No. 14-997

IN THE

Supreme Court of the United States

MARY CURRIER, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Should the Court grant certiorari to review the Court of Appeals' application of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), when there is no conflict of authority concerning whether Mississippi may rely on neighboring states to satisfy its constitutional obligations under the undue burden standard?

(2) Should the Court grant certiorari to review an interlocutory Court of Appeals decision upholding a preliminary injunction against enforcement of an abortion restriction that would close the last abortion clinic in Mississippi, when the record in the case is incomplete and the injunction applies only to the plaintiffs?

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INTRODUCTION

The petition for a writ of certiorari has nothing to recommend it. None of the recognized criteria for review is present, while the usual grounds for denying review are obvious. *First*, Petitioners forthrightly acknowledge that the petition implicates no circuit conflict. To the contrary, they admit that the Fifth Circuit is the first court of appeals to address head on the question of whether a woman's ability to obtain an abortion in a different state should factor into the undue burden analysis under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This is reason enough to deny review. And indeed, outside the abortion context, the courts of appeals are in agreement that a person's ability to exercise a constitutional right outside the jurisdiction cannot cure a constitutional violation inside the jurisdiction. *Second*, the decision below was interlocutory and rendered on an incomplete preliminary injunction record. The petition is thus a poor vehicle for resolving the questions presented, even if those questions were otherwise cert-worthy. *Third*, the decision below was entirely correct, and follows directly from the Court's precedents. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. The Challenged Law

Mississippi House Bill 1390 ("the Act") was signed into law in April 2012. It was designed to be impossible to satisfy, with Mississippi officials openly admitting at the time it was enacted that it was intended to close the last abortion clinic in the state and make Mississippi "abortion free." Dist. Ct. Dkt. 124, at 34.

The Act requires, *inter alia*, that "[a]ll physicians associated with [a licensed] abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians." H.B. 1390, § 1, *codified at* Miss. Code Ann. § 41-75-1(f) (the "admitting privileges requirement" or "requirement"). Providing abortions in violation of the requirement subjects a clinic and its medical staff to civil, disciplinary, and criminal penalties, including license revocation, misdemeanor liability, and fines of up to $1,000 per day. Miss. Code Ann. §§ 41-75-25 (incorporating by reference § 41-7-209), 41-75-26(1).

Respondent Jackson Women's Health Organization ("the Clinic") is the only licensed abortion clinic in Mississippi. Pet. App. 3a. It has been continuously licensed by the State for many years and provides abortion up to sixteen weeks, as well as other reproductive health services. Dist. Ct. Dkt. 5-1, at 3. All of the physicians who provide abortions at the Clinic, including Respondent Willie Parker, are board-certified obstetrician-gynecologists. Dist. Ct. Dkt. 46-2, at 3. Nevertheless, no local hospital would even consider the applications of Dr. Parker and Dr. Doe, another Clinic physician, when they attempted to obtain admitting privileges to satisfy the Act. *See infra* at 5.

Petitioners' claim that the effect of the Act is "to level the playing field by requiring all doctors on staff at abortion clinics to meet the same professional licensing standards applicable to doctors in other areas of outpatient surgical practice," Pet. 5, is simply wrong. Despite Petitioners' assertions, Pet. 3, Mississippi does *not* require "doctors performing outpatient procedures other than

abortion to hold admitting privileges" at a local hospital (emphasis removed). Mississippi physicians who provide similar or less safe surgical procedures in their offices, such as colonoscopy, hernia repair, hemorrhoidectomy, and dilation and curettage, do not need admitting privileges. Miss. Admin. Code 30-17-2635:2.5. Mississippi physicians can even provide surgery with general anesthesia in their offices without having admitting privileges. Miss. Admin. Code 30-17-2635:2.6.

Equally misleading is Petitioners' contention that the admitting privileges requirement eliminates an "exemption" in Mississippi's regulations of ambulatory surgical facilities ("ASF"). Pet. 14-16. The Clinic is not an ASF and is not required by Mississippi to be licensed as an ASF. *See* Miss. Code Ann. § 41-75-1; Miss. State Dep't of Health, Directory of Mississippi Health Facilities (July 2014) *available at* http://msdh.ms.gov/msdhsite/_static/resources/6217.pdf.[1] Thus, instead of eliminating an "exemption," the requirement adds another regulation to the web of regulations imposed on the Clinic, one that ultimately proved impossible for the Clinic and its physicians to satisfy despite their best efforts.

