No. 15A880

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

RESPONDENT'S OPPOSITION TO EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

This is a facial challenge to Louisiana's Act 620, which requires abortion providers to have admitting privileges at local hospitals. Following a bench trial, the district court ruled that Act 620 had the "effect" of placing a substantial obstacle in the path of a "large fraction" of women seeking abortion in Louisiana. The court therefore declared the Act facially invalid and preliminarily enjoined it. Louisiana immediately sought, and was denied, a stay pending appeal by the district court. Subsequently, a unanimous three-judge panel of the Fifth Circuit granted Louisiana's motion for stay pending appeal. The Fifth Circuit ruled that the district court's application of the "large fraction" test was legally erroneous, ignored undisputed evidence of the Act's impact on Louisiana providers, and wrongly overrode the interpretation of the Act by the state official charged with enforcing it.

Applicants now ask the Court to vacate the Fifth Circuit's stay. The Court should deny that request because it is based on serious misrepresentations of the undisputed facts, the nature of the proceedings below, and even the basis for Applicants' own claim.

First, the core of Applicants' argument for vacatur is that the Act will reduce the number of Louisiana abortion providers to "only one physician." Emerg. App. at 1. That is manifestly false: as the Fifth Circuit found, the assertion ignores the "undisputed evidence" that two *additional* abortion providers *already had* admitting privileges that allow them to continue to provide abortions in two of the major population centers of Louisiana—Shreveport and New Orleans. App. 11a.

Second, Applicants repeatedly claim that the Fifth Circuit's stay "altered the *status quo*" by allowing the Act to go into effect for the first time. Again, that is false. As both lower courts recognized, the Act had been in effect during the entire course of the lower court proceedings, limited only by a temporary restraining order exempting the Applicant doctors from penalties while applying for privileges. That *status quo* changed only when the district court facially invalidated and preliminarily enjoined the Act. The Fifth Circuit's stay, therefore, properly *restored* the *status quo* by allowing the Act again to go into effect.

Third, Applicants repeatedly mischaracterize the injunction issued in this case as "as-applied." That is wrong. Both lower courts emphasized that the Applicants sought facial invalidation only and never sought as-applied relief. More importantly, the district court framed its entire analysis on the basis of the criteria for facial relief in abortion cases—the "large fraction" analysis—and never once characterized the injunction as "as-applied." And if all that were not clear enough, the district court's ruling accompanying the injunction expressly declared the Act facially unconstitutional on the basis of the large fraction analysis.

The indisputable fact that this case presents only a facial challenge to the Act is crucially important. The last time this Court was asked to vacate a stay pending appeal in a facial challenge to an admitting privileges law, the Court denied the request. See *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506 (2013). Applicants obviously wish to avoid the clear implication of *Abbott* that their request in this case should be denied as well. But it is Applicants

who chose to seek only facial invalidation of the Act below, and they should not now be allowed to alter the nature of their claim at the eleventh hour simply because the record fails to support facial invalidation of the Act.

On the merits, Applicants have entirely failed to demonstrate either irreparable harm from the Fifth Circuit's stay, or that the Fifth Circuit was "demonstrably wrong" in applying the large fraction test for facial challenges to an abortion regulation. Their irreparable harm arguments depend on the serial misrepresentations of the facts and law discussed above. Their attack on the Fifth Circuit's large fraction analysis strenuously avoids the obvious—namely, that this case presents a facial and not an as-applied challenge to the Act.

Moreover, Applicants fail to explain why the Fifth Circuit erred in rejecting the district court's *sua sponte* large fraction calculations, which were either based on legal errors, grounded in calculations that produced statistically meaningless figures, or supported by pure speculation. Applicants also fail to explain why the Fifth Circuit erred by relying on Louisiana's unrebutted expert evidence, which showed without contradiction that the Act—at worst—would still leave over 90% of Louisiana women within 150 miles of an operating abortion clinic. Applicants fail to show that the Fifth Circuit erred *at all* in any of these conclusions, and much less do they show that the court was "demonstrably wrong," which is the high standard required to justify vacatur of the Fifth Circuit's stay.

The Court should deny Applicants' emergency request.

STATEMENT OF THE CASE

A. APPLICANTS CHALLENGE ACT 620 ON ITS FACE.

Applicants (noted in bold in the chart) are three of the five Louisiana abortion clinics, and two of six doctors performing abortions at those clinics:

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

See also App. 2a-3a n.2 (describing plaintiffs).[2]

On August 22, 2014, Applicants filed a lawsuit facially challenging Louisiana's "Unsafe Abortion Protection Act," which requires doctors performing abortions 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."[3] They claimed Act 620 was facially unconstitutional because it (1) failed rational basis review; (2) was

[1] Over Louisiana's objection, the doctors were allowed to proceed anonymously.

[2] "App." refers to the appendix to the emergency application. "Supp. App." refers to the supplemental appendix to this opposition.

[3] UNSAFE ABORTION PROTECTION ACT, 2014 La. Acts No. 620, § 1 (H.B. 388) (eff. Sept. 14, 2014), amending LA. REV. STAT. § 40:1299.35.2, recodified at LA. REV. STAT. § 40:1061.10(A)(2)(a) ("Act 620" or "Act"). Applicants sued Louisiana through the Secretary of the Louisiana Department of Health and Hospitals ("Secretary"), who enforces the Act. App. 3a n.3.

enacted for the purpose of impeding abortion access; and (3) would have the effect of impeding abortion access. App. 132a; *see Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 877 (1992) (law imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking [a pre-viability] abortion"). As both lower courts repeatedly observed, Applicants challenged the Act on facial grounds only and brought no as-applied challenge to the Act.[4]

B. THE DISTRICT COURT FACIALLY INVALIDATES AND ENJOINS ACT 620.

On August 31, 2014, the district court entered a temporary restraining order that allowed the Act to take effect but exempted Applicants from penalties while they sought admitting privileges. App. 3a; *see also id.* at 58a (district court noting that, under the TRO, "the Act would be allowed to take effect" but was unenforceable against Applicants "during the application process").[5] Following discovery, on May 12, 2015, the court granted Louisiana summary judgment on Applicants' rational basis claim. *Id.* at 60a. From June 22-29, 2015, the court held a six-day bench trial on Applicants' "purpose" and "effect" claims. *Id.* at 3a, 61a.

