No. 14-997

IN THE

Supreme Court of the United States

MARY CURRIER, M.D., M.P.H.,
IN HER OFFICIAL CAPACITY AS
MISSISSIPPI STATE HEALTH OFFICER, *ET AL.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION,
ON BEHALF OF ITSELF AND ITS PATIENTS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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I. IF THIS CASE PRESENTED A "STRAIGHTFORWARD" APPLICATION OF *CASEY* THE FIFTH CIRCUIT WOULD NOT HAVE FOUND IT NECESSARY TO RELY ON *GAINES*.

In the decision below, the Fifth Circuit panel majority created a new, hybrid legal standard fusing the substantive due process undue burden test from *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992) with the equal protection-based "principle of federalism" articulated in *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), as well as *Gonzales v. Carhart*, 550 U.S. 124 (2007), an essential ingredient of the Fifth Circuit's decision in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014). The panel majority in this case did not merely apply *Casey* and *Gonzales*, it extended those cases and grafted an equal protection principle of federalism onto the existing undue burden test, all the while failing to give due consideration to the importance of *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

Further, if the Fifth Circuit could have resolved the constitutionality of Mississippi's admitting privileges law without relying on a "separate but equal" education case, undoubtedly it would have done so. Yet the panel majority openly admitted that "the principle of *Gaines* resolves this appeal." App. 20a. As Judge Garza pointedly noted, the panel majority cited no binding precedent for its conclusion that the undue burden analysis under *Casey* precludes consideration of the out-of-state availability of abortion services. App. 32a.

Throughout their brief, Respondents pretend this case involves an established "constitutional right" to access abortion *within state boundaries*, yet that is the very issue that was presented to the Fifth Circuit below, and which is now presented to this Court—a question which has never heretofore been answered. So Respondents' assertion that "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," Br. Opp. 1, merely begs the question.

The Fifth Circuit's reliance on *Gaines* shows how difficult the court found the task of distinguishing Mississippi's admitting privileges law from the practically identical Texas law held constitutional in *Abbott*, and further shows that the decision below was anything but a "straightforward" application of the *Casey* undue burden test—if any application of *Casey* is ever straightforward.

II. THE CIRCUITS ARE IN CONFLICT AS TO WHETHER THE UNDUE BURDEN TEST REQUIRES COST-BENEFIT ANALYSIS.

The undue burden test has proved largely unworkable, as many predicted from the outset. *See, e.g.*, Elizabeth A. Schneider, *Workability of the Undue Burden Test*, Temp. L. Rev. 1003 (1993). By defining "undue burden" in terms of an equally subjective phrase, "substantial obstacle," the *Casey* court created a vague and amorphous standard that offered little guidance as to how that standard should be applied to real world situations. The lower courts have scoured this Court's post-*Casey* abortion opinions to glean every clue as to how the undue burden test

should actually be applied. The lack of clear guidance from this Court has resulted in confusion, inconsistency, and disagreements in the lower courts. *See* Emma Freeman, *Giving Casey its Bite Back: the Role of Rational Basis Review in Undue Burden Analysis*, 48 Harv. C.R.-C.L. L. Rev. 279, 314-21 & n.259 (2013) (collecting cases).

For example, the circuit courts sharply disagree as to whether the undue burden test, after *Gonzales*, requires an explicit balancing approach. The Fifth Circuit has found great significance in *Gonzales*' deceptively simple statement that:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

Gonzales, 550 U.S. at 158; *see Abbott*, 748 F.3d at 590. The Fifth Circuit has interpreted the Court's invocation of the term of art "rational basis" as guidance that the undue burden test is a specialized type of rational basis analysis rather than a balancing test. *Id.*; *see also Planned Parenthood S.W. Ohio Region v. DeWine*, 696 F.3d 490, 513-18 (6th Cir. 2012) (applying *Casey* without comparing the medical benefit with the severity of the burden); *Planned Parenthood of Wisc., Inc. v. Van Hollen ("Van Hollen III")*, 738 F.3d 786, 799-800 (7th Cir. 2013) (Manion, J., concurring in part and in the judgment).

However, other courts have reached different conclusions, such that the Fifth and Sixth Circuits are at odds with the Seventh and Ninth Circuits as to whether the undue burden test requires an explicit cost-benefit analysis. In this regard, when the Fifth Circuit denied rehearing in *Abbott*, Judge Dennis vehemently dissented and described the panel decision as a "sham" that "deepens a circuit split." *Planned Parenthood of Greater Tex. Surg. Servs. v. Abbott*, 769 F.3d 330, 332 (5th Cir. 2014) ("*Gonzales* . . . applied *Casey*'s two-part balancing test and did not introduce any additional aspects to the undue burden standard.") (Dennis, J., dissenting from denial of rehearing *en banc*).