B. The Proceedings Below

In April 2013, the Mississippi Department of Health ("the Department") stood poised to revoke the Clinic's

1. Although in the past Mississippi has required abortion facilities that provide second-trimester procedures to meet some of the ASF requirements in addition to the abortion facility regulations, Miss. Admin. Code 15-16-1:44.1(8), it never before required each of the physicians at any abortion facility to have admitting privileges at a local hospital.

license at a scheduled hearing because its physicians had not been able to obtain admitting privileges at any local Jackson hospital, as required by the Act. Pet. 7; Pet. App. 58a. Before that scheduled hearing could take place, the United States District Court for the Southern District of Mississippi issued a preliminary injunction so that the Clinic's license would not be revoked and so that Mississippi would not become the first state in the country to eliminate all access to legal abortion. Pet. App. 58a.[2]

In support of its ruling, the District Court found as a factual matter that:

- the Clinic had exhausted all avenues to comply with the requirement;
- the Department had refused to grant any waivers of the requirement;
- the State would close the Clinic without preliminarily relief;
- the Clinic is the only known provider of abortion in Mississippi; and,

Mississippi women would therefore have to leave the state to obtain a legal abortion if relief were not granted. Pet. App. 60a, 69a.

2. The District Court initially issued partial relief to the Clinic in July 2012, allowing the Act to take effect and requiring the physicians to apply for privileges at local hospitals but enjoining state officials from enforcing any civil or criminal penalties against the Clinic or its physicians during the hospital application process. Pet. 6-7; Pet. App. 75a-88a. That initial partial injunction was not at issue in the appeal.

The District Court also found that the Clinic's physicians had tried to secure privileges at every local hospital, but that the hospitals would not consider their applications on the merits. Pet. App. 66a. Specifically, the District Court found that two hospitals had refused even to provide applications to the physicians, and that all the others had "rejected the doctors' applications because they perform elective abortions." Pet. App. 60a. Each of those five other hospitals made an "administrative" decision not to complete review of the physicians' submitted applications. Dist. Ct. Dkt. 46-2, at 28-41.

Indeed, each of those five hospitals stated that it would not continue review of Drs. Parker and Doe's applications because

> "[t]he nature of your proposed medical practice is inconsistent with this Hospital's policies and practices as concerns abortion and, in particular elective abortion," and "[t]he nature of your proposed medical practice would lead to both an internal and external disruption of this Hospital's function and business within this community."

Pet. App. 4a n.3. As the District Court found, "elective abortions are anathema to the policies of the hospitals in the Jackson metropolitan area, which prompted them to reject the doctors['] applications out of hand." Pet. App. 66a.

None of these key facts was contested by evidence from Petitioners. To the contrary, the State conceded a number of key issues before the District Court, including

that if the physicians did not get admitting privileges at local hospitals, it would "frankly" "cut against" the State in terms of the undue burden analysis, and that "[c]losing [the Clinic's] doors would—as the State seems to concede in this argument—force Mississippi women to leave Mississippi to obtain a legal abortion." Pet. App. 65a (internal quotation marks and citation omitted), 69a.

Respondents also offered evidence demonstrating that even before the Act, the Clinic already had in place a number of emergency protocols to protect women in the very rare circumstance that hospital treatment might be needed following an abortion. Consistent with Mississippi law, the Clinic has a transfer agreement with a local hospital and a written agreement for back-up care with a physician who holds admitting privileges at a local hospital. Dist. Ct. Dkt. 5-1, at 4; Miss. Admin. Code 15-16-1:42.10, 15-16-1:44.12.

Based on this record, the District Court held that the Clinic had demonstrated a substantial likelihood of success on the merits of its claim that the Act imposed an undue burden and granted a preliminary injunction against further enforcement of the admitting privileges requirement. Pet. App. 70a, 74a.[3] The court flatly rejected the State's argument that forcing Mississippi women to

3. The District Court also determined that the Clinic had demonstrated a substantial threat of irreparable injury, that the threatened injury outweighs any harm the injunction might cause the State, and that the injunction was in the public interest. Pet. App. 71a-74a. The Fifth Circuit noted that, on appeal, the State principally contested the District Court's determination that the Clinic had established a substantial likelihood of success on the merits. Pet. App. 8a.

travel to a neighboring state to obtain an abortion does not constitute a substantial obstacle, finding that "the State offers no authority suggesting that closing its only identified abortion provider is a mere incidental effect." Pet. App. 69a. The District Court then held:

> [T]he State's position would result in a patchwork system where constitutional rights are available in some states but not others. It would also nullify over twenty years of post-*Casey* precedents because states could survive the undue-burden test by merely saying that abortions are available elsewhere.