On January 26, 2016, the court issued a ruling rejecting Applicants' "purpose" claim, but accepting their "effect" claim. *Id.* at 148a. Specifically, the court found the

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[4] *See* App. 61a (noting "[p]laintiffs contend that Act 620 is facially unconstitutional"); *id.* at 61a n.14 (noting "[p]laintiffs state emphatically that they are not making an 'as-applied' challenge and that their only challenge is facial"); *id.* at 7a (stating "[p]laintiffs have brought only a facial challenge to the Act"); *id.* at 13a n.17 (noting "[p]laintiffs asked for facial invalidation of the Act at every stage of this litigation").

[5] On September 19, 2014, the two other clinics (Women's Health and Delta) and doctors (Does 5 and 6) filed a separate lawsuit, which was consolidated with the original lawsuit. App. 58a. On December 5, 2014, that second lawsuit was voluntarily dismissed. *Id.* at 59a.

Act would reduce the number of Louisiana abortion providers from six to two—leaving only Doe 3 in Shreveport (who had privileges prior to Act 620) and Doe 5 in New Orleans (who obtained privileges after the Act passed). *Id.* at 117a, 119a, 128a, 129a. Based on the court's own interpretation of the Act, it rejected Louisiana's determination—submitted through the sworn affidavit of the Secretary—that an additional doctor, Doe 2, had obtained sufficient privileges at a New Orleans hospital. *Id.* at 116a; 11a-12a. The Act's reduction of providers from six to two, the court reasoned, would render abortion "unavailable" to a "large fraction" of Louisiana women—"approximately 55% of women seeking abortion in Louisiana and over 99% of women of reproductive age." *Id.* at 148a.

The court used two different calculations to derive those figures. It calculated 55% by taking (1) abortions performed in 2013 by the four non-privileged doctors (5,500), and dividing by (2) total abortions in Louisiana in 2013 (9,976). *Id.* at 128a-129a. It calculated 99% by taking (1) Louisiana reproductive-age women, minus abortions performed by non-privileged doctors in 2013 (933,219), and dividing by (2) Louisiana reproductive-age women (938,719). *Id.* Based on those calculations, the court declared Act 620 facially unconstitutional and granted Applicants a preliminary injunction. *Id.* at 158a-159a.[6]

On February 10, 2016, the court entered a separate judgment clarifying the scope of its injunction. *Id.* at 46a-47a (providing injunction applies to Doe 4 as well

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[6] The court also made alternative findings. On the assumption that Doe 2 could continue practicing (in addition to Does 3 and 5), the court found that the Act would deny access to 45% of women. *Id.* at 130a. On the assumption that the Act left only Doe 5, the court found the Act would deny access to 70% of women. *Id.* at 129a.

as Does 1 and 2). That same day, Louisiana filed a notice of appeal and moved in the district court for both a stay pending appeal and a temporary interim stay. Later that afternoon, the district court denied a temporary stay, and subsequently denied a stay pending appeal on February 16, 2016. *Id.* at 20a, 44a-45a. That same day, Louisiana moved for an emergency stay pending appeal in the Fifth Circuit. See Supp. App. 107a-140a.

C. THE FIFTH CIRCUIT STAYS THE INJUNCTION PENDING APPEAL, EMPHASIZING THE FACIAL CHARACTER OF APPLICANTS' CLAIMS AND OF THE DISTRICT COURT'S DECISION.

Following briefing by the parties, the Fifth Circuit granted Louisiana a stay pending appeal on February 24, 2016. *Id.* at 2a. Applying the familiar four-factor test, the court of appeals concluded that Louisiana had made a "strong showing that it was likely to succeed on the merits," and that the remaining equitable factors favored Louisiana. *Id.* at 5a, 14a-15a; *see also id.* at 5a (reciting four-factor test from *Nken* v. *Holder*, 556 U.S. 418, 425-26 (2009)).

With respect to the merits, the Fifth Circuit emphasized that Applicants "have brought only a facial challenge to the Act." *Id.* at 7a & n.9. The court noted that it had already twice considered facial challenges to an identical privileges law in Texas and had, in those cases, granted a stay pending appeal and facially upheld the law on the merits. App. 5a-6a (citing *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott* ("*Abbott I*"), 734 F.3d 406 (5th Cir. 2013), *application to vacate stay denied*, 134 S. Ct. 506 (2013); *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott* ("*Abbott II*"), 748 F.3d 583 (5th Cir. 2014), *en banc reh'g denied*, 769 F.3d 330 (5th Cir. 2014)). The court noted further

that—because the district court rejected the rational basis and "purpose" claims—the only issue before it was whether Louisiana had shown a strong likelihood of success on Applicants' "effect" claim under *Casey*. App. 8a. This required determining whether the lower court had correctly ruled that the Act would likely impede abortion access for a "large fraction" of women. *Id.* (citing *Abbott I*, 734 F.3d at 414). The Fifth Circuit concluded that "[a]pplication 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." App. 8a-9a.

In reaching that conclusion, the Fifth Circuit observed that the lower court based its large fraction analysis on a series of "*sua sponte* statistical analyses," which led the lower court to conclude that the Act would burden varying percentages of reproductive-age women, ranging from 99% to 70% to 55% to 45%. *Id.* at 9a. The Fifth Circuit found these "calculations . . . neither sufficient nor sufficiently reliable" to show that a large fraction of women would be burdened by Act 620. *Id.* at 10a.

The lower court's 99% figure—derived by taking Louisiana reproductive-age women (938,719), subtracting abortions annually performed by non-privileged doctors (5,500), and then dividing by total reproductive-age women (938,719)—was a meaningless statistic that "does not actually measure the effects of the Act." *Id.* As the Fifth Circuit explained, this flawed methodology means that "99% of Louisiana women had no access to abortion before the Act was passed and 99% of Louisiana

women will have no access to abortion after the Act goes into effect." *Id.* The Fifth Circuit found this to be an "absurd outcome" and rejected it. *Id.*

The Fifth Circuit found that the lower court's 70% figure was based on the incorrect assumption that the Act would leave Doe 5 as Louisiana's sole provider, "contrary to the undisputed evidence that Doe 3 and Doe 2 *already have* admitting privileges that satisfy the Act." *Id.* at 11a (emphasis in original). As the Fifth Circuit explained, the possibility that Doe 3 might discontinue his practice "would result from his own choice rather than the requirements of the Act," and Louisiana had "repeatedly conceded" that Doe 2's privileges qualified under the Act. *Id.* at 11a, 12a. Similarly, the lower court's 55% figure was "baseless" because it "presumes" that Doe 2's privileges fail to satisfy the Act, despite Louisiana's "repeated[ ]" concessions to the contrary and the Secretary's "affidavit affirming the validity of Doe 2's privileges." *Id.* at 12a. The Fifth Circuit concluded it was legally "improper for this court or the district court to presume to instruct Louisiana on the proper application of its laws." *Id.* (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984)).

