unreasonable; and, finally, d) evidence that any limited medical benefits brought by the Act are far outweighed by the burden that it places on a woman's right to an abortion.

370. Defendant argues that (1) the Act's legislative history, including the medical testimony received by the Legislature, shows that the true purpose of the bill is to further the health and safety of women undergoing an abortion; (2) the intention of individual legislators or lobbyists is legally irrelevant to the bill's purpose and cannot be considered by this Court; (3) the evidence at trial proved that the bill was medically necessary, beneficial and reasonable; (4) even if there is a legitimate debate about the Act's medical necessity and reasonableness, this "medical uncertainty" cannot render the Act unconstitutional and (5) Fifth Circuit jurisprudence forecloses this Court from weighing the Act's benefits against its harms.

371. The Court's factual findings on these issues have been summarized above. *See supra* Parts V–IX.

372. The rule in the Fifth Circuit, which this Court is bound to follow, is where there is medical and scientific uncertainty about the need or benefits of an abortion restricting law, Plaintiffs have failed to meet their burden in establishing an improper purpose. The Court is not permitted to weigh the benefits of the law against its burdens. It is only where the sole purpose of the law is an improper one, can Plaintiffs succeed on this prong. Plaintiffs have failed to make this showing.

C. Undue Burden - Effect of Act 620

373. The Court finds that Act 620 will have the effect of placing an undue burden on (i.e. placing a substantial obstacle in the path of) a large fraction of Louisiana women of reproductive age seeking an abortion.

374. As summarized in the Findings of Fact, *see supra* Parts V–IX, Act 620 will have the effect of making abortions unavailable to approximately 55% of women seeking abortion in Louisiana and over 99% of women of reproductive age. The Court concludes that either percentage is a large fraction and a significant number.

375. Even if one were to assume that Doe 2's privileges at Tulane meet the requirements of Act 620, which this Court finds is not the case, *see supra* Part VIII.B, this undue burden would still exist. Under this scenario, the reduced number of abortion providers would result in some 45% of women seeking abortions–and over 99% of Louisiana women of reproductive age–being unable to get an abortion at a Louisiana facility. The Court concludes that either percentage is a large fraction and a significant number.

376. In addition to the increased distance some women would have to travel to find a facility with the capacity to perform their abortion, there are the practical concerns and difficulties of increased risk of complications caused by delays in care, as well as a likely increase in self-performed, unlicensed and unsafe abortions. (Doc. 190 at 223–24.)

377. Defendant argues that Act 620 is not unconstitutional because any undue burden that it has created is not caused by or related to the statute.

378. In order for an undue burden or substantial obstacle to render a law unconstitutional, that burden or obstacle must be *created by or related to* the statute in question, in this case, the admitting privileges requirement. *K. P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013) (relying on, among others, *Harris v. McRae,* 448 U.S. 297, 316, 100 S. Ct. 2671, 2688, 65 L. Ed. 2d 784 (1980)); *accord, e.g.*, *Collins v. Hoke*, 705 F.2d 959, 962 (8th Cir. 1983) (quoting and applying *Harris*, 448 U.S. at 316); *W. Va. Ass'n of Cmty. Health Ctrs. v. Sullivan*, 737 F. Supp. 929, 944 (S.D. W. Va. 1990) (same).

379. Consequently, a facial challenge can be sustained only if "the law itself imposes an undue burden on at least a large fraction of women." *Cole,* 790 F.3d at 589 (quoting *Lakey*, 769 F.3d at 299; *Abbott I*, 734 F.3d at 415; *Harris*, 448 U.S. at 316; and *Maher v. Roe*, 432 U.S. 464, 474, 97 S. Ct. 2376, 2382–83, 53 L. Ed. 2d 484 (1977)).

380. Where the relevant obstacle was "*neither created nor in any way affected by* the . . . regulation," then it is not the law itself which imposes the burden. *Maher*, 432 U.S. at 474 (emphasis added). Stated another way, "although government may not place obstacles in the path of a woman's exercise [of her right], it need not remove those not of its own creation." *Harris*, 448 U.S. at 316 (quoting *Maher*, 432 U.S. at 474).

381. In this case, Act 620 requires abortion doctors to get "active admitting privileges," including being admitted as a member in good standing of the medical staff, at a nearby hospital. LA. R.S. § 40:1299.35.2; *see also supra* Part VI. However, the Act does not set the criteria necessary for obtaining those privileges and there is no state law or other uniform standard that sets these criteria. *See supra* Parts V–VI, IX. Instead, the law relies on the highly variable requirements set in the by-laws of each hospital. *Id.*

382. The Act therefore anticipates and relies upon existing private hospital's varying by-laws' admitting privileges requirements as allowed under Louisiana law. It delegates to private hospitals the duty of granting (or withholding) active admitting privileges and thereby utilizes by-laws and private hospital credentialing committees as instruments for the implementation of the Act. Unquestionably then, the admitting privileges law and practices existing in Louisiana before Act 620 are "related to" Act 620. As is discussed in detail above, it is the two working in concert that has created the inability of Doe 1, 2, 4, 5 (in Baton Rouge), and 6 to get the kind of active admitting privileges which the Act itself mandates. *See supra* Parts V.D, IX.

383. While not raised by Plaintiffs in this case, another court has held that a law essentially identical to Act 620 denied due process "based on the State delegating decisionmaking over the plaintiffs' right to their chosen profession to private entities, namely hospitals, without adequate oversight or a mechanism to waive or appeal the hospitals' denial of admitting privileges . . . ." *Van Hollen*, 94 F. Supp. 3d at 954.

384. Specifically, the district court in *Van Hollen* held that a hospital's business needs did not further any legitimate state interest nor did the requirement of some hospitals that the applying doctor show a record of in-patient care. *Id.* at 963–64. Necessarily, this Court holds,

based on the law of this circuit, that Act 620 furthers a legitimate state interest. Nevertheless, *Van Hollen*'s logic bolsters its own decision that the effective discrimination against abortion providers growing out of the admitting privileges requirements of Louisiana hospitals (especially in the absence of the protection against discrimination provided under other state laws) are related to and caused by Act 620.

385. As already noted, *see supra* Part VIII.B, in interpreting a state or federal statute, courts traditionally focus not only on "the language itself [and] the specific context in which the language is used [but also] the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also, e.g., Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486–87 (5th Cir. 2013) (citing *id.*).

386. An analysis of the statute's broader context is, in turn, informed by another cardinal rule of statutory construction: Congress, and by implication, any state legislature is "presumed to know the [existing] law, including judicial interpretation of that law, when it legislates." *Day v. Persels & Assocs.*, LLC, 729 F.3d 1309, 1332 (11th Cir. 2013); *see also, e.g., Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 488 n.5 (11th Cir. 2015)*; cf. Hernandez-Miranda v. Empresas Diaz Masso, Inc*., 651 F.3d 167, 175 (1st Cir. 2011) ("The understanding of a term employed by Congress is ordinarily determined at the time of enactment."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322–26 (2012) (outlining the prior-construction canon).

387. In effect, therefore, courts customarily impute to the legislature an awareness of any legal strictures relevant to a particular enactment's application. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–97, 99 S. Ct. 1946, 1957–58, 60 L. Ed. 2d 560 (1979); *see also, e.g.,*

Johnson v. Hous. Auth. of Jefferson Parish, 442 F.3d 356, 362 n.33 (5th Cir. 2006) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law." (internal quotation marks omitted) (citing *id.*)); *Trigon Ins. Co. v. United States*, 215 F. Supp. 2d 687, 698 (E.D. Va. 2002) ("Congress is presumed to know the existing statutory framework into which an amending statute fits."); *cf. Texas v. United States*, 497 F.3d 491, 501 (5th Cir. 2007) (explaining that, under *Chevron*, a court must determine whether the relevant "regulations reasonably flow from the statute when viewed in context of the overall legislative framework and the policies that animated Congress's design").

388. In other words, statutory interpretation does not take place in a vacuum, and any reasonable understanding of the statute's effect requires awareness of the preexisting legal regime.

389. As discussed above, *see supra* Parts V, IX, the Court finds that Louisiana's credentialing process and the criteria found in some hospital by-laws work to preclude or, at least greatly discourage, the granting of privileges to abortion providers, including the following:

- There are no laws or regulations in Louisiana mandating certain minimum objective credentialing criteria to assure that credentialing decisions are made only on objective, competency-related factors, akin to the American Medical Association's guidelines.[68]
- The credentialing processes adopted by the hospitals in question permit them to deny privileges for reasons purely personal and unrelated to the competency of the

[68] *See supra* note 25.

physician including, specifically, anti-abortion views held by some involved in credentialing;

- Louisiana law does not prevent a hospital or credentialing personnel from discriminating against abortion providers based on their status as abortion providers, regardless of their competency; and
- By having no maximum time period within which applications must be acted upon, a hospital can effectively deny a physician's application without formally doing so and therefore affect a de facto denial without expressing the true reasons (or any reasons) for doing so.

390. Indeed, the Court finds that, since Act 620 was enacted, these specific aspects of how Louisiana hospitals grant, deny, or withold hospital admitting privileges, have played a significant contributing role in Louisiana's abortion providers not being given privileges or being given only limited privileges. *See supra* Parts V–VI, IX.

391. The Court therefore finds that Act 620, acting in concert with existing Louisiana law on abortion and Louisiana law and practice as it pertains to hospital admitting privileges, is facially unconstitutional in placing an undue burden on the right of a large fraction of Louisiana women to an abortion.

XIII. Conclusion

A. Motion to Reconsider Rulings on Summary Judgment and Motion in Limine

392. As explained above, *see supra* Part II, Defendant moved for partial summary judgment, (Doc. 87), which was opposed, (Doc. 104). In the Partial MSJ, Defendant maintained

that Act 620 met both the rational basis and the purpose prong of the undue burden test as a matter of law. (Doc. 87 at 7 (summarizing Defendant's argument).) The Court granted the motion as to rational basis but held there were questions of fact which precluded the granting of the motion as it pertained to the purpose prong. (Doc. 138.)

393. For the same basic reasons, Defendant's Motion in Limine sought to exclude Plaintiffs' proposed evidence of Act 620's purpose including evidence of medical reasonableness and the evidence regarding the drafting of Act 620. (Doc. 95.) This was denied. (Doc. 139.)

394. Based on the intervening *Cole* case, Defendant moved for reconsideration of that part of the summary judgment ruling that dealt with the purpose prong and the Court's rulings denying Defendant's Motion in Limine. (Doc. 144.) This request was also opposed. (Doc. 150.) Because of the complexity of the issue and the proximity of the upcoming trial date, the matter was taken under advisement and deferred to trial.

395. Set forth in Federal Rule of Civil Procedure 56, FED. R. CIV. P. 56, the standard for deciding a summary judgment is well known and was set forth in the Court's original ruling. (Doc. 138 at 8–9.) It is the standard used in the current motion.

396. *Cole* holds that where there is conflicting medical testimony regarding the medical need for and reasonableness of the law, the law meets the purpose prong. 790 F.3d at 585. However, this narrow and tailored legal conclusion does not mean that medical testimony on these issues is not relevant and admissible. Thus, while this Court ultimately held that Act 620 meets the purpose prong, this was only after a consideration of the evidence on this issue.

397. Similarly, while this Court found that emails and public statements of those involved in drafting and supporting the legislation was not sufficient to establish Act 620's purpose as

unconstitutionally illicit, the evidence was nonetheless relevant. *See Okpalobi*, 190 F.3d at 355–56 (stating that involvement of an anti-abortion group in the drafting of the legislation is insufficient by itself, but not inadmissable, to show the statute's purpose).

398. In light of these distinctions, with the substantive law applied by this Court left unchanged after *Cole* and with no newly discovered evidence having been presented, the Court therefore denies Defendant's Motion for Reconsideration. *See, e.g.*, *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473–75 (5th Cir. 1989) (commentating that Rule 59(e) motions "serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence" (internal quotation marks omitted) (citing *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982))); *see also Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 n.1 (9th Cir. 2005) ("A Rule 59(e) motion is appropriate if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." (internal quotation marks omitted)).

B. Preliminary Injunction

(1) Preliminary Injunction Standard

399. "[T]he burden of proving the unconstitutionality of abortion regulations falls squarely on the plaintiffs." *Abbott II*, 748 F.3d at 597.

400. The four prerequisites which Plaintiffs must show are: (1) they are substantially likely to succeed on the merits; (2) absent the injunction, there is a significant risk of irreparable

harm; (3) the balance of hardships weighs in their favor; and (4) granting the preliminary injunction will not adversely affect the public interest. *See, e.g.*, *Opulent Life Church v. City of Holly Springs, Miss.* 697 F.3d 279, 288 (5th Cir. 2012); *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)*; Vaughn v. St. Helena Parish Police Jury*, 192 F. Supp. 2d 562, 575 (M.D. La. 2001) (citing *Women's Med. Ctr. of N.W. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001)).

401. A preliminary injunction is "an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion on all four (4) pre-requisites[.]" *Ledet v. Fischer*, 548 F. Supp. 775, 784 (M.D. La. 1982) (citations omitted); *accord Kliebert*, 2015 U.S. Dist. LEXIS 146988, at *71–73, 2015 WL 6551836, at *21–22; *see also, e.g.*, *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009) (emphasizing that the movant must "clearly carr[y]" burden to obtain "extraordinary and drastic remedy" of preliminary injunction and quoting the four elements as formulated in *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

402. This heavy burden applies when plaintiffs seek to enjoin regulations that may impact abortion access. *See Mazurek*, 520 U.S. at 972 ("'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'") (quoting 11A CHARLES WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 2948 (2nd ed. 1995))).

(2) Application of Preliminary Injunction Standard

403. There is a substantial threat that, were Act 620 to be enforced, irreparable injury would result to the Plaintiffs and their patients.

404. As explained in detail above, *see supra* Part XII, the Act will violate the constitutional right of Louisiana women to abortion. This is, by definition, irreparable harm. *Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (holding that the fact that if a woman's right to an abortion is "'either threatened or in fact being impaired' . . . mandates a finding of irreparable injury") (citing to *Elrod v. Burns*, 427 U.S. 347, 373–74, 96 S. Ct. 2673, 2689–90, 49 L. Ed. 2d 547 (1976))).

405. Likewise, the severely restricted access to abortion care by a large fraction of Louisiana women caused by Act 620, and the resulting unreasonable and dangerous delays in scheduling abortion procedures, constitute irreparable harm for Louisiana women seeking abortions. *See Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013), *aff'd in part*, 760 F.3d 448.

406. Many Louisiana women will also face irreparable harms from the burdens associated with increased travel distances in reaching an abortion clinic with sufficient capacity to perform their abortions. These burdens include the risks from delays in treatment including the increased risk of self-performed, unlicensed and unsafe abortions.

407. The Court therefore finds that Plaintiffs have shown that the failure to grant the injunction will likely result in irreparable injury.

408. Plaintiffs have shown that the injury threatened by enforcement of Act 620 outweighs any damage the injunction may cause Defendant. While Plaintiff has given clear evidence of harm, Defendant, by contrast, has not shown that any damage would result from the issuance of a preliminary injunction. A preliminary injunction will preserve the status quo, and permit the clinics and physicians to continue to provide safe, needed abortion care to their patients. The

substantial injury threatened by enforcement of the Act – namely irreparable harm to women and the violation of their constitutional rights – clearly outweighs the impact of an injunction on Defendant. *See Currier*, 940 F. Supp. 2d at 424.

409. A preliminary injunction is also in the public interest. The public interest is not served by allowing an unconstitutional law to take effect. *Currier*, 940 F. Supp. 2d at 424 ("[T]he grant of an injunction will not disserve the public interest, an element that is generally met when an injunction is designed to avoid constitutional deprivations."); *see also, e.g.*, *Nobby Lobby, Inc. v. Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) ("[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve") (citing *Nobby Lobby, Inc. v. Dallas*, 767 F. Supp. 801, 821 (N.D. Tex. 1991))).

410. Without an injunction, Louisiana women will suffer significantly reduced access to constitutionally protected abortion services, which will likely have serious health consequences.

411. The Court concludes that Plaintiffs have demonstrated that the threatened injury of Act 620 outweighs any damages the injunction may cause Defendant, and that the injunction will not disserve the public interest.

C. Judgment

For the reasons stated above, IT IS ORDERED that

1. Defendant's Motion to Reconsider Rulings on Summary Judgment and Motion in Limine, (Doc. 144), is DENIED.
2. The active admitting privileges requirement of LA. R.S. § 40:1299.35.2 is declared unconstitutional as violating the substantive due process rights of Louisiana women seeking abortions.

3. Plaintiff's Motion for Preliminary Injunction is GRANTED to the extent that any enforcement of LA. R.S. § 40:1299.35.2 is preliminarily enjoined as to the Plaintiffs: specifically, Doctor John Doe 1, Doctor John Doe 2, June Medical Services, LLC, d/b/a Hope Medical Group for Women; Bossier City Medical Suite; and Choice, Inc. of Texas, d/b/a Causeway Medical Clinic.[69] This injunction will remain in effect until further notice from this Court.

4. Because there are applications for active admitting privileges which technically remain "pending," the Court orders Plaintiffs to provide to the Court and Defendant on a monthly basis beginning March 1, 2016, with a notification of any changes in the status of the applications.

5. Should the applications status change, the Parties are free to seek any other relief that they may deem appropriate.

6. A status conference will be held on January 29, 2016, at 11:30 a.m., so as to consider, among other matters, what other proceedings must still take place and whether this Court should convert the preliminary injunction issued by this Ruling to a permanent one.

Signed in Baton Rouge, Louisiana, on January 26, 2016.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[69] An order enjoining enforcement of Act 620 against parties other than Plaintiffs herein would be overly broad. *Currier*, 760 F.3d at 459.

No. 16-30116

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.

Appeal from the United States District Court for the Middle District of Louisiana, case no. 3:14-CV-525-JWD

MOTION TO EXTEND DEADLINE FOR FILING RESPONSE TO APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL

Appellees hereby move to extend the deadline to respond to Appellant's Emergency Motion for Stay Pending Appeal, which Appellant filed earlier today, February 16, 2016. This Court's Order, which also issued today, provides that Appellees' response should be filed on or before Thursday, February 18, 2016, by 5:00 p.m. Appellees respectfully request that this Court grant additional time for

Appellee's response. Given that Appellees' response is currently due on Thursday, February 18, Appellee's respectfully request that this Court rule on this request by 5 p.m. on Wednesday, February 17.

No emergency was triggered by the district court's preliminary injunction, which issued nearly a month ago, and therefore Appellant's motion is not appropriate for emergency action. Appellees intend to oppose the motion but, as there is no emergency, request an opportunity to respond in the regular course under Rule 27(a)(3) of the Federal Rules of Appellate Procedure.

On August 21, 2014, Appellees brought a constitutional challenge to Act 620 ("the Act"), a Louisiana law that would require physicians who provide abortions to obtain hospital admitting privileges within 30 miles of their practice, seeking a preliminary injunction or, in the alternative, a temporary restraining order ("TRO"). On August 31, 2014, after hearing argument and considering briefs and affidavits from both sides, and prior to the Act's effective date, the district court entered a TRO barring Appellant from enforcing the law. In June 2015, the district court held a six-day evidentiary hearing on Appellees' motion for a preliminary injunction. On January 26, 2016, based on its determination that the Act is unconstitutional, the district court granted the motion, but only as applied to Appellees, thus narrowing the scope of the injunction as contrasted with the TRO that had been in force since August 31, 2014. Judgment on the preliminary injunction was entered on February 10, 2016.

Appellant sought an emergency stay from the district court on February 10, 2016, which the district court denied on February 16, 2016.

Appellant's motion should not be heard on an emergency basis because this matter has been ripe for appeal since September 2014. *See Sampson v. Murray*, 415 U.S. 61, 85-88 (1974) (TRO becomes appealable preliminary injunction after notice and a hearing, and after the 14-day period provided for by Fed. R. Civ. P. 65(b) has passed); *accord* 11A Fed. Prac. & Proc. Civ. (Wright & Miller) § 2962 (3d ed.). Appellant strategically chose not to seek appellate relief a year and a half ago, nor at any available time since then. In fact, Appellant consented to an extension of the TRO twice, first on September 30, 2014, when she sought five months for discovery, and again on March 19, 2015, when she consented to a postponement of the evidentiary hearing until after her partial summary judgment motion could be decided.

Moreover, had this been a true emergency, Appellant could have sought relief from the preliminary injunction last month, as soon as it was entered. *See generally Matter of Miranne*, 852 F.2d 805, 806 (5th Cir. 1988) (appellant may seek stay in district court before or after filing appeal). She had no need to wait for the district court to enter judgment before seeking a stay pending appeal. Fed. R. App. P. 4(a)(7)(B); *comment to id.* ("[T]he decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone."). Yet she declined to either file an appeal or to seek a stay in the district court for over two

weeks – apparently in order to allow her to make a belated emergency motion in this forum. *See* Fed. R. App. P. 8(a)(1).

Further, at a status conference regarding Appellant's stay motion filed below on February 10, 2016, Appellant's counsel represented to the district court that, by her stay motion, she sought to reinstate the district court's earlier TRO. (Transcript page attached as Exhibit 1.) But the TRO applied to all abortion providers in the state, not (as the preliminary injunction does) just to Appellees. *Compare* Second Order Clarifying TRO of August 31, 2014, ECF No. 84 (Jan. 15, 2015), and Findings of Fact and Concl. of Law, ECF No. 216 (Jan. 26, 2016), at p. 122.[1] Thus, the relief that Appellant had requested in the district court last week would have actually broadened the scope of the injunction that Appellant now claims is harming her.

