No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When Respondent Whole Woman's Health applied for a license to open a new abortion clinic in South Bend but refused to supply documentation of past complaints against its affiliates, the Indiana State Department of Health denied its first license application and refused to act on its second. Rather than avail itself of Indiana's administrative and judicial review processes, Whole Woman's Health obtained immunity from Indiana's licensing laws via federal court preliminary injunction. The Seventh Circuit ruled that Indiana could generally apply its licensing laws to the South Bend clinic, yet ordered the State to issue a "provisional" license to Whole Woman's Health pending a federal trial over the necessity of the State's document demands.

The State presents two questions for the Court's consideration:

1. May a corporation that has been denied a state license to open a new abortion clinic assert the Fourteenth Amendment rights of hypothetical future patients as the basis for challenging the licensing requirement and the license denial?

2. May a federal court order a state agency to issue an abortion clinic license as a remedy for an "as applied" undue burden challenge to state implementation of its licensing laws?

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PETITION FOR WRIT OF CERTIORARI

Curtis T. Hill, Jr, Attorney General of the State of Indiana, Kristina Box, M.D., Commissioner of the Indiana State Department of Health, John Strobel, M.D., President of the Medical Licensing Board of Indiana, and Kenneth P. Cotter, St. Joseph County Prosecutor, respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

PARTIES TO THE PROCEEDINGS

Plaintiffs Whole Woman's Health Alliance, All-Options, Inc., and Jeffrey Glazer, M.D., brought suit against Defendants Curtis T. Hill, Jr, Attorney General of the State of Indiana, Kristina Box, M.D., Commissioner of the Indiana State Department of Health, John Strobel, M.D., President of the Medical Licensing Board of Indiana, and Kenneth P. Cotter, St. Joseph County Prosecutor.

OPINIONS BELOW

The Seventh Circuit panel opinion, App. 1a–30a, is reported at 937 F.3d 864 (7th Cir. 2019). The order of the United States District Court for the Southern District of Indiana granting Whole Woman's Health's motion for preliminary injunction, App. 31a–118a, is reported at 388 F. Supp. 3d 1010 (S.D. Ind. 2019).

JURISDICTION

The Seventh Circuit entered judgment on August 22, 2019. App. 1a. Petitioners requested an enlargement of time to file their petition for certiorari until January 15, 2020, and the Court granted that request. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code sections 16-18-2-1.5, 16-21-1-9, 16-21-2-2.5, 16-21-2-10, and 16-21-2-11 are reproduced in the appendix at pages 119a–28a.

INTRODUCTION AND STATEMENT OF THE CASE

In this case the federal judiciary has required a state agency to issue a bespoke license to a new abortion clinic and has thereby inserted itself directly into enforcement of Indiana's abortion-clinic licensing laws. Equally troubling, it has done so in order to protect the business model of one abortion clinic using *not* the clinic's own rights, but the Fourteenth Amendment rights of hypothetical future patients. The Court should take this case as a companion to *June Medical Services v. Gee*, No. 18-1323 (U.S.), to police the boundaries of both third-party standing and federal supervision of state agencies. At the very least, the Court should hold this case pending resolution of *June Medical*, and then either grant-vacate-and-remand for reconsideration below or set this case for plenary review.

I. Indiana's Abortion-Clinic Licensing System

Indiana requires a license from the State Department of Health ("the Department") before a person may establish, conduct, operate, or maintain an abortion clinic, hospital, ambulatory outpatient surgical center, or birthing center. Ind. Code § 16-21-2-10 (the "Licensing Law"). Operating a birthing center or an abortion clinic without a license is a class A misdemeanor. Ind. Code § 16-21-2-2.5(b). The licensing requirement applies to clinics that provide surgical abortions as well as those that provide only chemical abortions. Ind. Code §§ 16-18-2-1.5, 16-21-2-2.5(c). The Indiana General Assembly has directed the De-

partment to promulgate and enforce regulations establishing minimum license qualifications, license requirements, medical record policies, and procedures for issuing, renewing, denying, and revoking licenses. Ind. Code § 16-21-2-2.5(a). The licensing standards include sanitation standards, staff qualifications, emergency care procedures, necessary emergency equipment, emergency care procedures, quality assurance standards, post-anesthesia monitoring, informed consent brochures, and infection control. *Id.*

The license application must include information about whether the clinic will provide both surgical and chemical abortions, only surgical abortions, or only chemical abortions; must disclose information about applicants (or owners or affiliates) that operated an abortion clinic that was closed as a direct result of "administrative or legal action" or "patient health and safety concerns"; and must state whether a principal or clinic staff member has ever been convicted of a felony. 410 Ind. Admin. Code 26-2-3; 410 Ind. Admin. Code 26.5-3-3. To be granted a license, the clinic must show that it is of "reputable and responsible character," is in compliance with the minimum standards for abortion clinics, has not engaged in illegal activity, has not engaged in activity detrimental to the health of its patients, and has provided accurate and complete information in its application materials. 410 Ind. Admin. Code 26-2-5; 410 Ind. Admin. Code 26.5-3-5.