The Fifth Circuit also found that the lower court's 45% figure—which assumed three providers (Does 2, 3, and 5) would remain—was flawed. The figure was not based on any expert testimony or statistics; indeed, Applicants' own expert "offered no specific testimony as to the number or location of women who would potentially be affected." App. 12a. Instead, the figure was calculated by the district court "based on raw numbers drawn from disparate testimony." *Id.* Moreover, the Fifth Circuit

pointed out that "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." *Id.*

The Fifth Circuit noted the "puzzling[ ]" fact that Applicants did not "seriously contest Louisiana's criticisms of the district court's *sua sponte* calculations." *Id.* at 13a. Instead, Applicants insisted that the large fraction test was "irrelevant" because the injunction was "as-applied." *Id.* at 13a & n.17. The Fifth Circuit flatly rejected this argument. It pointed out that Applicants "asked for facial invalidation of the Act at every stage of the litigation," that the district court's opinion "cited the criteria for facial invalidation of the statute," and that the large fraction analysis was "the basis for the injunction [Applicants] ask us to uphold." *Id.* at 13a-14a n.17. Moreover, while not foreclosing the possibility of future as-applied challenges to the Act, the Fifth Circuit observed that at present "the record does not contain the discrete and specific evidence required to maintain an as-applied challenge." *Id.*

Finally, the Fifth Circuit found that the remaining stay factors favored Louisiana. The court explained that when a law is enjoined, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its law," a harm which "merges with that of the public." *Id.* (citing *Abbott I*, 734 F.3d at 419) (citing *Nken*, 556 U.S. at 435). The court rejected Applicants' argument that the existence of the prior TRO undermined the necessity of a stay pending appeal. As the court explained, the TRO was merely "designed to allow physicians time to obtain admitting privileges while the Act went into effect." App. 14a.

The court also rejected Appellants' argument that this Court's vacatur of the stays in *Lakey* and *Cole* weighed against granting Louisiana a stay. *Id.* at 14a n.18 (citing *Whole Woman's Heath* v. *Lakey*, 135 S. Ct 399 (2014); *Whole Woman's Health* v. *Cole*, 135 S. Ct. 399 (2014)). The court explained that in those rulings this Court "did not stay [the Fifth Circuit's] ruling on the facial challenge to Texas's admitting-privileges requirement," but instead vacated the stay only respecting as-applied relief as to two clinics. App. 14a-15a n.18. Furthermore, the Fifth Circuit pointed out that *Abbott I* "is the most analogous to the present case" because it involved a facial challenge to a privileges law, and, in that case, "the Supreme Court denied in full the motion to vacate our stay order." *Id.* (citing *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506 (2013)).

LEGAL STANDARD

This Court may vacate an interim stay granted by a court of appeals only if that court is "demonstrably wrong in its application of accepted standards in deciding to issue the stay," if the rights of parties would be "seriously and irreparably injured by the stay," and if the case is likely to be reviewed by this Court following the appeal. *Western Airlines, Inc.* v. *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)); *see also Abbott*, 134 S. Ct. at 506 (Scalia, J., concurring in denial of application to vacate stay) (reciting standard). The court of appeals' stay merits "great deference," *Garcia-Mir* v. *Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers), and should not be disturbed "'except upon the

weightiest considerations.'" *Certain Named and Unnamed Non-citizen Children* v. *State of Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers) (quoting *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)).

ARGUMENT

I. Applicants' irreparable harm argument misrepresents the undisputed facts, the lower court proceedings, and the legal basis for Applicants' own claims.

Applicants argue that the Fifth Circuit's stay irreparably harms them and their patients because (1) the stay will prevent "all but one physician" from providing abortions in Louisiana and will cause clinics to lose their licenses, Emerg. App. at 19; and (2) the stay "altered the *status quo*" by allowing the Act to go into effect for the first time. They also assert that this Court's partial vacatur of the Fifth Circuit's stays in *Lakey* and *Cole* should lead the Court to vacate the stay here, since Louisiana's case also involves an "as-applied" injunction. *Id.* at 21-22. The Court should reject these arguments, however, because they are based on misrepresentations of the undisputed facts, the lower court proceedings, and the legal basis for Applicants' own claims.

A. Applicants' claim that the Act will reduce the number of Louisiana abortion providers to one misrepresents the undisputed facts.

Over and over again, Applicants assert that the Act's operation will leave Louisiana "with only one physician providing abortions." Emerg. App. at 1.[7] This is

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[7] *See also*:

- *id.* (contending "*one physician* cannot possibly provide all abortions in Louisiana");
- *id.* at 6 (claiming "Louisiana will be left with *a single abortion provider*");
- *id.* (claiming "[t]hat *lone doctor* . . . cannot meet the need" for Louisiana abortions);

the core premise of their claim that the Act is having an "immediate, ongoing, and devastating impact" on abortion access in Louisiana. *Id.* And that premise is demonstrably false. As the Fifth Circuit recognized, the "undisputed evidence" shows that, in addition to Doe 5, two additional physicians "*already have* admitting privileges that satisfy the Act." App. 11a (emphasis in original).[8] Doe 3 already had privileges at two North Louisiana hospitals before the Act passed, and Doe 2 obtained privileges at a New Orleans hospital shortly before trial in February 2015. *Id.* at 2a n.2, 11a-12a.

To be sure, the district court suggested it could disregard Doe 3 and Doe 2's privileges, but the Fifth Circuit flatly rejected that view as legally untenable. *Id.* at 11a-12a. Doe 3 speculated that he might choose to stop providing abortions if the

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- *id.* at 9 (asserting, "if the stay is not lifted, the state will be left with *only one abortion provider*");
- *id.* at 10 (claiming Act will leave "*only one physician* practicing in one location");
- *id.* (asserting, "[w]ith *a single provider* remaining, women seeking abortion in Louisiana will be prevented in great numbers" from obtaining abortions);
- *id.* at 19 (claiming "[t]he Act will prevent *all but one physician* who is currently providing abortions in Louisiana . . . from continuing to do so");
- *id.* at 25 (claiming, "if Act were to take effect, Applicants would cease providing abortion services, as would every other physician, *save one*");
- *id.* (asserting "all women seeking abortions in Louisiana would have to seek abortion care from *a single doctor*");
- *id.* (referring to "the state's *lone remaining doctor*");
- *id.* at 37 (claiming Act "will result in the closure of every abortion clinic in the state *save Women's*") (emphases added).