Pet. App. 70a.

The State then moved to clarify. In response, the District Court issued a further order stating that its ruling "related solely to Plaintiffs' claim that *this* Act, as-applied to *this* clinic, on the particular facts before the Court, is likely to be found unconstitutional." Pet. App. 54a. The District Court concluded by holding that "the record fails to show that the Act is so necessary as to overcome the undue-burden Plaintiffs established." Pet. App. 57a.

The State appealed. It also moved for a stay pending appeal of further discovery, including expert discovery and depositions, which the Clinic opposed. On October 10, 2013, the District Court granted the stay. Dist. Ct. Dkt. 145.

On July 29, 2014, the United States Court of Appeals for the Fifth Circuit issued an opinion holding that Mississippi may not effectively extinguish the constitutional

right to abortion within its borders. It affirmed the preliminary injunction against the requirement, finding that Respondents had shown a substantial likelihood of success in demonstrating that the requirement was unconstitutional as applied to them. Pet. App. 21a.

The Fifth Circuit further held "that the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state—here, Mississippi." Pet. App. 21a. It reached this holding based on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where the availability of abortion in nearby states was irrelevant to the Court's analysis of the abortion restrictions at issue. Pet. App. 17a (citing 505 U.S. at 893-94). The Fifth Circuit also relied on decisions by federal courts of appeals to conclude that "courts have limited the undue burden analysis to the burden imposed within the state." Pet. App. 18a.

Finally, the Fifth Circuit found "additional support" for its holding in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), which "simply and plainly holds that a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." Pet. App. 19a, 20a. The Fifth Circuit relied on *Gaines* for an essential principle of federalism—that "no State can be excused from performance [of its constitutional obligations] by what another state may do or fail to do." Pet. App. 21a (quoting *Gaines*, 305 U.S. at 350). It held that this principle "requires us to conduct the undue burden inquiry by looking only at the ability of Mississippi women to exercise their right within Mississippi's borders." Pet. App. 20a-21a.

Petitioners filed a petition for rehearing *en banc*, which was denied on November 20, 2014. Pet. App. 51a-52a.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT OF AUTHORITY CONCERNING WHETHER MISSISSIPPI MAY RELY ON NEIGHBORING STATES TO SATISFY ITS CONSTITUTIONAL OBLIGATIONS.

Petitioners ask for review of a question on which there is no controversy whatsoever: whether a court evaluating a state abortion restriction under the undue burden test should limit its analysis to the impact within the regulating state. Petitioners have not identified a single decision of any court of appeals that is contrary to the decision below. Petitioners even admit that the Fifth Circuit "is the first court of appeals to consider" this issue head on. Pet. 4.[4] Thus, the petition requests error correction on a splitless question and does not merit this Court's review.

The Fifth Circuit's ruling was rooted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). There, this Court invalidated the spousal

4. Petitioners suggest that although the Fifth Circuit is the first court of appeals to address this issue explicitly, other circuits will be forced to do so soon because there are several states other than Mississippi that have only one abortion clinic left. Pet. 4. But there is no pending court challenge to an admitting privileges requirement in any of those other states. Thus, contrary to Petitioners' suggestion, the question of how to analyze such a requirement in a one-clinic state is unlikely to recur in the near future.

notification law at issue without examining whether married Pennsylvania women who did not want to notify their spouses could travel to New York or New Jersey or Delaware to obtain an abortion. Pet. App. 16a-17a (citing *Casey*, 505 U.S. at 893-94). Indeed, *all* of the restrictions at issue in *Casey* were subject to the substantial obstacle test. 505 U.S. at 881-900. If state borders were irrelevant to this test, the plurality would not have needed to engage in most of the analysis in its lengthy opinion. It simply could have pointed out that Pennsylvania women could travel to New York, which did not have any of these restrictions in place in 1992, N.Y. Penal Law § 125.05; N.Y. Pub. Health Law § 4164, to avoid similar obstacles.