After reviewing an application, the Department may approve it or reject it on the grounds that the ap-

plicant did not meet the formal application requirements or the substantive licensing standards. 410 Ind. Admin. Code 26-2-4(a), 410 Ind. Admin. Code 26.5-3-4(a). If it approves the application, the Department issues a provisional license that is good for 90 days, during which time the Department's surveyors will undertake an inspection of the clinic to confirm it is operating in conformity with Indiana standards. 410 Ind. Admin. Code 26-2-4(c); 410 Ind. Admin. Code 26.5-3-4(c). If the clinic is doing so, the Department will issue a full license. But if the Department's surveyors find deficiencies during the initial inspection, the Department may extend the provisional license for another 90 days and conduct another licensing survey and request additional documentation. 410 Ind. Admin. Code 26-2-4(e); 410 Ind. Admin. Code 26.5-3-4(e). This process may continue until the clinic is compliant and the Department issues a full license or ultimately denies the application. *Id.* Once approved, a clinic must renew its license every year and remains subject to inspections both annually and in response to complaints. 410 Ind. Admin. Code 26-2-1; 410 Ind. Admin. Code 26.5-3-1; 410 Ind. Admin. Code 26-3-2; 410 Ind. Admin. Code 26.5-4-2; 410 Ind. Admin. Code 26-3-3; 410 Ind. Admin. Code 26.5-4-3. The Department is subject to the Indiana Administrative Orders and Procedures Act, which provides for administrative review of licensing decisions and judicial review of the administrative proceeding. Ind. Code chs. 4-21.5-3, 4-21.5-5.

Under this system, six licensed abortion clinics currently operate in Indiana, including three in Indi-

anapolis (central Indiana) and one each in Bloomington (southern Indiana), Lafayette (mid-northwest Indiana), and Merrillville (far-northwest Indiana). Appellants' App. 13. Planned Parenthood's Lafayette clinic provides only chemical abortions, but the others all provide both chemical and surgical abortions. *Id.* at 243.

II. Whole Woman's Health's License Application

Whole Woman's Health Alliance is a Texas 501(c)(3) nonprofit corporation that owns and operates two abortion clinics in Virginia and Texas. App. 9a. Amy Hagstrom Miller founded Whole Woman's Health in 2014 under the name "Whole Woman's Advocacy Alliance." Appellants' App. 123. She alone appointed its initial board of directors, served as president, and chaired the board during its entire existence under that name. *Id.* It changed its name to Whole Woman's Health Alliance in 2015, and since the name change, Miller has without interruption chaired the organization's board of directors and served as its President and Chief Executive, which gives her unlimited, unilateral control over Whole Woman's Health. *Id.* at 124–25.

In addition to Whole Woman's Health, Miller controls several separately incorporated abortion clinics, which several surveys indicate have violated numerous health codes. These other clinics are owned and controlled by a company called Booyah Group, Inc., which in turn owns Whole Woman's Health, LLC. Appellants' App. 125–26. All of these clinics are listed together with the Whole Woman's Health clinics on wholewomanshealth.com. *Id.* at 126.

On August 11, 2017, Whole Woman's Health filed a formal application with the Department for a license to open a clinic providing chemical abortions in South Bend, which is in north-central Indiana, less than 90 miles from Merrillville (the home of a Planned Parenthood abortion clinic). App. 7a, 4a. An employee of the Department asked Whole Woman's Health to submit a revised application to cure some minor deficiencies, including a failure to name a proposed clinic administrator. App. 59a. Whole Woman's Health did so, and identified a person named Liam Morley as its proposed administrator. App. 59a–60a.

That name raised red flags at the Deparment, as Morley had also been the clinic administrator for the notorious Dr. Ulrich Klopfer, whose license had been suspended for failure to report sexual abuse of minors on whom he had performed abortions, and who subsequently has been found to have been hoarding thousands of aborted fetal remains in his garage and automobiles. Chris Sikich, *More Fetal Remains Found in Mercedes-Benz Owned by Indiana Abortion Doctor*, Indianapolis Star (Oct. 10, 2019), https://www.indystar.com/story/news/politics/2019/10/10/fetal-remains-found-ulrich-klopfer-mercedes-benz/3928812002/. Given that link to Dr. Klopfer—and concern for what Morley's leadership might portend for patient safety—the Department's chief of staff, Trent Fox, became involved in the application review.

Furthermore, the Deparment received a number of letters from state senators disparaging the safety record of clinics operating under the name "Whole

Woman's Health" based on complaints they had received from constituents. App. 61a. Fox searched "Whole Woman's Health" online and reviewed a website listing abortion clinics under that name, which included references to Whole Woman's Health LLC and statements by its president, Amy Hagstrom Miller, about clinics she referred to generally as "Whole Woman's Health" clinics. App. 61a-62a.

As a result of this research, the Department requested additional information related to Whole Woman's Health's ownership structure and clinics operated by its affiliate organizations. App. 62a. It received a response explaining only the structure of Whole Woman's Health *Alliance* and identifying two other Whole Woman's Health Alliance clinics in Virginia and Texas, but not mentioning Whole Woman's Health, LLC or any of the for-profit abortion clinics bearing the name "Whole Woman's Health" and managed by Whole Woman's Health, LLC. App. 10a.