[8] *See also id.* at 10a-11a (explaining the "assumption" that "Dr. Doe 5 will be the only abortion provider in Louisiana after the Act takes effect" is "contrary to the undisputed evidence that Doe 3 and Doe 2 *already have* admitting privileges that satisfy the Act"); *id.* at 2a n.2 (explaining that Doe 2 and 5 have privileges in the New Orleans area, and that Doe 3 has privileges in the Shreveport area).

Act took effect, but, as the Fifth Circuit explained, his voluntary decision to close his practice would not be legally attributable to the Act.[9] And although the sufficiency of Doe 2's privileges was "repeatedly conceded" by Louisiana—and was moreover confirmed by the sworn affidavit of the Secretary, "the state official charged with enforcement of the Act," App. 12a—the district court nonetheless undertook its own interpretation of the Act and overrode the Secretary's determination that Doe 2 had adequate admitting privileges. As the Fifth Circuit explained, that was legally "improper," because federal courts lack authority "to presume to instruct Louisiana on the proper application of its laws." *Id.* (citing *Pennhurst*, 465 U.S. at 106).

Furthermore, Applicants' suggestion that clinics will "irretrievably" lose their licenses if they cease doing business is both irrelevant and wrong. Emerg. App. at 20. Applicants never made this argument in opposition to Louisiana's stay motions, either in the district court or the Fifth Circuit. Furthermore, even assuming any Louisiana clinic has ceased (or will cease) doing business, a clinic could easily re-apply for and obtain a license if its doctor obtains privileges or if it hires a doctor with privileges. See LA. ADMIN. CODE tit. 48, § 4405 (2016) (setting out "initial licensing application process"); *id.* § 4413 (abortion facility that has ceased doing business shall not provide services "until it has obtained a new initial license"). Contrary to Applicant's argument, Emerg. App. at 36, moreover, the potential loss

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[9] See *id.* at 11a (noting Doe 3's testimony was "purely hypothetical" and, regardless, any decision to stop providing abortions "would result from his own choice rather than the requirements of the Act"); see also, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297, 316 (1980) (explaining that, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation").

of a *renewable* business license does not constitute irreparable harm. Cf., *e.g.*, *Atwood Turnkey Drilling, Inc.* v. *Petroleo Brasiliero, S.A.*, 875 F.22d 1174, 1179 (5th Cir. 1989) (collecting authorities for proposition that "threat of bankruptcy" or "destruction of . . . business" constitutes irreparable harm).

B. The Fifth Circuit's stay restored the status quo *by allowing the Act to again take effect.*

Applicants' argument that the Fifth Circuit's stay "altered" the *status quo* is likewise premised on a demonstrably inaccurate representation of the proceedings below. Applicants insist that, prior to the stay's being entered, the Act's enforcement had been "barr[ed]" for the previous eighteen months by a temporary restraining order.[10] That is false. As the Fifth Circuit explained, the TRO entered on August 31, 2014 "*permitted the Act to go into effect* but exempted [Applicants] 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." App. 3a (emphasis added). On this point the court of appeals *agreed* with the district court: under the TRO, the district court's ruling explained, "the Act would be allowed to take effect," but Applicants would not face penalties "during the application process." *Id.* at 58a. Indeed, the whole premise of the TRO was that the Act would go into effect, but Applicants would be given a reprieve from any penalties while seeking privileges. See *Abbott II*, 748 F.3d at 600 (privileges law

[10] See Emerg. App., at 3 (claiming TRO "barr[ed] enforcement of the Act"); *id.* at 15 (asserting Louisiana "agreed to extend the TRO blocking enforcement of the law").

could not be enforced against doctors with applications pending on law's effective date).

Contrary to Applicants' argument, what altered the *status quo* was not the Fifth Circuit's stay of the preliminary injunction but rather the district court's entry of its judgment declaring the Act unconstitutional statewide and specifically barring its enforcement altogether as to Applicants. See App. 158a-159a (declaring Act unconstitutional and enjoining "any enforcement" against Applicants); *id.* at 46a (judgment enjoining Act's enforcement against Applicants). By staying that order, the Fifth Circuit *restored* the status quo, allowing the Act again to take effect, both as to Applicants and throughout the State. See *id.* at 3a (court of appeals noting that August 31, 2014 TRO had "permitted the Act to go into effect").

In sum, the Court should reject Applicant's mistaken claim that the Fifth Circuit's stay altered the *status quo*. Exactly the opposite is true.

C. Like **Abbott***, Louisiana's case involves a facial challenge, not an as-applied challenge.*

Finally, Applicants suggest that this Court's partial vacatur of the Fifth Circuit's stays in *Lakey* and *Cole* should lead it to vacate the Fifth Circuit's stay here. Emerg. App. at 21. But there is a critical difference between those cases and Louisiana's. In *Lakey* and *Cole*, plaintiffs brought as-applied challenges to Texas's privileges law, whereas in this case "[p]laintiffs have brought only a facial challenge." App. 7a; cf. *Whole Woman's Health* v. *Cole*, 790 F.3d 563, 592-598 (5th Cir. 2015) (addressing as-applied challenges), *cert. granted sub nom. Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 499 (Nov. 13, 2015) (No. 15-254). Because Applicants' challenge was facial

only, their request to vacate the stay should be controlled by *Abbott*, in which this Court refused to vacate the stay of a facial injunction against an identical admitting privileges law. See *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506 (2013) (denying application to vacate stay).

In a transparent attempt to avoid the implications of *Abbott*, Applicants repeatedly assert that the preliminary injunction in Louisiana's case is "as-applied." See Emerg. App., at 4, 15, 21, 23. That is flatly wrong. The Fifth Circuit emphasized that Applicants "have brought only a facial challenge to the Act," App. 7a, and "asked for facial invalidation of the Act at every stage of the litigation," *id.* at 13a n.17. The district court likewise observed that Applicants "state emphatically that they are not making an 'as-applied' challenge and that their only challenge is facial." *Id.* at 7a n.9 (quoting district court). The district court consequently framed its declaratory judgment and injunction under "the criteria for facial invalidation of [the] statute." *Id.* at 14a n.17. In other words, *both* lower courts emphasized that Applicants sought facial and not as-applied relief, and *both* lower courts rejected Applicants' premise that the district court's order was entered solely on an as-applied basis.

