No. 19-743

IN THE
Supreme Court of the United States

CURTIS T. HILL, JR., Attorney General of the State of Indiana, in his official capacity, *et al.*,

Petitioners,

v.

WHOLE WOMAN'S HEALTH ALLIANCE, *et al.*,

Respondents.

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

REPLY BRIEF OF PETITIONERS

Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General*
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
COURTNEY ABSHIRE
Deputy Attorneys General

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONERS 1

ARGUMENT 2

I. Review Is Warranted To Prevent Federal Courts from Applying State Law to State Officials and Issuing State Licenses as a Mode of Injunctive Relief 2

A. Whole Woman's Health concedes that the jurisdictional issues raised by the State may not be waived 3

B. The Seventh Circuit's order exceeds the relief Whole Woman's Health requested and the relief it had authority to grant 4

1. The Seventh Circuit's injunction tells state officials how to comply with state law in contravention of *Pennhurst* 4

2. The Court should squarely address whether *Rooker-Feldman* applies to quasi-judicial decisions 6

II. This Case Squarely Presents Third-Party Standing Questions that May Be Affected by the Court's Decision in *June Medical* 8

CONCLUSION.. 11

TABLE OF AUTHORITIES

Cases

D.C. Court of Appeals v. Feldman,
460 U.S. 462 (1983)..7, 8

Frew v. Hawkins,
540 U.S. 431 (2004)..4

June Medical Services L.L.C. v. Russo,
Nos. 18-1323, 18-1460 ....2, 8

Lance v. Dennis,
546 U.S. 459 (2006)..7

Lawrence v. Chater,
516 U.S. 163 (1996)..9

Payton v. New York,
445 U.S. 573 (1980)..3

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 4

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002)..7

Other Authorities

410 Ind. Admin. Code § 26.5-3-4 5

OTHER AUTHORITIES [CONT'D]

Oral Argument, *Whole Woman's Health All. v. Hill*, 937 F.3d 864 (7th Cir. 2019), http://media.ca7.uscourts.gov/sound/2019/lj.19-2051.19-2051_07_11_2019.mp3 3

Robert Stern, Eugene Gressman, et al., *Supreme Court Practice* (8th ed. 2002) 9

REPLY BRIEF OF PETITIONERS

In the words of the district court, this case, though arising from a preliminary injunction, "is not strictly preliminary to anything." Pet. App. 91a. It is cert-worthy as a test of federal judicial power to issue state licenses as a mode of preliminary injunctive relief. Whole Woman's Health Alliance, a provider of chemical abortions and an affiliate of Booyah Group, Inc. and Whole Woman's Health, LLC, Pet. App. 56a–57a, (hereinafter "Whole Woman's Health"), brought a facial challenge to Indiana's abortion clinic Licensing Law. Yet it asked the district court to enjoin the Licensing Law only as applied to itself—an injunction the district court granted.

On appeal, however, the Seventh Circuit held that "most of Indiana's licensing statutes appear inoffensive," and "[e]ven Indiana's requirement that licensees have 'reputable and responsible character' is nothing unusual or suspect." Pet. App. 19a. Nevertheless, the Seventh Circuit held that the Indiana State Department of Health's attempt to enforce those provisions by seeking information about Whole Woman's Health and its affiliates did "not suggest a *bona fide* process" because "there becomes a point where record requests become so duplicative or marginally (if at all) relevant, that they are nothing but harassment." Pet. App. 25a. In other words, the Seventh Circuit believed that the Department's information requests were not necessary to enforce state law. This determination, however, is not a proper issue for a federal court.

Moreover, while the Seventh Circuit nominally applied the undue burden test, it made no holding of an undue burden imposed on *women*—only an undue burden on *clinics* required to comply with state document requests. Even more fundamentally, Whole Woman's Health's interests in avoiding state regulation conflict with the health and safety interests of hypothetical patients whose rights it presumes to assert.

Accordingly, the Court should grant the petition, or at least hold it pending resolution of *June Medical Services L.L.C. v. Russo,* Nos. 18-1323, 18-1460.

ARGUMENT

I. Review Is Warranted To Prevent Federal Courts from Applying State Law to State Officials and Issuing State Licenses as a Mode of Injunctive Relief

The decision below goes beyond merely enjoining Indiana officials either to issue a final determination on Whole Woman's Health's license application or refrain from enforcing the Indiana Licensing Law. It creates a wholly new license applicable only to Whole Woman's Health's South Bend clinic—an intrusive form of relief that oversteps federalism and sovereign immunity boundaries. A federal court ordering a state agency to issue a license—particularly one tailored for only one applicant—is unprecedented and warrants review by this Court.

