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.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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Applicants respectfully submit this reply in further support of their application to vacate an order by the U.S. Court of Appeals for the Fifth Circuit that stayed a preliminary injunction granting as-applied relief against a Louisiana law ("the Act") requiring physicians performing abortions to have active admitting privileges at a hospital within thirty miles of where the abortion is performed.

As the Application demonstrates, absent relief from this Court, thousands of women will be entirely denied access to abortion in Louisiana before the present litigation is concluded, and before this Court decides the constitutionality of a nearly-identical Texas law in *Whole Woman's Health v. Hellerstedt*, No. 15-274. In that case, this Court is reviewing the same application of the undue burden test that the Fifth Circuit has applied here. This Court has never before upheld an abortion restriction like Louisiana's admitting privileges requirement, which furthers no valid state interest and yet has a devastating impact on women's ability to access safe and legal abortion, nor could it if *Casey v. Planned Parenthood of Se. Penn*, 505 U.S. 833 (1992) is to retain any meaning. Applicants seek relief that would preserve the status quo as to them, allowing them to continue providing abortion care while the present litigation progresses. If the stay is not vacated, and the Court in *Whole Woman's Health* rejects the Fifth Circuit's application of the undue burden standard, thousands of women would have lost access to abortion and the clinics that served them would have been permanently closed as a result of the misapplication of that standard by the Fifth Circuit in this case.

Respondent wrongly alleges that Applicants have engaged in "serial misrepresentation of the facts and law." Respondent's Opposition ("Opp.") 8, *accord ibid.* at 1, 12, 30, 31, 32, 33. As shown below, Applicants rely on the District Court's actual findings, which were based on the evidence presented at a six-day hearing with live witnesses. Respondent supports many of her allegations by relying on the Fifth Circuit's improper re-weighing of evidence and its rejection of well-supported District Court findings. *See, e.g.,* Opp. 22 (referring to Fifth Circuit's rejection of district court findings). First, the district court found, correctly, that the Act's enforcement will reduce the number of abortion providers to one. Appl. App. 128a ("If Act 620 were to be enforced * * * Louisiana would be left with one provider and one clinic."). Moreover, even under the Fifth Circuit and Respondent's version of the facts, the Act would reduce the number of doctors providing abortion care to one full-time and two part-time providers, *see* Opp. 13, and thousands of women would *still* be deprived of access to abortion. Second, the Fifth Circuit's stay did change the status quo. When the litigation began, six doctors at five clinics were providing abortions to 10,000 women in Louisiana annually. The stay of the preliminary injunction has drastically reduced the number of doctors providing abortions, and the number of clinics where they work, and the remaining doctors are unable to meet the needs of thousands of women annually. Finally, the district court's injunction is plainly as-applied; the language of the district court's order states plainly that it applies only as to Applicants. And, regardless of the label placed on the district court's injunction,

vacatur of the Fifth Circuit's stay is necessary to avoid irreparable harm to women pending final adjudication on the merits.

I. Continuation of the Stay Will Leave Thousands of Women Without Access to Abortion Care in Louisiana

If the stay is not vacated, Act 620 will reduce the number of abortion providers to one. This is not a "misrepresentation," as Respondent avers. It is a finding of the district court, which is fully supported by the record. Appl. App. 128a. ("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 (Women's) without one of the two doctors that normally serves its patients.").

Respondent does not dispute that as a result of the act, Does 1, 4, and 6 will not be able to provide abortion services in Louisiana at all, and Doe 5 only in the New Orleans area. Respondent argues that Does 2 and 3 already have admitting privileges that satisfy the Act. Opp. 13-14. But the district court's finding that Doe 2 does not have "active admitting privileges" under the "plain language" of the Act was correct. Appl. App. 114a-116a. Respondent does not even attempt to show any legal error in the district court's plain reading of "active admitting privileges." Respondent argues instead that the district court should have accepted at face value her predecessor's non-binding affidavit. But, to determine the meaning of Louisiana law "in the absence of a final decision by the Louisiana Supreme Court," the district court does not blindly accept a state official's interpretation of it; rather, the court was required, as it did, to "make an *Erie* guess and determine, in [its] best judgment, how [the Louisiana Supreme Court] would resolve the issue if presented" with it. *In*

re Katrina Canal Breaches Litig., 495 F.3d 191, 206 (5th Cir. 2007). Respondent has made no effort to challenge the legal correctness of the district court's conclusion about how the law would be interpreted. Respondent's and the Fifth Circuit's reliance on *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), *see* Opp. 14, is misplaced. *Pennhurst* held only that federal courts may not award injunctive relief against state officials on the basis of state law. 465 U.S. at 106, 124-25.