Applicants also assert that this Court's decision in *Hellerstedt* will "control" the outcome of this case. Emerg. App. at 20. They are again mistaken. *Hellerstedt*, addresses as-applied challenges to Texas's privileges and ambulatory surgical center requirements. A decision in that case might affect future as-applied challenges to Louisiana's privileges law. As the Fifth Circuit noted, its decision

"does not foreclose future as-applied challenges" to Act 620. App. 14a n.17. But the present case concerns a decision *facially* invalidating Act 620.

The far more analogous case, then, is not *Hellerstedt* but *Abbott*. As already explained, in *Abbott* this Court refused to vacate the Fifth Circuit's stay pending appeal of the district court's facial invalidation of Texas's privileges law. *Abbott*, 134 S. Ct. 506. Moreover, when the Fifth Circuit subsequently upheld the law on the merits against facial attack, see *Abbott II*, 748 F.3d at 600, the plaintiffs did not seek certiorari. See *Cole*, 790 F.3d at 577 (noting that "no [certiorari] petition was filed" in *Abbott II*). Thus, any facial challenge to Texas's privileges requirement in *Hellerstedt* is barred by *res judicata*. See Brief for Respondent at 17, *Whole Woman's Health* v. *Hellerstedt*, No. 15-254 (U.S. Jan. 2016) (arguing *res judicata* bars petitioners' facial attacks on Texas's admitting privileges requirement). And for this reason too, this case is unlikely to be controlled by this Court's decision in *Hellerstedt*.

II. Applicants fail to show how the Fifth Circuit's undue burden analysis was wrong *at all*, much less "demonstrably wrong."

To satisfy the requirements for vacating the Fifth Circuit's stay, Applicants must show that the Fifth Circuit was "demonstrably wrong" in applying *Casey*'s undue burden standard. See, *e.g., Western Airlines*, 480 U.S. at 1305; *Abbott*, 134 S. Ct. at 506 (Scalia, J., concurring in denial of application to vacate stay) (reciting "demonstrably wrong" standard). Attempting to meet that high standard, Applicants claim that the Fifth Circuit "radically departed" from *Casey* in three ways: (1) by applying *Casey*'s "large fraction" test, which pertains to facial

challenges to abortion laws, to an "as-applied" injunction; (2) by "disregarding" the district court's "factual findings" concerning the Act's alleged undue burden; and (3) by refusing to balance the Act's medical benefits against its burdens on abortion. Emerg. App. at 22-34. These claims are entirely mistaken. Not only have Applicants failed to establish that the Fifth Circuit's application of *Casey* was "demonstrably wrong," they have failed to establish that the Fifth Circuit erred *at all*—much less in a way that made any difference in the outcome.

A. The Fifth Circuit properly reviewed whether the district court had correctly applied the large fraction test.

To facially challenge an abortion law, a plaintiff must show that the law would impose "an undue burden 'in a large fraction of the cases in which it [is] relevant.'" *Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007) (quoting *Casey*, 505 U.S. at 859). This legal framework for facial challenges framed Applicants' arguments in the district court.[11] Indeed, the district court's ruling observes that Applicants "state emphatically that they are not making an 'as-applied' challenge and that their only challenge is facial." App. 61a n.14. Consequently, the district court framed its undue burden analysis *entirely* in terms of the "large fraction" facial analysis.[12]

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[11] See, *e.g.*, Pl. Prop. Findings of Fact and Conclusions of Law, at ¶302 (Dist. Ct. Dkt. No. 196) (asserting their proposed findings "lead inexorably to this Court's determination that the undue burdens imposed by Act 620 will fall on *a large fraction of women* seeking an abortion in Louisiana and that therefore the Act must be struck down *on its face*") (emphases added).

[12] See, *e.g.*, App. 142a ("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.") (citing, *inter alia*, *Gonzales*, 550 US. at 167-68; *Casey*, 505 U.S. at 895) (emphasis in original); App. 142a-144a (discussing how to determine a "large fraction" under Fifth Circuit precedent); *id.* at 148a ("The Court finds

While conceding that they brought only a facial challenge to the Act, see Emerg. App. at 23, Applicants now claim that the preliminary injunction awarded narrower "as-applied" relief. *Id.* at 23-24. The Fifth Circuit correctly rejected this argument. The court noted that Applicants had "emphatically" disavowed bringing an as-applied challenge in the district court. App. 7a n.9. Additionally, the Fifth Circuit correctly observed that (1) "[t]he district court cited the criteria for facial invalidation of a statute"; (2) on that basis, the court "declared" the Act unconstitutional generally as violating the rights of "Louisiana women seeking abortions"; and (3) moreover, "the record does not contain the discrete and specific evidence required to maintain an as-applied challenge." *Id.* at 14a n.17.

Applicants mention none of this. Instead, they appear to argue that the injunction must be "as-applied" because the district court declined to specifically enjoin enforcement of the Act "against parties other than Plaintiffs herein." App. 159 n.69. But this one footnote at the conclusion of the district court's 112-page opinion does not convert the court's facial invalidation of the Act into an "as-applied" ruling. See, *e.g.*, *Gonzales*, 550 U.S. at 167-68 (explaining that, in contrast to a facial challenge, an as-applied challenge asserts a law's unconstitutionality "in discrete and well-defined instances"); *United States* v. *Salerno*, 481 U.S. 739, 745 n.3 (1987) (an as-applied challenge claims a law is unconstitutional "because of the way it was applied to the particular facts of [plaintiffs'] case"). Rather, the court

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that Act 620 will have the effect of placing an undue burden on . . . a large fraction of Louisiana women of reproductive age seeking an abortion"); *id.* at 153a (same); *id.* at 157a (same in preliminary injunction findings).

limited its ruling to the "plaintiffs" simply because the remaining Louisiana abortion providers, who were once parties, had voluntarily dismissed their claims. See App. 59a (noting voluntary dismissal); see also FED. R. CIV. P. 65(d)(2) (providing that an injunction binds only "the parties," their "officers, agents, servants, employees, and attorneys," and others in "active concert or participation" with them).