The Seventh Circuit has said:

> The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an "undue burden" on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if slight to be "undue" in the sense of disproportionate or gratuitous.

Planned Parenthood of Wisc. Inc. v. Van Hollen ("Van Hollen IV"), — F. Supp. 3d —, 2015 WL 1285829, at *10 (W.D. Wisc. Mar. 20, 2015) (quoting *Van Hollen III*, 738 F.3d at 798).

Like the Seventh Circuit, the Ninth Circuit believes that "[t]he more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test; conversely, the stronger the state's justification, the greater the burden may be

before it becomes 'undue.'" *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 912 (9th Cir. 2014). In *Humble*, the Ninth Circuit described the disagreement among the circuits:

> In applying the undue burden test, the Fifth and Sixth Circuits consider the state's justification only for the very limited purpose of applying rational-basis review. Once an abortion regulation survives rational-basis review, these circuits pay no attention to whether the regulation has been shown actually to advance the state's legitimate interests. In *Abbott*, the Fifth Circuit held that courts may not consider the strength of the state's justification, stating that an abortion regulation need only be supported by "rational speculation." 748 F.3d at 593-95 (internal quotation marks omitted). In *DeWine*, the Sixth Circuit analyzed whether an Ohio abortion regulation was an undue burden without considering the strength of the state's justification for the regulation. 696 F.3d at 513-18.
>
> We conclude that *Abbott* and *DeWine* are inconsistent with the undue burden test as articulated and applied in *Casey* and *Gonzales*. The Fifth and Sixth Circuits' approach fails to recognize that the undue burden test is context-specific, and that both the severity of a burden and the strength of the state's justification can vary depending on the circumstances.

Humble, 753 F.3d at 914. Additionally, the apparent departure by the Fifth Circuit panel majority in *this* case from the non-balancing approach endorsed by *Abbott* has not gone unnoticed. *See Van Hollen IV*, 2015 WL 1285829, at *10 n.14 (quoting *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) ("the undue burden analysis must consider 'the entire record and factual context in which the law operates'")).

In sum, the "undue burden" test has proven to be a malleable standard, easily manipulated to suit the public policy preferences of a given court to reach a desired result. How the undue burden test should be interpreted and applied is an issue which has had ample time to percolate in the lower courts. The inconsistent interpretation and application of that standard shows that it is high time for this Court to revisit the issue and provide meaningful guidance for those courts grappling with the real world impact of *Casey*.

III. THE QUESTIONS PRESENTED HAVE SIGNIFICANT NATIONAL IMPLICATIONS.

Respondents attempt to minimize the importance of the questions presented by pointing out that in the five other states with only one abortion clinic there is no pending case involving a challenge to an admitting privileges law.[1] Br. Opp. 9 n.4. However, the issues

[1] Contrary to Respondents' contentions, the interlocutory nature of the decision being appealed does not make review by this Court inappropriate. In *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Court granted *certiorari* to review a Ninth Circuit decision reversing a denial of a preliminary injunction against a state law allowing only physicians to perform abortions. The Court rejected the respondents' argument that it should not decide the case because it came to the Court "prior to the entry of

raised in the petition are implicated in several pending cases in other states. As Respondents note, Br. Opp. 11 n.6, in just the last year, district courts in Alabama and Louisiana have blocked the enforcement of similar admitting privileges laws on the ground that they would close the vast majority of the abortion clinics in those states. *See June Med. Servs., LLC v. Caldwell*, 2014 WL 4296679 (M.D. La. Aug. 31, 2014); *Planned Parenthood S.E., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1341 & 1381 (M.D. Ala. 2014) (three of five clinics). Further, although it concluded that Wisconsin's admitting privileges law would impose an undue burden, the district court in *Van Hollen* rejected the panel majority's approach and considered the availability of abortion services provided at out-of-state clinics in its undue burden analysis. *Van Hollen IV*, 2015 WL 1285829, at *7 & n.12, *36-38.