A. Whole Woman's Health concedes that the jurisdictional issues raised by the State may not be waived

Whole Woman's Health concedes that all of Indiana's arguments, with the exception of third-party standing, "concern jurisdictional defenses that are not subject to forfeiture." Br. in Opp. to Cert. 27. It argues, however, that this Court generally will not consider issues not addressed by lower courts in the first instance. Here, the State had no previous opportunity to present these defenses, as the Seventh Circuit issued its unprecedented and unrequested injunction *sua sponte*. Even so, when Chief Judge Wood first raised the prospect of issuing such an injunction at oral argument, counsel for the State asserted that the court lacked authority to issue it. *See* Oral Argument at 0:44–1:45, *Whole Woman's Health All. v. Hill*, 937 F.3d 864 (7th Cir. 2019), http://media.ca7.uscourts.gov/sound/2019/lj.19-2051.19-2051_07_11_2019.mp3. And the Seventh Circuit presumably considered whether it had jurisdiction to issue the order it issued. *See Payton v. New York*, 445 U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court.").

Regardless, because the decision below creates the first need for the State to press its jurisdictional defenses, it is appropriate for the Court to consider them.

B. The Seventh Circuit's order exceeds the relief Whole Woman's Health requested and the relief it had authority to grant

The Seventh Circuit ordered the Department to create an extra-legal, bespoke license just for the Whole Woman's Health South Bend clinic. Ordering Indiana to issue a license under state law both violates *Pennhurst* and disrespects the finality of state proceedings in contravention of the *Rooker-Feldman* doctrine.

1. The Seventh Circuit's injunction tells state officials how to comply with state law in contravention of *Pennhurst*

Federal courts may not use *Ex Parte Young* lawsuits to order state officials to follow state law in a particular manner. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89; *see also Frew v. Hawkins*, 540 U.S. 431 (2004). But that is precisely what the injunction ordered by the Seventh Circuit does—it orders state officials to issue a particular type of license governed by state law.[1]

Whole Woman's Health characterizes the Seventh Circuit's injunction as a bar on Indiana officials

[1] Separately, *amici* Kentucky et al. point out that *Ex Parte Young* applies *only* to matters where an injunction orders an individual to stop violating the Constitution, not matters "where a federal court orders a state official to affirmatively take some action that can only be accomplished under the guide of the state's sovereign, official power." Amicus Br. of Ky. et al. 11–12. Officials cannot issue a license in their individual capacities; they can do so only in their official capacities, which is an exercise of state sovereign power. *Id.* at 12.

"enforcing the Licensing Law against WWHA in a manner that violates the Due Process Clause of the Fourteenth Amendment." Br. in Opp. to Cert. 31. But as the Seventh Circuit made clear, the Due Process Clause does not require Indiana to permit all comers to open an abortion clinic. Indiana may, for example, deny licenses to applicants with a demonstrated record of harming women. Even if the Department's license-related information requests are excessive under the Due Process Clause, the extent of proper injunctive relief would be to order the Department to consider the license application without reference to the applicant's refusal to supply the information.

An excessive information request cannot justify an injunction requiring issuance of a license—in effect ordering the Department to determine that, under state law, Whole Woman's Health is qualified for a license. The Department, for example, should be permitted to assess whether Whole Woman's Health is in compliance with regulations governing patient health and safety and professional standards of care.

Furthermore, Indiana's law governing provisional licenses not only requires inspections assessing compliance with such regulations every 90 days, 410 Ind. Admin. Code § 26.5-3-4, but also affords the Department the tool of non-renewal as leverage for requiring licensees to address deficiencies. Here, Whole Woman's Health has itself alluded to the deficiency reports issued by the Department following its recent inspections. Under the terms of a normal provisional license, the Department could, if dissatisfied with the provisional licensee's response to such a report, refuse to renew the license—a decision

that could be subjected to state judicial review. With the Seventh Circuit's injunction, however, Whole Woman's Health's "provisional" license carries no expiration (other than the contingency of final judgment in favor of the State), which means the Department has no opportunity to use non-renewal to leverage compliance.

And, indeed, Whole Woman's Health's purported first efforts to cure deficiencies have fallen short. *See* Br. in Opp. to Cert. 24. The State Department of Health issued a statement of deficiencies that included an investigation into three complaints filed against the clinic. *Id.* And Whole Woman's Health concedes that there has been "failure to document certain information in employee personnel files or the clinic's policy and procedure manual." *Id.* at 25.