Furthermore, putting to one side arguments about the "scope" of the injunction entered below, Applicants do not and cannot deny that the declaratory relief awarded by the district court *facially* invalidated the Act. The district court's ruling plainly and categorically states that the Act "is declared unconstitutional as violating the substantive rights of Louisiana women seeking abortions." App. 158a. Manifestly, this is not a declaration that the Act is unconstitutional only in "discrete and well-defined instances," *Gonzales*, 550 U.S. at 167-68, or only "because of the way [the Act] was applied to the particular facts of [Applicants'] case," *Salerno*, 481 U.S. at 745 n.3. Rather, it is a declaration that the Act is facially unconstitutional across the board. See App. 14a n.17 (Fifth Circuit noting that declaratory relief was framed in terms of "the criteria for facial invalidation of the statute"). By itself, that declaration makes it impossible for Louisiana officials to enforce the Act against anyone, regardless of the scope of the injunction that the district court paired with that declaration. In sum, because the district court's order was based on the lower court's facial invalidation of the Act—and was therefore in no sense merely an "as-applied" injunction—Applicants' argument that the Fifth Circuit erred by reviewing

the lower court's large fraction analysis simply falls apart. The Fifth Circuit was entirely correct to review the validity of the order in light of the large fraction test.

B. The Fifth Circuit correctly rejected the district court's large fraction calculations as legally incorrect and statistically meaningless.

Applicants claim that, by rejecting the district court's large fraction analysis, the Fifth Circuit erroneously "disregarded" the district court's "factual findings." Emerg. App. at 25-27. Applicants are mistaken for many reasons.

First, this argument (like their irreparable harm argument, see *supra* I.A) is premised on the flatly incorrect assertion that the Act will reduce the number of Louisiana abortion providers to one. Applicants insist the Fifth Circuit wrongly ignored the Act's "dramatic, unconstitutional impact" on abortion access, but as evidence for that they point only to the supposed "finding" that all women in Louisiana "would have to seek abortion care from a single doctor." *Id.* at 25. As already discussed, however, *supra* I.A, the Fifth Circuit rejected this premise root and branch because it contradicts the "undisputed evidence" that two *additional* doctors *already* have admitting privileges. App. 11a.

Second, Applicants claim the Fifth Circuit disregarded the district court's "factual findings" by rejecting the "*sua sponte* statistical analyses" that court employed to calculate its various fractions. Emerg. App. at 26-27; see App. 9a (discussing court's "*sua sponte* statistical analyses"). Applicants are again mistaken. The Fifth Circuit rejected the district court's calculations, not because it disagreed with its "fact findings" or "credibility determinations," but because the calculations themselves were either statistically meaningless or legally wrong.

For instance, the 99% figure was statistically meaningless because the calculation that produced it would have shown that 99% of Louisiana women were "denied" access to abortion both *before* and *after* the Act was passed. *Id* at 10a & n.12. In other words, that calculation "does not actually measure the effects of the Act" and says nothing about the percentage of women who may be burdened by the Act. *Id.*

The 70% and 55% figures, the Fifth Circuit explained, were based on legally flawed premises. Those figures ignored the privileges obtained by two other doctors on grounds not legally attributable to the Act itself. See *id.* at 11a (explaining Doe 3's possible choice to close his practice could not be attributed to the Act); *id.* at 11a-12a (explaining the district court wrongly overrode the Secretary's interpretation of the Act as to Doe 2's privileges).

The district court's 45% figure was, as the Fifth Circuit explained, based on pure speculation. *Id.* at 12a. Applicants introduced no evidence to support the conclusion that, if only Does 2, 3, and 5 were left providing abortions in Louisiana, any particular fraction of women would be denied access to abortion. The Fifth Circuit pointed out that Applicants' expert "offered no specific testimony as to the number or location of women who would potentially be affected" by the reduction in providers. *Id*. Indeed, Applicants' expert—who was offered only on the sociology of poverty and gender, not on statistics or demography—repeatedly testified that she could offer no opinion or data concerning the percentage of Louisiana women who

would be deprived of abortion access by Act 620. See Supp. App. 20a-21a, 24a-30a (testimony of Dr. Sheila Katz).

Moreover, in contrast to the dearth of evidence supporting the district court's 45% figure, the Fifth Circuit observed that "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." App. 12a. Louisiana's statistics expert, Dr. Tumulesh Solanky[13]—relying on U.S. Census data showing the distribution of Louisiana reproductive-age women—calculated the "weighted" average distance those women would have to travel to obtain abortions under various hypotheticals. *See* Supp. App. 33a, 36a-41a (Solanky expert report); *id.* at 42a (Table 1); *id.* at 60a-61a (Ex. B, population tables); *id.* at 64a-73a, 90a-93a (Solanky testimony). As Dr. Solanky explained, the "weighted" average distance factors in the geographical distribution of reproductive-age women in Louisiana. *Id.* at 71a-73a, 92a. The plaintiffs did not offer any evidence to rebut Dr. Solanky's analysis or data. See *id.* at 3a (plaintiffs' expert offered in sociology, not statistics or mathematics)

Dr. Solanky offered calculations addressing the scenario where the only remaining providers were in Shreveport and New Orleans. *Id.* at 40a (¶16(iii)); *id.* at 92a-93a. This is precisely the scenario the district court found. App. 128a-129a, 148a. Under that scenario, Dr. Solanky testified that the weighted average distance Louisiana reproductive-age women would have to travel to reach a provider would

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[13] The district court accepted Dr. Solanky as an expert in mathematics and statistics. App. 89a.

be 82 miles. See Supp. App. 40a (¶16(iii)); *id.* at 92a-93a. Furthermore, Dr. Solanky's population data plainly showed that, under this scenario, over 90% of Louisiana reproductive-age women would still live within 150 miles of a provider in Shreveport or New Orleans. See *id.* at 60a-61a (Ex. B, parish population distribution); *id.* at 105a-106a (maps).