The Fifth Circuit's decision to apply *Casey* by analyzing the impact of the requirement within Mississippi is entirely consistent with the opinions of other courts of appeals. Pet. App. 2a. In these other decisions, the courts evaluated an abortion "regulation's effect within the regulating state" and "failed to consider the availability of abortions in neighboring states." Pet. App. 17a-18a (citing *Jane L. v. Bangerter*, 102 F.3d 1112, 1114 (10th Cir. 1996); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 200-10 (6th Cir. 1997)). Indeed, no court has ever ruled that state borders are irrelevant to the undue burden analysis.[5]

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5. In its recent decision finding the Wisconsin admitting privileges law to be unconstitutional, a federal district court considered the existence of out-of-state abortion clinics in its undue burden analysis, but without ruling whether such consideration was necessary and only after noting that the Seventh Circuit has yet to address this issue head on. *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-CV-465-WMC, 2015 WL 1285829, at *7 n.12, *36-37 (W.D. Wis. Mar. 20, 2015).

The lack of conflict on the relevance of state borders is unsurprising given the important practical concerns the Fifth Circuit identified in its ruling. As the court explained, it "would be exceedingly difficult" to apply the undue burden standard if state borders did not matter, because courts would be "required to consider not only the effect on abortion clinics in the regulating state, but also the law, potential changes in the law, and locations of abortion clinics in neighboring states." Pet. App. 18a n.8. The Fifth Circuit rightly noted that this practical "concern is not farfetched" because "[b]oth Alabama and Louisiana," two of the states where Petitioners claim Mississippi women could access abortion if the Clinic closes, Pet. 19, "have passed similar admitting privileges regulations for abortion providers, which could lead to the closure of clinics in those states." Pet. App. 18a n.8.[6]

Further, Respondents are "unaware of *any* case in which [a court has ruled that a] state may deprive someone of a constitutional right because the individual could exercise it in another state." *Isaacson v. Horne*, 716 F.3d 1213, 1234 (9th Cir. 2013) (Kleinfeld, J., concurring) (emphasis added), *cert. denied*, 134 S. Ct. 905 (2014). To

6. Indeed, many clinics in Alabama and Louisiana are currently open only because of court orders obtained through litigation, and those orders are subject to appeal. *See June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD (M.D. La. Jan. 15, 2015) (second order clarifying temporary restraining order of August 31, 2014); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014). A similar Texas law already has closed approximately half of the clinics in that state. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014), *staying injunction in part*, 769 F.3d 285 (5th Cir. 2014), *vacating stay in part*, 135 S. Ct. 399 (2014).

the contrary, the Court and the federal courts of appeals have declined to allow out-of-jurisdiction access to remedy within-jurisdiction restrictions in numerous constitutional contexts. *See, e.g.*, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (free speech); *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (firearm rights); *Islamic Ctr. of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 298-99 (5th Cir. 1988) (free exercise); *see also Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1360 (M.D. Ala. 2014) (defendant "could identify no precedent for a court to consider conduct outside the political boundaries of a jurisdiction in order to justify the constitutionality of actions by that jurisdiction") (abortion). For example, in *Schad*, the Court rejected the borough's argument that its zoning ordinance prohibiting live entertainment did not violate the First Amendment because live entertainment was "amply available in close-by areas outside the limits of the Borough." 452 U.S. at 76. In so ruling, it held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id*. at 76-77 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

Finally, there is no conflict over the proper interpretation of *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938). In that case, the Court held that Missouri had violated the equal protection clause of the Fourteenth Amendment when it refused to admit plaintiff to its law school because he was African-American, even though Missouri had offered to pay for him to attend law school in a nearby state. *Id.* at 342-43, 349-50. In reaching its holding, the Court ruled that the "separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system." *Id.* at 350.

Despite Petitioners' argument to the contrary, Pet. 23, the Fifth Circuit was clear that it was relying on *Gaines not* for its equal protection analysis but for an essential principle of federalism, "a principle that obviously has trenchant relevance here," "that a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." Pet. App. 20a. There is no conflict in the appellate courts on the applicability of this principle in the abortion context.

As Petitioners themselves admit, there is no split of authority on the question of whether state borders matter to the undue burden effects analysis. Thus, the Court's review is not merited at this time.

II. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE IS AN UNSUITABLE VEHICLE FOR REVIEW.

The interlocutory posture of this case also warrants denying the petition. In upholding the preliminary injunction, the Fifth Circuit "h[e]ld only that [Respondents had] demonstrated a substantial likelihood of proving that H.B. 1390, on this record and as applied to the plaintiffs in this case, imposes an undue burden on a woman's right to choose an abortion." Pet. App. 22a.