The district court's finding as to Doe 3 was also supported by substantial evidence. Doe 3 testified that if he is the last abortion provider in northern Louisiana, he will stop providing abortions. Appl. App. 117a, 126a-127a. Respondent argues that this "voluntary decision to close his practice would not be legally attributable to the Act." Opp. 14. But it is not merely his voluntary decision driving this result. As explained at Appl. App. 9, Doe 3 is likely to be without a clinic to perform abortions because Hope will be unlikely to remain open if its primary provider, Doe 1, is unable to perform abortions. Respondent has no answer to this.

Because the district court's findings as to Does 2 and 3 were correct, the district court appropriately found, and common sense dictates, that Doe 5 could not possibly provide abortions to all 10,000 women who seek one each year in Louisiana. Appl. App. 129a. Based on the evidence that established that Doe 5 currently performs only approximately 3,000 abortions a year, Appl. App. 129a, the district court easily determined that enforcing Act 620 would leave 70% of Louisiana women without the means to exercise their right to choose to terminate a pregnancy. This finding was further supported by evidence in the record that Doe 5 cannot provide substantially

more abortions at Women's (the only clinic where he has privileges),[1] due to the size limitations of the facility, and because he already offers abortion care substantially full time, having given up other employment. Appl. App. 206a.

Although the District Court concluded that Does 2 and 3 could not, in fact, continue to provide abortions, it also made alternative findings: discounting the loss of one or both physicians, either 55% or 45% of women, respectively, would still lack access to abortion in Louisiana.[2] Even the Fifth Circuit conceded that the percentage was nearly 10%. This, too, is an unprecedented loss of access. Respondent suggests that "at no point did * * * the Fifth Circuit[] remotely suggest that the Act would *actually* deprive 9.7% of Louisiana women of the ability to obtain abortion." Opp. 13. To the contrary, the Fifth Circuit stated precisely "that as few as 9.7% of Louisiana women seeking an abortion may lack access under the Act," apparently accepting *arguendo* Respondent's assertion to this effect, Appl. App. 13a, and relied on that figure as part of its conclusion that the Act does not impose an undue burden. Appl. App. 13a-14a.

Respondent's suggestion that Louisiana's remaining doctors could simply expand their practice two-or-threefold to respond to the demand, Opp. 23-26, is

[1] The parties agree that Doe 5 does not have privileges in the Baton Rouge area, *see* Opp. 6, which is where he was formerly the only abortion provider, and now may not practice. This means that women who would have obtained abortions from Doe 5 in Baton Rouge before the Fifth Circuit's stay are now in the position of having to drive 80 miles to New Orleans to obtain abortions from the very same doctor (if they can get an appointment).

[2] The district court calculated that Doe 5 and Doe 3 provide 4,500 abortions out of the 10,000 annually performed in Louisiana, based on their testimony and 2013 statistics in the trial record; this would leave 5,500 women, or 55%, without access. Appl. App. 130a. It likewise calculated that Doe 5, Doe 3, and Doe 2 provide 5,500 abortions annually, which would leave 4,500, or 45%, without access. Appl. App. 129a-130a.

contradicted by the record. Doe 5's inability to do so is discussed *supra* 4-5. Doe 2 does not have admitting privileges in the northern part of the state where he lives and typically has seen the majority of his patients. Doe 2's limited privileges, which the District Court deemed inadequate under the Act, are at Tulane Medical Center, which is 330 miles—and five hours' driving distance—from his home. Doe 2 traveled to work at the clinic for which he applied for these privileges only four days per month at the time of the evidentiary hearing. *See also* App. 7-8 (discussing the scope of Doe 2's practice as found by the District Court). And Doe 2 certainly cannot be forced to move to southern Louisiana to be nearer to his limited admitting privileges.[3] Doe 3 cannot substantially increase his workload because of his obstetrics practice. Not only is maintaining this practice necessary to keep his hospital privileges active, Appl. App. 126a, but Doe 3 testified that his obstetrics practice "takes up about 70 to 80 hours a week of my time," with only "an additional 10 to 15 hours a week working with Hope Medical Group," meaning Doe 3 already works "a total of about 90 hours a week * * * ." In his own words, Doe 3 made clear that he cannot expand the number of abortion patients he serves: "I just can't physically work that – handle that much more volume." Reply App., *infra*, 416a.[4]

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[3] As noted at Appl. n. 6, this clinic, Causeway, is now closed. Since the stay issued on February 24,also closing Bossier, Doe 2 has not performed any abortions.