Based on this unrebutted expert evidence, Fifth Circuit precedent squarely foreclosed Applicants' facial challenge to the Act. See, *e.g.*, *Abbott I*, 734 F.3d at 415; *Abbott II*, 748 F.3d at 598 (concluding no undue burden on large fraction of women where privileges law left over 90% of reproductive-age women within 100-150 miles of provider). Applicants do not explain why this was an incorrect—much less a "demonstrably wrong"—application of *Casey*'s undue burden test in a facial challenge. They say only that travel distances to clinics are "irrelevant" because "*Casey* does not create a constitutional rule about what distance to a clinic is too far." Emerg. App. at 29. But that is an inaccurate account of *Casey*, which strongly suggested that increased travel distances much farther than the ones at issue here would not constitute a substantial obstacle.[14]

Applicants also suggest that driving distances are irrelevant because the injunction was based solely on the notion that a lower number of providers would

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[14] See *Abbott II*, 748 F.3d at 598 (observing that *Casey* upheld 24-hour waiting period despite evidence that most Pennsylvania women "were required to 'travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider'") (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 744 F.Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3rd Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); cf. *Casey*, 505 U.S. at 887 ("Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.").

lack capacity to serve "all women seeking abortion in Louisiana." Emerg. App. at 29. But that misses the point. The issue in a facial challenge is whether a decrease in the number of providers, caused by the challenged law, would deny access to a large fraction of a state's reproductive age women. See *Casey*, 505 U.S. at 895 (considering whether law would impose an undue burden "in a large fraction of cases in which [it] is relevant"). As the Fifth Circuit explained, Applicants presented no evidence suggesting what percentage of women might be denied access by a decrease in abortion providers from six to three, and the district court's 45% calculation was based on pure speculation. App. 12a.[15]

Third, and finally, Applicants make a last-ditch effort to show that the Fifth Circuit "ignored" *Casey* by supposedly overlooking evidence that "9.7%" of Louisiana women would be "completely deprived" of abortion access. Emerg. App. at 27-28. That is patently false. As the Fifth Circuit's opinion shows, Louisiana made an alternative showing that the district court's large fraction analysis—even *assuming* it was the correct one—used statistics that grossly inflated the number of women allegedly "denied" access. App. 12a-13a; see also Supp. App. 128a-130a. Based on more realistic numbers, Louisiana merely suggested that even the district court's erroneous analysis would result in a figure of about 9.7%—in other words, nowhere

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[15] Alternatively, Louisiana also argued that the district court's statistical analyses grossly inflated the fraction of Louisiana women denied abortion access because (1) the court overlooked uncontradicted evidence that the remaining doctors have in fact provided abortions at a far higher rate than the annual rates the district court used; and (2) the statistic representing the total number of annual abortions in Louisiana included a significant number of abortions provided to women who traveled from outside Louisiana. See Supp. App. 128a-130a. The Fifth Circuit did not rely on these alternative arguments in granting a stay pending appeal, but suggested that the arguments might be relevant to a future as-applied challenge to the Act. App. 12a-13a & n.15.

near its inflated figures of 70%, 55%, or 45%. *Id.* But at no point did Louisiana, or the Fifth Circuit, remotely suggest that the Act would *actually* deprive 9.7% of Louisiana women of the ability to obtain an abortion. To the contrary, Louisiana consistently relied on its unrebutted expert testimony showing that, at worst, the Act would leave "over 90% of Louisiana women . . . within 150 miles of a provider." *Id.* at 128a. The Fifth Circuit did the same. See App. 12a (relying on Louisiana's "uncontroverted" expert testimony that, even assuming Does 2, 3, and 5 were the only remaining providers, "well more than 90% of Louisiana will live within 150 miles of two operating clinics").

Thus, it is demonstrably wrong for Applicants to claim that the Fifth Circuit ruled that the "total deprivation" of abortion access for "thousands of women" does not constitute an undue burden under *Casey*. Emerg. App. at 27. Not only does this argument take the hypothetical 9.7% figure completely out of context, but it again incorrectly assumes that the injunction order in this case was merely "as-applied." *Id.* at 28 (asserting that the district court's "entry of as-applied relief to protect those women" was proper). As already explained at length, and as recognized by both lower courts, the relief Applicants sought and received in this case was clearly facial, not "as-applied." See *supra* I.C; App. 7a & n.9, 13a & n.17 (finding Applicants never sought as-applied relief and that the injunction was based on facial invalidation of the Act). In other words, there was never any "finding" by the district court that some particular fraction or subset of Applicants' patients would be "completely denied" access to abortion, nor was there any "as-applied" injunctive

relief tailored to prevent that from occurring. Cf. *Gonzales*, 550 U.S. at 167 (explaining that as-applied relief may be sought to remedy unconstitutional applications of a law "in discrete and well-defined instances").

To be sure, the Fifth Circuit left open the possibility of *future* as-applied challenges to the Act. See App. 13a (observing, "[t]o 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") (citing *Gonzales*, 550 U.S. at 167); *id.* at 14a n.17 ("[O]ur decision today does not foreclose future as-applied challenges."). At the same time, however, the Fifth Circuit correctly noted that the record in this facial challenge "does not contain the discrete and specific evidence required to maintain an as-applied challenge." *Id.* Nowhere in their application do Applicants either address these statements by the Fifth Circuit, or explain what "discrete and specific" record evidence would support an as-applied challenge—a challenge, of course, which they "emphatically" denied bringing in the first place. App. 61a n.14.

C. The Fifth Circuit correctly excluded from the undue burden analysis a re-assessment of the medical benefits of admitting privileges requirements.

Applicants spend five pages criticizing the Fifth Circuit for not incorporating into the undue burden test a cost-benefit analysis that "examine[s] the extent to which a law actually promotes women's health" and weighs that against the law's burdens on abortion access. Emerg. App. at 30-34, 32. They candidly recognize that Fifth Circuit precedent prohibited any such balancing test, *id.* at 31, and that the issue is currently before Court in *Hellerstedt*, *id.* at 32. What Applicants do not even

attempt to explain, however, is why in this case involving a facial challenge the Fifth Circuit was "demonstrably wrong" in simply following circuit precedent and declining to incorporate into *Casey* a requirement to balance the medical benefits of Act 620 against its purported burdens on abortion. That is enough, in and of itself, to reject Applicants' request to vacate the Fifth Circuit's stay on that basis.