The Court has stated repeatedly that it will only grant certiorari to review interlocutory judgments in rare or extraordinary circumstances. *See, e.g.*, *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (holding that no "special circumstances" existed to justify the exercise of the Court's discretionary certiorari jurisdiction); Stephen M. Shapiro, et al., *Supreme Court*

Practice 285 (10th ed. 2013) ("[I]n the absence of some such unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari."). This is so even in cases that present important questions. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

Neither rare nor extraordinary circumstances exist in this case to justify granting certiorari before final judgment. To the contrary, Petitioners concede that *Casey* requires a fact-specific inquiry, Pet. 18, but the full record in this case has yet to be developed.

Because of the preliminary nature of the decision below, the medical evidence in this case is incomplete. In support of their motion for a preliminary injunction, Respondents provided medical evidence demonstrating that the requirement would harm, rather than benefit, women's health, that it is inconsistent with current standards of medical care for outpatient procedures, and that it would not further the two health-related interests asserted by the State for enacting it—continuity of care and credentialing of physicians. Dist. Ct. Dkt. 5-2, at 2-9; 23-2, at 1-8; 23-3, at 1-9; Pet. 9. Petitioners attempted to contest some of Respondents' medical evidence with declarations from Drs. John Thorp and James Anderson. Dist. Ct. Dkt. 20-1; 20-2.

Respondents have not yet had the opportunity to depose the State's medical experts because the District Court granted Petitioners' request to stay the case pending appeal. *See supra* at 7. Importantly, however, other federal courts considering challenges to similar requirements

have concluded after full trials that admitting privileges are not the standard of care for physicians specializing in out-patient practice and have specifically found that the State's experts Drs. Thorp and Anderson are not credible. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-CV-465-WMC, 2015 WL 1285829, at *12, *13 n.16, *20 (W.D. Wis. Mar. 20, 2015) (finding Wisconsin's admitting privileges law unconstitutional because, *inter alia*, it imposes undue burden and noting "several concerns with Dr. Thorp's credibility"); *see also Planned Parenthood Se.,* 33 F. Supp. 3d at 1364, 1371-72 n.24-25 (finding Alabama's admitting privileges law unconstitutional because it imposes undue burden); *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3, 685 (W.D. Tex. 2014) (concluding, *inter alia*, that Texas's admitting privileges law is unconstitutional), *staying injunction in part*, 769 F.3d 285 (5th Cir. 2014), *vacating stay in part*, 135 S. Ct. 399 (2014). Because the medical record in this case is not complete, it is a poor vehicle for resolving the question of the constitutionality of admitting privileges requirements.

Indeed, this petition does not squarely present the question of whether admitting privileges requirements in general are constitutional. To the contrary, the Fifth Circuit has upheld a different state's admitting privileges law, when the consequences of that law would not have resulted in the closing of every abortion clinic in the state. *See Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014). The decision below applies *Abbott* and merely holds that the facts of this case render this law unconstitutional. Pet. App. 22a. If the Court would like to consider the constitutionality of admitting privileges laws generally, it should await a case that presents that question.

III. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S PRECEDENT.

Finally, the ruling below does not merit further review because it is a straightforward, fact-bound application of this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). Properly applying this Court's precedent, the Fifth Circuit concluded that the requirement, "*on this record and as applied to the plaintiffs in this case*, imposes an undue burden on a woman's right to choose an abortion." Pet. App. 22a (emphasis added).

In *Casey*, the Court reaffirmed that a woman has the fundamental right to terminate her pregnancy prior to viability. 505 U.S. at 845-46; *see also Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (right to abortion has "real and substantial protection as an exercise of [a woman's] liberty under the Due Process Clause"). The *Casey* plurality also articulated the undue burden standard, which affords greater weight to a state's interest in fetal life from the outset of pregnancy than was permitted under the trimester framework created by *Roe v. Wade*, 410 U.S. 113 (1973). *See* 505 U.S. at 876-77. *Casey* does not, however, permit a state to restrict women's access to abortion services where the restriction is not reasonably designed to further a valid state interest. *See id.* at 885 (evaluating whether state's legitimate interest in informed consent is "reasonably served" by the challenged waiting-period requirement).[7]

7. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of

The preliminary record here demonstrates that the requirement would eliminate access to legal abortion in Mississippi without furthering *any* interests asserted by the State, and therefore the Fifth Circuit was correct to conclude that it was likely unconstitutional. The District Court found as a factual matter that the effect of the requirement would be to close the last clinic in Mississippi. Pet. App. 60a ("The State will close the Clinic."); *see also* Pet. App. 66a ("the State has not identified any willing abortion providers other than the Clinic" and "even the State seems to concede the 'practical effect' of closing the Clinic is women . . . may have to travel to another state to obtain abortions").[8] It also found that no local hospital would even process the applications for privileges of Dr. Parker and Dr. Doe. Pet. App. 60a, 66a. The State's asserted interest in continuity of care is undermined rather than enhanced when women are forced to leave the state to obtain medical services. Similarly, any interest in credentialing abortion providers cannot be served when local hospitals refuse even to consider physicians' applications. Thus, the record below demonstrated that the requirement would not advance women's health.