Regardless, this is not the only pending case that raises the issue of whether the enforcement of an admitting privileges law, that would result in the closure of all abortion clinics in a state for noncompliance, is constitutional. In the Louisiana case, the district court has stated that all five clinics in Louisiana will close if local hospitals refuse to give admitting privileges to clinic doctors. *June Med. Servs., LLC v. Caldwell*, Case No. 3:14-cv-00525-JWD-RLB, (Nov. 3, 2014) (Order Clarifying Temporary Restraining Order) (Doc. No. 57) at 7 (noting that five of the six physicians performing abortions in Louisiana have applied for but not received admitting privileges and that the sixth physician will stop performing abortions if the other physicians' applications are denied). Thus,

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a final judgment," observing that "our cases make clear there is no absolute bar to review of nonfinal judgments of the lower federal courts[.]" *Mazurek*, 520 U.S. at 975.

the notion that this case presents only unique questions having no relevance for other cases is incorrect.

It is also significant that Louisiana and Mississippi, unlike Texas, require physicians performing surgical procedures at an ambulatory surgery facility ("ASF") to have admitting privileges.[2] La. Admin. Code. § 4535(E)(1). And yet, under the Fifth Circuit's divergent applications of the undue burden test in *Abbott*

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[2] Respondents are technically correct that Mississippi law does not require Respondent Jackson Women's Health Organization ("JWHO") to be *licensed* as an ASF. However, under Mississippi law Level I abortion facilities like JWHO must comply with the regulations applicable to ASFs as well as the regulations applicable only to abortion facilities. Miss. Code Ann. § 41-75-1(h); *see also* Miss. Code Ann. § 41-75-1(e) ("Abortion procedures after the first trimester shall only be performed at a Level I abortion facility or an ambulatory surgical facility or hospital licensed to perform that service."). The fact that the State does not require the Clinic to be "licensed" as an ASF does not change the applicability of ASF standards to JWHO.

In a related sense, although Mississippi law does permit certain outpatient procedures to be performed at "the offices of private physicians or dentists, whether practicing individually or in groups" by excluding them from the definition of "ambulatory surgical facility," Miss. Code Ann. § 41-75-1(a), comparing the Clinic with that type of private medical office is misleading and inaccurate. "[O]rganizations or facilities primarily engaged in that outpatient surgery, whether using the name 'ambulatory surgical facility' or a similar or different name" *are* classified as ASFs. Miss. Code Ann. § 41-75-1(a). Moreover, Mississippi law permits doctors to perform less than ten first trimester abortions per month at their private offices without requiring those offices to be licensed as abortion facilities (similar to the medical office exception to ASF licensure). Miss. Code Ann. § 41-75-1(f). The Clinic's out-of-state doctors do not have "offices." Their practice of medicine is limited to performing abortions at JWHO, a facility designed, created, intended, and operated specifically for that very purpose.

and this case, the states (Louisiana and Mississippi) which require physicians who work at ASFs to hold admitting privileges cannot require the same of abortion doctors (if doing so would close all abortion clinics in the state), but Texas is permitted to impose this requirement solely on abortion doctors simply because of the large number of abortion clinics operating within its borders. Whether such a result comports with the Constitution is a question of national importance, since under the panel majority's logic, the ability of states with limited numbers of abortion clinics to enforce generally applicable health and safety regulations against such clinics would be less than larger states.

Additionally, the issue of whether the availability of the abortion services at out-of-state clinics can be considered in the undue burden analysis has national ramifications for other abortion regulations. Any state regulation that would have the effect of closing an abortion clinic located in a metropolitan area near a state border could be held unconstitutional if the panel majority is correct that "the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state." App. 21a. For example, in *Whole Woman's Health v. Lakey*, an abortion clinic obtained an injunction against a Texas law requiring it to comply with the physical plant requirements for ASFs. 46 F. Supp. 3d 673, 676 (W.D. Tex. 2014), *injunction stayed in part*, 769 F.3d 285 (5th Cir. 2014), *stay vacated in part*, 135 S. Ct. 399 (2014). Texas argued that even if the clinic closed, the law would not impose an undue burden because women could travel just across the state line to New Mexico to obtain abortions. A Fifth Circuit motions panel upheld the relevant portion of that injunction because the panel majority's holding in this case barred consideration

of the availability of out-of-state abortion services. *Whole Woman's Health v. Lakey*, 769 F.3d 285, 304 (5th Cir. 2014), *stay vacated in part*, 135 S. Ct. 399 (2014).[3] Therefore, the questions presented have implications far beyond cases involving admitting privileges laws and states with only one abortion clinic.

CONCLUSION

The petition for a writ of certiorari to the Fifth Circuit should be granted.

Respectfully submitted,

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[3] The appeal on the merits of *Lakey* is still pending in the Fifth Circuit. *Whole Woman's Health, et al. v. David Lakey, et al.*, Docket No. 14-50928 (5th Cir.) (filed Aug. 29, 2014).