[4] The accuracy of the District Court's findings of fact regarding the Act's impact continue to be borne out by ongoing media reports of increasing wait times and the impossibility of Louisiana's remaining physicians, even in advance of Doe 2's impending resignation due to overwork and fear of violence, to meet current demand. *See, e.g.,* Molly Redden, *Last Two Abortion Providers in Louisiana See Texas as a Cautionary Tale,* The Guardian (Mar. 3, 2016), http://www.theguardian.com/us-news/2016/mar/03/louisiana-abortion-texas-law-supreme-court. Respondent complains that, in bringing press reports to this Court's attention, Applicants are relying on extra-record evidence. But these press reports merely confirm that the District Court's findings about what the Act's effect if

II. The Fifth Circuit's Stay Altered the Status Quo

For forty-three years, physicians who performed outpatient abortions in Louisiana, like all other physicians who performed outpatient procedures, were not subject to a requirement that—unlike other outpatient health care providers—they obtain hospital admitting privileges. That status quo was upended on February 24, 2016, when the Fifth Circuit took the extraordinary measure of staying the district court's preliminary injunction against enforcement of the admitting privileges provision of the Act. Far from "restor[ing] the status quo by allowing the Act to again take effect," Opp. 15, the Fifth Circuit disrupted health care for thousands of women seeking an abortion in Louisiana.

The TRO issued in this case remained in effect until January 26, 2016, and applied to all physicians performing abortions in the state and the clinics where they worked. On January 26, 2016, the preliminary injunction took its place and altered the scope of relief significantly. By its plain language, the preliminary injunction applied only as to the named plaintiffs and clinics. Appl. 4-5 (quoting Appl. App. 46a-47a, 159 n.60). The Fifth Circuit's stay and Respondent's reliance on the reasoning underlying that stay fundamentally mischaracterize this basic procedural history.

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allowed to take effect have actually come true. Applicants do not rely on them, but rather rely on the findings of the District Court. Press reports simply serve to confirm the correctness of those findings, and this Court's admonition that courts of appeals should not second-guess findings of fact, as those guesses are apt to prove wrong. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). Moreover, Respondent does not actually contest the fact that Causeway, Delta, and Bossier are all closed (as the District Court found they would be), so Respondent's complaint is not germane either to the merits or to the irreparable harm faced by Applicants and their patients.

Respondent's (and the Fifth Circuit's) assertion that the TRO in this case was just like the injunction the Fifth Circuit approved in *Abbott*—that is, one that enjoined the law only to allow physicians time to have their privileges applications acted on—is false. The district court considered the *Abbott* framework and rejected it, explaining:

> 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.

Appl. App. 187a [Order Clarifying TRO of Aug. 31, 2014, ECF No. 57 (Nov. 3, 2014), at 6] (emphasis added). By contrast, the relief extended to each physician in *Abbott* expired upon final disposition of his last outstanding hospital privileges application.

Nor did the reach of the TRO here change with the dismissal of the other abortion providers from this case in December 2014. The district court explicitly

stated that non-plaintiff physicians continued to be protected from enforcement of the admitting privileges requirement, regardless of whether they had privileges applications pending. The district court again held that keeping the TRO in place with regard to each of the clinics in the state and their doctors avoided the possibility that the district court would have to entertain "multiple separate TRO applications which would be disruptive and time-consuming" and that the district court would face "an incomplete record, before the full impact of the law can be measured." The district court's clear intention was to "maintain[] the status quo until the preliminary injunction hearing" because it "would not cause Defendants to suffer irreparable harm or substantial prejudice." Appl. App. 181a [Second Order Clarifying TRO of Aug. 31, 2014, ECF No. 84 (Jan. 15, 2015), at 4)].