In sum, the district court's preliminary injunction of January 26, 2016 did not change the status quo in Louisiana except to narrow the scope of the injunction to encompass only Appellees, which is clearly not an injury to Appellant. Appellant has, as long ago as September 2014, and as recently as the past month, chosen to forgo the relief available to her. Even now, Appellant requests relief in ten days, and does not

[1] Appellant's statement in her Rule 27.3 Emergency Certification, at ii n. 4, that the TRO applied only to plaintiffs, is wrong. It applied both to plaintiff and non-plaintiff clinics, and to the physicians of each. D. Ct. ECF No. 84 at 2-3 (affirming that TRO would continue to apply to all of Louisiana's abortion providers without admitting privileges, and all clinics where they provide abortions, regardless of whether or not they were or had ever been plaintiffs).

articulate why relief by that date in particular is necessary. Accordingly, there is no basis to assert that there is an emergency that must be resolved by the end of next week.

Appellees therefore respectfully request that Appellant's motion be placed on the regular motions calendar and that Appellees be afforded an opportunity to submit briefing in opposition to the merits of the motion in due course. Appellee's response would ordinarily be due on February 29, 2016. *See* Fed. R. App. P. 26(c), 27(a)(3)(A); 5th Cir. R. 26.1. Appellant's reply, if any, would then be due no later than March 10, 2016. *See* Fed. R. App. P. 26(c), 27(a)(4); 5th Cir. R. 26.1 In the alternative, Appellees respectfully request that the time for their response be extended at least until February 19, 2016, at 5 p.m.

Pursuant to 5th Cir. Rule 27.4, undersigned counsel attempted to contact counsel for Appellant by email on February 16, 2016 to inquire of Appellant's position on this motion and whether she intends to file a response. Undersigned counsel has not received any response to that email.

Respectfully submitted,

Dated: February 16, 2016

/s/ Dimitra Doufekias

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CERTIFICATE OF SERVICE

I hereby 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 February 16, 2016.

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: February 16, 2016 /s/ Dimitra Doufekias

Exhibit 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES, LLC ET AL.,	:	Docket No. C.V. 14-525-JWD-RLB
Plaintiffs,	:	Baton Rouge, Louisiana Wednesday, February 10, 2016
v.	:	4:00 p.m.
JAMES DAVID CALDWELL, ET AL.,	:	
Defendants.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE JOHN W. deGRAVELLES,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	Morrison & Foerster, LLP BY: DIMITRA DOUFEKIAS, ESQ. 2000 Pennsylvania Ave., NW, #6000 Washington, DC 20006-1888
Audio Operator:	COURT PERSONNEL
Transcript prepared by:	JANICE RUSSELL TRANSCRIPTS 1418 Red Fox Circle Severance, CO 80550 (757) 422-9089 trussell31@tdsmail.com

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

Go -- run that by me, again.

MR. DUNCAN: Sure. Okay.

Before the preliminary injunction was going to be delayed by the judgment, there was a temporary restraining order in place. Your Honor's ruling explained that it's actually still in effect while that temporary restraining order was in play. It just would allow the plaintiffs to seek (indiscernible).

All we are asking by way of a temporary stay is to put the preliminary injunction on hold. It would maintain the status quo that we all have leading up to trial and just allow, you know, just, just put the preliminary injunction on hold while Your Honor considers our stay motion. That's why we're asking for two separate things and I just wanted to be clear whether you are denying that or not ruling on that right now, or, or what.

THE COURT: Okay. But just to, to be clear on your position, your position is that, that if I were to grant the temporary stay, the TRO would still be in effect?

MR. DUNCAN: Right. That's right. And it's our position the (indiscernible) could still be in effect at that point, but the plaintiffs are still given privileges. It'd just be protected by the TRO that was issued so long ago.

THE COURT: What's the, what's the plaintiffs' position on that?

U.S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE #: 3:14-cv-00525-JWD-RLB

02/05/2016	226	ORDER approving 224 Joint Stipulation, filed by Bossier City Medical Suite, John Doe 1, Choice Inc. of Texas, John Doe 2, June Medical Services LLC. Signed by Judge John W. deGravelles on 02/05/2016. (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.)(KDC) (Entered: 02/05/2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC, *et al.*, Plaintiffs, v. DR. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals, Defendant.	Civil Action No. 3:14-CV-525-JWD-RLB

JOINT STIPULATION AND [PROPOSED] ORDER REGARDING THE COURT'S JANUARY 26, 2016 FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dr. Rebekah Gee, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals (hereinafter, "DHH"), through her attorney, and Plaintiffs, through their attorneys, file this Joint Stipulation and Proposed Order and respectfully represent to the Court as follows:

DHH acknowledges that the Plaintiff clinics, including Choice Inc. of Texas, d/b/a Causeway Medical Clinic, (hereinafter, "Causeway"), sued in this matter on behalf of their physicians, staff, and patients. DHH further acknowledges that this included the physician identified as Dr. Doe 4, who performs abortions at Causeway.

In light of the Order issued by the Court on January 26, 2016 declaring Louisiana HB 388/Act 620 (the "Act") unconstitutional as violating the substantive due process rights of Louisiana women seeking abortions and preliminarily enjoining the Act's enforcement against Plaintiffs, DHH understands the Court's preliminary injunction to include Dr. Doe 4 and further agrees that the terms of the injunction will apply to Dr. Doe 4 so long as the injunction remains

in effect. DHH further agrees not to retroactively investigate or take disciplinary action against Dr. Doe 4 for any violations of the statute that took place while the preliminary injunction remained in effect.

Dated: February 1, 2016

Respectfully submitted,

/s/ William E. Rittenberg

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Attorney for Defendant Dr. Rebekah Gee in her official capacity as President of the Louisiana State Board of Medical Examiners

ORDER

The above Joint Stipulation having been considered and good cause appearing therefore,

IT IS SO ORDERED this _____ day of _____, 2016.

_____

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2016, a copy of the foregoing Joint Stipulation and [Proposed] Order Regarding the Court's January 26, 2016 Findings of Fact and Conclusions of Law has been served upon all counsel of record by email.

/s/ Kerry Jones
Kerry Jones

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
March 19, 2015
deGRAVELLES, J.

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.

CIVIL ACTION

VERSUS

NO. 14-CV-525-JWD-RLB

JAMES DAVID CALDWELL, in his official capacity as Attorney General of Louisiana; JIMMY GUIDRY, in his official capacity as Louisiana State Health Officer & Medical Director of the Louisiana Department of Health and Hospitals; and MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners

The matter came on this day for a pretrial conference.

PRESENT: Dimitra Doufekias
Ilene Jaroslaw
William E. Rittenberg
Counsel for plaintiffs

S. Kyle Duncan
J. Mike Johnson
Counsel for Defendants

Trial procedures and previously set deadlines were discussed with the parties.

In the conference, the parties agreed that in the event the case is not completed in 4 days, the trial will be continued at the earliest convenience of the Court. The parties agreed that the Temporary Restraining Order will remain in effect until completion of the trial and ruling on the merits.

The parties requested and the Court granted the parties 30 days from the completion of the hearing transcript within which to file proposed findings of fact and conclusions of law. The parties will have 7 days thereafter in which to file a reply memorandum.

A status conference was scheduled to be held in chambers at 8:30 a.m. on the morning of trial to discuss any pretrial matters.

Bench book of exhibits were ordered to be submitted to the Court on or before Wednesday, March 25, 2015.

Oral argument on the pending motions in limine was scheduled for 4:00 p.m. on Thursday, March 24, 2015. The oral argument was to be held by telephone and counsel for plaintiff was to circulate the call-in number for the oral argument.

On March 20, 2015, a follow-up telephone conference was held. Present on the call were Dimitra Doufekias, Ilene Jaroslaw, Zoe Levine for plaintiffs, and S. Kyle Duncan & Mike Johnson for defendants.

The parties have agreed to continue the trial of this matter to June 22, 2015. Trial is scheduled to last approximately 6 days.

Per agreement at the March 19, 2015 pretrial conference, the Temporary Restraining Order remains in effect until the completion of the trial ruling on the merits.

Oral argument on the pending motions in limine is rescheduled and will be held on telephonically on April 1, 2015 at 10:00 a.m. Counsel for Plaintiffs is to circulate a dail-in number for the argument.

Signed in Baton Rouge, Louisiana, on March 23, 2015.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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

CIVIL ACTION

v.

NO.14-525-JWD-RLB

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

CONSOLIDATED WITH

WOMEN'S HEALTH CARE CENTER, INC., on behalf of its patients, physicians, and staff; DELTA CLINIC OF BATON ROUGE, INC., on behalf of its patients, physicians, and staff; JOHN DOE 5, M.D., on behalf of himself and his patients,

CIVIL ACTION

v.

NO. 14-597-JWD-RLB

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

SECOND ORDER CLARIFYING TEMPORARY RESTRAINING ORDER OF AUGUST 31, 2014

The procedural history of this case prior to this Court's November 3, 2014 Order Clarifying Temporary Restraining Order of August 31, 2014 (Doc. 57) is set forth in that ruling. On December

5, 2014, the newly joined Women's Health Plaintiffs moved to dismiss their case without prejudice. (Doc. 70.) The Court invited briefs regarding the effect this dismissal might have, if any, on the Court's existing temporary restraining order. (Doc. 73.) The Court has read and considered those briefs. (Docs. 74, 75 and 76.) On December 11, 2014, Plaintiff's Motion to Dismiss was granted with the consent of all parties. (Doc. 77.) Having reviewed the pleadings, the Court concludes that its TRO of August 13, 2014 (Doc. 31) as clarified by its ruling of November 3, 2014 (Doc. 57) remains in force and is unaffected by the dismissal of the Women's Health Plaintiffs.

In its previous ruling, the Court stated the following in clarifying its TRO:

> It was and is the intention of this Court that the TRO remain in effect as to all parties before it until the end of the Preliminary Injunction Hearing. As the Defendants correctly stated, "Defendants do not see how the Court can decide the underlying merits issue, even at the preliminary injunction phase, if the factual picture remains in flux." (Doc. 38, p. 2.) The Court also agrees with the contention of Plaintiffs that if the TRO did not remain in effect with regard to each of the Plaintiff clinics and their doctors (even as to the doctors' whose applications have been acted upon), the Court would necessarily have to entertain as many as five separate TRO applications which would be disruptive and time-consuming not only to the Court but also to the parties in their efforts to complete discovery before the March 30, 2015 hearing.
>
> Furthermore, trying these TROs separately as each physician's application is acted upon would necessarily require the Court to rule in each case on an incomplete record, before the full impact of the law can be measured. On the other hand, the Court finds that, by maintaining the status quo until the preliminary injunction hearing, Defendants will suffer no irreparable harm or substantial prejudice.
>
> At the time the TRO was originally issued, the Court had before it only three of five clinics and two of an unknown number of physicians performing abortions in the State of Louisiana. (Doc. 31, p. 17, citing Decl. of Kathleen Pittman, Doc. 5-3, p. 2-3.) The record was therefore unclear regarding important questions bearing on the central issue of the potential undue burden of the law on Louisiana women's right to an abortion. "How many patients do these other two facilities treat? How many doctors practice there? How many of these doctors have applied for admitting privileges and what is the status of their applications? If these other two facilities remain open (or don't), what would be the overall effect in terms of the time and distance patients would need to travel in order to receive their care? This, and other information not currently before the court, would be relevant in measuring the impact on the constitutional right. See, e.g. *Abbott*, 748 F.3d 583 (5th Cir. 2014). Based on

> the record before it *at this time*, the Court finds that Plaintiffs have not shown a substantial likelihood of success on this ground." (Doc. 31, p. 8, 17-18, emphasis added.)
>
> But the circumstances have changed significantly since the Court's original ruling. Now, all five facilities providing abortions in Louisiana are before the Court. Also before the Court are four of the six physicians who perform abortions in Louisiana: Drs. Doe 1, 2, 5 and 6. (Docs. 50 and 51.) Although Dr. Doe 4 is not a party, he is providing to the Court, through counsel for the June Medical Plaintiffs, information regarding the status of his applications for admitting privileges. (Doc. 51.) Dr. Doe 3 has submitted a Declaration in which he states that he has admitting privileges at a hospital within 30 miles of where he performs abortions but if the applications of the other physicians are denied and he is the only physician performing abortions in Louisiana, he will discontinue performing abortions because of fears for his personal safety. (Doc. 5-7, p. 4, ¶ 12.) If admitting privileges are denied to five of the only six physicians performing abortions in Louisiana and, for the reasons stated, the sixth physician quits performing abortions, Louisiana women would be denied any and all access to abortions in Louisiana, a situation likely to place an undue burden on this constitutionally protected right. *Jackson Women's Health Organization v. Currier*, 760 F3d. 448 (5th Cir. July 29, 2014).[1]
>
> (Doc. 57.)

Although the Women's Health Plaintiffs are no longer parties to this suit, their participation in this proceeding prior to dismissal provided answers to important questions that the Court had at the time of its original TRO, including that there are a total of six physicians performing abortions at five clinics in Louisiana. Five of the six physicians have made at least one application for admitting privileges at nearby hospitals. The conclusion I reached in the previous ruling remains unaffected by the dismissal of the Women's Health Plaintiffs, namely that if admitting privileges are denied to five of only six physicians performing abortions and if the sixth physician quits performing abortions, as he has indicated he will, Louisiana women would be denied any and all access to abortions in Louisiana. This situation would likely place an undue burden on a constitutionally protected right. *Jackson Women's Health Organization v. Currier*, 760 F.3d 448 (5th

[1]The Court's earlier decision, quoted herein, cited *Planned Parenthood v. Abbott*, 748 F.3d 583 (5th Cir. 2014). Rehearing in *Abbott* has been denied. *Planned Parenthood v. Abbott*, 769 F.3d 330 (5th Cir. 2014).

Cir. July 29, 2014), *reh'g denied*, No. 00512843283 (5th Cir. Nov. 12, 2014).

The other reason given for the Court's previous ruling is also unchanged by the dismissal: if the TRO does not remain in effect with regard to each of the clinics and their doctors as their applications are eventually acted upon, the Court may have to entertain multiple separate TRO applications which would be disruptive and time-consuming not only to the Court but also to the parties in their efforts to complete discovery and preparation for the March 30, 2015 hearing. Furthermore, trying these TROs separately as each physician's application is acted upon would necessarily require the Court to rule in each case on an incomplete record, before the full impact of the law can be measured. On the other hand, maintaining the status quo until the preliminary injunction hearing of March 30, 2015 would not cause Defendants to suffer irreparable harm or substantial prejudice.

Accordingly, the TRO of August 31, 2014 (Doc. 31) remains in force until the Preliminary Injunction hearing of March 30, 2015 or as otherwise modified by this Court.

Signed in Baton Rouge, Louisiana, on January 15, 2015.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

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

Plaintiffs,

v. Case No.: 3:14-CV-525-JWD-RLB

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

Defendants

CONSOLIDATED WITH

WOMEN'S HEALTH CARE CENTER, INC., on behalf of its patients, physicians, and staff; DELTA CLINIC OF BATON ROUGE, INC., on behalf of its patients, physicians, and staff; JOHN DOE 5, M.D., on behalf of himself and his patients,

Plaintiffs,

v. Case No.: 3:14-CV-597-JWD-RLB

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

Defendants

ORDER CLARIFYING TEMPORARY RESTRAINING ORDER OF AUGUST 31, 2014 AND SETTING STATUS CONFERENCE FOR NOVEMBER 6, 2014

This case was initiated by the filing of a Complaint for Declaratory and Injunctive Relief on August 22, 2014 by June Medical Services, LLC; Bossier City Medical Suite; Choice, Inc. of Texas, d/b/a Causeway Medical Center; Dr. John Doe 1 and Dr. John Doe 2 (sometimes referred to as the "June Medical Plaintiffs"). (Doc. 1.) On the same day, a Motion for Temporary Restraining Order and Preliminary Injunction was filed by these Plaintiffs. (Doc. 5.) A hearing on the Motion for Temporary Restraining Order was held on August 28, 2014. (Doc. 33.)

On August 31, 2014, this Court issued a Temporary Restraining Order enjoining any enforcement of § A(2)(a) of act 620 of the regular session 2014, codified at La. R.S. 40:1299.35.2, until a hearing could be held to determine whether a preliminary injunction should issue. The Act requires every doctor who performs abortions in Louisiana to have "active admitting privileges at a hospital within 30 miles of the facility where the abortions are performed. The Temporary Restraining Order reads in part, "[t]he Act will be allowed to take effect but Plaintiffs will not be subject to the penalties and sanctions allowed in the statute at this time or in the future for practicing without the relevant admitting privileges during the application process. Plaintiffs will be allowed to operate lawfully while continuing their efforts to obtain privileges." (Doc. 31, p. 1-2.)

A telephone conference was held on September 30, 2014 for the purpose of receiving a status report on the doctors' pending applications for admitting privileges, determining the amount of time needed by the parties to prepare for the hearing on the preliminary injunction, setting a date for the preliminary hearing, discussing the scope of the issues and nature of the proof which would be presented at the hearing and discussing any additional issues of importance to the parties. (Doc. 31,

p. 19.) The Court requested briefs by the parties on these issues. (Doc. 35.) These were filed on September 23, 2014. (Docs. 37 and 38.)

In the meantime, on September 19, 2014, a separate Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunction was filed by other plaintiffs: Women's Health Care Center, Inc., Delta Clinic of Baton Rouge, Inc., Dr. John Doe 5 and Dr. John Doe 6. (No. 3:14-cv-00597, Docs. 1 and 5 respectively, sometimes referred to as the "Women's Health Plaintiffs.") These two cases were consolidated on September 24, 2014. (No. 3:14-cv 00597, Doc. 8.) All parties in the consolidated cases participated in the status conference of September 30, 2014.

All parties agreed in brief and orally at the status conference that significant discovery would need to be done to prepare for the hearing on the preliminary injunction. Defendants proposed either January 14, 2015 or February 18, 2015 ("preferably the proposed February 18, 2015 date", Doc. 38, p. 1-2) saying that "[s]etting the hearing any earlier would likely be impractical *** [because] plaintiff physicians' pending admitting-privileges applications may not be resolved for a considerable time. Defendants do not see how the Court can decide the underlying merits issues, even at the preliminary injunction phase, if the factual picture remains in flux." (*Id.*) The Women's Health Plaintiffs estimated that "several months" would be needed to complete discovery. (Doc. 40, p. 3.) The June Medical Plaintiffs estimated discovery might take as much as 90 days. (Doc. 37, p. 3.) Because of a conflict on the Court's calendar, the Court could not set the hearing on the February 18, 2015 date requested and it was set for March 30, 2015. No party voiced an objection.[1]

At the status conference, all Plaintiffs were ordered to submit a report regarding the status of pending applications by Drs. John Doe 1, 2, 4, 5 and 6. These were submitted on October 8, 2014

[1] Fed. R. Civ. P. 65(b)(2) allows a TRO to be extended beyond 14 days from entry, even when issued without a hearing, with the consent of the adverse party.

and showed that all of these doctors had at least one pending application for admitting privileges which had not been finally acted upon. (Docs. 50, 51.) The newly added Women's Health Plaintiffs requested that the Court's TRO be officially extended to them. Defendants had no objection and the Court granted that request. (Doc. 45.)

A dispute arose at the status conference as to whether current TRO would apply to any plaintiff doctor whose applications for privileges were finally denied before the March 30 hearing on the preliminary injunction. The Court ordered the parties to attempt to resolve this dispute amicably but, if it could not be resolved, to submit briefs on or before October 9, 2014. The parties were unable to reach an agreement and the Court has received and reviewed the briefs stating their respective positions. (Docs. 52, 53 and 54.)

The June Medical Plaintiffs ask the Court to clarify its previous order to show specifically that the "TRO will remain in effect until the preliminary injunction hearing is held on March 30, 2015, as to each of the [June Medical] plaintiffs, regardless of whether the physicians continue to have applications for admitting privileges pending." (Doc. 52, p. 6.) They argue that the only alternative would be to take up interim requests to extend the TRO to each doctor as the applications for each have been finally acted upon. Such a process, they argue, "would be disruptive, would burden judicial resources, would confuse the issues to be addressed at the preliminary injunction hearing, and would unnecessarily complicate an already ambitious discovery schedule." (*Id.* at p. 3.)

The Woman's Health Plaintiffs likewise argue that the TRO should be clarified to make clear that the TRO will remain in effect as to all doctors, even those whose applications have been finally denied before the preliminary injunction hearing. (Doc. 54.) They argue that the Court's TRO

currently so holds and, to interpret it otherwise, would lead to piecemeal and multiple hearings, be extremely burdensome on the parties and leave no plaintiffs with a real remedy since no single physician or clinic could succeed in proving an undue burden on an individual basis (*Id*. at p. 7.) Because the Women's Health Plaintiffs did not participate in the original TRO, they "reserve the right to seek a TRO on any and all applicable grounds, but again, [argue that] the prospect of such a scenario is unworkable." (*Id*. at p. 8.) They further argue that the circumstances have changed significantly since the original TRO because now, all clinics and physicians performing abortions in Louisiana are before the court. (Doc. 54, p. 9-10.) In any event, Defendants would suffer no irreparable harm, these Plaintiffs contend, because extending the TRO to all parties until March 30, 2015 is simply maintaining the status quo. (*Id*. at p. 8.)

Defendants argue that the original TRO was granted solely on procedural due process grounds, i.e., that it would be fundamentally unfair to enforce a law against a physician during the time that he is attempting to comply with the law (Doc. 53, p. 3) and that Plaintiffs have not proven an undue burden that would justify the extension of the TRO to doctors whose applications have been finally acted upon. Defendants argue that this Court refused to grant Plaintiffs' request for TRO on broader grounds and has already ruled that "even if the applications of all Plaintiffs doctors were to be denied in this case, the overall impact on the right of women to have an abortion in Louisiana is unclear." (*Id.* at p. 5, quoting this Court's Order (Doc. 31, p. 17.)) Defendants point to the fact that the Fifth Circuit has twice issued emergency stays in order to allow a similar Texas law to go into effect pending appeal, even following the district court's permanent injunction. (*Id.* at p. 6, citing *Planned Parenthood v. Abbot*, 730 4F 3d 406, 411-16 (5th Cir. 2013) *(Abbott I)* and *Whole Women's Health v. Lakey*, – F.3d –, 2014 WL 4930907, *12-13 (5th Cir.