Knowing from Fox's online searches of the connection between Whole Woman's Health Alliance and other Whole Woman's Health entities, the Department denied Whole Woman's Health's application on the basis that it had failed to "meet the requirement that the Applicant is of reputable and responsible character" and that its "supporting documentation provided inaccurate statements or information." App. 10a.

Whole Woman's Health appealed the license denial, arguing that because Whole Woman's Health was a nonprofit, it was under no obligation to disclose information about the other Whole Woman's Health

entities. App. 10a. An administrative law judge took extensive testimonial and documentary evidence and held that, based on the ALJ's understanding of the term "affiliate" under Indiana law, Whole Woman's Health's responses to the Department's information requests "were complete and accurate" and, accordingly, the Department had not shown that Whole Woman's Health lacked "the requisite character for a license." App. 11a.

The Department appealed those findings to a three-member Appeals Panel, which voted two-to-one in the Department's favor, reversing the ALJ's decision. App. 11a. The Appeals Panel concluded that the term "affiliate" refers to common control of the organization, such that all of the "Whole Woman's Health" entities controlled by Amy Hagstrom Miller were affiliates that should have been disclosed in response to the Deparment's information requests. App. 11a–12a. The Appeals Panel made no conclusion as to whether Whole Woman's Health had demonstrated the "reputable and responsible" character necessary to qualify for a license. App. 12a.

In the meantime, the Indiana General Assembly amended the licensing scheme to define "affiliate" to mean "any person who directly or indirectly controls, is controlled by, or is under common control of another person." App 12a; Ind. Code § 16-18-2-9.4. With that definition in place (by virtue of both the Appeals Panel and the new statute), Whole Woman's Health did not seek judicial review of the Appeals Panel's decision and instead filed a new license application, as the Department had stated that Whole Woman's

Health had "the opportunity to reapply at any time and give us the information that we need." Appellants' App. 91.

In response to the new license application, the Department requested several disclosures for the affiliates identified in the Appeals Panel order: Whole Woman's Health, LLC; Whole Woman's Health of McAllen, LLC; Whole Woman's Health of Fort Worth, LLC; Whole Woman's Health of Baltimore, LLC; Whole Woman's Health of the Twin Cities, LLC; Whole Woman's Health of San Antonio, LLC; and Whole Woman's Health of Peoria, LLC. App. 72a–73a. In particular, the Department requested "copies of all reports, complaints, forms, correspondence, and other documents that concern, mention, or relate to any investigation, inspection, or survey of the affiliate by any state or other regulatory authorities at any time since and including January 1, 2014" and similar documents for any "affiliate license applications, administrative enforcement actions, and administrative, civil, or criminal court actions involving all affiliates." App. 73a.

Whole Woman's Health refused to provide the requested affiliate information, writing the Department on March 15, 2019, that the judgment of the Appeals Panel deciding that the LLC Whole Woman's Health clinics were "affiliates" of the Whole Woman's Health South Bend clinic "does not govern WWHA's current application," and that in any case, "the Department is not entitled to the extensive information it now demands." Appellants' App. 123. Because it does not consider Whole Woman's Health's second application

to be complete, the Department has not acted on the application. *Id.*; App. 75a.

III. This Federal Court Litigation

Even as it continued to apply for an abortion-clinic license, Whole Woman's Health, along with co-plaintiffs Dr. Jeffrey Glazer and All-Options, Inc., filed this case in federal court on June 21, 2018. The lawsuit launched facial and as-applied challenges to nearly every Indiana abortion statute and regulation (including the licensing scheme described above) based on the Fourteenth Amendment rights of hypothetical future abortion patients. Appellants' App. 39–40.

After the case had been pending for several months, and while the district court was considering Defendants' motion to dismiss (predicated on standing and abstention grounds), Whole Woman's Health abandoned its second license application and moved for a preliminary injunction permitting it to operate *without* a license. App. 14a–15a. Notably, its demand for preliminary relief was predicated not on facial invalidity of Indiana's abortion licensing laws, but on the theory that those laws were unconstitutional under the undue burden standard as applied to *it*, and specifically to its South Bend Clinic. App. 14a–15a. 31a. In its view, notwithstanding six licensed abortion clinics, Indiana is experiencing an "abortion access crisis" due to the "unmet need for an abortion provider in South Bend." ECF No. 77 at 2. It also asked for relief on the grounds that Indiana's "reputable and responsible character" licensing standard and the Department's use of the term "affiliate" are unconstitutionally vague. Appellants' App. 49.

The district court granted the relief Whole Woman's Health requested, enjoining Defendants from enforcing—as to Whole Woman's Health's South Bend clinic only—any of the licensing provisions of Indiana Code section 16-21-2-2(4). It first rejected Whole Woman's Health's vagueness challenges to "affiliate" and "reputable and responsible character," leaving both intact. The court concluded that "[t]here is no longer any room for confusion on the meaning of 'affiliate'" and that "Plaintiffs have a negligible chance of success on their vagueness challenge to the 'reputable and responsible character' requirement," particularly given that a majority of States have a similar requirement for licensing health-related facilities. App. 102a, 91a, 87a.