The Fifth Circuit erred in stating that "[t]he 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," Appl. App. 3a, and Respondent similarly relies on that finding in error. The district court never limited the TRO to "the application process," and the TRO that remained in effect throughout this case was different in kind than the preliminary relief granted by the Fifth Circuit in *Abbott*.

This case is unlike *Abbott* for another reason: *Abbott* was a pre-enforcement challenge, and the Fifth Circuit presumed that Texas physicians would be granted privileges. 738 F.3d at 598-99 & n.13. Here, at the district court's instructions, all

five physicians who lacked admitting privileges applied for them and received determinations (primarily "de facto" denials) in advance of the hearing.

Respondent's contention that Act 620 has been in effect since September 1, 2014, but simply has not been enforceable, is inapposite. The effect of the August 2014 TRO, from the point of view of those upon whom the statute operates, was to maintain an environment in which six doctors were providing abortion care to 10,000 women annually in Louisiana at five operating clinics. This status quo changed radically on the day the preliminary injunction was stayed.[5] The critical fact is that the district court's orders had permitted physicians in Louisiana to continue performing—and women to continue obtaining—abortions. There can be no reasonable dispute that on the day the stay was issued, abortion providers without admitting privileges were forced to stop providing abortions in Louisiana.

III. Despite Applicants' Request for Facial Relief, the Preliminary Injunction Provided Only As-Applied Relief

Respondents do not challenge the contention that, if the district court granted as-applied injunctive relief, then the Fifth Circuit's analysis is demonstrably wrong

[5] Applicants asserted before the District Court, and before the Court of Appeals, that the evidence established that several clinics in Louisiana would close permanently, resulting in irreparable harm to Applicants, their doctors, and their patients. Reply App., *infra*, 313a, 376a. Respondent's assertion that Applicants never made, and therefore waived, any argument that the clinics will irretrievably lose their licenses is therefore misplaced. Applicants have consistently raised the expected permanent closure of clinics under full enforcement of the Act, and did not need to elaborate on the role of losing a license or cite to a particular aspect of the regulations governing licenses, in order to preserve the argument. *See Elder v. Holloway*, 510 U.S. 510, 512 (1994); *Dixon v. ATI Ladish LLC*, 667 F.3d 891, 895 (7th Cir. 2012) (explaining that a litigant does not forfeit a position by not citing a certain authority, rather, "it suffices to make the substantive argument"). Respondent's suggestion that licenses are renewable, such that loss of a license is not irreparable harm, is also wrong. As Respondent concedes, Louisiana regulations provide that once a clinic ceases operations, the license is void, and the clinic must obtain a new initial license to resume operations. La. Admin. Code tit. 48, pt. I, §§ 4413(B), 4413(G).

and warrants vacatur. Rather, Respondent strives to re-characterize the district court's as-applied relief as facial relief.

Respondent insists the relief granted by the district court must be considered facial because Applicants sought facial relief. But it is the injunction ordered by the district court that is the subject of Respondent's appeal, not the original claim as framed by Applicants. Respondent's argument is particularly troubling here, where Respondent acknowledged to the district court that the injunction applied only as to Applicants. At a status conference three days after the injunction issued, counsel stated, "You know, I guess, I mean, that's a fair question because *Your Honor's preliminary injunction seems pretty clearly limited to Doe 1 and Doe 2*." Reply App., *infra*, 320a (emphasis added).

Even now, Respondent continues to acknowledge that the preliminary injunction protected only certain providers. In its opposition, Respondent described the preliminary injunction as "specifically barring [the Act's] enforcement altogether as to Applicants." Opp. 16. Indeed, Respondent differentiates between those providers who received as-applied relief and those who did not, by emphasizing the former in bold type. Opp. 4.

CONCLUSION

No matter how the Fifth Circuit or Respondent characterizes the district court's preliminary injunction, it is evident that before the stay, six physicians served the 10,000 women who seek an abortion in the state annually. Even under the Fifth Circuit and Respondent's view of the evidence—that one full-time and two part-time physicians remain to perform abortions in Louisiana under the Act—approximately

45% of women seeking an abortion are left without access because of the Fifth Circuit's stay. Under the current state of the law, thousands of women in Louisiana are irrevocably losing their ability to exercise their constitutional right to choose abortion, Applicant clinics are facing permanent and irreversible closure, and intervention by this Court is needed.

To prevent widespread irreparable harm, and for all 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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