Furthermore, as the Respondent comprehensively explains in *Hellerstedt*, this Court's precedents—including *Casey* itself—foreclose the kind of balancing test that Applicants contend for here. See generally Brief of Respondents at 20-29, *Whole Woman's Health* v. *Hellerstedt*, No. 15-254 (U.S. Jan. 2016) (explaining why *Casey* and its progeny prohibit courts from re-weighing the costs and benefits of rational medical regulations). For instance, requiring courts to re-assess the medical benefits of an abortion regulation as part of the undue burden analysis would overrule *Casey* itself, which upheld various abortion regulations under the undue burden test without once assessing their medical costs and benefits. See, *e.g.*, *Casey*, 505 U.S. at 881-83, 884-85 (upholding requirement that a doctor provide informed-consent information to a patient). It would also overrule post-*Casey* decisions such as *Gonzales* and *Mazurek*, which upheld abortion regulations under the undue burden analysis despite scientific disagreement about the medical benefits of the regulations and even in the face of medical evidence showing the regulation was unnecessary.[16] Moreover, it would render superfluous the rational-basis analysis

[16] See, *e.g.*, *Gonzales*, 550 U.S. at 163 (upholding ban on second-trimester abortion technique and noting that legislatures "have wide discretion to pass legislation in areas where there is medical and scientific uncertainty"); *Mazurek* v. *Armstrong*, 520 U.S. 968, 973 (1997) (upholding requirement that only physicians could perform abortions despite

required by *Gonzales*, which held that "a State may regulate abortion so long as it 'has a rational basis to act, and it does not impose an undue burden.'" *Id.* at 21 (quoting *Gonzales*, 550 U.S. at 158). Finally, and most fundamentally, Appellants' proposed revision to *Casey*'s undue burden test would return abortion jurisprudence to the pre-*Casey* world in which this Court "serve[d] as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards through the United States." *Gonzales*, 550 U.S. at 163-64 (internal quotation marks omitted).

Applicants are wrong that *Casey*'s undue burden test requires (or even allows) courts to balance the medical benefits of an abortion regulation against its burdens on abortion. More importantly for purposes of this emergency application, Applicants fail to explain why the Fifth Circuit was "demonstrably wrong" not to follow their preferred view of *Casey*—must less establish that they were prejudiced by that failure.

III. Applicants' irreparable harm arguments misrepresent the law and the facts and rely on outside-the-record evidence.

At the conclusion of their application, Applicants attempt to show that they and their patients will suffer irreparable harm if the Fifth Circuit's stay is not vacated, but these arguments repeat the same misrepresentations of fact and law found throughout the application.

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fact that "the only extant study comparing the complication rates for first-trimester abortions . . . found no significant difference" between abortions performed by physicians versus physician-assistants).

For example, Applicants broadly claim that enforcement of the Act will deprive "most Louisiana women" of their right to abortion, continuing to ignore that in this *facial* challenge to the Act they have manifestly failed to show that the Act will unduly burden a "large fraction" of women. As the Fifth Circuit concluded, "[a]pplication 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." App. 8a-9a. The same can be said for Applicants' broad claims that the "drastic reduction" in the number of abortion providers will "increase health risks" for women able to obtain abortions. Emerg. App. at 35. This claim is inseparable from Applicants' facial undue burden claim, which they have simply failed to establish. Furthermore, as explained at length earlier, Applicants have repeatedly misrepresented to the Court that the Act will reduce the number of abortion providers in Louisiana to one (see *supra* I.A)—a claim the Fifth Circuit squarely rejected as "contrary to the undisputed evidence" in the record. App. 11a. Thus, their insistence that the Act will work a "drastic reduction" in the number of providers is neither supported by the record nor worthy of credence. Finally, as Louisiana has already explained, *supra* I.A, the possibility that some clinics will close, lose their licenses, and thus "permanently" go out of business is both irrelevant (because it was never raised below), overstated (because a clinic can re-apply for a license when it conforms with the law), and insufficient to establish irreparable harm.[17]

[17] At the conclusion of the application, Applicants rely on alleged factual developments

Furthermore, Applicants suggest the Fifth Circuit erred in balancing the equities by overlooking "Respondent's policy of waiting to enforce the Act and to forbear seeking available relief for a year and a half." Emerg. App. at 37. Those assertions are baseless. Contrary to Applicants' claim, Louisiana has not "established a policy of non-enforcement of the Act during the case." *Id.* at 6. The administrative note Applicants cite merely provides that Louisiana will abide by any court orders in its enforcement of the Act. See LA. ADMIN. CODE tit. 48, § 4423 (Jan. 2016) (note "acknowledg[ing]" pendency of federal litigation and providing that privileges law "will only be enforced pursuant to" the court's orders). Nor did Louisiana "wait a year and a half" before seeking appellate relief. Emerg. App. at 37. This simply repeats in another form the misrepresentation that the August 31, 2014 TRO "barr[ed] enforcement" of the Act. *Id.* at 3. To the contrary, both lower courts recognized that the TRO "permitted the Act to go into effect," while allowing Applicants a grace period from any penalties while they sought to obtain admitting privileges. App. 3a; see also *id.* at 58a (under TRO "the Act would be allowed to take effect," while suspending penalties for plaintiffs "during the application process"). Furthermore, the moment the Act was facially invalidated and enjoined, Louisiana

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that arose after entry of the stay and that are not in the record. To support their contention that the Act is now causing "harmful effects" on abortion access, Applicants candidly rely on unsubstantiated claims in newspaper articles about the capacity of the remaining Louisiana clinics. See Emerg. App., at 38 (citing articles in *Baton Rouge Advocate* and *N.Y. Times* from February 25, 2016). These facts are not in the record, and neither the Fifth Circuit nor this Court could verify them in order to assess the propriety of the stay. See, *e.g.*, *Lincoln Gen. Ins. Co.* v. *U.S. Auto Ins. Servs., Inc.*, 787 F.3d 716, 731 (5th Cir. 2015) (observing that "our review is confined to an examination of materials before the lower court at the time the . . . ruling was made; subsequent materials are irrelevant") (internal quotation marks omitted).

immediately sought emergency relief in the district court and in the Fifth Circuit. See App. 4a (Fifth Circuit noting that "[t]he day judgment was entered," Louisiana appealed, unsuccessfully sought a stay pending appeal and a temporary stay from the district court, and then "immediately filed in this court an emergency motion to stay the injunction pending appeal").

CONCLUSION

As shown above, Applicants' emergency request to vacate the Fifth Circuit's stay pending appeal is based on repeated misrepresentations about the relevant facts, the procedural history, and the decisions below. Their request should be denied.

Respectfully submitted,

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March 2, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2016, I sent an electronic copy of the foregoing to Applicants' counsel of record via electronic mail.

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