2014).)[2]

It was and is the intention of this Court that the TRO remain in effect as to all parties before it until the end of the Preliminary Injunction Hearing. As the Defendants correctly stated, "Defendants do not see how the Court can decide the underlying merits issue, even at the preliminary injunction phase, if the factual picture remains in flux." (Doc. 38, p. 2.) The Court also agrees with the contention of Plaintiffs that if the TRO did not remain in effect with regard to each of the Plaintiff clinics and their doctors (even as to the doctors' whose applications have been acted upon), the Court would necessarily have to entertain as many as five separate TRO applications which would be disruptive and time-consuming not only to the Court but also to the parties in their efforts to complete discovery before the March 30, 2015 hearing.

Furthermore, trying these TROs separately as each physician's application is acted upon would necessarily require the Court to rule in each case on an incomplete record, before the full impact of the law can be measured. On the other hand, the Court finds that, by maintaining the status quo until the preliminary injunction hearing , Defendants will suffer no irreparable harm or substantial prejudice.

At the time the TRO was originally issued, the Court had before it only three of five clinics and two of an unknown number of physicians performing abortions in the State of Louisiana. (Doc. 31, p. 17, citing Decl. of Kathleen Pittman, Doc. 5-3, p. 2-3.) The record was therefore unclear regarding important questions bearing on the central issue of the potential undue burden of the law on Louisiana women's right to an abortion. "How many patients do these other two facilities treat?

[2] After Defendants' brief was filed, The Supreme Court vacated the Court of Appeals' stay with reference to the district court's order enjoining the admitting-privileges requirement as applied to the McAllen and El Paso clinics. *Whole Woman's Health v. Lakey*, __ S.Ct. __, 2014 WL 5148710 (Oct. 14, 2014).

How many doctors practice there? How many of these doctors have applied for admitting privileges and what is the status of their applications? If these other two facilities remain open (or don't), what would be the overall effect in terms of the time and distance patients would need to travel in order to receive their care? This, and other information not currently before the court, would be relevant in measuring the impact on the constitutional right. See, e.g. *Abbott*, 748 F.3d 583 (5th Cir. 2014). Based on the record before it *at this time*, the Court finds that Plaintiffs have not shown a substantial likelihood of success on this ground." (Doc. 31, p. 8, 17-18, emphasis added.)

But the circumstances have changed significantly since the Court's original ruling. Now, all five facilities providing abortions in Louisiana are before the Court. Also before the Court are four of the six physicians who perform abortions in Louisiana: Drs. Doe 1, 2, 5 and 6. (Docs. 50 and 51.) Although Dr. Doe 4 is not a party, he is providing to the Court, through counsel for the June Medical Plaintiffs, information regarding the status of his applications for admitting privileges. (Doc. 51.) Dr. Doe 3 has submitted a Declaration in which he states that he has admitting privileges at a hospital within 30 miles of where he performs abortions but if the applications of the other physicians are denied and he is the only physician performing abortions in Louisiana, he will discontinue performing abortions because of fears for his personal safety. (Doc. 5-7, p. 4, ¶ 12.) If admitting privileges are denied to five of the only six physicians performing abortions in Louisiana and, for the reasons stated, the sixth physician quits performing abortions, Louisiana women would be denied any and all access to abortions in Louisiana, a situation likely to place an undue burden on this constitutionally protected right. *Jackson Women's Health Organization v. Currier*, 760 F3d. 448 (5th Cir. July 29, 2014).

At the status conference of September 30, 2014, Defendants agreed that the TRO issued as

to the June Medical Defendants would be applicable to the newly added Women's Health Plaintiffs. At that time, there was an understandable disagreement among the parties as to whether the TRO would extend to doctors whose applications were finally acted upon before the hearing on the Motions for Preliminary Injunction. The parties were unable to resolve that disagreement amicably. Because the Women's Health Plaintiffs were not parties at the time of the TRO hearing and came into the case under the circumstances described above, it did not have the opportunity to introduce evidence in support of a TRO. In its memorandum, these Plaintiffs reserved their right to do so. (Doc. 54, p. 8.) In addition, Defendants have not had an opportunity to introduce evidence or fully argue the issue of the TRO as it pertains to the Women's Health Plaintiffs or the entire case since the two cases were consolidated.

The Court therefore grants leave to the Women's Health Plaintiffs to Move for a TRO. The Court sets a telephone status conference on Thursday, November 6, 2014 at 10 a.m. for the purpose of selecting a date for the hearing on this motion. In addition, all parties will be allowed to introduce any additional evidence and argument in support of or opposition to the TRO now in effect. The Court's TRO issued on August 31, 2014 (Doc. 31), as clarified herein, will remain in effect until the conclusion of the hearing on the preliminary injunction motion or as otherwise modified by the Court.

Signed in Baton Rouge, Louisiana, on November 3, 2014.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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

Plaintiffs,

v.

JAMES DAVID CALDWELL, in his official capacity as Attorney General of Louisiana; JIMMY GUIDRY, in his official capacity as Louisiana State Health Officer & Medical Director of the Louisiana Department of Health and Hospitals; and MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners,

Defendants.

Civil Action

No. 3:14-cv-525-JWD-RLB

C/W No. 3:14-cv-597-JWD-RLB

THIS DOCUMENT PERTAINS TO:

No. 3:14-cv-597-JWD-RLB

ORDER

Before the Court is Plaintiffs' Motion for a Protective Order filed by Plaintiff John Doe 5, M.D., and Plaintiff John Doe 6, M.D. (collectively, the "John Doe Doctors") on September 19, 2014.[1] Any opposition to this Motion was required to be filed within 21 days after service of the Motion. L.R. 7.4. Defendants have not filed an opposition as of the date of this Order. The Motion is therefore unopposed. For the reasons set forth in the Court's August 28, 2014 Order in the lead case of these consolidated actions, *June Medical Services LLC, et. at. v. Caldwell, et. al.*, No. 3:14-cv-525-JWD-RLB (R. Doc. 24), the Motion is **GRANTED**.

[1] This Motion was filed prior to consolidation in *Women's Health Care Center, Inc. et. al v. Kleibert et. al.,* No. 3:14-cv-597-JWD-RLB (R. Doc. 4).

It is therefore **ORDERED**:

1. Plaintiff John Doe 5, M.D. and John Doe 6, M.D. shall be permitted to proceed in this litigation using pseudonyms.

2. The real names of the Plaintiff John Doe 5, M.D., and Plaintiff John Doe 6, M.D., shall be placed under seal. A copy of that filing shall be served on Defendants in a manner other than through the court's electronic filing system.

3. Defendants, their employees, agents, and successors in office, including their attorneys, shall be prohibited from disclosing the real names of the John Doe Doctors, without leave of the Court, to:

   (i) anyone employed by the Attorney General of Louisiana, the Louisiana Department of Health and Hospitals, or the Louisiana State Board of Medical Examiners who is not directly involved in this litigation; and

   (ii) anyone outside of the Attorney General of Louisiana, the Louisiana Department of Health and Hospitals, or the Louisiana State Board of Medical Examiners, other than any outside counsel that is specifically retained by such parties to represent their interests in this litigation.

4. The parties shall confer regarding discovery procedures, including the terms of a proposed protective order, in order to ensure that Defendants are able to seek appropriate discovery regarding the John Doe Doctors while still preserving their anonymity.

Signed in Baton Rouge, Louisiana, on October 15, 2014.

RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
SEPTEMBER 30, 2014
deGRAVELLES, J.

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.

CIVIL ACTION

VERSUS

NO. 14-CV-525-JWD-RLB

JAMES DAVID CALDWELL, in his official capacity as Attorney General of Louisiana; JIMMY GUIDRY, in his official capacity as Louisiana State Health Officer & Medical Director of the Louisiana Department of Health and Hospitals; and MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners

Consolidated with

WOMEN'S HEALTH CARE CENTER, INC. on behalf of it patients, physicians, and staff; DELTA CLINIC OF BATON ROUGE, INC., on behalf of its patients, physicians, and staff; JOHN DOE 5, M.D., on behalf of himself and his patients; and JOHN DOE 6, M.D., on behalf of himself and his patients,

CIVIL ACTION

VERSUS

NO. 14-CV-597-JWD-RLB

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

This cause came on this day for a telephone conference.

PRESENT: William E. Rittenberg
Dimitra Doufekias
Ellie T. Schilling
Counsel for plaintiffs

S. Kyle Duncan
Don S. McKinney
Counsel for Defendants

There are no objections to the current Temporary Restraining Order being extended to the new consolidated Plaintiffs in this matter.

By **October 8, 2014**, counsel for Plaintiffs shall submit a chart including the following information listed by doctor:

- the name and location of each hospital to which they have applied;
- the date the application was filed;
- if there has been action taken on the application, the nature of the action and the date of the action;
- if there has been a denial, the reasons for the denial if reasons have been provided by the hospital.

Counsel for the plaintiffs shall submit updated charts as the hospitals act upon the applications.

On or before **Wednesday, October 8, 2014**, the parties shall submit a proposed briefing schedule including the deadlines set forth in this hearing. This matter is assigned for trial (non-jury) on **Monday, March 30, 2015 at 9:00 a.m.** The Court notes for the record that it intends to keep the current trial date, but if there are physicians with applications still be pending prior to trial, the Court will then entertain a motion to continue.

Counsel for plaintiffs shall begin circulating a confidentiality order for the purpose of conducting discovery in this matter. If the Court's help is needed in implementing a confidentiality order, the parties may either contact the Court or the Magistrate Judge for assistance.

The Court advised the parties that the Temporary Restraining Order be extended to all parties until the hearing on the preliminary injunction per its original language. Following a discussion

regarding extension of the scope of the Temporary Restraining Order, the Court ordered the parties to attempt to reach a stipulation in this regard or in the event no stipulation can be reached, to file briefs on the issue within 10 days, **by October 9, 2014**.

* * * * *

Cv 38b; 1:00
Reporter: Shannon Thompson

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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

Plaintiffs,

v.

JAMES DAVID CALDWELL, in his official capacity as Attorney General of Louisiana; JIMMY GUIDRY, in his official capacity as Louisiana State Health Officer & Medical Director of the Louisiana Department of Health and Hospitals; and MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners,

Defendants.

Case No. 3:14-cv-525

ORDER

Before the Court is Plaintiffs' Motion for a Protective Order (R. Doc. 4) filed by Plaintiff John Doe 1, M.D., Plaintiff John Doe 2, M.D., John Doe 3, M.D., and John Doe 4, M.D. (collectively, the "John Doe Doctors"). The Motion is opposed. (R. Docs. 19 and 20 at 13-17). Plaintiffs provided additional briefing in support of the Motion. (R. Doc. 23 at 7-8). For the foregoing reasons, the Motion is GRANTED.

The Federal Rules of Civil Procedure require all plaintiffs to disclose their names in the complaint. *See* Fed. R. Civ. P. 10(a). "Public access to this information is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict

public scrutiny of judicial proceedings." *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. Unit A Aug. 1981). The Fifth Circuit has allowed departure from the usual rule requiring disclosure of the plaintiff's identity in certain circumstances, mandating that the "decision requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Stegall*, 653 F.2d at 186.

In support of their Motion, Plaintiffs have expressed a concern that, were their identities made known to the public, they have legitimate fears regarding "the very real threat of physical violence, harassments, and intimidation." (R. Doc. 23 at 11). In support of this concern, Plaintiffs point to a history of violence against abortion providers, including several instances of abortion doctors being killed in the past. In addition to these broad concerns, the John Doe Doctors have provided first-hand information regarding specific experiences pertaining to intimidation and harassment in connection with their work as abortion providers. For example, Dr. John Doe 3[1] has declared, under penalty of perjury, that there are regular protestors outside of Dr. John Doe 3's place of employment (Plaintiff June Medical Services LLC d/b/a Hope Medical Group for Women); that Dr. John Doe 3 has received numerous physical and verbal threats to his/her life and reputation within the past month; that information has been handed out in Dr. John Doe 3's neighborhood and near Dr. John Doe 3's office encouraging others to harass Dr. John Doe 3; and that Dr. John Doe 3 has reported these incidents to law enforcement who has responded by escorting Dr. John Doe 3 home and searching his/her neighborhood and home before entering. (R. Doc. 4-5). Plaintiffs Dr. John Doe 1 and 2 have likewise acknowledged

[1] Dr. John Doe 3 is not an individual plaintiff in this matter.

protests outside of their place of employment as well as knowledge of the victimization of other abortion providers. (R. Docs. 4-3, 4-4).[2]

Courts have entered protective orders to safeguard the identities of individuals in cases such as this one. The Middle District of Louisiana has previously granted protective orders placing the identity of a physician who provides abortions under seal and permitting that physician to proceed under a pseudonym. *See Hope Med. Grp. For Women v. Caldwell*, No. 10-cv-511-RET-SCR (M.D. La. Aug. 9, 2010); *K.P., M.D. v. LeBlanc*, No. 07-cv-879-HGB-KWR (M.D. La. Jan. 7, 2008). In a case very similar to the instant one, also involving abortion providers challenging an admitting privileges requirement, our sister court in the Southern District of Mississippi likewise allowed the plaintiffs to proceed under pseudonyms. *See Jackson Women's Health Org. v. Currier*, No. 3:12-cv-436 (S.D. Miss. May 22, 2013).

The Court is satisfied that the potential for harassment, intimidation and violence in this case, particularly in light of the past and present instances of such conduct both nationwide and in Louisiana, justifies the unusual and rare remedy of allowing the individual Plaintiffs to proceed anonymously. While the instant order will limit the public's right to know their identities, the public's ability to scrutinize governmental functioning is unobstructed by this order and the public will retain a complete and open view "of the issues joined" in this proceeding as well as "the court's performance in resolving them." *Stegall*, 653 F.2d at 185.

Defendant Caldwell (in his capacity as Attorney General) and Defendant Guidry (in his capacity as State Health Officer of Louisiana and Medical Director of the Louisiana Department of Health and Hospitals) have both raised additional concerns should the Plaintiffs be allowed to

[2] Dr. Doe 4's affidavit indicates that there are regular protestors outside of Plaintiff Choice, Inc., of Texas d/b/a Causeway Medical Clinic. There is nothing to indicate that these protests are in any way improper or violent. There is also no indication that Dr. Doe 4 or any other abortion provider at this location have been personally victimized in any way.

proceed anonymously. Specifically, both have demonstrated the potential for prejudice if the Defendants are unable to ascertain, among other things, whether those individuals have standing to bring this suit. (R. Doc. 19 at 4) ("The identities of the physicians are essential for purposes of the Defendants being able to verify credentials and board certification and to determine if these physicians have standing."); (R. Doc. 20 at 16-17) ("Disclosure of plaintiff physicians' names is also compelled by due process concerns. The government defendants must be able to intelligently and effectively research the professional background of these physicians as relates to the issues in this lawsuit.").

The Court agrees that the circumstances of this case do not support withholding the names of the John Doe Doctors from the Court or the named defendants.[3] Although it is not entirely clear that Plaintiffs were requesting such relief, nothing in this order is intended to prevent any Defendant from preparing and presenting a defense in this case, including any necessary discovery regarding the individual John Doe Doctors and specifically their standing to bring this suit. In addition, because the Plaintiffs have presented affidavits from John Doe 3 and John Doe 4 for the Court's consideration, their identities shall likewise be disclosed. Plaintiffs shall file, under seal, the identity of Plaintiff John Doe 1, M.D., Plaintiff John Doe 2, M.D., John Doe 3, M.D., and John Doe 4, M.D. A copy of this filing shall be served on the Defendants by means other than through the Court's electronic filing system.[4] The parties are also directed to confer regarding discovery procedures, including terms of a proposed protective order, which would allow Defendants to seek appropriate discovery as the case proceeds. Any such proposed order shall be submitted to the Court for consideration.

[3] Defendant Caldwell specifically requests that, if the Court grants the protective order, that Plaintiffs be required to disclose their names to the Court and the parties. (R. Doc. 19 at 5).

[4] Section I.E.5 of the Administrative Procedures for Filing Electronic Documents for the Middle District of Louisiana specify that "[s]ervice of electronically filed sealed documents must be made by other means than through the court's electronic filing system since sealed documents cannot be electronically accessed."

It is therefore ORDERED:

1. Plaintiff John Doe 1, M.D. and John Doe 2, M.D. shall be permitted to proceed in this litigation using pseudonyms.
2. The real names of the Plaintiff John Doe 1, M.D., Plaintiff John Doe 2, M.D., John Doe 3, M.D., and John Doe 4, M.D. shall be placed under seal. A copy of that filing shall be served on Defendants in a manner other than through the court's electronic filing system.
3. Defendants, their employees, agents, and successors in office, including their attorneys, shall be prohibited from disclosing the real names of the John Doe Doctors, without leave of the Court, to:
   (i) anyone employed by the Attorney General of Louisiana, the Louisiana Department of Health and Hospitals or the Louisiana State Board of Medical Examiners who is not directly involved in this litigation; and
   (ii) anyone outside of the Attorney General of Louisiana, the Louisiana Department of Health and Hospitals or the Louisiana State Board of Medical Examiners, other than any outside counsel that is specifically retained by such parties to represent their interests in this litigation.
4. The parties shall confer regarding discovery procedures, including the terms of a proposed protective order, in order to ensure that Defendants are able to seek appropriate discovery regarding the John Doe Doctors while still preserving their anonymity.

Signed in Baton Rouge, Louisiana, on August 27, 2014.

RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

WOMEN'S HEALTH CARE CENTER, INC. on behalf of it patients, physicians, and staff; DELTA CLINIC OF BATON ROUGE, INC., on behalf of its patients, physicians, and staff; JOHN DOE 5, M.D., on behalf of himself and his patients; and JOHN DOE 6, M.D., on behalf of himself and his patients,	*	Case No. 3:14-cv-597
Plaintiffs	*	
Versus	*	
KATHY KLIEBERT, in her official capacity as Secretary of the Department of Health and Hospitals; and MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners,	*	
Defendants	*	

DECLARATION OF JOHN DOE 5, M.D.

I, JOHN DOE 5, M.D., declare under penalty of perjury that the following statements are true and correct:

EXHIBIT C

Plaintiffs' Exhibit 114

Joint Exhibit 110

1. I am a board-certified obstetrician-gynecologist with over 9 years of experience in women's health. I have provided medical services to women at Women's Health Care Center, Inc. ("Women's Clinic") in New Orleans and Delta Clinic of Baton Rouge, Inc. ("Delta Clinic") in Baton Rouge since 2012.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

3. In 2013, I performed approximately 40% of the abortions at Women's Clinic and all of the abortions at Delta Clinic.

4. The types of complications that may occur following an abortion include infection, bleeding, uterine perforation, and retained tissue. In the overwhelming majority of cases, these complications can be handled in an outpatient setting without the need for hospitalization. If such a complication occurs during a procedure, I am well equipped and prepared, with the assistance of the staff, to handle the complication at Women's Clinic or Delta Clinic.

5. These types of complications when they do occur, however, are often after the patient has returned home. The vast majority of the time, they would still not require hospital care. Both Women's Clinic and Delta Clinic have medical staff who are available 24 hours a day for patients to call if they believe they are experiencing a complication. The medical staff is able to provide immediate advice and consults with me or Dr. Doe 6, as necessary. Any complication for most of these patients can either be handled over the phone or the patient is scheduled for follow up care at the clinic.

6. In the event that a more serious complication arises after the patient has returned home, we advise the patient to go to the nearest emergency room, and I call the hospital to alert

the attending physician of the nature of the complication and continue to check on the patient's status and to consult on any follow-up questions that may arise.

7. In my experience, the risk of complications that require a direct hospital transfer are extremely low. In 2013, I provided approximately 2000 abortions at Delta Clinic and approximately 950 abortions at Women's Clinic. Moreover, I began providing services at Women's Clinic and Delta Clinic in April 2012, and of the many abortions I have provided during that time, I have never had to transfer a patient directly to the hospital.

8. I am confident that if I ever needed to directly transfer a patient from Women's Clinic or Delta Clinic, that the clinics have policies and procedures that would ensure quality of care. In the event of a complication during a procedure, Women's Clinic has a transfer agreement with a trained OB/Gyn physician in New Orleans who has admitting privileges at an area hospital, and Delta Clinic has a transfer agreement with a trained OB/Gyn in Baton Rouge who has admitting privileges at an area hospital. In any event that a hospital transfer is necessary, the clinics transfer the patient to the hospital with a copy of the clinic record, and the physician calls the hospital to alert the attending physician of the nature of the complication and continues to check on the patient's status and consult on any follow-up questions, if they may arise.

9. The risk of complications arising during an abortion at Women's Clinic and Delta Clinic that would require hospitalization is even further reduced because all abortions are currently performed using either a minimal analgesic or no sedation.

10. When I heard that H.B. 388 was going to be enacted, I began reviewing hospital bylaws and speaking with people in the medical community in New Orleans and Baton Rouge in order to determine where I should apply for privileges. For example, many hospitals require that

a physician admit a certain number of patients per year in order to obtain admitting privileges. Since I have not admitted any patients for over two years, and the risk of a complication from an abortion requiring hospitalization is so low, I will not be able to meet these requirements. In my experience, hospitals who are affiliated with the Catholic church or that are affiliated with the State also will not grant admitting privileges to a physician who performs abortions.

11. Therefore, I applied to the hospitals where I believed that I had a realistic chance of obtaining admitting privileges. I was very concerned about applying to hospitals where my application would almost certainly be denied because such a determination has adverse professional consequences, such as being reported to the National Practitioner Data Bank, and the denial must often be disclosed in any future application for privileges at a hospital.

12. I currently do not have admitting privileges at any hospitals within 30 miles of Delta Clinic. Prior to September 1, 2014, I applied for admitting privileges at Woman's Hospital, Baton Rouge General Medical Center, and Lane Regional Medical Center. I have not received a response from any of the hospitals in Baton Rouge where my applications for privileges are pending.