Applying *Hellerstedt*, however, the district court concluded that "the marginal benefits to the state in requiring [Whole Woman's Health] to obtain a license before operating the South Bend Clinic are slight to none" and were "dwarfed by the burdens of women's access to abortion in and around South Bend." App. 112a. In its view, the State, by applying the Licensing Law to Whole Woman's Health, was at least partially responsible for the lack of any abortion provider in South Bend. App. 112a–113a. The court determined that women "in and around South Bend" seeking abortion incur burdens "because of a confluence of factors," including: "the long-distance travel burden," "high monetary costs undefrayed by state aid," a "reportedly hostile" "social environment," "the necessity of securing the help and support of others" in such an environment, the "high opportunity costs incurred by operation of all the foregoing, including lost wages,

missed educational opportunities and missed rent and utility payments," and the "prospect of undergoing the abortion in an unfamiliar, unsupportive setting." App. 111a. These burdens, the district court held, should be considered together for the purpose of the undue burden analysis. App. 97a, 111a.

On the regulatory side of the scale, the district court concluded that the Licensing Law produces "little more than de minimis marginal advancement" of the State's regulatory statutes beyond other law enforcement mechanisms (such as post-violation criminal prosecution). App. 108a. It determined that the "[d]efendants have not shown why the state's interests . . . may not be equally well advanced by a registration requirement" and concluded that the "licensing requirement is thus 'not necessary' to achieve the state's proffered ends." App. 112a.

Defendants appealed, and while the Seventh Circuit agreed with the State that "affiliate" and "reputable and responsible character" are not unconstitutionally vague and that Indiana could not be enjoined from enforcing its clinic licensing laws against the South Bend clinic altogether, it crafted its own (equally dramatic) injunction benefitting Whole Woman's Health. The Department, the court said, must issue Whole Woman's Health a "provisional license" for the South Bend clinic or at least "treat" that clinic "as if it had a provisional license." App. 28a.

In support of this new, replacement, injunction, the Seventh Circuit determined that, in requesting information about complaints against Whole Woman's Health's affiliates and raising questions

about the background of Liam Morley, the Department had used "scorched-earth tactics" in carrying out its licensing standards—"tactics" that likely imposed an "undue burden" on the abortion rights of hypothetical future patients. App. 25a. On remand, the Seventh Circuit said, the district court should (as to this issue) consider evidence relating to several questions:

- How has the Department handled previous license applications from abortion clinics?
- What specific evidence of wrongdoing was given to the Department in support of its initial concerns about WWH? Did it attempt to verify that information?
- What evidence did the Department have of a connection between the Alliance and a clinic that had been closed by Indiana in the past?
- What objection, if any, does the state still have against Dr. Jeffrey Glazer, the Medical Director of the clinic?
- Did the Department understand the meaning of "affiliate" to be ambiguous at the time it required the Alliance to disclose its "affiliates"? Why didn't it specify the information it was seeking?
- Can the Department point to other instances in which it has withheld guidance on the meaning of an ambiguous term in state law in order to assess the honesty or accuracy of a license applicant?
- Did the Department make a specific finding that the evidence submitted by the Alliance

was inadequate? What was the basis for that finding? If no finding was made, why not?
- What information supported each of the February 2019 supplemental requests? How did they relate to or advance the state's interests?
- Are there privacy protections for materials turned over as part of obtaining a license? How was the state prepared to comply with statutes protecting the medical records of third parties or patients?

App. 28a–29a.

In response to the Seventh Circuit's decision, the district court modified the preliminary injunction and ordered Defendants to "treat Whole Women's [*sic*] Health Alliance with respect to the South Bend Clinic as provisionally licensed under 410 Ind. Admin. Code 26-2 until this Court issues a final judgment on the merits of the case." ECF No. 186. The modified preliminary injunction did not include the caveat suggested by the Seventh Circuit—that the provisional license should be effective "in the absence of a failure to comply with valid licensing criteria." App. 28a.

REASONS FOR GRANTING THE PETITION

I. A Corporation Seeking an Abortion Clinic License May Not Invoke the Rights of Hypothetical Future Patients When Challenging Denial of its Application

Only women seeking abortions, not abortion providers, have specially protected abortion-related rights under the Fourteenth Amendment. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833,

884 (1992) ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position."); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) ("The Supreme Court has never identified a freestanding right to perform abortions.").

And while this Court has in some circumstances permitted physicians to invoke the Fourteenth Amendment rights of abortion patients, *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976), it will this Term consider whether that doctrine reaches challenges by abortion clinics to abortion health and safety laws. *June Med. Servs. L.L.C. v. Gee,* 905 F.3d 787 (5th Cir. 2018), *cert. granted* 140 S. Ct. 35 (Oct. 4, 2019). If the Court rejects third-party standing in *June Medical*, it should also reject it here, where a would-be abortion clinic seeks to avoid state licensing standards designed to protect patients from incompetent and unscrupulous providers.

A. Whole Woman's Health's interests are not aligned with hypothetical future patients

A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted). That rule has prevailed for most of our Nation's history. *Id.* at 135-36 (Thomas, J., concurring).