With the current injunction, however, the Department apparently must ask a federal court's permission to revoke Whole Woman's Health's "provisional" license. Such ongoing federal control of a State's regulatory apparatus is excessive, unnecessary, and an impingement of sovereign immunity.

2. The Court should squarely address whether *Rooker-Feldman* applies to quasi-judicial decisions

The Department demanded documents it deemed relevant under state licensing standards. Whole Woman's Health eschewed state judicial review of that assessment in favor of federal court intervention, and the Seventh Circuit ordered an injunction based

on its disagreement with the Department's understanding of state law. Such a ruling not only implicates sovereign immunity under *Pennhurst* but also constitutes a collateral attack on the holding of a State's quasi-judicial administrative determination.

The question for this Court, then, is whether the quasi-judicial determination of a state regulatory agency is protected from collateral attack in federal court under *Rooker-Feldman* doctrine. Whole Woman's Health says it is not, citing *Lance v. Dennis*, 546 U.S. 459, 463 (2006), and *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002). But those cases addressed only whether *Rooker-Feldman* applies to "executive action," *Verizon Md., Inc.*, 535 U.S. at 644 n.3, not whether it applies to quasi-judicial proceedings, *see D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983) (distinguishing between judicial administrative proceedings and other types of administrative proceedings). And, crucially, whether *Rooker-Feldman* applies depends on the nature of the proceedings, not the "character of the body." *Id.*

Indiana's administrative procedure for considering abortion clinic license applications is judicial in nature because, in making a licensing determination, the agency "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Id.*; *see* Pet. for Writ of Cert. 29. Requiring Indiana to treat Whole Woman's Health as provisionally licensed, overriding the agency's final substantive determination that Whole Woman's Health had not

met the requirements for an abortion clinic license, implicates the same concerns of federalism and comity as those protected by *Rooker-Feldman* doctrine.

Indeed, the *Feldman* Court anticipated the circumstances of this case when it observed that "[b]y failing to raise [its] claims in state court a plaintiff may forfeit [the] right to obtain review of the state-court decision in any federal court." *Feldman*, 460 U.S. at 482 n.16. Such a result "is eminently defensible on policy grounds" because of the "desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments." *Id.* Here, Whole Woman's Health unabashedly appealed to federal courts to override the Indiana regulatory system rather than give state courts the first shot at evaluating whether the Department had exceeded its authority. The Court should take this case to clarify that federal courts are not to be used as a substitute for state courts for purposes of reviewing state regulatory agency adjudication.

II. This Case Squarely Presents Third-Party Standing Questions that May Be Affected by the Court's Decision in *June Medical*

This Term, the Court may consider whether abortion clinics have standing to invoke the rights of their patients. *See June Medical Services L.L.C. v. Russo,* Nos. 18-1323, 18-1460. This case, where an abortion clinic, a physician, and a health services organization have brought suit invoking the due

process rights of hypothetical future patients, raises precisely the same issue. The Court therefore should at the very least hold this case pending the outcome in *June Medical*.

Whole Woman's Health's contention that the State somehow waived its third-party standing defenses overlooks the State's district court filings and misunderstands the State's request for relief on this score.

In the district court, the State has both raised standing deficiencies as an affirmative defense to Whole Woman's Health's complaint and specifically argued against third-party standing in support of its motion for summary judgment. *See* ECF 106, 56; ECF 214, 27–30. Accordingly, the issue of third-party standing is very much alive in this case.

Indeed, Whole Woman's Health concedes the State has not waived its third-party standing defense in the district court, so the rationale for its objection to holding this case pending *June Medical* is unclear. *See* Br. in Opp. to Cert. 30. When considering a petition for certiorari on a case that presents a question identical or similar to a case that has already been granted certiorari, it is standard practice for this Court to "postpone consideration of the petition until the other case had been decided and then make summary disposition of the case in accordance with that decision." Robert Stern, Eugene Gressman, et al., *Supreme Court Practice* 255 (8th ed. 2002); *see Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been

granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided." (emphasis in original)).

If the Court addresses and rejects third-party standing in *June Medical*, it should follow its usual GVR course. Whole Woman's Health does not contend that the third-party standing question raised by the State in its petition differs from the third-party standing question presented in *June Medical*. And in any case, a GVR in light of *June Medical* will ultimately prompt lower courts to confront the third-party standing issue in the first instance, which Whole Woman's Health apparently concedes to be appropriate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
COURTNEY ABSHIRE
Deputy Attorneys General

Counsel for Petitioners

Dated: March 10, 2020