13. However, I have been contacted by Woman's Hospital with concerns that I do not reside close enough to the hospital to meet the hospital's residency requirement. I tried to reassure the hospital that I could get to the hospital quickly and that a hospitalist could provide services in the meantime. I also contacted the physician with whom Delta Clinic has a transfer agreement in Baton Rouge to see if he would agree to sign on as my covering physician. He is very concerned about anti-abortion protestors threatening him or his family and protesting outside of his private practice. Even though Delta Clinic has a transfer agreement with him, he

has requested that the information be kept confidential, so he is too afraid to be my covering physician at the hospital. I do not yet know how the hospital will resolve this issue.

14. I have also received reports that during the past few weeks, in an effort to pressure the hospital into denying my privileges, Woman's Hospital has been targeted by anti-abortion activists have sent threatening letters to the hospital and have been escorted out of the medical staff offices because of disruptive conduct. These incidents increase my concerns that the hospital will decide to deny my privileges, even though they have indicated that my credentials are not an issue.

15. If H.B. 388 were allowed to be enforced at this time, I would be forced to stop providing abortion services at Delta Clinic, and the clinic would have to close because it would not have a doctor. I would be too afraid to continue providing abortions in Baton Rouge because H.B. 388 allows the Louisiana State Board of Medical Examiners to take disciplinary action against a physician's license if the physician is not in compliance with H.B. 388, and it subjects physicians to a fine of up to $4,000 per violation.

16. I believe it is very unlikely that another physician who has admitting privileges within 30 miles of Delta Clinic would begin providing abortions at the clinic. Given the hostile environment in Louisiana towards abortion providers and the extreme harassment and intimidation by anti-abortion activists, most doctors are simply too afraid. I am very concerned about what my patients in Baton Rouge and the surrounding areas will do if Delta Clinic is forced to close. Delta Clinic is the only licensed abortion provider in Baton Rouge, and many of my patients are low income.

17. I also applied for admitting privileges in New Orleans at New Orleans East Hospital and Touro Infirmary in order to attempt to comply with H.B. 388 as it relates to

Women's Clinic. I thought that I had the best chance of obtaining admitting privileges in New Orleans at one of these hospitals because I performed my residency at Touro Infirmary and New Orleans East Hospital is a hospital that will be reopening and may be in need of physicians.

18. I have not yet received a response from New Orleans East Hospital. New Orleans East Hospital has not yet begun offering services, but it is scheduled to do so in the near future and will be providing obstetrics and gynecology services. However, if my pending application for privileges were granted at this time, the privileges would not immediately comply with the statutory requirements of H.B. 388.

19. However, I have been granted admitting privileges at Touro Infirmary, so for now, I will be able to continue providing abortion services at Women's Clinic.

20. I am extremely concerned, though, that Touro Infirmary will change its mind and refuse to allow me to be a member of its medical staff while performing abortion services at an abortion clinic. In my experience, the chances that a hospital will revoke a physician's privileges are dramatically increased once anti-abortion protestors find out that a particular hospital has decided to associate with an abortion provider. I know that Touro Infirmary is already receiving threatening letters, and phone calls, including from some very high profile members of the religious community, and that protestors are threatening a large demonstration outside of the hospital if it does not revoke my privileges.

21. I am well aware of how this type of threatening behavior affects hospital decisions making. Previously, I was a hospital-employed physician. Within three months of when I began performing abortions at Delta Clinic and Women's Clinic, anti-abortion protestors mounted a protest outside of the hospital over July 4th weekend, and the hospital told me that I had to either cease performing abortions or cease working at the hospital. I was therefore forced

to stop working at the hospital, so that I could continue providing services at Women's Clinic and Delta Clinic.

22. Even if I am able to maintain my privileges at Touro Informary, if H.B. 388 is allowed to be enforced, Women's Clinic will be operating with significantly diminished capacity and will not be able to serve the number of patients it currently serves because Dr. Doe 6 will not be able to perform any abortion services. During 2013, Dr. Doe 6 provided 60% of the abortion services at Women's Clinic, and all of the medication abortion services. Even if I were able to commit all of my time to serving patients at Women's Clinic, I do not see how we could serve all of the patients who will be coming to our doors once Delta Clinic closes, and with the predicted closures of two of the three other abortion clinics in Louisiana.

23. Even if I am able to see all of the patients that Women's Clinic has served in the past, which in 2013 was approximately 2300 patients, the size of the facility, alone, will make it impossible for me to see many more of the patients who would have ordinarily gone to Causeway or Delta Clinic.[1] Women will also certainly face long waits to obtain appointments and be delayed in their abortion care.

[1] I find it just as unlikely that we will be able to recruit another doctor to perform abortions at Women's Clinic, for the same reasons that I explained about Delta Clinic. However, even with additional physicians, the size constraints of the facility and the need to increase staff, combined with the fact that every patient must come to the clinic twice because of the 24 hour waiting period, will make it impossible for Women's Clinic to serve the increased need for abortion services.

24. Although abortion is a very safe procedure, its risks increase with gestational age. I am very concerned that delay in a woman's ability to obtain abortion care as a result of H.B. 388 will expose her to unnecessary and increased health risks.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on September 19th, 2014.

John Doe 5, MD.

DR. JOHN DOE 5, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; BOSSIER CITY MEDICAL SUITE, on behalf of its patients, physicians, and staff; CHOICE, INC., OF TEXAS d/b/a CAUSEWAY MEDICAL CLINIC, on behalf of its patients, physicians, and staff; JOHN DOE 1, M.D.; JOHN DOE 2, M.D.; WOMEN'S HEALTH CARE CENTER, INC. on behalf of it patients, physicians, and staff; DELTA CLINIC OF BATON ROUGE, INC., on behalf of its patients, physicians, and staff; JOHN DOE 5, M.D., on behalf of himself and his patients; and JOHN DOE 6, M.D., on behalf of himself and his patients, Plaintiffs, v. KATHY KLIEBERT, in her official capacity as Secretary of the Department of Health and Hospitals; MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners, Defendants.	Civil Action No. 3:14-CV-525-JWD-RLB (Consolidated with 3:14-CV-597-JWD-RLB)

RULE 26(a)(2)(B) EXPERT REPORT OF
CHRISTOPHER M. ESTES, M.D., M.P.H.

Plaintiffs' Exhibit 127

Joint Exhibit 123

I. Qualifications and Publications Authored in Previous Ten Years

1. My qualifications are described in detail in my *curriculum vitae*, a copy of which is attached as Exhibit A. My *curriculum vitae* also contains a full list of all publications I have authored in the last ten years. All of my opinions in this report are stated to a reasonable degree of professional certainty.

2. I am a physician licensed to practice medicine in Florida. I am Board Certified by the American Board of Obstetrics and Gynecology. I hold a B.S. in Biology from the University of Miami, College of Arts and Sciences, an M.D. from the University of Miami, Miller School of Medicine ("UMMSM"), and an M.P.H. in Epidemiology from Columbia University, Mailman School of Public Health. I am also a member of the American College of Obstetricians and Gynecologists and the American Society of Reproductive Medicine, and a Junior Fellow of the Society of Family Planning.

3. I completed my residency in obstetrics and gynecology ("ob-gyn") at UMMSM, and I completed the Ryan Fellowship in Family Planning at Columbia University/New York Presbyterian Hospital. As part of the Ryan Fellowship, I received training in abortion care from experts in the field. We practiced in a tertiary care referral center and provided abortions to patients referred to us by other physicians who needed a higher level of care due to various obstetrical and medical conditions. I participated in the training of residents and medical students throughout my time in fellowship.

4. At UMMSM and at Jackson Memorial Hospital in Miami, Florida, as well as during my medical residency in New York, I have attended thousands of births and delivered thousands of babies.

5. In June 2014, I was appointed as the Chief Medical Officer of Planned Parenthood of South Florida and the Treasure Coast (PPSFTC), which comprises nine health care clinics across southern Florida. In that role, I am responsible for numerous aspects of medical care at PPSFTC, including the overall quality of our care and risk management, compliance with medical standards, and oversight of our billing practices. In addition, I serve as the Director of Ultrasound Services and the Director of Laboratory Services at PPSFTC.

6. I also have clinical duties at PPSFTC and provide my patients with the full range of gynecologic care, including comprehensive family planning, cancer screening, testing for sexually transmitted diseases, gynecologic surgery, pre-natal care, and abortion services through 14 weeks from a woman's last menstrual period (LMP), including both surgical and medication abortion.

7. From August 2007 through June 2014, I was an assistant professor in the obstetrics and gynecology department at UMMSM in Miami, Florida, where I served as the Medical Director for Reproductive Health Services. In this role, I was responsible for the conduct of a tertiary care, referral-based family planning clinic. This clinic offers the full scope of family planning care, including surgical abortion up to 24 weeks, and receives referrals from as far away as the Panhandle of Florida, as well as from the Caribbean, Central and South America. Residents in the clinic during every session received training in abortion care as a required portion of our residency program in obstetrics and gynecology. I was also the Director of the Third Year Clerkship in Obstetrics and Gynecology and the Co-Coordinator for the Second Year Medical Students Reproduction and Endocrinology module at UMMSM. I supervised the instruction of medical students in all aspects of obstetrics and gynecology and was responsible for the content of their curriculum at our medical school. The students regularly

attended the Reproductive Health Clinic to learn about and participate in all aspects of family planning, including medication and surgical abortion.

8. As the Medical Director for Reproductive Health Services at UMMSM, I received referrals from other physicians to care for women with medical conditions that necessitated my high level of expertise. In that role, I was one of only a few providers in the Southeast with the skills and access to facilities to care for women who need abortions and are at high risk for complications. I also specialized in the contraceptive and reproductive health needs of women with complicated medical histories.

9. Although I am now Chief Medical Officer of PPSFTC, I remain on the faculty of UMMSM with a voluntary appointment. I continue to serve as an on-call physician on the labor and delivery floor at the hospital and continue to teach ob-gyn residents. And, as before, I still cover the labor floor at Jackson Memorial Hospital, where I attend births and deliver babies regularly.

10. From July 2010 through June 2014, I was a member of the Quality Review Committee of UMMSM. The Committee reviewed the quality of care delivered by physicians in the hospital setting, particularly in the aftermath of adverse and other sentinel events (those resulting in death or serious physical or psychological injury to a patient, not related to the natural course of the patient's illness). Actions taken by the Quality Review Committee included referrals to the Medical Executive and Credentialing Committees of UMMSM. Based on my experience related to the Quality Review Committee, I am familiar with the interpretation and execution of hospital by-laws.

II. Statement of Opinions and Bases and Reasons for Them

11. I have reviewed Louisiana Act No. 620 (House Bill 388), including the "admitting privileges" requirement, which mandates that all physicians who provide abortion service "[h]ave active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced."

12. The Louisiana admitting privileges requirement departs from accepted medical practice and no reliable evidence of which I am aware supports the claim that this requirement will improve the safety of abortion procedures or promote women's health. To the contrary, if the requirement decreases access to legal abortion in Louisiana, overwhelming evidence indicates that these requirements will put the health of women seeking abortions at risk.

A. Surgical and Medication Abortion: A Common and Safe Procedure

13. Roughly 90 percent of all abortions performed in the United States occur during the first trimester of pregnancy (up to 13.6 weeks of pregnancy as measured from the first day of a woman's last menstrual period, or "LMP") and almost two-thirds (61 percent) occur at eight weeks LMP or less.

14. Moreover, very early abortions (6 weeks LMP or less) have become more prevalent, essentially doubling from 14 percent of all abortions in 1992 to 30 percent in 2006.[1]

15. In general, two methods of performing abortions are used in the United States: surgical abortion and medical abortion. Abortion is a very safe procedure; the overall hospitalization rate is approximately 0.3 %.[2]

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[1] Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, 35 Perspectives on Sexual and Reproductive Health, 16 (Jan./Feb. 2003).

[2] *Id.*

16. Surgical abortion involves the use of instruments to evacuate the contents of the uterus. Despite the term "surgical," this method of abortion does not involve an incision. Instead, it entails insertion of instruments into the uterus through the vagina. As such, it is a minimally invasive procedure.

17. The procedure is typically performed in a room with an examination table, on which the patient will lie on her back with her hips and knees flexed and thighs apart and with her feet or legs in stirrups similar to a routine gynecologic examination. After gently stretching open the patient's cervix using graduated dilators, the physician will insert a suction cannula through the cervix into the uterus to empty its contents. The procedure typically lasts two to ten minutes.

18. Surgical abortions performed in outpatient clinics generally do not entail the use of general anesthesia. Instead, the vast majority of such abortions can be safely and comfortably performed with local anesthesia. A local anesthetic is typically applied to the cervix. At the patient's request and for the patient's comfort, oral medication like valium or Xanax can also be provided. Some clinics will also offer intravenous (IV) moderate sedation. These types of sedation are commonly used in other medical and dental offices to alleviate pain and anxiety during procedures. The risks associated with oral sedation or IV moderate sedation are minimal and are orders of magnitude less than general anesthesia administered in an operating room setting.

19. From my own experience as an ob-gyn providing medical care to women for well over a decade, I know that surgical abortion is similar to other gynecological procedures I provide to my patients in terms of risks, invasiveness, instrumentation, and duration. For example, first-trimester surgical abortions are, technically, nearly identical to diagnostic or

therapeutic dilation and curettage ("D&C") on a non-pregnant woman and surgical completion of a spontaneous miscarriage; both of these procedures involve opening the cervix and evacuating the uterus with instruments. Surgical abortion is also similar to hysteroscopy procedures (using a small camera to look inside the uterus).

20. Surgical abortion is also comparable to several commonly-performed non-gynecologic procedures in terms of risk, invasiveness, instrumentation, and duration, such as gastrointestinal endoscopy, certain dental procedures, and liposuction.

21. Many other non-gynecologic surgical procedures that are typically performed in office-based settings are considerably more complex and invasive than abortion. These include certain colonoscopy and upper gastrointestinal endoscopy, oral surgeries and cosmetic surgeries.

22. Medication abortion involves the use of medications to terminate a pregnancy. The medications most commonly used for this purpose are mifepristone and misoprostol. Mifepristone (also known as "RU-486" or by its trade name, Mifeprex) terminates a pregnancy by blocking progesterone, a naturally produced hormone that prepares the lining of the uterus for a fertilized egg and helps maintain pregnancy. Without progesterone, the pregnancy cannot continue; the lining of the uterus softens and breaks down, and the embryo detaches from the uterine lining. Misoprostol (also known as a prostaglandin or by its trade name, Cytotec) causes the uterus to contract and expel the embryo or fetus and other products of conception. These same medications are offered as a treatment option to women who have a spontaneous miscarriage with retained tissue.

23. Medication abortion requires no anesthesia or sedation. Oral medications prescribed by the provider are sufficient to alleviate any pain associated with medication abortion. Most women take only over-the-counter oral pain medications, such as ibuprofen.

24. Legal abortion is one of the safest medical procedures in the United States, and it is quite common. Approximately 3 in 10 women will obtain an abortion by the age of 45.[3]

25. Abortion is a very low risk medical procedure. Complications from abortion are very rare and major complications are extremely rare, well below 1.0%. A recent large study found that the prevalence of any complication of first-trimester surgical abortion – including minor complications – performed by physicians in an outpatient setting was 0.89%. The prevalence of major complications requiring treatment at a hospital was 0.05%.[4]

26. In another study, the prevalence of major immediate complications (defined as uterine perforation or hospital transfer) was 0.3% at 12-15 weeks and 0.7% at 15-18 weeks.[5] The risks of abortion compare favorably with the risks of other gynecologic procedures, such as laparoscopic oophorectomy, laparoscopic hysterectomy, and vaginal hysterectomy, all of which are far more complicated and entail a higher risk of complications.

27. The types of complications that may occur following a surgical abortion include retained tissue, infection, bleeding and injury of the uterus or cervix (perforation or laceration).

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[3] Rachel Jones & Megan Kavanaugh, *Changes in Abortion Rates between 2000 and 2008 and Lifetime Incidence of Abortion,* 117 Obstet. & Gynecol. 1358 (2011).

[4] Tracy A. Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver,* 103 Am J. Public Health 454, 458 (2013).

[5] C. M. Racek, et al., *Complication Rates and Utility of Intravenous Access for Surgical Abortion Procedures from 12 to 18 Weeks of Gestation.* 82 Contraception 286 (2010).

The same complications, except for surgical injuries, can occur after a medication abortion. Bleeding after an abortion is not always a sign of complication, because some bleeding is expected after both surgical and medication abortions.

28. The vast majority of the complications associated with abortion – such as excessive bleeding (hemorrhage) and infection – can be appropriately and safely managed in the clinic setting. Women with bleeding may be treated on an outpatient basis with uterotonics (medications that increase the tone of uterine contractions and reduce bleeding). Women with infections may be treated on an outpatient basis with oral and/or injected antibiotic.

29. Likewise, most cases of cervical laceration are managed in the clinic setting with either cauterizing medications or by suturing the laceration. The majority of cases of uterine perforation are treated by observation and expectant management; they usually do not require repair or additional surgery to treat as they will heal spontaneously. Cases of incomplete abortion with retained tissue are generally managed in the clinic through repeat aspiration and uterotonic medications if needed.

30. During my years working at UMMSM, I was called on a few occasions to the emergency room ("ER") to assist in treating women who had recently obtained abortions. Most of the women I saw in the ER could have been safely treated in a clinic setting, but their symptoms simply occurred outside regular clinic operating hours. Many of these patients were not experiencing complications at all and were having normal symptoms following an abortion. Most post-abortion patients who arrive at the ER are treated as outpatients by ER doctors or the on-call ob-gyn and released.

31. Major complications from abortions performed in a clinic are extremely rare. These rare complications include hemorrhage not responsive to medication or re-evacuation of the

uterus; uterine perforation involving damage to other organs or vascular structures; or severe complications related to anesthesia, such as a seizure or aspiration. Patients experiencing these complications should be transferred to a hospital for appropriate treatment, which may include blood transfusion, uterine artery embolization, or major abdominal surgery such as hysterectomy.

B. Louisiana's Admitting Privileges Requirement Is At Odds With Accepted Medical Practice And Will Not Make Legal Abortion in Louisiana Safer

32. Having hospital admitting privileges is not related to competence in abortion care. It is my understanding that both the American Medical Association ("AMA") and the American Congress of Obstetricians and Gynecologists ("ACOG") have stated that there is no sound medical basis for requiring abortion providers to obtain hospital admitting privileges.

33. The trend in medicine today is toward specialization of physicians who practice in outpatient settings and physicians who practice in hospitals. Most hospitals have their own dedicated staff physicians. These "hospitalists" often provide only inpatient care. For example, obstetrician hospitalists, called "laborists," provide inpatient obstetric care during delivery, while a community obstetrician, or even a nurse practitioner or midwife, provides prenatal care and treats the pregnant woman during pregnancy.

34. Even where a hospital's staff physicians are not solely hospitalists, if a pregnant woman experiences a complication, like pre-eclampsia or preterm labor, that requires emergency care, she will often be cared for in the hospital by the physician specialist on call and not her regular physician.

35. Also, many physicians who practice in an office setting, such as internal medicine and family practice physicians, will not hold admitting privileges at a hospital because they do

not expect to treat their patients in a hospital setting. Instead, these physicians provide their patients with primary care and outpatient management of acute and chronic medical problems, and perform minor surgical procedures in their office. They rely on hospital-based physicians to provide any care needed in a hospital. Such physicians are often working with patients that can be considered at risk of needing hospitalization. Examples include patients who have a history of heart attack, stroke, poorly controlled diabetes, renal failure or severe hypertension.

36. It is an established part of medicine today that physicians cover for each other and refer to other physicians as necessary to treat a patient. Also, for a physician to be properly trained and qualified to perform the procedures he or she performs, he or she must be able to recognize any and all potential complications, even though he or she may not have the skills to manage certain complications. All physicians, at some point, must (and should) refer their patients to another specialist, or a subspecialist, to ensure quality of care.

37. A good example of this is the gastroenterologist who regularly performs colonoscopy and polyp removal in an outpatient setting. Complications from colonoscopy such as heavy bleeding or perforation are managed by a colorectal surgeon, not the gastroenterologist. Moreover, management of these serious complications is performed in a hospital-based operating room setting. Nonetheless, colonoscopies are routinely performed in outpatient settings and any complications can be treated safely after transferring the patient to the ER, without the need for the gastroenterologist to have admitting privileges at the hospital to which the patient was transferred.

38. Similarly, an internist or family doctor who is treating a patient with a history of stroke may need to emergently transfer a patient out of his or her clinic. If the patient suffers an acute episode while in the physician's office, the appropriate care will include sending the

patient to the closest hospital emergency room. As with all emergency cases, whether the patient's own physician has admitting privileges at the hospital is completely irrelevant to the care the patient will receive in the ER. As a physician who has served "on call" duty on hundreds of occasions for the emergency room for the University of Miami Hospital, it would never occur to me to ask whether a patient's treating physician had admitting privileges because it simply does not matter.

39. Referring a patient to an ER to manage complications that arise from outpatient procedures is common in the ob-gyn field. I have treated patients who have come to the hospital because of complications from a variety of gynecologic surgeries performed in outpatient settings, and I provide high quality care to those patients regardless of whether the physician who performed the procedure has admitting privileges. For example, hysteroscopy and diagnostic dilation and curettage on non-pregnant women and surgical management of spontaneous miscarriage are frequently performed in outpatient settings. If there are complications, such as a uterine perforation, the patient will be transferred to the hospital ER and may need follow-up surgery that I would perform without regard to the admitting privileges status of another doctor.

40. It is crucial to understand that it is extremely unlikely that an abortion patient will experience a serious complication at the clinic that requires emergent hospitalization. But in the very rare case in which the patient needs to be transferred by ambulance to a hospital from the clinic, the quality of care that the patient receives will not be affected by whether the abortion provider has admitting privileges at that particular hospital. Emergency room physicians, regardless of whether they perform abortions, are qualified to manage the care of a patient experiencing a complication from an abortion, because such complications are the

same as those that would follow a spontaneous miscarriage or other gynecologic surgery. Emergency rooms are also prepared to involve the care of an on-call specialist where necessary.