The exception to the general rule is *jus tertii*—third-party-standing doctrine. Under that limited exception, litigants may assert the rights of third

parties *only* when: (1) the litigant has a "close relationship" to the third party; and (2) some "hindrance" affects the third party's ability to take legal action. *See id.* at 130 (citations omitted); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring in judgment) (noting that the Court departs from normal standing rules "only where the party seeking to invoke the judicial power 'has a 'close' relationship with the person who possesses the right' and 'there is a 'hindrance' to the possessor's ability to protect his own interests.'") (quoting *Kowalski*, 543 U.S. at 130). Under the *jus tertii* doctrine, the Court has long limited litigants' ability to assert the constitutional rights of third parties. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 99 n.20 (1968); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

In *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976), a plurality of the Court distilled the justification for barriers to third-party standing to matters of agency and pragmatism. Principally, "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* In addition, "third parties themselves usually will be the best proponents of their own rights." *Id.* at 114.

Yet the Court in *Singleton* permitted abortion physicians to assert hypothetical patients' rights in challenging a prohibition against using Medicaid to pay for non-therapeutic abortions. *Id.* at 108. The Court

determined that in this context "several obstacles" impeded the ability of individual pregnant women to take legal action, including threats to privacy and the "imminent mootness" of pregnancy-related claims. *Id.* at 117.

Critically, the Court also found a unity of interests between the physicians' injury (lack of payment) and the patients' injury (lack of services). The "constitutionally protected abortion decision is one in which the physician is intimately involved," said the Court. *Id.* at 117. A woman considering an abortion will necessarily discuss with her physician concerns such as the potential psychological harm caused by birthing an unwanted child, the difficulty of bringing a child into a family unable to care for it, or the stigma of unwed motherhood. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Particularly important in this regard is the oath physicians take to put the health of their patients above all other considerations. *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991) ("A physician's first loyalty must be to his patient."); *Lindgren v. Moore*, 907 F. Supp. 1183, 1189 (N.D. Ill. 1995) ("The 'Physician's Oath' adopted by the World Medical Association requires doctors to pledge that 'the health of my patient will be my first consideration.'"). The traditions of the medical profession carry forth the understanding that the special training and skills of medical professionals bind them to take responsibility for the proper care of those entrusted to them. *Jarvis*, 575 N.E.2d at 995 (describing the duty of a physician to a patient as a

"special consensual relationship" arising from an "implied contract that the physician possesses the ordinary knowledge and skill of his profession" and will use those skills "in a reasonable, diligent, and careful manner in undertaking the care and treatment of his patient"). Indiana law codifies these standards. 844 Ind. Admin. Code 5-2-2; 844 Ind. Admin. Code 5-2-3; 844 Ind. Admin. Code 5-2-5.

Medical *corporations*, however, do not have the special, confidential relationships with patients that individual physicians do. Abortion clinics, not being corporeal persons, do not take oaths, and while their licensing standards require them to maintain sufficient facilities and to report abuse and neglect of minor patients, they do not impose a broader duty to act in the patient's best interests. 410 Ind. Admin. Code 26.5-17-1; Ind. Code § 16-34-2-5. What qualifies physicians to act as the agent of patients in some circumstances is their irreducible capacity to exercise professional judgment as to the patient's best medical interests. As a matter of law, tradition, and real life, abortion clinics (and medical facilities generally) as business entities *never* have that same intimate relationship with patients.[1] And the prospect of a special re-

[1] In this regard, the rationale for physicians' agency authority has limits. It is one thing for physicians to assert rights of patients to undergo a particular procedure; it is quite another to assert "rights" of patients to forego health and safety standards governing that procedure. In such cases, the interests of patients and physicians diverge and physicians lose agency authority. *See*, *e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004). The point here, however, is that abortion clinics *never*

lationship between a medical corporation and individual patients is even more remote where the corporation does not yet have a license or any actual patients. *See Kowalski*, 543 U.S. at 130 (rejecting third-party standing predicated on a future attorney-client relationship with "as yet unascertained Michigan criminal defendants . . . .").

In short, no basis exists for entrusting a would-be abortion clinic seeking to avoid state licensing standards with the rights of hypothetical future customers.

B. Assertion of third-party rights is especially improper in an as-applied challenge such as this

Permitting *just tertii* creates particular problems where, as here, the plaintiff purports to raise an as-applied challenge rather than a facial challenge to a state statute. With as-applied challenges, the entire point of the litigation is to test whether the State's regulatory interests are strong enough to override a litigant's particular rights in concrete circumstances. *See*, *e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 593–594 (2005) (balancing the individual's right to freedom of association against the State's regulatory interests in preserving political parties in an as-applied constitutional challenge).

Accordingly, an abortion clinic asserting an as-applied challenge to state licensing laws should be limited to invoking its own rights and circumstances, such that a court can evaluate whether something

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have the type of relationship with patients that justifies invocation of patients' rights.

particular about *the clinic* overrides the State's ordinary regulatory interests. Such a claim, however, would only justify asking whether Indiana's application of its licensing laws to Whole Woman's Health passes the rational-basis test; it would not justify asking whether it imposes an undue burden on the right to abortion. For an as-applied challenge to qualify for the undue burden standard, it needs to be asserted by an actual woman seeking an abortion; the question in such a case would be whether application of state law to *her* violates *her* rights given *her* circumstances.