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placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* "And a statute which, *while furthering the interest in potential life or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* (emphasis added).

8. The Fifth Circuit ruled that Petitioners had waived their right to contest these factual findings on appeal. Pet. App. 8a-9a.

Ignoring the actual record in this case, Petitioners wrongly assert that the Fifth Circuit created a "bright-line" rule preventing a state from enforcing any regulation that has the effect of closing that state's last clinic. Pet. 26. To the contrary, the Fifth Circuit explicitly refused to adopt such a bright-line test, Pet. App. 22a, and made clear that its ruling was about this particular abortion restriction and the facts before it. As the court wrote, in reaching its decision, it looked

> to the entire record and factual context in which the law operates, including, but not limited to, the statutory provision in question, the Clinic's status as the sole abortion clinic in Mississippi, the ability of the Clinic to comply with H.B. 1390, Dr. Parker's and Dr. Doe's efforts to obtain admitting privileges, the reasons cited by the hospitals for denying admitting privileges to Dr. Parker and Dr. Doe, the absence of a Mississippi law prohibiting hospitals from discriminating against physicians who perform abortions when granting admitting privileges, and the nature and process of the admitting-privileges determination.

Pet. App. 22a (citing *Casey*, 505 U.S. at 887-95).

Moreover, Petitioners concede that singling out the Clinic and its physicians for far more burdensome regulatory requirements than the State imposes on other medical practices and physicians is not allowed under this Court's precedent. Pet. 15 ("Thus, read together, *Simopoulos* [*v. Virginia*, 462 U.S. 506 (1983)], *Casey*, and *Gonzales* stand for the principle that abortion facilities

and doctors should n[ot] be singled out by a State for more stringent licensing requirements . . . ."). But that is exactly what the requirement does. Prior to the Act, Mississippi law held the Clinic and its physicians to the same standard for emergency arrangements as physicians providing comparable surgical procedures in their offices—specifically, it required the Clinic to have a transfer agreement with a local hospital and a written agreement for backup care with a physician who holds admitting privileges. *See* Miss. Admin. Code 30-17-2635:2.5(B), (F). With the requirement, Mississippi has singled out the Clinic and its physicians for far more burdensome regulations than it imposes on physicians who provide surgical procedures or medications that pose similar or, even greater, potential risks. *Compare* Miss. Code Ann. § 41-75-1(f) *with, e.g.*, Miss. Admin. Code 30-17-2635:2.6(B).

Petitioners' last-ditch suggestion that the ruling below cannot be squared with this Court's decisions in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) and *Simopoulos*, 462 U.S. at 517, Pet. 14-16, 28, is also baseless. The *Mazurek* Court upheld Montana's physician-only law after concluding that it did not limit access to abortion in Montana. 520 U.S. at 973-74. Indeed, completely unlike this case, the evidence before the Court in *Mazurek* established that "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Id.* at 974. The requirement would not only force all of the Clinic's patients to travel to a different facility, but it would also effectively eliminate access to legal abortion in Mississippi. Thus, the decision below is entirely consistent with *Mazurek*.

Similarly, in *Simopoulos*, the record indicated that Virginia's requirement that second-trimester abortions be performed only in licensed clinics was consistent with accepted medical standards of major medical organizations and would advance women's health without a substantial burden on access for Virginia women. 462 U.S. at 516-17. Thus, the Court found that the restriction was "not an unreasonable means of furthering the State's compelling interest" in women's health. *Id.* at 519. The record is entirely different here. *See supra* at 4-7, 14, 18-19.

Under *Casey,* "the means chosen by the State to further the [state] interest . . . must be calculated to inform the woman's free choice, not *hinder* it." 505 U.S. at 877 (emphasis added). Thus, states cannot affirmatively harm women's health and safety under the guise of legislation that purports to promote women's health and safety. *See Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014). Allowing the admitting privileges requirement to take effect would have harmed Mississippi women by eliminating the only legal abortion provider in the state, without furthering any of the health interests asserted by the State in defending the restriction. Accordingly, there is nothing extraordinary about the Fifth Circuit's decision to affirm preliminary relief on the record before it, and nothing to warrant the Court's review at this preliminary stage of the case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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