41. In the extremely rare event of a grave emergency, the protocol for the responding emergency medical technicians is to transport the patient to the nearest hospital that is accepting patients. Continuity of care can be maintained by direct telephone communication between the abortion provider and the ER physician; it is not dependent on whether the abortion provider has admitting privileges. Such direct telephone conduct is standard medical practice and serves to ensure that the ER physician is aware of the extent of the complication, prior treatment, and medication received. Additionally, it is standard procedure to send a copy of the patient's medical records with the patient being transferred to a hospital by ambulance.

42. Admitting privilege requirements also will not help those abortion patients who experience complications after they have left the clinic. Even if the abortion provider has privileges at a local hospital, if the patient requires emergency care and has contacted the clinic for assistance, the proper course of action would be to instruct the patient to go to the hospital emergency room closest to the patient.

43. Particularly when a patient travels a substantial distance for abortion care, the closest hospital is often *not* the hospital where the abortion provider has privileges. For example, I have admitting privileges at both the University of Miami Hospital and Jackson Memorial Hospital. If a patient of mine had an emergency subsequent to an abortion procedure I performed at PPSFTC's clinic located in Wellington, Florida, I would instruct her to go to the hospital emergency room nearest to her, rather than ask her to travel two hours south to Miami simply because I have admitting privileges there. If the patient were able to travel that

distance without distress, I would ask her to return to the clinic the next day so that she could be treated there, rather than admit her to the hospital.

44. Indeed, the distances many women travel to obtain an abortion further illustrates why the admitting privileges requirement does nothing to improve patient health or safety. As explained above, abortion complications are very rare. But when they arise, they usually occur only after a patient has been discharged from a clinic and returned home. Indeed, complications following a medication abortion almost always occur after the patient has left the clinic because the medications used to induce the abortion take time to exert their effects. For example, if a medication abortion patient experiences heavy bleeding that requires hospital treatment, it will typically be days after beginning the procedure.

45. If a woman who lives outside the area where she obtained abortion care experiences a complication that requires hospital treatment, it makes no sense for her to be treated at a hospital near the abortion clinic just because her abortion provider has admitting privileges there. She should go to the hospital emergency room that is closest to her home. In an emergency or potential emergency situation, no physician or emergency medical technician would countenance a patient traveling farther than necessary just to get to a hospital where her provider has privileges.

46. For example, if a woman traveled several hours to Shreveport for an abortion and experienced a complication when she returned home, the fact that the physician who performed the procedure has privileges at a Shreveport hospital would not make it medically appropriate for the woman to travel those hours to return to Shreveport rather than seeking care at a hospital near her home.

47. And to the extent the admitting privileges requirement would have the effect of reducing the availability of abortion care, women in Louisiana will necessarily travel greater distances to access a physician who provides abortion care. A woman who subsequently has a complication will seek medical care close to home; the fact that the physician who performed the original procedure has admitting privileges within 30 miles of the clinic is of no medical value to her. Thus, insofar as Act No. 620 would increase the distances that women must travel to obtain abortion care, the admitting privileges requirement is self-defeating.

48. Even for the rare patient who experiences serious complications, the requirement that her abortion provider have admitting privileges at a hospital near at the clinic does not confer on her any additional safety benefit. A physician in abortion care may not have the relevant expertise to treat the complication that the patient is experiencing. A woman with a cardiac or lung condition may need treatment from a cardiologist or pulmonologist. A woman in sepsis will have to be admitted in the intensive care unit and treated by an intensivist, an internal medicine specialist and/or an infectious disease specialist. A woman with an embolism would need treatment by a hematologist. I rely on my colleagues to assist me in the management of these complications and conditions, just as they rely on me to evaluate gynecologic pathology that they might encounter during surgery they perform. Given how specialized the practice of medicine has become, particularly in hospital settings, such transfers to the appropriate specialists are common and necessary across medicine.

49. It bears repeating that it is only rarely than an abortion patient, after discharge, goes to a hospital emergency room because of concerns or complications. And in the overwhelming majority of those cases, she is treated in the ER without being admitted to the hospital. ER physicians are qualified to evaluate and treat most complications of abortion. The skills needed

to do so are the same as those needed for the treatment of miscarriages, which are often treated in hospital emergency rooms. If additional care is necessary, the on-call physicians at the hospital can provide it.

50. Finally, the credentialing process of a hospital can be at least in part a business decision. To my knowledge, most hospitals considering granting privileges to a physician will ask the physician to estimate the number and types of procedures that the doctor intends to perform at that hospital. Most hospitals want physicians with admitting privileges to admit a certain number of patients into the hospital each year. Because abortions are exceptionally safe, a physician specializing in that procedure will rarely if ever perform procedures in the hospital or admit a patient into the hospital. If that physician applies for privileges and reports that he or she expects to perform zero to one procedure at the hospital in the coming year, the hospital may well decide not to grant admitting privileges for that reason.

51. Given current medical practice and procedure, the admitting privileges requirement will do absolutely nothing to improve the quality of care for women. In short, the admitting privileges requirement of Act No. 620 has absolutely no medical justification.

C. Obtaining Admitting Privileges In Select Louisiana Hospitals

52. I have been furnished with the by-laws of the following Louisiana hospitals: Willis Knighton Bossier Health Center, Christus Health System - Shreveport/Bossier, East Jefferson General Hospital, Ochsner Medical Center – Kenner, Touro Infirmary, University Health – Shreveport, and Minden Medical Center. I reviewed those sections of the by-laws pertaining to the prerequisites that a physician must meet in order to be considered for active admitting privileges.

53. In my opinion, it would be very difficult for an abortion provider to get active admitting privileges at these hospitals. Most require a provisional period of observation at the hospital before the hospital will grant active admitting privileges to a physician. Because the overwhelming majority of abortions are performed in an out-patient setting, physicians who specialize in this procedure will never have an opportunity to be observed by the hospital staff.

54. Another barrier that abortion providers face in obtaining admitting privileges is the provision found in all the reviewed by-laws that the hospital may refuse to provide a service if the hospital deems that it cannot supply the resources to do so. Under such a provision, a hospital disinclined to extend privileges to a physician who performs abortions may decide that its staff is not willing to participate in abortion care, and therefore the hospital may refuse to allow a physician to perform this service on site.

55. According to the by-laws of Ochsner Medical Center – Kenner, Section 4.1 states that applicants for active admitting privileges must go through 12 months with provisional status and may apply to extend provisional status an additional year. The by-laws further state that "when sufficient clinical activity has occurred" at the hospital, the physician will be referred to the credentialing committee for appointment. If no clinical activity has occurred, the physician will not be eligible. Because abortion providers rarely have a patient admitted to the hospital or have a need to perform the procedure in the hospital operating room, such physicians will be unable to obtain admitting privileges at Ochsner Medical Center – Kenner.

56. The by-laws of Minden Medical Center allow a path for physicians to obtain Provisional privileges through a review process which does not involve direct observation of admissions to the hospital. In Article III, Part G(a), it is stated that, "Information for this evalutaion may be derived from any of the following Chart Review, Monitoring Clinical

Practice Patterns, Proctoring, Simulation or External Peer Review." An abortion provider could arrange for such a review to qualify for Provisional privileges, but would be no more likely to admit a patient to the hospital as a result of doing so. As such, at the end of the maximum 1 year provisional period, the hospital could refuse to advance the physician to Courtesy or Active Staff due to lack of use. Moreover, there is no provision to maintain Courtesy or Active Staff privileges via the alternative routes mentioned above.

57. According to the by-laws of Willis Knighton Bossier Health Center, section 1.B.1j requires physicians with active admitting privileges "to use the Hospital sufficiently to allow for continuing assessment of current competence." Once again, because abortion providers rarely have a patient admitted to the hospital or have a need to perform the procedure in the hospital operating room, such physicians will not be able to maintain active admitting privileges.

58. The by-laws of University Health – Shreveport have similar limitations regarding Hospital Need and Ability to Accommodate. In Section 3.2.1 they state, "Clinical privileges shall be granted only for the provision of care that is within the scope of services, capacity, capabilities, and business plan of the Hospital." Also, as a part of the reappointment process, Utilization of Hospital Resources is reviewed. Since an abortion provider's utilization of hospital resources is likely to be non-existent, it would be difficult to continue active privileges.

59. Christus Health System is a Catholic, not-for-profit corporation. According to the by-laws of Christus Health System - Shreveport/Bossier, Article 2.2(b)(6), in order to obtain privileges, a physician must adhere to "... the terms of the Ethical and Religious Directive for Catholic Health Care Services promulgated by the National Conference of Catholic Bishops."

These Directives specifically ban abortion in all circumstances. As such, physicians who provide abortions as a part of their practice could be denied privileges on this ground.

D. Access to Legal Abortion is Crucial for the Public Health

60. It is extraordinarily important for women to have meaningful access to legal abortion. Women of childbearing age who do not have access to legal abortion face increased risks of death and poor health outcomes. Laws that make abortion harder to access have the greatest impact on the poorest patients. For example, when women are forced to travel long distances for care, the costs quickly escalate. Many women will delay obtaining an abortion until they can find the money for the procedure, as well as money for transportation, lodging, and child care. Although legal abortion is a very safe procedure, the risks increase as the pregnancy advances. Thus, delaying abortion until later in pregnancy increases the risk of complications.[6]

61. Some women, deprived of access to legal abortion, forgo the abortions they would have obtained if they could and, instead, carry unwanted pregnancies to term. These women are exposed to increased risks of major complications from childbirth, including death, and they and their newborns are at much greater risk of complications during pregnancy and after delivery.

62. When safe, legal abortion is unavailable or difficult to access, some women turn to illegal and unsafe, methods to terminate unwanted pregnancies, often causing women great suffering or death. These real-life consequences are inevitable for the women of Louisiana if the admitting privileges requirement substantially reduces their access to legal abortion.

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[6] Linda Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstet. & Gynecol. 729, 735 (2004) (P-098).

63. As I discussed above, abortion is a common medical procedure that nearly one third of all American women will need by the time they are 45. Women need access to legal abortion as an essential part of their primary care. Laws that restrict access to abortion with no corresponding benefit to women's health will only hurt women.

64. If Louisiana Act No. 620 goes into effect, and it decreases the number of legal abortion providers in Louisiana, women will be forced to travel longer distances and incur greater expenses. Making abortion less available will increase wait time; in turn, it will increase health risks to women.

65. In my expert opinion, Louisiana Act No. 630 (House Bill No. 388) will do nothing to make abortion safer or to help women's health. And if it decreases Louisiana women's access to legal abortion, it will gravely damage their health.

III. Data or Facts Considered in Forming My Opinions.

66. The data and facts I have relied on in forming my opinions in this case include my fifteen years of experience as a physician specializing in obstetrics and gynecology and my eleven years of experience training others to perform abortions. I have also relied on information obtained through conferences and discussions with colleagues. In addition, I have relied on the relevant professional literature, which includes ongoing review of studies and commentary on obstetrics and gynecology, including abortion.

67. Papers representative of the consensus in the literature, which support my opinions, include, but are by no means limited to, the following:

- Jody Steinauer, et al., *Multi-Specialty Family Planning Training: Collaborating to Meet the Needs of Women*, 86 Contraception 188 (2012).
- Tracy A. Weitz, et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. Public Health 454 (2013).

- Lilo T. Strauss, et al., Centers for Disease Control and Prevention (CDC), *Abortion Surveillance—United States, 2002*, 54 MMWR Surveill Summ 1 (Nov. 25, 2005).
- *National Survey of Obstetricians/Gynecologists on Contraception and Unplanned Pregnancy: Attitudes and Practices with Regard to Abortions*, The Henry J. Kaiser Family Foundation (Aug. 30, 1995), http://kff.org/womens-health-policy/poll-finding/national-survey-of-obstetriciansgynecologists-on-contraception-and/.
- Stanley K. Henshaw, et al., Centers for Disease Control and Prevention (CDC), *The Accessibility of Abortion Services in the United States, 2001*, 35 Perspectives on Sexual and Reproductive Health 16 (Jan./Feb. 2003).
- Karen Pazol, et al., Centers for Disease Control and Prevention (CDC), *Abortion Surveillance—United States, 2006*, 58 MMWR Surveill. Summ. 1 (Nov. 27, 2009) (P-081).
- Sonya Gamble, et al., Centers for Disease Control and Prevention (CDC), *Abortion Surveillance—United States, 2005*, 57 MMWR Surveill. Summ. 1 (Nov. 28, 2008) (P-082).
- *The Role of Laborist in Patient Care*, ObLaborist.org (2007), http://www.oblaborist.org/ (P-097).
- Linda Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstet. & Gynecol. 729, 735 (2004) (P-098).
- Jessica Gipson, et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 Stud. Fam. Plan. 18 (Mar. 2008) (P-099).
- Daniel Grossman, et al., *Self-Induction of Abortion among Women in the United States*, 18 Reprod. Health Matters 136 (Nov. 2010) (P-160).

IV. Exhibits To Be Used to Summarize or Support Opinions

68. None.

V. List of All Cases During The Previous Four Years In Which I Have Testified As An Expert At Trial or By Deposition

69. None.

VI. Statement of Compensation

70. I am contributing my time *pro bono*. I will be reimbursed for all of my out-of-pocket expenses and any necessary travel expenses.

Miami, Florida
December 1, 2014

Christopher Estes, M.D., M.P.H.

Exhibit A

Christopher M. Estes MD, MPH
Curriculum Vitae

CONTACT INFORMATION

Address: 2300 North Florida Mango Road
West Palm Beach, FL 33409

Email: Christopher.Estes@ppsoflo.org

EXPERIENCE

Planned Parenthood of South Florida and the Treasure Coast — **8/2014 – Present**

- *Position:* Chief Medical Officer
- *Roles:*
  - Supervise medical operations of 9 clinics across South Florida, from Martin to Miami-Dade County
  - Oversee Quality and Risk Management Program
  - Oversee implementation and compliance with Planned Parenthood's National Standard and Guidelines
  - Oversee all Ultrasound and Laboratory Services provided at clinics
  - Supervise and Oversee all medical providers (MD, ARNP, CNM)
  - Facilitate ongoing education of all medical providers
  - Supervise and Oversee all medical education activities (medical students and residents)
  - Assist and Support Legislative Advocacy projects with Florida Association of Planned Parenthood Affiliates
  - Assist and Support Education and Community Outreach projects

University of Miami, Miller School of Medicine Dept. of Obstetrics and Gynecology — **8/2007 - Present**

- *Appointment/Rank:* Voluntary Professor — 8/2014 – Present
- *Department Committees (As Voluntary Professor):*
  - Residency Program Admissions Committee — 8/2014 – Present
  - Residency Program Evaluation Committee — 8/2014 – Present
  - Dept. of Obstetrics and Gynecology Education Committee — 8/2014 – Present
- *Other Educational Activities*
  - Faculty Advisor, Medical Students for Choice — *7/2009* - Present
  - Faculty Advisor, OB/GYN Interest Group — *10/2010* - Present
- *Appointment/Rank:* Assistant Professor — 8/2007 – 6/2014
- *Roles (As Assistant Professor):*
  - Medical Director, Reproductive Health Services — 7/2008 – 6/2014
  - Director, 3rd Year Clerkship in Obstetrics and Gynecology — 10/2010 – 6/2014
  - Course Coordinator, Reproductive System, Endocrine Module (*MD Track)* — 3/2009 – 5/2014

- Course Coordinator, Reproductive System, Endocrine Module (*MD/MPH Track*) 2/2012 – 5/2014

- *University Committees (As Assistant Professor):*
  - Academy of Medical Educators, Steering Committee 8/2012 – 6/2014
  - University of Miami Hospital Ethics Committee 4/2011 – 6/2014
  - UMMSM Honors Program in Medical Education Admissions Committee 9/2010 – 6/2014
  - University of Miami Hospital Quality Review Committee 7/2010 – 6/2014
  - UMMSM Basic Science Advisory Committee 10/2010 – 6/2014
  - UMMSM Clinical Curriculum Advisory Committee 10/2010 – 6/2014
  - Center of Excellence for Laparoscopic and Minimally Surgery at UMMSM, Medical Advisory Board 2/2010 – 9/2013
  - UMMSM Continuing Medical Education Advisory 12/2010 – 1/2012
- *Department Committees (As Assistant Professor)*
  - Residency Program Admissions Committee 8/2007 – 6/2014
  - Education and Grand Rounds Committee 8/2007 – 6/2014
  - Obstetrics and Gynecology Practice Committee 5/2009 – 6/2014

Columbia University/New York Presbyterian Hospital **7/2005 – 6/2007**
Department of Obstetrics and Gynecology
- Ryan Fellowship in Family Planning
- *Program Director:* Carolyn Westhoff, MD, MSc

University of Miami/Jackson Memorial Hospital **7/2001 – 6/2005**
Department of Obstetrics and Gynecology
- Internship/Residency in Obstetrics and Gynecology
- *Program Director:* Victor H. Gonzalez-Quintero, MD, MPH

HIGHER EDUCATION

University of Miami, College of Arts and Sciences **9/1994 – 5/1997**
- *Degree:* BS, Biology

University of Miami, Miller School of Medicine: **7/2007 – 5/2001**
- *Degree:* MD

Columbia University, Mailman School of Public Health: **9/2005 – 5/2007**
- *Degree:* MPH, Epidemiology

CERTIFICATION & LISCENSURE:

Diplomat, American Board of Obstetrics and Gynecology **1/2010 - Present**

Medical Licenses
- Florida, Number: ME 99617 7/2007 – Present
- New York, Number: 236498 7/2005 – 7/2007

Hospital Appointments

• University of Miami Hospital	8/2007 – Present
• Jackson Memorial Hospital	8/2007 – Present

BLS/ACLS 8/2001 – Present

SERVICE ACTIVITIES

National Boards and Committees

• National Abortion Federation, Board of Trustees	4/2013 – Present

Regional and Local Activities

• Florida Alliance of Planned Parenthood Affiliates Lobby Days	3/2008-9, Present
• Medical Director, Lotus House Clinic	9/2010 – 6/2014
• Gynecology Director and Attending Physician UMMSM DOCS Clinics	12/2007 – 7/2014

LEGAL ADVOCACY CONSULTING

Expert Witness

• Center for Reproductive Rights, Representing Hope Medical Group for Women; opposing Louisiana Act No. 620 (House Bill No. 388)	8/2014
• Center for Reproductive Rights, Representing Jackson Women's Health Organization, opposing Mississippi House Bill 1390	2/2013

Amicus Briefs

- Assisted ACLU Reproductive Freedom Project in writing Amicus Briefs to Supreme Court of the United States
  - Ayotte v. Planned Parenthood of Northern New England,126 S.Ct. 961 — 2006
  - Carhart v. Gonzalez, 413 F.3d 791 (8th Cir. 2005), cert. granted 126 S. Ct. 1314 — 2006

PROFESSIONAL CONSULTING ACTIVITIES

• Bayer, Consultant	9/2013 – Present
• Merck, Consultant and Nexplanon Trainer	9/2012 - Present
• Genesis Medicus, Consultant	10/2011 – Present
• Teva Women's Health, Consultant	9/2010 – Present
• Conceptus, Consultant and Essure Trainer	11/2009 – 5/2013
• Covidien/ValleyLab, Consultant and Clinical Mentor	6/2008 – 10/2011

PUBLICATIONS

Book Chapters

1. Aesthetic and Functional Surgery of the Female Genital Tract: Salgado C, Redett R, eds.; **Estes C**, Bishop J, Fein L, 'Function of the Female Genitalia and Orgasmic Response'; Nova Science Publishers, NY, 2014.

2. Gynecology for the Primary Care Physician, Second Edition: Stovall, Ling, Zite, Chuang, Tillmans, eds.; **Estes C**, : 'Amenorrhea'; Current Medicine Group, 2007.

Refereed Journal Articles

1. Salgado, CJ, **Estes, CM**, Tang, JC, Reed HM, Alvarez-Villaba C, Sun Z, 'Use of dermal-fat grafts for augmentation of labia majora in a transgendered woman'; Journal of Sexual Medicine, *in press 2013*.

2. Beasley A, **Estes CM**, Guerrero J, Westhoff, CW, 'The effect of obesity and low dose oral contraceptives on carbohydrate and lipid metabolism'; Contraception, 85(5): 456-52, 2012.

3. **Estes CM**, Potter J, 'Intrauterine Contraception for women Living with HIV'; HIV CareLink, Vol. 11(7), 2010.

4. Lupi CS, **Estes CM**, Broome MA, Schreiber NM, 'Conscientious refusal in reproductive medicine: An educational intervention'; AJOG, 2009, 201 (5): 502 e1-7.

5. **Estes C**, Ramirez J, Westhoff C, Tiezzi L, 'Self-pregnancy testing in an urban family planning clinic: Promising results to a new approach for contraceptive follow up'; Contraception: 2008(1):40-43.

6. **Estes C**, Westhoff C: 'Contraception for the transplant patient' (Review, 27 refs), Seminars in Perinatology, 2007, 31:372-77.

- **Other Published Works**

1. **Estes C**, Comment: 'Response to Surti, et al.: 'Pregnancy and liver transplantation'; Liver Int., 29(3): 475, 2009.

2. **Estes C**: Comment: Virginity is not defined by anatomy. BJOG 114: 1379, 2007.

3. Opinion Editorial: 'How Abortion Ruling Will Cut Off Doctors' Hands', **Christopher M. Estes, MD**, New York Daily News, April 22, 2007.

4. Norris PM, Kamat A, **Estes C**, Medina C, Pietro P, Whitted W: Contraceptive failure in overweight patients taking combination oral contraceptive pills (abstract). Contraception 68:143, 2003.