Yet here, even though no woman seeking an abortion has stepped forward to claim the Indiana abortion clinic licensing scheme violates her constitutional rights, both the district court and the Seventh Circuit have permitted Whole Woman's Health to claim that the licensing law, as applied to *it*, violates a hypothetical woman's right to choose abortion. Such an "as-applied" *jus tertii* claim permits no context-specific evaluation of the interests of an individual rights holder. Instead, it invites evaluation of the circumstances and interests of someone who has no rights to assert. Here, this distortion of the Court's third-party-standing doctrine has permitted Whole Woman's Health to shield itself—but no other abortion clinic, past, present or future—from Indiana's licensing standards.

Again, Whole Woman's Health's actual preliminary injunction request was that it be permitted to provide chemical abortions without any license whatever, on the grounds that it was likely to succeed with an "as-applied" challenge to Indiana's abortion-clinic licensing law. Yet Whole Woman's Health did not present any evidence that even a single woman anywhere

was, as a result of *its* inability to procure a clinic license, unable to have an abortion. Instead, it presented evidence showing the travel time and lack of direct public transportation options from South Bend to clinics in Merrillville, Indianapolis, Lafayette, or Bloomington. App. 37a–38a, 40a. Its theory (embraced by the district court) was that hypothetical women in South Bend (or north central Indiana more generally—the relevant geographic area has never been entirely clear) seeking abortion have a constitutional right to a clinic closer to their homes than currently exists, such that the Fourteenth Amendment prohibits enforcement of Indiana's clinic-licensing law "as applied" to Whole Woman's Health.

The Seventh Circuit correctly saw a doctrinal problem with suspending state licensing laws wholesale for one abortion clinic, but did not correct the fundamental mistake of affording clinic-specific relief based on woman-specific rights. The Seventh Circuit observed that this Court has held unequivocally that States may require abortion providers to have licenses, and the Seventh Circuit held that accordingly Indiana could generally apply its licensing law to Whole Woman's Health. App. 17a–19a.

But, the Seventh Circuit said, Indiana's demand for documents from Whole Woman's Health likely imposes an undue burden on the rights of women to choose abortion, reasoning that the State's requests for information may be born of animus to the abortion right or may otherwise be unnecessary. App. 20a–21a. The proper remedy, it held, was not limited to providing relief for any particular women whose rights were potentially infringed; instead, the remedy required

granting Whole Woman's Health an ongoing "provisional" abortion clinic license pending trial on the merits of Whole Woman's Health's lawsuit. App. 28a.

So, just like the district court, the Seventh Circuit fashioned "as applied" licensing relief for one abortion clinic without examining how the law "applied" to any actual bearer of the constitutional right at issue.

No decision of this Court permits conferring provider-specific relief on the basis of the as-applied abortion rights of hypothetical women not before the Court. *Singleton*, 428 U.S. at 108, rejected a facial challenge to a prohibition against using Medicaid funds for non-therapeutic abortions. *Casey*, 550 U.S. at 844, considered facial challenges to five different abortion regulations. And the Court in *Hellerstedt* facially invalidated the Texas admitting privileges and ASC licensing laws based on proven statewide impact. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016).

In an as-applied challenge brought by the pregnant woman, the court can more easily compare the interests of the actual rights holder with those of the State in light of the prevailing circumstances and conditions. No such concrete as-applied analysis is possible, however, where a clinic requests re-channeled as-applied relief based on the rights of others. In such circumstances, the parties must inevitably litigate the right of the plaintiff abortion clinic to special exemption from state abortion laws—not the right of women to choose abortion. Indiana and other States have seen this phenomenon again and again in the context of third-party challenges predicated on women's rights. *See*, *e.g.*, *Planned Parenthood of Ind.*

& Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 896 F.3d 809, 812 (7th Cir. 2018) (allowing abortion clinic to challenge statute requiring ultrasound at least 18 hours before an abortion rather than purchasing new ultrasound machines), *cert. pet. docketed*, No. 18-1019 (Feb. 4, 2019); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1261 (E.D. Ark. 2019) (allowing abortion clinic to assert the rights of its patients against statute requiring physicians who performed abortions to be board-certified or board-eligible in obstetrics and gynecology), *appeal filed*, No. 19-2690 (8th Cir. Aug. 9, 2019). The incidental impact of abortion laws on abortion clinic business practices is not even plausibly relevant to an as-applied challenge predicated on others' rights.

If in *June Medical* the Court resolves the third-party standing issues by holding that abortion clinics and physicians may not assert the rights of patients to challenge abortion health and safety laws, it could dispose of this case by simply granting the petition, vacating the decision below, and remanding for further proceedings. But if it permits third-party standing to launch a facial challenge in *June Medical*, it should take this case to consider whether and how abortion clinics may assert third-party rights to bring as-applied challenges. Abortion clinics frequently bring third-party challenges seeking special exemptions from state abortion laws. *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc.*, 896 F.3d at 812; *Little Rock Family Planning Servs.*, 397 F. Supp. 3d at 1261. Such challenges force lower courts to apply undue burden doctrine in a way that protects the business models of abortion clinics. The Court should

grant certiorari to clarify that these challenges are improper.