FUNDED RESEARCH

- Natera, PreNatus, PI
  Christopher M. Estes, MD, MPH
  Amount: Funded per subject enrolled
  Dates: April 2013 – June 2014
  Topic: 'Prenatal genetic diagnosis using free fetal DNA in mother's sera'

- University of Miami Miller School of Medicine, Institute for Women's Health
  PI: Christopher M. Estes, MD, MPH
  Amount: $50,000
  Dates: March 2008- March 2009
  Topic: 'Progestin-only contraception in the post-partum period: metabolic and bone density effects'

- Ryan Fellowship in Family Planning PI: Carolyn Westhoff, MD, MSc
  Fellow: Christopher M. Estes, MD, MPH
  Amount: $25,000
  Dates: February 2006- February 2007
  Topic: 'Self pregnancy testing in an urban family planning clinic'

- Ryan Fellowship in Family Planning PI: Carolyn Westhoff, MD, MSc
  Fellow: Christopher M. Estes, MD, MPH
  Amount: $50,000
  Dates: June 2006- June 2007
  Topic: 'Glucose tolerance among normal and obese women taking oral contraceptive pills'

EDITORIAL RESPONSIBILITIES

- **Submission Reviewer**
  - American Journal of Obstetrics and Gynecology
  - British Journal of Obstetrics and Gynecology
  - Contraception
  - Journal of Women's Health
  - American Journal of Public Health

PROFESSIONAL MEMBERSHIPS

- American College of Obstetricians and Gynecologists (ACOG) 2001 – Present
- National Abortion Federation 2004 – Present
- Physicians for Reproductive Health 2006 – Present
- Society of Family Planning, Junior Fellow 2007 – Present

HONORS AND AWARDS

- Medical Students For Choice National Faculty 11/2012

Mentor Award

- George Paff Award
  - *Awarded by students of UMMSM to best teaching faculty*
  - Class of 2013 4/2012
  - Class of 2005 4/2004
- Alpha Omega Alpha, Medical Honor Society 6/2005
- Society of Laparoendoscopic Surgeons Resident Award 6/2005
- Organon Resident Research Award 6/2004
- William Little Best Resident Research Award 4/2003

INVITED LECTURES

- 'Medical and Surgical Management of Early Pregnancy Failure', Grand Rounds, UMMSM, Dept. of Family Medicine (Local Meeting) 6/2014
- 'A Brief History of Medicine: Transitions in Thought and Practice', Grand Rounds, UMMSM Dept. of Family Medicine (Local Meeting) 3/2014
- 'Teaching Evidence Based Medicine: An effective model for a longitudinal, cross-clerkship curriculum'; Southern Group on Educational Affairs, Annual Meeting (Regional Meeting) 3/2014
- 'Teaching Professionalism to Medical Students: The Role of Family Planning Rotations', Ryan Program Webinar (National) 3/2014
- 'MVA Workshop: First Trimester Abortion Technique' Medical Students for Choice, Annual Meeting (National Meeting) 11/2013
- 'Developing Systems for Financial Oversight'; Ryan Residency Training Program, Annual Meeting (National Meeting) 10/2013
- 'No-Scalpel Vasectomy: Introducing an underutilized method of contraception into your clinic', Ryan Program Webinar (National) 4/2013
- South Florida TransCon: 'Comprehensive Transgender care: Update in the latest evidence', Fort Lauderdale, FL (Regional Meeting) 4/2013
- 'A History of Abortion In America: From the 19th Century To 40 Years after Roe'; UMMSM Dept. of Family Medicine 11/2012

Grand Rounds, Miami, FL (Local Meeting)

- 'Contraception For the Medically Complicated Patient'; UMMSM Dept. of Internal Medicine, Grand Rounds, Miami, FL (Local Meeting) 11/2012
- 'No Scalpel Vasectomy: Permanent, Effective Contraception In 5 Minutes or Less'; Medical Students for Choice Annual Meeting, St. Louis, MO (National Meeting) 11/2012
- 'Salpingectomy vs. Laparoscopic Tubal Ligation for Sterilization and Prevention of Ovarian Cancer: An Interactive Debate'; ASRM, Annual Meeting, San Diego, CA (National Meeting) 10/2012
- 'Opt-out Policies and Abortion Training in Obstetrics and Gynecology Residency Programs', APGO/CREOG Annual Meeting, Orlando, FL (National Meeting) 3/2012
- 'Emergency Contraception: A Review and A New Pill' Department of Family Medicine, Grand Rounds, UMMSM Miami, FL (Local Meeting) 11/2011
- 'Update in Emergency Contraception', Roundtable ASRM Annual Meeting, Orlando, FL (National Meeting) 10/2011
- 'Integrating Family Planning Into the Third Year Obstetrics and GynecologyClerkship', Ryan Program Webinar (National) 6/2011
- 'Emergency Contraception: A Review and A New Pill', Continental Continental OB/GYN Society, Annual Meeting, Naples, FL (Regional Meeting) 5/2011
- 'Mifepristone and Misoprostol for Medical Abortion', Department of Family Medicine Grand Rounds, UMMSM, Miami, FL (Local Meeting) 12/2010
- 'No-Scalpel Vasectomy: How to provide permanent, effective contraception in 10 Minutes or less', Medical Students for Choice, Northeast Regional Meeting, New York, New York (Regional Meeting) 2/2010
- 'Contraception for Adolescent Women', University of California, Irvine, Dept. of Obstetrics and Gynecology, Grand Rounds Irvine, CA (Local Meeting) 10/2009
- 'Hormonal Contraception and Bone Mineral Denisty', UMMSM Dept. of Endocrinology, Grand Rounds, Miami, FL (Local Meeting) 10/2009
- 'Post-partum Contraception', UMMSM Dept. of Family Medicine Grand Rounds, Miami, FL (Local Meeting) 9/2009

- 'Update in Hormonal Contraception', UMMSM Dept. of Family Medicine, Grand Rounds, Miami, FL (Local Meeting) 1/2009
- 'Early Pregnancy Failure: Management and Complications', Emory University, Dept. of Obstetrics and Gynecology, Grand Rounds, Atlanta, GA (Local Meeting) 9/2008
- 'Innovations in Contraception', EXCEL CME, South Florida Obstetrics and Gynecology Conference, Miami, FL (Regional Meeting) 9/2008
- 'Cultural Humility and Family Planning Services for Adolescents', Miami Children's Hospital, Dept. of Pediatrics, Grand Rounds Miami, FL (Local Meeting) 5/2008
- 'Innovations in Contraception', University of Miami Institute for Women's Health, Grand Rounds, Miami, FL (Local Meeting) 4/2008
- 'Family Planning in Central America: The challenge of the Urban Poor', Medical Students for Choice, Annual Meeting, St. Louis, MO (National Meeting) 4/2008
- 'No-Scalpel Vasectomy Workshop: How to provide permanent, effective contraception in 10 minutes or less', Medical Students for Choice, National Meeting, St. Louis, MO (National Meeting) 4/2008
- 'Innovations in Contraception', Bays Medical Society, Annual Meeting, Pensacola, FL (Regional Meeting) 1/2008
- 'Innovations in Contraception', St. Barnabas Medical Center, Dept. of Obstetrics and Gynecology, Grand Rounds New York City, NY (Local Meeting) 10/2007
- 'Cultural Humility and Adolescent Reproductive Health Care', St. Joseph's Hospital, Department of Family Medicine, Grand Rounds New York City, NY (Local Meeting) 4/2007
- 'Planificación Familiar: Nuevas técnicas y sus usos para mejorar el salud publico y la vida de nuestras pacientes', Conferencia de Planificación Familiar, Instituto de Medicina y SeguroSocial – HGO #4, México, DF (International Meeting) 3/2007
- 'VPH: Epidemiología, Patología, Vacuna y el Impacto en la Salud en la Salud Publico', Conferencia Departamental Obstetricia-Ginecología, IMSS- HGO #4, México, DF (Local Meeting) 3/2007
- 'Management of Abortion Complications', Long Island Jewish Jewish Hospital, Dept. of Obstetrics and Gynecology, Grand 1/2007

Rounds, Long Island, NY (Local Meeting)

- 'Management of Abortion Complications', St. Barnabas Medical Center, Dept. of Obstetrics and Gynecology, Grand Rounds New York City, NY (Local Meeting) 9/2006
- 'Medical and Surgical Management of Early Pregnancy Failure', UMMSM, Dept. of Obstetrics and Gynecology, Grand Rounds Miami, FL (Local Meeting) 9/2006
- ACOG, Annual Clinical Meeting Luncheon Presentation Luncheon Presentation: 'What's new in contraception', Washington, DC (National Meeting) 5/2006
- 'Lecture and Teaching Lab: Manual Vacuum Aspiration for First Trimester Abortion', Medical Students For Choice, Northeast Regional Meeting, New York City, NY (Regional Meeting) 10/2005

PRESENTATIONS

- 'Influencing Medical Students' Attitudes towards IUC Use on the Third Year OB/GYN Clerkship', Poster Presentation, ACOG Annual Clinical Meeting; Chicago, IL (National Meeting) 4/2014
- National Abortion Federation, Annual Meeting: 'Advocacy Partnerships: The role of physicians in legal and policy advocacy' New York City, NY (National Meeting) 4/2013
- APGO/CREOG Annual Meeting, Workshop Presentation: 'Student journal clubs: An effective method for longitudinal Instruction of Evidence Based Medicine in the third year clerkships' Fernandina Beach, FL (National Meeting) 1/2011
- APGO/CREOG Annual Meeting, Poster Presentation: 'Correlates of comfort with ethically challenging medical Interventions: A Survey of third year medical students', Chicago, IL (National Meeting) 3/2010
- ACOG, Annual Clinical Meeting, Poster Presentation: 'Self Esteem, Substance Use, Sexual Activity and Body Piercing in Young Women', Philadelphia, PA (National Meeting) 5/2004
- NAF, Annual Meeting, Poster Presentation: 'A Case of Spontaneous Ovarian Hyperstimulation Syndrome in a Twin Gestation Immediately Following an Elective Abortion', New Orleans, LA (National Meeting) 4/2004

- ACOG, District IV Annual Meeting, Oral Presentation: 'Self Esteem, Substance Use, Sexual Activity and Body Piercing in Young Women", San Juan, Puerto Rico (Regional Meeting) 9/2003

- ARHP, Annual Conference, Poster Presentation: 'Contraceptive Poster Presentation: 'Contraceptive Failure in Overweight Patients Taking Combination Oral Contraceptive Pills', San Diego, CA (National Meeting) 9/2003

- University of Miami Department of Obstetrics and Gynecology: William Little Alumni Conference, Oral Presentation: 'Serous and Clear Cell Adenocarcinoma- A review of the literature and the Jackson Memorial Hospital experience', Miami, FL (Local Meeting) 5/2002

Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Services

ACOG Departments & Activities
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Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Services

April 25, 2013

Washington, DC -- The American Congress of Obstetricians and Gynecologists (ACOG) believes physicians who provide medical and surgical procedures, including abortion services, in their offices, clinics, or freestanding ambulatory care facilities should have a plan to ensure prompt emergency services if a complication occurs and should establish a mechanism for transferring patients who require emergency treatment. However, ACOG opposes legislation or other requirements that single out abortion services from other outpatient procedures. For example, ACOG opposes laws or other regulations that require abortion providers to have hospital admitting privileges. ACOG also opposes facility regulations that are more stringent for abortion than for other surgical procedures of similar low risk.

The American College of Obstetricians and Gynecologists (The College), a 501(c)(3) organization, is the nation's leading group of physicians providing health care for women. As a private, voluntary, nonprofit membership organization of approximately 56,000 members, The College strongly advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care. The American Congress of Obstetricians and Gynecologists (ACOG), a 501(c)(6) organization, is its companion organization. www.acog.org

Follow us:

Recent News Releases

ACOG Elects New Officers
May 8, 2015

Mark S. DeFrancesco, MD, Becomes 66th President of the American College of Obstetricians and Gynecologists
May 6, 2015

American College of Obstetricians and Gynecologists Kicks Off Annual Clinical and Scientific Meeting in San Francisco, CA
April 30, 2015

ACOG Releases New Recommendations on Early Pregnancy Loss
April 21, 2015

ACOG's Dr. Barbara Levy Honored by Modern Healthcare
April 6, 2015

Joint Exhibit 136

No. 13-51008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD SEXUAL HEALTHCARE SERVICES; WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; SOUTHWESTERN WOMEN'S SURGERY CENTER; WEST SIDE CLINIC, INCORPORATED; ROUTH STREET WOMEN'S CLINIC; HOUSTON WOMEN'S CLINIC, each on behalf of itself, its patients and physicians; ALAN BRAID, M.D.; LAMAR ROBINSON, M.D.; PAMELA J. RICHTER, D.O., each on behalf of themselves and their patients; PLANNED PARENTHOOD WOMEN'S HEALTH CENTER,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL GREGORY ABBOTT; DAVID LAKEY, M.D.; MARI ROBINSON, Executive Director of the Texas Medical Board,
Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
Case No. 1:13-cv-00862-LY

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

KIMBERLY A. PARKER
DYANNE M. GRIFFITH
SKYE L. PERRYMAN
M. GOSIA SPANGENBERG
EMILY L. STARK
WILMER CUTLER PICKERING
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Counsel for Amici Curiae

No. 13-51008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD SEXUAL HEALTHCARE SERVICES; WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; SOUTHWESTERN WOMEN'S SURGERY CENTER; WEST SIDE CLINIC, INCORPORATED; ROUTH STREET WOMEN'S CLINIC; HOUSTON WOMEN'S CLINIC, each on behalf of itself, its patients and physicians; ALAN BRAID, M.D.; LAMAR ROBINSON, M.D.; PAMELA J. RICHTER, D.O., each on behalf of themselves and their patients; PLANNED PARENTHOOD WOMEN'S HEALTH CENTER,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL GREGORY ABBOTT; DAVID LAKEY, M.D.; MARI ROBINSON, Executive Director of the Texas Medical Board,
Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

Amici curiae, the American College of Obstetricians and Gynecologists and the American Medical Association, are non-profit organizations, with no parent corporations or publicly traded stock. Undersigned counsel of record certify that no persons and/or 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.

Counsel for parties and *amici* in this case are as follows:

Plaintiffs-Appellees	**Plaintiffs-Appellees' Counsel**
• Planned Parenthood of Greater Texas Surgical Health Services • Planned Parenthood Center for Choice • Planned Parenthood Sexual Healthcare Services • Planned Parenthood Women's Health Center	Helene T. Krasnoff Alice Clapman Planned Parenthood Federation of America
• Whole Woman's Health • Austin Women's Health Center • Killeen Women's Health Center • Southwestern Women's Surgery Center • West Side Clinic, Inc. • Alan Braid, M.D. • Lamar Robinson, M.D. • Pamela J. Richter, D.O.	Janet Crepps Esha Bhandari Jennifer Sokoler Center for Reproductive Rights
• Routh Street Women's Clinic • Houston Women's Clinic • Southwestern Women's Surgery Center	Brigitte Amiri Renée Paradis American Civil Liberties Union Foundation, Reproductive Freedom Project Rebecca L. Robertson American Civil Liberties Union of Texas
• All Plaintiffs	R. James George, Jr. Elizabeth von Kreisler Rico Reyes George Brothers Kincaid & Horton, LLP

Defendants-Appellants	**Defendants-Appellants' Counsel**
• Greg Abbott • David Lakey, M.D. • Mari Robinson	Jonathan F. Mitchell John B. Scott Adam W. Aston Andrew S. Oldham

	Arthur C. D'Andrea Beth Klusmann Philip A. Lionberger Michael P. Murphy Gunnar P. Seaquist Office of the Attorney General

Defendants in the District Court dismissed from this action upon the stipulation of the parties	**Dismissed Defendants' Counsel**
• David Escamilla	Elaine A. Casas
• Craig Watkins • Devon Anderson • Matthew Powell • James E. Nichols • Joe Shannon, Jr. • Rene Guerra • Susan D. Reed • Abelino Reyna • Jaime Esparza	Dismissed prior to appearance of Counsel

Amici Curiae	***Amici Curiae*'s Counsel**
• American Association of Pro-Life Obstetricians & Gynecologists • Christian Medical Association • Catholic Medical Association • Physicians for Life • National Association of Pro-Life Nurses • National Catholic Bioethics Center • National Association of Catholic Nurses	Mailee Rebecca Smith Americans United for Life
• Texas Alliance for Life Trust Fund • Texas Center for Defense of Life	Stephen Daniel Casey Casey Law Office, P.C.
• David Dewhurst • Association of American Physicians & Surgeons • Texas Eagle Forum	Lawrence John Joseph

• Texas Right to Life • Eagle Forum Education & Legal Defense Fund • Texas State Representatives: ○ Charles Anderson ○ Cecil Bell, Jr. ○ Dwayne Bohac ○ Dennis Bonnen ○ Greg Bonnen, M.D. ○ Cindy Burkett ○ Bill Callegari ○ Giovanni Capriglione ○ Tony Dale ○ John E. Davis ○ Gary Elkins ○ Pat Fallon ○ Allen Fletcher	
○ Dan Flynn ○ James Frank ○ Craig Goldman ○ Linda Harper-Brown ○ Bryan Hughes ○ Jason Isaac ○ Philip King ○ Stephanie Klick ○ Matt Krause ○ Jodie Laubenberg ○ George Lavender ○ Jeff Leach ○ Rick Miller ○ Jim Murphy ○ John Otto ○ Chris Paddie ○ Tan Parker ○ Charles Perry ○ Larry Philips ○ Jim Pitts ○ Scott Sanford ○ Matt Schaefer ○ Ron Simmons	

○ David Simpson ○ John T. Smithee ○ Drew Springer ○ Jonathan Stickland ○ Van Taylor ○ Ed Thompson ○ Steve Toth ○ Scott Turner ○ James White ○ Paul Workman ○ Bill Zedler ○ Texas State Senators ○ Brian Birdwell ○ Donna Campbell ○ John Carona ○ Bob Deuell ○ Craig Estes	
○ Tony Fraser ○ Kelly Hancock ○ Glenn Hegar, Jr. ○ Eddie Lucio ○ Jane Nelson ○ Robert Nichols ○ Dan Patrick ○ Ken Paxton ○ Larry Taylor	
• Texas State Representative Daniel Hugh Branch	Daniel Hugh Branch Winstead, P.C.
• Alliance Defending Freedom • Bioethics Defense Fund • Family Research Council	Catherine Glenn Foster Alliance Defending Freedom

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CASES

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STATEMENT OF INTEREST OF AMICI CURIAE

The American College of Obstetricians and Gynecologists (the "College" or "ACOG") and the American Medical Association ("AMA") submit this brief *amici curiae* in support of Appellees.[1]

ACOG is a non-profit educational and professional organization founded in 1951. The College's objectives are to foster improvements in all aspects of healthcare of women; to establish and maintain the highest possible standards for education; to publish evidence-based practice guidelines; to promote high ethical standards; and to encourage contributions to medical and scientific literature. The College's companion organization, the American Congress of Obstetricians and Gynecologists (the "Congress"), is a professional organization dedicated to the advancement of women's health and the professional interests of its members. Sharing more than 57,000 members, the College and the Congress are the leading professional associations of physicians who specialize in the healthcare of women.

The membership of the Texas District of the Congress includes 2,532 obstetrician-gynecologists who provide medical care to the women of Texas. The College and the Congress recognize that abortion is an essential health care service

[1] Pursuant to Federal Rule of Appellate Procedure 29, the parties have consented to the filing of this *amicus* brief. Also pursuant to Rule 29, undersigned counsel for *amici curiae* certify that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amici curiae*, its members, and its counsel—contributed money intended to fund the preparation or submission of this brief.

and oppose laws regulating medical care that are unsupported by scientific evidence and that are not necessary to achieve an important public health objective.

The College has previously been granted leave to appear as *amicus curiae* in various courts throughout the country including the U.S. Supreme Court. In addition, the College's work has been cited frequently by the Supreme Court and other federal courts seeking authoritative medical data regarding childbirth and abortion.[2]

AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all fields of medical specialization and in every state, including Texas.

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[2] *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 932-936 (2000) (quoting ACOG's *amicus* brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG's *amicus* brief in assessing disputed parental notification requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG publication in discussing "accepted medical standards" for the provision of obstetric-gynecologic services, including abortions); *see also Gonzales v. Carhart*, 550 U.S. 124, 170-171, 175-178, 180 (2007) (Ginsburg, J., dissenting) (referring to ACOG as "experts" and repeatedly citing ACOG's *amicus* brief and congressional submissions regarding abortion procedure); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 168 (4th Cir. 2000) (extensively discussing ACOG's guidelines and describing those guidelines as "commonly used and relied upon by obstetricians and gynecologists nationwide to determine the standard and the appropriate level of care for their patients").

SUMMARY OF ARGUMENT

Women should have access to all needed medical care—ranging from mammograms to prenatal visits to reproductive care—based on the latest medical developments and scientific facts. Women who live in Texas are no exception. Yet, Texas' House Bill ("H.B.") 2 imposes government regulation on abortion care that is not based on scientific facts or the best available medical knowledge. Putting aside the legal and constitutional infirmities presented by H.B. 2,[3] there is simply no medical basis to impose a local admitting privileges requirement on abortion providers or to limit medical abortion to specific regimens, especially when scientific progress has demonstrated that other regimens are safer and more effective. H.B. 2 does not serve the health of women in Texas, but instead jeopardizes women's health by restricting access to abortion providers and denying women well-researched, safe, evidence-based, and proven protocols for the provision of medical abortion.

For these and the reasons set forth below, *amici* urge this Court to set aside H.B. 2's admitting privileges requirement and, with respect to medical abortion, at a minimum, uphold the district court's prohibition on the enforcement of H.B. 2's medical abortion provisions "where a physician determines in appropriate medical

[3] Unless expressly discussed herein, *amici* do not express an opinion on all or other aspects of H.B. 2 or the district court's opinion.

judgment, such a procedure is necessary for the preservation of the life or health of the mother."[4]

ARGUMENT

I. H.B. 2's Privileges Requirement Does Not Serve the Health of Women in Texas.

Amici oppose legislative interference with the practice of medicine and a woman's relationship with her doctor, especially when legislative enactments—like H.B. 2's privileges requirement—do nothing to protect the health of women and are incongruous with modern medical practice. In contemporary medical practice, it is not only accepted, but expected, that a woman experiencing a rare complication from an abortion—or any other medical procedure—will receive care for that complication from a nearby hospital. The privileges requirement imposed by H.B. 2 does nothing to enhance the safety of, or healthcare provided to, women in Texas. There is no medically sound reason for Texas to impose a more stringent requirement on facilities in which abortions are performed than it does on facilities that perform other procedures that carry similar, or even greater, risks. Therefore, there is no medically sound basis for H.B. 2's privileges requirement.