II. Federal Courts Do Not Have Authority To Issue State Licenses

As discussed, Whole Woman's Health sought a preliminary injunction precluding Indiana from enforcing its licensing laws against it at all, *not* an injunction that the Department grant it a license. That original demand was unjustified on the merits, but at least it was for a type of relief that federal courts generally have the power to grant. The same cannot be said for the Seventh Circuit's *sua sponte* injunction requiring the Department to grant Whole Woman's Health a state license—of a type not even contemplated by state law.

In particular, the Seventh Circuit instructed the Department to "either treat Whole Woman's Health of South Bend as if it had a provisional license under 410 Ind. Admin. Code § 26-2, or actually to grant such a provisional license, to be effective (in the absence of a failure to comply with valid licensing criteria) until the district court issues a final judgment on the merits of the case." App. 28a. On remand, the district court carried out this directive by entering an injunction stating "Defendants are PRELIMINARILY ENJOINED to treat Whole Women's [*sic*] Health Alliance with respect to the South Bend Clinic as provisionally licensed under 410 Ind. Admin. Code § 26-2 until this Court issues a final judgment on the merits of the case." ECF No. 186.

In effect, this is a wholly new license not found in state law. Indiana law, to be sure, provides for something called a "provisional license," but such a license does not represent the open-ended temporary status the Seventh Circuit and district court have in mind. Rather, under the Indiana regulatory scheme, provisional licenses expire after 90 days, by which time the Department is to undertake a licensing survey—satisfactory completion of which entitles an abortion clinic to a full license, which must be renewed annually, subject to satisfactory inspections and compliance with corrective action ordered by the Department. 410 Ind. Admin. Code 26-2-4(c)–(e); 410 Ind. Admin. Code 26.5-3-4(c)–(e). The district court's injunction creates in effect a new type of provisional license that, while ostensibly in place pending trial, as a practical matter lasts as long as the federal courts say.

The difference between what Indiana law provides and what the federal courts have ordered is not merely nominal. The point of the provisional license provided by state law is to permit a clinic to operate and then undergo an inspection prior to permanent licensing so that the Department can review the clinic's actual operations and, if necessary, order early corrective action by the clinic. The injunction required by the Seventh Circuit and ordered by the district court plainly compromises that authority. For while Whole Woman's Health has thus far permitted the Department to conduct surveys, in the event the Department finds deficiencies at the clinic that may justify action against the license, it will be required to go to federal court to seek leave to take such action or risk a contempt sanction. In effect, the preliminary

injunction ordered by the courts below is not a narrow preservation of the status quo pending litigation, but an institutional decree that requires a state agency to seek federal judicial permission to carry out its mission.

Whether federal courts may order such intrusive relief, even on an ostensibly temporary basis, warrants Supreme Court review. Under *Rooker-Feldman* doctrine, *Pennhurst* sovereign immunity, and general federal-state comity principles, it is inappropriate for a federal court to order a state licensing authority to issue a license to a particular applicant.

A. Under *Rooker-Feldman* doctrine, a state licensing decision is a judicial act not subject to federal court review

Rooker-Feldman doctrine holds that while district courts may have jurisdiction over general challenges to the constitutionality of state regulations, they "do not have jurisdiction . . . over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923) (holding that a judgment of the Indiana Supreme Court could not be reviewed by a district court).

Indiana's administrative procedure for considering abortion clinic license applications is judicial in nature and protected by *Rooker-Feldman* doctrine from federal court review. *Feldman* itself acknowledges that administrative action may be judicial in nature (and insulated from federal court review)

when an agency "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Feldman*, 460 U.S. at 477. In considering an abortion clinic application, the Department must take precisely such measures: It must investigate applicants' backgrounds, inspect their premises, and make various declarations and determinations, including whether "the licensee or licensees are . . . of reputable and responsible character." 410 Ind. Admin. Code 26-2-5(1); 410 Ind. Admin. Code 26.5-3-5. The Department may also deny a license if it determines that the "conduct or practice of the clinic are found to be detrimental to the patients of the abortion clinic," if it determines that the clinic has violated any of the statutes or regulations governing licensing of abortion clinics, or if it finds that the clinic permitted, aided, or abetted the "commission of any illegal act in the clinic." 410 Ind. Admin. Code 26-2-5(2)–(4), (6); 410 Ind. Admin. Code 26.5-3-5(2)–(4), (6). Such determinations require judgment and discretion and are not mere ministerial acts.

To be clear, the Department's licensing determinations are not insulated from judicial review; the Indiana Administrative Orders and Procedures Act affords multiple layers of agency review as well as judicial review in state court. *See* Ind. Code § 4-21.5-1-1 *et seq*. Here, Whole Woman's Health appealed the Department's initial denial of its license application within the agency—a proceeding that included "extensive testimony" about the applicant, the application, and the Department's process and standards for consideration. App. 11a. But when it lost before the

Appeals Panel, Whole Woman's Health failed to pursue judicial review in Indiana courts, choosing instead to file a new application and then ask a federal court to enjoin the licensing process in its entirety.

Again, the State is not taking the position that *Rooker-Feldman* precluded the district court from considering Whole Woman's Health's *actual* request for an injunction against enforcement of the abortion-clinic licensing scheme as a whole (though that demand was unjustified on other grounds). Indeed, as counsel for the State represented to the Seventh Circuit at oral argument, a federal court could even order the Department to rule on Whole Woman's Health's application without receiving the additional documents the Department has demanded. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (observing that a federal court may only compel an agency "to take action upon a matter, without directing *how* it shall act.").