Access to safe and legal abortion is an important aspect of women's health care. Abortion is one of the safest medical procedures performed in the United States. The risk associated with childbirth is approximately fourteen times higher

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[4] ROA.1559.

than abortion.[5] Over 90% of abortions in the United States are performed in outpatient settings[6] and almost all complications that arise after an abortion can be, and are, treated on an outpatient basis. Hospitalization due to an abortion is rare. There is a less than 0.3% risk of major complications following an abortion that might need hospital care[7] and a recent study found that the risk of major complications from first trimester abortions by the aspiration method is even less—0.05%.[8] According to Texas vital statistics data as of 2011 (the most recent year for which data is available), since 2008, there have been *no* reported maternal deaths out of 227,912 abortions in Texas.[9]

Even though abortions rarely result in complications, H.B. 2 imposes more stringent requirements on facilities where abortions are performed than on other facilities—such as outpatient and Ambulatory Surgical Centers—at which riskier

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[5] Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 215 (Feb. 2012).

[6] Rachel Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 Persp. on Sexual & Reprod. Health 41, 46 (2011).

[7] Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, in A Clinician's Guide to Medical and Surgical Abortion 11, 21 (Maureen Paul et al., eds., 1999).

[8] Tracy A. Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. Pub. Health 454, 458 (Mar. 2013). Similarly, the risk of hospitalization from a medical abortion is 0.06%. Kelly Cleland et al., *Significant Adverse Events and Outcomes After Medical Abortion*, 121 Obstetrics & Gynecology 166, 169 (Jan. 2013).

[9] Tex. Dep't of State Health Servs., Ctr. for Health Statistics, *Vital Statistics Annual Reports* for 2008-2011, Table 33, Selected Characteristics of Induced Terminations of Pregnancy, *available at* http://www.dshs.state.tx.us/chs/vstat/annrpts.shtm (last visited Dec. 18, 2013). There was one death in 2008 out of 81,591 abortions (or a mortality rate of 0.001%). *Id.* In contrast, in that same year, there were 90 maternal deaths out of 405,242 live births (a mortality rate of 0.02%) or approximately 20 times the mortality rate of abortion procedures. *Id.* at Table 28, Infant, Neonatal, Fetal, Perinatal, and Maternal Deaths for 2008.

surgical procedures are performed, including those that use general anesthesia.[10] The common procedures performed at these facilities are not necessarily safer than abortion and, indeed, many pose greater risks.[11] For instance, the mortality rate of a colonoscopy (34.5 per 100,000[12]) is more than 40 times greater than that of abortion (0.67 or less per 100,000[13]). There is absolutely no medical reason to treat facilities that provide abortions differently than facilities at which procedures with similar or greater risks of complications are performed.

While hospital privileges should be awarded based on the competency of physicians, in some cases the requirements to obtain privileges are difficult, if not impossible, for a physician to meet, irrespective of the physician's technical competency. For example, some requirements may dictate that a physician reside in the local area, that the physician have a particular faculty appointment, or that the physician perform a certain number of procedures at the hospital annually. As

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[10] General anesthesia itself carries risks. *See, e.g.*, Michelle Harris & Frances Chung, *Complications of General Anesthesia*, 40 Clin. Plastic Surg. 503 (2013) (discussing risk of complications associated with general anesthesia, the most common of which are cardiovascular and respiratory complications); *see also* Barbara S. Gold, MD et al., *Unanticipated Admission to the Hospital Following Ambulatory Surgery*, 262 J. Am. Med. Assoc. 3008, 3008-10 (Dec. 1989) (finding that general anesthesia was one factor associated with an increased likelihood of post-surgery admission following ambulatory surgery).

[11] These procedures include, among others, colonoscopy, vasectomy, cystoscopy, colposcopy, subcutaneous implant placement, sigmoidoscopy, hemorrhoid banding, skin biopsy, abscess incision and drainage, dental extraction, joint injection, and eye surgery including LASIK.

[12] Cynthia W. Ko et al., *Complications of Colonoscopy: Magnitude and Management*, 20 Gastrointestinal Endoscopy Clinics of N. Am. 659, 659-71 (Oct. 2010).

[13] Raymond, *supra* note 5 at 216 (finding mortality rate of 0.6 per 100,000); Karen Pazol et al., Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 2009*, Morbidity and Mortality Weekly Report 61:1-44, Table 25 (Nov. 23, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm (last visited Dec. 18, 2013) (finding national legal induced abortion case fatality rate for 2003-2009 of 0.67 per 100,000).

discussed more fully below, often qualified and competent physicians who perform abortions are not able to meet these and other similar requirements to obtain privileges.

H.B. 2 is also inconsistent with prevailing medical practices, which are focused on ensuring prompt medical care and do not require that each individual abortion provider have admitting privileges.[14] Therefore, it is important that the provider's facility have a plan to provide prompt emergency services and (if needed) transfer to a nearby emergency facility if complications occur,[15] something that Texas law already requires.[16] Indeed, in the rare instance when a woman experiences a complication after an abortion and seeks hospital-based care, under the prevailing medical practice, she is, and can be, appropriately treated by a trained emergency room physician or, if necessary, the hospital's on-call specialist. Emergency room physicians are trained to handle the rare complications from abortion the same way they are trained to handle complications arising from any

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[14] *See* Inst. of Med., *Crossing the Quality Chasm: A New Health System for the 21st Century*, 8-9 (Mar. 2001) (finding that patient care should be guided by certain rules, including that "[p]atients should receive care whenever they need it and in many forms, not just face-to-face visits … [and] that the health care system should be responsive at all times (24 hours a day, every day) and that access to care should be provided over the Internet, by telephone, and by other means in addition to face-to-face visits" and that "[c]linicians and institutions should actively collaborate and communicate to ensure an appropriate exchange of information and coordination of care.").

[15] ACOG, *Guidelines for Women's Health Care: A Resource Manual*, 433 (3d ed. 2007) ("Clinicians who perform abortions in their offices, clinics or freestanding ambulatory care facilities should have a plan to provide prompt emergency services if a complication occurs and should establish a mechanism for transferring patients who require emergency treatment."); *see also* Nat'l Abortion Fed'n, *2013 Clinical Policy Guidelines*, 55 (Dec. 2012).

[16] 25 Tex. Admin. Code. § 139.56(a) (requiring a "readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital.").

other medical procedure. Thus, as the lower court recognized, the care a woman receives at the emergency room is independent of, and not contingent on, her abortion provider having admitting privileges.[17]

In fact, the transfer of care from the abortion provider to an emergency room physician is consistent with the developments in medical practice dividing ambulatory and hospital care in the medical field more broadly.[18] That is, throughout modern medical practice, often the same physician does not provide both outpatient and hospital-based care; rather, hospitals increasingly rely on "hospitalists" that provide care only in a hospital setting.[19] Continuity of care is achieved through communication and collaboration between specialized health care providers,[20] which does not depend on those providers having hospital privileges.

H.B. 2's privileges requirement will not assist women in the rare event they experience complications after being discharged and returning home. It is unlikely that the hospital at which a woman would seek treatment (*i.e.*, a hospital near her home) is the one at which her provider maintains privileges (*i.e.*, a hospital within 30 miles of the abortion provider's clinic). Texas is a large state and many women

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17 ROA.1541.

18 *See, e.g.*, ACOG, Comm. on Patient Safety & Quality Improvement, Op. 459, *The Obstetric Gynecologic Hospitalist*, July 2010.

19 *Id.*

20 *See* Inst. of Med., *supra* note 14 at 9, 62, and 133-134.

do not live within a 30-mile radius of a clinic. If these women needed emergency care, it would be inappropriate to transport them an additional distance to the hospital at which their abortion provider maintains privileges.[21] H.B. 2's privileges requirement is therefore not only out of step with modern medical practice, which contemplates provision of emergency care by specially trained hospital physicians at a hospital near the patient's residence, it also provides no benefit to women who may experience post-procedure complications.

II. Requiring Hospital Privileges Jeopardizes Women's Health By Restricting Access To Abortion Providers.

Amici oppose H.B. 2's privileges requirement because it jeopardizes women's health in Texas by imposing a legislative constraint on access to safe and legal abortion. H.B. 2's requirement that abortion providers obtain privileges at a local hospital will have the effect of restricting and/or delaying women's access to abortion providers, because, as the district court found, clinics will be forced to close or to stop providing abortion services.[22] A number of providers cannot satisfy H.B. 2's privileges requirement because, as noted above, they cannot obtain privileges for reasons that have nothing to do with the quality of care that they

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[21] Indeed, H.B. 2 acknowledges that the prevailing practice is for a patient to receive emergency care at a facility near her home. Tex. Health & Safety Code § 171.0031(2)(B) (requiring that women be given "the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.").

[22] ROA.1542.

provide.[23]

Some academic hospitals will only allow medical staff membership from physicians who also qualify for and accept faculty appointments. Other hospitals include a requirement to perform a certain number of deliveries and/or a certain number of major obstetric or gynecological surgeries in order to be affiliated with the hospital. Physicians who specialize in performing abortions, a very safe procedure only rarely resulting in hospitalization, are not able to meet such requirements. Finally, certain hospitals require doctors to live within a certain distance of the hospital due to on-call requirements. However, the scarcity of abortion providers make these requirements difficult if not impossible to meet.[24]

The difficultly of obtaining privileges is not theoretical. In Texas, twelve of the 34 abortion clinics were forced to stop providing abortions because providers

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[23] Am. Congress Obstetricians & Gynecologists, *Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Services*, Apr. 25, 2013 (opposing legislation requiring abortion providers to have hospital admitting privileges and stating that such physicians should have a plan to ensure prompt emergency services in the case of a complication).

[24] In its Brief, the State argues that nondiscrimination statutes protect physicians from being denied privileges on religious grounds, Appellants' Br. 33-34, but nondiscrimination statutes do not necessarily prevent this treatment. Indeed, at least one such nondiscrimination statute, the Church Amendment, applies nationwide and it has not stopped religious hospitals from being clear that they would not grant privileges to an abortion provider. *See, e.g*, Akbar Ahmed, *Court file Shows Confusion Over Wisconsin Abortion Regulation Law*, Milwaukee-Wisconsin J. Sentinel (July 26, 2013) (quoting an email from Rita Hanson, Chief Medical Officer at Wheaton Franciscan stating "Wheaton Franciscan Healthcare is a ministry of the Catholic church. [] For that reason, if it's known to us that a doctor performs abortions and that doctor applies for privileges at one of our hospitals, our hospital board would not grant privileges" and quoting an unnamed spokeswoman for Columbia St. Mary's Health System as stating that the organization would deny privileges to physicians who provide abortions "as a matter of our Catholic identity.").

did not have privileges.[25] This is especially significant for the 275,000 women of reproductive age living in the lower Rio Grande Valley near the Texas-Mexico border.[26] Since H.B. 2 went into effect, the only two abortion clinics located in the Valley have been forced to close because the abortion providers have been unable to obtain hospital privileges, leaving women in the Valley without a provider in the four county wide area.[27]

Restrictions on abortion access will lead to increased patient loads on the remaining abortion providers and will inevitably prevent some women from obtaining an abortion altogether.[28] Some women who are still able to access abortion will be required to travel farther to do so, which is likely to lead to delay.[29] Surveys of women who delay obtaining abortions have found that the time needed to raise money, including for travel, is one of the principal sources of delay in women obtaining an abortion.[30] Not surprisingly, the delays associated with obtaining resources and making arrangements to travel to an abortion provider are

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25 Daniel Grossman et al., *The Public Health Threat of Anti-Abortion Legislation*, XX Contraception XX (XX 2013) (published online Nov. 6, 2013), *available at* http://www.contraceptionjournal.org/article/S0010-7824(13)00660-4/abstract.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *See* Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, Am. J. Pub. Health (2013) (published online Aug. 15, 2013), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301378; *see also* Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729 (Apr. 2004).

most prevalent among lower income women.[31] This is particularly problematic in Texas where 40% of women seeking abortions are at or below 100% of the Federal Poverty Guidelines and where many of these women already have to travel some distance to the nearest abortion provider.[32]

As one example, as a result of the closures of the only two clinics in the lower Rio Grande Valley, the closest abortion provider for the more than quarter of a million women of reproductive age living in that area is now 150 miles away and the closest ambulatory surgical center ("ASC") is 250 miles away. This distance adds approximately eight hours of travel time for women in the Valley, which is likely to be prohibitive for many women.[33] Even for women who do have the resources to travel, the travel required may force some women to delay their procedures until later in pregnancy, which, as discussed below, increases their exposure to complications and risks.[34] This is particularly problematic in Texas because after fifteen weeks of gestation an abortion must be performed in an ASC, and ASCs are located only in a few cities.

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[31] *See* Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, Am. J. Pub. Health (2013) (published online Aug. 15, 2013), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301378; *see also* Grossman et al., *supra* note 25.

[32] ROA.370-71.

[32] *Id.*

[33] Grossman et al., *supra* note 25. Moreover, if a woman needs to obtain a medical abortion, Texas law would require a woman to travel these distances at least three times. *Id.*

[34] *Id.*

Delays in obtaining an abortion, such as those that are likely to occur as a result of H.B. 2, endanger women's health. While abortion procedures are among the safest medical procedures, the risk of complications associated with abortion procedures increases with the length of the pregnancy.[35] Medical studies consistently show that the mortality rate for abortion-related deaths in the first trimester, when almost nine in ten abortions are performed, is no more than four in one million abortions,[36] but increases to one death per 11,000 when an abortion is performed at 21 weeks or later.[37] Moreover, in some instances, the added burden imposed by the privileges requirement will prevent women from obtaining safe abortions altogether, which could lead some women to self-induce abortion. Indeed, Texas already has a higher-than-national average of attempts to self-induce an abortion and evidence suggests that such attempts will become more common under H.B. 2.[38] H.B. 2 presents risks to women's health by restricting and delaying access to safe abortion, and, accordingly, should be set aside.

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[35] Bartlett et al., *supra* note 30.

[36] Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics – and the Women They Serve – Pay the Price*, 16 Guttmacher Pol'y Rev. 7 (Spring 2013) (citing Bartlett et al. *supra* note 30).

[37] Guttmacher Institute, *Facts on Induced Abortion in the United States* 2 (Oct. 2013), *available at* http://www.guttmacher.org/pubs/fb_indsuprauced_abortion.html; *see also* Karen Pazol et al., *Abortion Surveillance* (Nov. 23, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm?s_cid=ss6108a1_w#Tab25 (noting that complications are lowest early in pregnancy).

[38] Grossman et al., *supra* note 25; ROA.371-72; Rachel K. Jones, *How Commonly Do U.S. Abortion Patients Report Attempts to Self-Induce?*, 204 Am. J. Obstetrics & Gynecology 1 (2011).

III. The District Court's Limited Prohibition on Enforcement of Medical Abortion Provisions Should be Upheld.

H.B. 2 also binds physicians who administer medical abortions to an inferior protocol identified on the drug label approved by the Food and Drug Administration ("FDA") and to the dosage amount described in certain ACOG guidelines, denying Texas women the benefits of past, current, and future medical advancements. Although this Court has not been asked to review H.B. 2's broad ban on evidence-based medical abortion protocols, the State is challenging the district court's prohibition on the enforcement of H.B. 2's medical abortion provisions in situations when medical abortion would be significantly safer for the woman than any alternative procedure. A description of the current state of medical knowledge on a number of points—including various benefits associated with evidence-based medical abortion regimens and the existence of health conditions where medical abortion is preferred over surgical abortion—makes clear why this Court should uphold the district court's limited prohibition on enforcement.

The practice of medicine should be based on the latest scientific research and medical advances. Absent a substantial public health justification, legislatures should not interfere with patient care, medical decisions, and the patient-physician

relationship.[39] Laws that mandate a medical abortion treatment protocol that goes against best medical practice guidelines are dangerous to patient health.[40] Even laws that mandate a protocol that is valid at the time of the law's enactment are ill-advised because medical knowledge is not static.[41] As knowledge advances, medical treatments enshrined within such laws become outdated, denying patients the best evidence-based care.[42]

As a result of three decades of studies of various medical abortion regimens, a number of evidenced-based regimens have emerged that make medical abortion safer, faster, and less expensive, and that result in fewer complications as compared to the protocol approved by the FDA over 13 years ago. In October 2005, ACOG issued its Practice Bulletin No. 67 on the Medical Management of Abortion ("Practice Bulletin No. 67"), which concluded, among other things, that then-available good and consistent scientific evidence demonstrated that, as compared with the FDA-approved regimen, regimens using 200 mg of mifepristone orally and 800 µg of misoprostol vaginally were associated with better outcomes, fewer side effects, and lower cost for women with pregnancies up

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[39] ACOG, Statement of Policy, *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship* (May 2013), *available at* http://www.acog.org/~/media/Statements%20of%20Policy/Public/2013LegislativeInterference.pdf.

[40] *Id.*

[41] *Id.*

[42] *See id.*

to 63 days of gestation.[43] Practice Bulletin No. 67 also concluded that a patient could administer misoprostol safely and effectively, orally or vaginally, in her home,[44] eliminating the need for an additional visit to a health center and allowing the patient greater control over the time and place of her abortion. Thus, the state of scientific research and evidence, as of at least 2005, supported the use of certain alternative regimens over the FDA-approved regimen, which had been approved several years earlier.

Indeed, it is common for medical practice to advance beyond what is described on FDA drug labels. The FDA allows "off-label" use of registered products—meaning use that is not expressly provided for in an FDA-approved label—when existing medical evidence supports such use.[45] Accordingly, prescribing medication off-label "is common in every field of medicine, and in a

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[43] ACOG, Practice Bulletin No. 67, Medical Management of Abortion, 8 (Oct. 2005). ACOG's guidelines are designed to aid practitioners in making decisions about appropriate patient care, but do not dictate an exclusive course of treatment or procedure. *See id.* at 1. *See generally*, ACOG, *Reading the Medical Literature*, http://www.acog.org/Resources_And_Publications/Department_Publications/Reading_the_Medical_Literature (last visited Dec. 18, 2013) (describing in detail ACOG's methodical and comprehensive guideline development process).

[44] *See* ACOG, Practice Bulletin No. 67, Medical Management of Abortion, 8 (Oct. 2005).

[45] FDA Drug Bulletin, Vol. 12, No. 1, *Use of Approved Drugs for Unlabeled Indications*, 4-5 (Apr. 1982) (off-label use "may be appropriate and rational in certain circumstances, and may, in fact, reflect approaches to drug therapy that have been extensively reported in medical literature."). Although the FDA has regulatory authority over the manufacturers of drugs and medical devices, it does not regulate physicians and the practice of medicine as such. *Id.* Off-label use is also supported by the medical community. *See, e.g.*, Am. Medical Ass'n, Policy H-120.988 Patient Access to Treatments Prescribed by Their Physicians, *available at* https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fdoc%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-120.988.HTM (confirming the AMA's strong support for the proposition that "a physician may lawfully use an FDA approved drug product or medical device for an unlabeled indication when such use is based upon sound scientific evidence and sound medical opinion").

large number of fields most patients are prescribed at least one drug off-label."[46] For example, the FDA has only approved misoprostol for treatment of gastric ulcers,[47] yet the current FDA-approved label for mifepristone expressly instructs providers to use misoprostol in combination with mifepristone for medical abortions[48] and misoprostol is commonly used in obstetrics off-label for, among other things, cervical ripening, induction of labor, postabortion care, medical management of miscarriage, and treatment of postpartum hemorrhage.[49]

While H.B. 2 also permits the provision of "the abortion-inducing drug in the dosage amount prescribed by the clinical management guidelines defined by the [ACOG] Practice Bulletin as those guidelines existed on January 1, 2013,"[50] this too is problematic both because it selects only the dosage aspect of the evidence-based regimens described in the guidelines (and not the timing, location,

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[46] Alexander T. Tabarrok, *Assessing the FDA via the Anomaly of Off-label Drug Prescribing*, V(1) The Independent Review 25, 26 (Summer 2000) (collecting studies, including ones showing that 56% of cancer patients, 81% of AIDS patients, 80 to 90% of pediatric patients, and 23% of pregnant women have been prescribed at least one drug off-label). *See also* William F. Rayburn & Gayla L. Turnbull, *Off-Label Drug Prescribing on a State University Obstetric Service*, 40 J. of Reprod. Med. 186, 186-87 (Mar. 1995) (concluding that 23% of patients attending a prenatal clinic took one or more drugs for off-label indications); Marcio A. da Fonseca & Paul Casamassimo, *Old Drugs, New Uses*, 33 Pediatr. Dent. 67, 67 (Jan./Feb. 2011) (stating that as much as 50% of pediatric use of medications is considered off-label).

[47] Cytotec (misoprostol) FDA label, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2002/19268slr037.pdf.

[48] Mifeprex (mifepristone) FDA label approved in September 2000, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2000/20687lbl.pdf.

[49] Scott G. Petersen et. al, *Can We Use a Lower Intravaginal Dose of Misoprostol in the Medical Management of Miscarriage? A Randomized Controlled Study*, 53 Australian & New Zealand J. of Obstetrics and Gynecology 64, 64 (2013); ACOG, Practice Bulletin No. 107, Induction of Labor 2 (Aug. 2009); ACOG, Committee Opinion No. 427, Misoprostol for Postabortion Care 1 (Feb. 2009); ACOG, Practice Bulletin No. 76, Postpartum Hemorrhage 3-4 (Oct. 2006).