What *Rooker-Feldman does* preclude, however, is a federal court injunction requiring the Department to issue a license, which amounts to a collateral override of a substantive state judicial determination. *See Feldman*, 460 U.S. at 473 (precluding relief where the constitutional challenge was "wholly and directly intertwined with plaintiff's efforts to secure" state licensing relief "and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case"). Critically, with the preliminary injunction now in place, the Department is required to treat a facility as licensed even though it has never made an ultimate

finding as to Whole Woman's Health's minimal qualifications, including its reputable and responsible character—a licensing standard that both courts below said is perfectly acceptable.

Federal courts may not, through preemptive collateral lawsuits, pretermit state licensing decisions. Both the Department and Indiana's courts must be afforded respect in whatever their disposition of this license application may be. A federal court may at most enjoin a state agency to issue a final determination on a license application; it may not decree or override the state agency's final substantive determination.

B. The order to treat Whole Woman's Health as if it is provisionally licensed violates sovereign immunity under *Pennhurst*

Because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law," sovereign immunity precludes federal courts from enjoining state officials to follow state law. *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). The Seventh Circuit's order to treat Whole Woman's Health "as if" it is provisionally licensed under state law violates sovereign immunity by requiring state officials to conduct themselves in a particular way under state law.

The Seventh Circuit asserted—in the absence of any district court findings on the issue—that the record failed to support the conclusion that the Department had given Whole Woman's Health's application

a "fair shake" and that it was "not clear what else Indiana expects to learn from these additional requests." App. 26a. Accordingly, the injunction the Seventh Circuit issued reflects its *own* determination that Whole Woman's Health has satisfied state law requirements and standards for an abortion clinic license—including the "reputable and responsible character" requirement that both courts below held to be perfectly valid. This is a federal court telling state officials how to comply with state law.

The issues identified by the Seventh Circuit as the proper subject of an "undue burden" trial reinforce the point. It ordered the district court on remand to make determinations such as "whether there was specific evidence of wrongdoing;" "[w]hat evidence did the Department have of a connection" between Whole Woman's Health and Ulrich Klopfer; the Department's understand[ing] [of] the meaning of 'affiliate'" and "[w]hy didn't it specify the information it was seeking?"; and "what information supported each of the February 2019 supplemental requests? How did they relate to or advance the state's interests?" App. 29a. These (and the other) questions may perhaps be relevant to whether the Department could properly deny Whole Woman's Health a license under state law, but under this Court's precedents they are not relevant to any undue burden analysis. These questions represent ever-greater intrusion into the decisional processes and state law standards employed by the Department. Such inquiries may be proper for state court review, but not for federal courts.

The Seventh Circuit's holding is not only an insult to the State's role as a co-equal sovereign entitled to

enforce its own licensing standards (including the "reputable and responsible character" requirement the courts below deemed valid), but inflicts ongoing harm to the State. Enjoining state officials to issue licenses that are supposed to be governed by state standards will yield federal intrusion that "is likely to be extensive" as in "cases of ongoing oversight of a state program that may extend over years." *Pennhurst*, 465 U.S. at 122 n.32. Here, the *de facto* provisional license required by the injunction is essentially a special license created by the court and not recognized by Indiana's licensing scheme. The injunction provides no guidance as to how frequently inspections of the Whole Woman's Health's clinic should occur or what remedies the Department may use to correct any clinic deficiencies, effectively requiring the Commissioner to seek relief from federal court to carry out remedies that are, after all, matters of state law.

It is not even clear that such supervisory authority will terminate following a trial on the merits. If following trial the district court permanently enjoins the State to issue a full license, any later attempt by the Department to revoke that license for facility, practice, or reporting deficiencies will almost certainly be challenged as a violation of the injunction. In this way, the Department will remain under the constant supervision of the federal judiciary in carrying out its duties to regulate this particular abortion clinic.

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Indiana is not alone in having its regulatory and licensing enforcement subordinated to federal judicial supervision in the wake of *Hellerstedt*. The Middle

District of Louisiana in *June Medical* declared invalid Louisiana's hospital admitting privileges requirement only after overriding a state agency's understanding of what sort of privileges sufficed under state law. *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 90 (M.D. La. 2017), *rev'd by* 905 F.3d 787 (5th Cir. 2018), *cert. granted* 140 S. Ct. 35 (Oct. 4, 2019). As in this case, such an order puts federal courts in the position of directing state officials how to comply with state law, all in the name of administering the undue burden rights of hypothetical future patients.

Whether the Court resolves *June Medical* on third-party standing grounds or reaches the meaning of the undue burden test, it should make clear that federal courts should not interfere with the inner workings of state regulatory systems. If the Court confronts that point in *June Medical*, the proper disposition of this petition may be to grant, vacate, and remand. But if the Court does not see *June Medical* as an opportunity to re-set the proper relationship between state administrative agencies and federal courts in constitutional litigation, it should take this case to address precisely that issue, which is plainly of exceptional national importance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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