[50] H.B. 2 Sec. 171.063(b).

and route of administration of misoprostol) and because it binds future care to a particular point in time in the past. In fact, the ACOG guidelines that existed on January 1, 2013, Practice Bulletin No. 67, were published *eight* years ago.[51] Since then, medical knowledge has continued to develop and advance, and the result of H.B. 2 will be to deny patients the benefits of those advancements.

Indeed, since ACOG Practice Bulletin No. 67 was published in 2005, more recent studies have shown that vaginal, sublingual, *and* buccal routes of misoprostol administration increase efficacy and increase the gestational age range for use as compared with the FDA-approved regimen[52] and that misoprostol can be safely self-administered at home.[53] Data also indicate that the overall risk of serious infection with medical abortion is very low and that buccal administration of misoprostol may result in a lower risk of serious infection compared with vaginal administration.[54] Research in medical care is always continuing; for medical abortion, continued research demonstrates advances every year, with the

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[51] ACOG periodically, but not continually, updates its guidelines to keep up with the ever-evolving nature of the practice of medicine. ACOG reviews its Practice Bulletins every 18 to 24 months to assess currency and accuracy, and will reaffirm a Bulletin unless it contains information that is incorrect or harmful. When ACOG's review indicates that advances in the medical evidence warrant a revision to the document, ACOG will begin a process for revising a Practice Bulletin that takes up to 24 months to complete.

[52] *See* Cleland et al., *supra* note 8 at 166; Eric A. Schaff, *Mifepristone: Ten Years Later*, 81(1) Contraception 1, 1-7 (Jan. 2010) ("Schaff, *Mifepristone*").

[53] *See* Thoai D. Ngo et al., *Comparative Effectiveness, Safety and Acceptability of Medical Abortion at Home and in a Clinic: A Systematic Review*, 89 Bull World Health Organ. 360 (concluding that home-based self-administration of misoprostol as part of mifepristone-misoprostol medical abortion was safe and effective under the conditions in place in the included studies).

[54] Cleland et al., *supra* note 8 at 166-71; Mary Fjerstad et al., *Rates of Serious Infection After Changes in Regimens for Medical Abortion*, 361 N. Eng. J Med. 145, 145-151 (Oct. 2009).

development of newer, evidence-based regimens that make medical abortion safer, faster, less expensive, and result in fewer side effects, and that are superior to the FDA-approved regimen.[55] In fact, evidence-based regimens through at least 63 days of gestation are safer and more effective than the FDA-approved regimen up to 49 days of gestation.[56] As with any medical care, treatments that are safer and more effective are medically preferable. Unfortunately, because of H.B. 2, physicians in Texas now face punishment should they apply these and other medical advances and knowledge when caring for their patients. Moreover, were ACOG to publish a revised Practice Bulletin based on the most up to date and best medical evidence, under H.B. 2 physicians will be punished for following the protocols outlined in the updated Bulletin by virtue of the fact that the Bulletin would not have existed "as of January 2013."[57]

H.B. 2's restriction on the regimens that can be used for medical abortions is harmful to women. The law is flatly at odds with AMA and ACOG's missions to foster improvements in all aspects of health care for women. There is also no

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[55] *See* Regina Kulier et al., *Medical Methods for First Trimester Abortion*, Cochrane Database of Systematic Reviews, Issue 11 (2011); Schaff, *Mifepristone supra* note 52.

[56] After 49 days of gestation, the efficacy of the FDA-approved regimen declines significantly, and the likelihood of continuing pregnancy increases. Mitchell D. Creinin & Irving M. Spitz, *Use of Various Ultrasonographic Criteria to Evaluate the Efficacy of Mifepristone and Misoprostol for Medical Abortion*, 181 Am. J. Obstetrics & Gynecology 1419, 1419-24 (1999). However, regimens using vaginal, sublingual and buccal misoprostol provide efficacy rates up to 63 days of gestation that exceed the approximately 92% efficacy of the FDA-approved regimen up to 49 days of gestation. Irving M. Spitz et al., *Early Pregnancy Termination with Mifepristone and Misoprostol in the United States*, 338 New Eng. J. Med. 1241, 1241-1247 (Apr. 1998); Kulier et al., *supra* note 55; Schaff, *Mifepristone supra* note 52; Cleland et al., *supra* note 8 at 166-71.

[57] *See* Grossman et al., *supra* note 25.

substantial public health justification underlying H.B. 2's restriction on medical abortion. Although concerns about serious, rare, and deadly infection with clostridial bacteria in women having medical abortion has been raised, it has since become evident that there is no specific connection between clostridial organisms and medical abortion.[58] As noted above, good and consistent scientific evidence supports the use of evidence-based protocols over the FDA-approved regimen.[59]

H.B. 2's restriction on the regimens that can be used for medical abortions is especially harmful to those women with certain medical conditions that make first-trimester medical abortions (even after 49 gestational days) recommended over other abortion methods, such as aspiration. Those conditions include certain

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[58] Investigators have found these organisms also are associated with other obstetric and gynecological procedures, including spontaneous abortion, term delivery, surgical abortion, and medical procedures for cervical dysplasia. *See* A. L. Cohen et al., *Toxic Shock Associated with Clostridium Sordellii and Clostridium Perfringens After Medical and Spontaneous Abortion*, 110 Obstetrics & Gynecology 1027 (Nov. 2007); Christine S. Ho et al., *Undiagnosed Cases of Fatal Clostridium-Associated Toxic Shock in Californian Women of Childbearing Age*, 201 Am. J. Obstetrics & Gynecology 459 (2009).

[59] That there have been eight infection-related deaths reported to the FDA that involved the vaginal and buccal administration of misoprostol versus no infection-related deaths reported to the FDA that involved the FDA-approved regimen is of no import because the regimen approved by the FDA has been disfavored and not widely used for many years. *See FDA's Mifepristone U.S. Postmarketing Adverse Events Summary through 04/30/2011*, http://www.fda.gov/downloads/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/UCM263353.pdf (summarizing reported adverse events); Melanie M.J. Wiegerinck et al., *Medical Abortion Practices: A Survey of National Abortion Federation Members in the United States*, 78 Contraception 486, 488 (2008) (finding that in 2001"[t]he combination of 200 mg mifepristone followed by home use of 800 mcg vaginally administered misoprostol, commonly referred to as the alternative or evidence-based regimen, was used by 83% of facilities. The FDA approved regimen…was used in only 4% of facilities."). According to the aforementioned FDA adverse report data, through April 2011, approximately 1.52 million women used mifepristone in the U.S., resulting in a fatality rate due to infection of 0.0005 percent, which is extremely low. Given the infrequent use of the FDA approved regimen, one would not expect to see any deaths associated with the small set of women that have received medical abortion that followed the FDA approved regimen.

uterine anomalies and a stenotic (narrow) cervix.[60] Appellants have incorrectly stated that "[b]efore the FDA approved the Mifeprex regimen in 2000, abortion patients could not obtain any drug-induced abortions, no matter how impractical or risky a surgical abortion might be for any individual patient."[61] In fact, prior to 2000, medical abortions using other drug regimens, that did not include mifepristone, were recommended in lieu of aspiration or other instrumental methods for patients with the medical conditions described above.[62] The passage of H.B. 2 imposes a new prohibition on the use of non-mifepristone regimens since those regimens, too, are not approved by the FDA. As a result, women whose gestation exceeds 49 days and who have medical conditions that require medical abortion, are unable to obtain a medical abortion despite strong medical need, leaving them worse off than they would have been before 2000.

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60 Eric A. Schaff et al., *Methotrexate and Misoprostol When Surgical Abortion Fails*, 87(3) Obstetrics & Gynecology 450-452 (Mar. 1996) ("Schaff, *Methotrexate*"); Mitchell D. Creinin et al., *Medically Induced Abortion in a Woman With a Large Myomatous Uterus*, 175(5) Am. J. Obstetrics & Gynecology 1379-80 (Nov. 1996); *see also* ROA.1551 (stating that such conditions may arise in "women who are extremely obese, have uterine fibroids distorting normal anatomy, have a uterus that is very flexed, or have certain uterine anomalies [and] when a woman has a condition known as stenotic cervix-a cervix with an abnormally small opening, often caused by scarring from prior surgeries [or when] a woman has undergone female genital mutilation.").

61 Appellants' Br. 34.

62 *See* Schaff, *Methotrexate supra* note 60; Creinin et al., *supra* note 60. Methotrexate is FDA-approved for treatment of certain cancers, psoriasis, and rheumatoid arthritis. Methotrexate Injection, USP FDA label, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2011/011719s117lbl.pdf. Misoprostol is FDA-approved for use relating to gastric ulcers. Cytotec (misoprostol) FDA label, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2002/19268slr037.pdf. Practice Bulletin No. 67 concludes that "[m]ifepristone-misoprostol regimens using 200 mg of mifepristone orally and 800 µg of misoprostol vaginally are generally preferred to regimens using methotrexate and misoprostol or misoprostol only for medical abortion." ACOG, Practice Bulletin No. 67 at 8.

In light of the foregoing, and while reaffirming its opposition to H.B. 2's medical abortion provisions as a whole, *amici* urge this Court to uphold the district court's limited prohibition on the enforcement of the medical abortion provisions "where a physician determines in appropriate medical judgment, such a procedure is necessary for the preservation of the life or health of the mother."[63] The district court's limited prohibition would, at least, provide physicians some additional flexibility in the limited, but important, circumstances when the life or health of the patient may require administration of medical abortions through evidence-based protocols.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to uphold the district court's decision.

[63] ROA.1559.

December 19, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,416 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 2013, I electronically filed the foregoing Brief of *Amici Curiae* American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees and In Support of Affirmance with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to counsel for the parties and *amici curiae*:

/s/ Kimberly A. Parker

Counsel for Amici Curiae

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES, L.L.C., ET AL	CIVIL ACTION
VERSUS	NO. 14-525
KATHY KLIEBERT, ET AL	HON. JOHN W. DEGRAVELLES
	JUNE 22, 2015
	VOLUME I OF VI

REDACTED

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BENCH TRIAL
HONORABLE JOHN W. DEGRAVELLES

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I N D E X

ANY OTHER PRELIMINARY MATTERS?

ALL RIGHT. THEN THE PLAINTIFF MAY PROCEED.

MS. DOUFEKIAS: YOUR HONOR, PLAINTIFFS CALL MS. KATHALEEN PITTMAN.

THE COURT: MS. CAUSEY, WHY DON'T YOU COME AROUND. WE HAVE AN UNUSUAL SITUATION.

MS. DOUFEKIAS, WAS MS. PITTMAN GOING TO TESTIFY WITH HER IDENTITY PROTECTED, THAT IS TO SAY BEHIND THE SCREEN, OR...

MS. DOUFEKIAS: NO, YOUR HONOR, SHE'LL BE AS THE CURTAIN IS NOW.

THE COURT: OKAY. GOOD. WELL, THEN LET'S GET MS. PITTMAN IN.

(WHEREUPON, KATHALEEN PITTMAN, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS.)

DIRECT

BY MS. DOUFEKIAS:

Q GOOD MORNING, MS. PITTMAN.

A MORNING.

Q COULD YOU PLEASE STATE YOUR NAME AND SPELL IT FOR THE RECORD FOR THE COURT REPORTER?

A KATHALEEN, K-A-T-H-A-L-E-E-N, PITTMAN, P-I-T-T-M-A-N.

Q MS. PITTMAN, WHERE DO YOU WORK?

A I WORK AT HOPE MEDICAL GROUP FOR WOMEN IN

SHREVEPORT, LOUISIANA.

Q WHAT DOES HOPE DO?

A WE ARE PRIMARILY AN ABORTION CLINIC.

Q YOU SAID HOPE IS LOCATED IN SHREVEPORT, LOUISIANA?

A YES.

Q APPROXIMATELY HOW FAR FROM NEW ORLEANS IS HOPE LOCATED?

A IN EXCESS OF 300 MILES.

Q WHAT IS YOUR JOB AT HOPE?

A I'M THE ADMINISTRATOR AND HAVE BEEN SINCE 2010.

Q CAN YOU DESCRIBE WHAT IT IS THAT YOU DO AS AN ADMINISTRATOR?

A I OVERSEE THE DAY-TO-DAY FUNCTIONS OF THE CLINIC REGARDING STAFFING, OVERSEE PATIENT CARE IN CONJUNCTION WITH THE PHYSICIANS AND NURSES. I DO THE HIRING AND FIRING.

Q DID YOU WORK AT HOPE PRIOR TO BECOMING THE ADMINISTRATOR?

A YES. I WAS INITIALLY HIRED IN 1992 AS A PART-TIME COUNSELOR.

Q AND WHAT DOES A COUNSELOR DO AT HOPE? OR WHAT DID A COUNSELOR DO AT HOPE IN 1992?

A THE COUNSELORS WOULD SIT ONE-ON-ONE WITH THE PATIENT PRIOR TO HAVING A PROCEDURE DONE, JUST TO TALK ABOUT HER SITUATION AND MAKE SURE SHE WAS COMFORTABLE WITH HER DECISION, DISCUSS WITH HER BIRTH CONTROL, BASICALLY HER OPTIONS.

A WELL, WE TALK WITH THEM, YOU KNOW -- FIRST OF ALL, WHEN WE'RE TRYING TO ARRANGE FOR -- FOR THEIR PAYMENT FOR THEIR PROCEDURE FOR SOME WOMEN IT'S A -- EXCUSE ME -- IT'S A MATTER OF PAYING A LIGHT BILL OR COMING TO HOPE AND -- OR, YOU KNOW, BUYING GROCERIES FOR THAT MATTER, TAKING CARE OF THE RENT.

AND, I MEAN, EITHER I OR THE COUNSELOR IS LITERALLY SITTING THERE WITH THEM TALKING TO THEM TRYING TO FIGURE OUT HOW THEY CAN GET ALL OF THIS DONE GIVEN THE FACT THAT, YOU KNOW, THERE ARE THE TRANSPORTATION ISSUES. SO MANY WOMEN ARE HAVING TO PAY EXTRA JUST TO GET EVERYTHING TAKEN CARE OF TO RETURN TO US AND THEY'RE TALKING ABOUT, "WELL, I HAVE THIS AMOUNT OF MONEY BUT THIS IS DUE, MY RENT IS DUE," I MEAN, THAT'S A DAILY OCCURRENCE.

Q AND WHEN YOU FIND YOURSELF IN THOSE DISCUSSIONS, WHAT SORTS OF THINGS ARE OFFERED TO THE PATIENT?

A WE'LL TRY TO TAP INTO ANY FUNDING WE CAN. WE'LL DISCOUNT AS MUCH AS POSSIBLE. ON OCCASIONS, THE PHYSICIAN WILL WAIVE THE FEE.

Q WHERE DO HOPE'S PATIENTS COME FROM?

A THE MAJORITY OF OUR PATIENTS ARE FROM LOUISIANA, ALL OVER THE STATE, NORTH AND SOUTH. WE DO SEE WOMEN FROM TEXAS, ARKANSAS, AND MISSISSIPPI. WE DO SEE SOME MILITARY WOMEN THAT ARE IN JUST -- HAVE SOME -- HAVE -- YOU KNOW, HAVE THE SURGERY TAKEN CARE OF. BUT MOST OF THEM ARE FROM LOUISIANA.

Q APPROXIMATELY HOW MANY PATIENTS DOES HOPE SEE A YEAR?

A IN EXCESS OF 3,000.

Q AND HOW DOES THE NUMBER OF PATIENTS HOPE SAW IN 2014 COMPARE WITH THE PRIOR YEAR?

A THERE WAS A DEFINITE INCREASE.

Q DO YOU HAVE ANY IDEA WHERE THAT INCREASE CAME FROM?

A WELL, LOOKING AT OUR NUMBERS FROM WHERE OUR PATIENTS ARE COMING FROM, WE SAW A LARGE JUMP IN THE NUMBER COMING FROM TEXAS.

Q DO YOU HAVE ANY UNDERSTANDING OF THE STATE RESOURCES THAT ARE AVAILABLE TO HELP THE POOR WOMEN WHO COME TO HOPE PAY FOR SERVICES?

A OKAY. THERE ARE NONE. MEDICAID WILL NOT PAY FOR ABORTION IN THE STATE OF LOUISIANA. THERE IS A CAVEAT. THEY ARE -- MEDICAID IS SUPPOSED TO COVER IN CASES OF RAPE OR INCEST, BUT WE HAVE NEVER ATTEMPTED TO GO THAT ROUTE ON THESE PATIENTS.

Q WHY IS THAT?

A THE WOMEN ARE UNDER A LIMITED AMOUNT OF TIME WHERE THEY CAN TAKE ACTION AND ATTEMPTING TO GET MEDICAID TO PAY FOR IT WOULD BE I KNOW WAY MORE PROBLEMATIC THAN, YOU KNOW, THAN IT'S WORTH. SO WHAT WE'LL DO IN THOSE CASES IS WE'LL EITHER WAIVE THE FEE COMPLETELY OR WE'LL GET IT DOWN TO WHERE THE PATIENT IS PAYING A MINIMAL AMOUNT.

(WHEREUPON COURT RESUMED. ALL PARTIES WERE PRESENT.)

THE COURT: BE SEATED.

THE PLAINTIFFS CALL DR. DOE NUMBER 3. WHILE WE'RE WAITING FOR DR. DOE NUMBER 3, I'M NOT SURE THE RECORD REFLECTS THE PHYSICAL LAYOUT WE HAVE HERE. SO FOR PURPOSES OF THE APPEALS COURT. WE HAVE A SCREEN WHICH BLOCKS THE VIEW OF THE LAWYERS AND THE AUDIENCE, REALLY EVERYBODY BUT THE COURT, OF THE WITNESS.

THE PURPOSE FOR THIS WAS BECAUSE OF THE AGREED PROTECTIVE ORDER AMONG THE PARTIES AND THE BASIS OF WHICH IS THE CONCERN ABOUT THE SAFETY AND SECURITY OF THE DOCTORS. AND SO WE HAVE SET THIS UP, BUT I JUST WANTED THE RECORD TO REFLECT THAT I HAVE A GOOD VIEW OF THE WITNESSES AND CAN OBSERVE THEIR DEMEANOR.

DOCTOR, WOULD YOU COME BY? AND, LET'S SEE, WHERE'S MS. CAUSEY? SHE'S GOING TO SWEAR YOU IN.

DID YOU SWEAR OUR DOCTOR IN?

OH, YOU DID ALREADY, OKAY.

RAISE YOUR RIGHT HAND, DOCTOR.

(WHEREUPON, DR. DOE #3, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS.)

THE COURT: ALL RIGHT. YOU MAY BE SEATED.

DIRECT

BY MS. JAROSLAW:

Q DOCTOR, WHAT IS YOUR PROFESSION?

THE HOPE MEDICAL GROUP FOR WOMEN; IS THAT CORRECT?

A THAT IS CORRECT.

Q HOW LONG HAVE YOU WORKED FOR HOPE?

A I STARTED WORKING FOR HOPE 34 YEARS AGO.

Q OKAY.

A IN 1981.

Q NOW, AS THE MEDICAL DIRECTOR, WHAT ARE YOUR DUTIES AND RESPONSIBILITIES?

A IT'S PRIMARILY MY RESPONSIBILITY TO SEE TO IT THAT ALL OF THE MEDICAL CARE PROVIDED TO THE PATIENTS IS APPROPRIATE AND TO SCREEN AND TRAIN TO BE CERTAIN THAT OUR NURSES AND ALL OF THE PERSONNEL THAT HAVE ANYTHING TO DO WITH THE MEDICAL ASPECT OF OUR PRACTICE ARE UP TO -- ARE WELL TRAINED, ARE ADEQUATELY TRAINED. AND THEN IT'S ALSO MY RESPONSIBILITY TO REVIEW APPLICATIONS BY ANY OF THE PHYSICIANS TO BE ADDED TO OUR STAFF.

Q AND DO YOU ALSO PROVIDE MEDICATION AND SURGICAL ABORTIONS AT HOPE?

A YES, WE DO.

Q AND WHAT IS YOUR SCHEDULE WHEN YOU'RE ON THE PREMISES AT HOPE?

A I'M SORRY?

Q WHEN ARE YOU AT HOPE, WHICH DAYS PER WEEK?

A I'M THERE ON THURSDAY AFTERNOON AND ALL DAY ON SATURDAY.

Q IN AN AVERAGE WEEK, ABOUT HOW MANY PATIENTS DO YOU SEE AT HOPE?

A WELL, ON THE AVERAGE I SEE ABOUT 20 TO 30 PATIENTS A WEEK. JOHN DOE NUMBER 1 SEES PATIENTS ON THOSE SAME DAYS THAT I'M THERE AND SEES AN EQUAL OR GREATER NUMBER THAN I DO ON THOSE DAYS.

JOHN DOE NUMBER 1 WAS ON VACATION LAST WEEK, SO I HAD THOSE TWO DAYS COMPLETELY TO MYSELF AND SAW 64 PATIENTS ON THOSE DAYS.

Q AND JOHN DOE NUMBER 1 IS YOUR COLLEAGUE AND THE ONLY OTHER PHYSICIAN WHO PRESENTLY PROVIDES ABORTIONS AT HOPE; CORRECT?

A THAT IS CORRECT.

Q WHERE DID YOU RECEIVE YOUR TRAINING IN SURGICAL ABORTION METHODS?

A FROM THE ORIGINAL OWNER OF HOPE MEDICAL GROUP WHO WAS -- ONE OF THE OWNERS WAS FROM A SIMILARLY NAMED CLINIC, HOPE CLINIC, UP IN ST. LOUIS, DR. HECTOR ZEVALLOS. AND HE CAME DOWN AND SHOWED US HOW TO DO ABORTION TECHNIQUES.

Q IN ADDITION TO THAT, DID YOU HAVE A COLLEAGUE ON THE FACULTY OF LSU MEDICAL SCHOOL WHO AT THE TIME WAS PROVIDING ABORTIONS AT HOPE?

A YES. THAT ACTUALLY IS JOHN DOE NUMBER 2, I BELIEVE, IF I CAN REMEMBER OUR NUMBERS.

Q I THINK THAT'S CORRECT.