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; KRISTINA BOX, M.D., Commissioner of the Indiana State Department of Health, in her official capacity; JOHN STROBEL, M.D., President of the Medical Licensing Board of Indiana, in his official capacity; and KENNETH P. COTTER, St. Joseph County Prosecutor, in his official capacity,

Petitioners,

v.

WHOLE WOMAN'S HEALTH ALLIANCE; ALL-OPTIONS, INC.; and JEFFREY GLAZER, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the court of appeals erred in affirming entry of a preliminary injunction granting narrow, as-applied relief from an ongoing violation of the Fourteenth Amendment caused by a state health department's refusal to grant an abortion clinic license to a qualified applicant.

(2) Whether this Court should address Petitioners' arguments about third-party standing, the *Rooker-Feldman* doctrine, and sovereign immunity when those arguments were neither raised in nor addressed by the courts below and concern the application of legal rules that are not in dispute.

CORPORATE DISCLOSURE STATEMENT

Neither Whole Woman's Health Alliance nor All-Options, Inc., has a parent corporation, and neither issues stock.

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INTRODUCTION

The Court should deny the petition because it seeks review of a preliminary injunction that will soon be superseded by a final judgment; the issues it raises were neither presented to nor decided by the courts below; and all of its arguments rest on fact-bound contentions about the application of legal rules that are not in dispute.

The district court preliminarily enjoined the defendants, who are Indiana officials, from enforcing an abortion clinic licensing requirement against Whole Woman's Health Alliance ("WWHA" or the "Alliance") after the nonprofit organization tried and failed to obtain a license from the Indiana State Department of Health (the "Health Department" or "Department") that would enable it to provide medication abortions at a clinic in South Bend, Indiana (the "South Bend Clinic"), which is in a region that has unmet demand for abortion services. *See Whole Woman's Health All. v. Hill*, 388 F. Supp. 3d 1010, 1013-14, 1016, 1049 (S.D. Ind. 2019) ("*WWHA I*"). The court of appeals affirmed the preliminary injunction with modifications designed to ensure that it will not "tie [the State's] hands in an unwarranted way." *Whole Woman's Health All. v. Hill*, 937 F.3d 864, 879 (7th Cir. 2019) ("*WWHA II*"). Specifically, the court of appeals directed the district court to instruct "the state either to treat [the South Bend Clinic] as if it had a provisional license . . . or actually to grant such a provisional license" pending entry of final judgment. *Id.* It explained that "[t]his modification of the injunction will ensure that the

State continues to have its normal regulatory power over the clinic, including the power to conduct inspections. . . ." *Id.*

Indiana does not contend that the court of appeals applied the wrong legal standard or otherwise erred in concluding that Plaintiffs are likely to succeed on the merits of their claim that Indiana's abortion clinic licensing requirement—as applied to WWHA in the particular circumstances of this case—violates the Due Process Clause of the Fourteenth Amendment. Instead, the petition lodges a series of unfounded attacks on federal jurisdiction that Indiana did not raise in the courts below.

Indiana has good reason for seeking to insulate the Health Department's handling of WWHA's license application from constitutional scrutiny. After undertaking a thorough review of the factual record, the court of appeals expressed "concerns about the state's handling of the Alliance's license application," *WWHA II*, 937 F.3d at 868, declaring that "[t]he record before us paints a troubling picture," *id.* at 877. It found that the record did not support the conclusion that the Health Department's "actions were all based on constitutionally permissible concerns for women's health or fetal life." *Id.* at 878. The Health Department confirmed as much at its subsequent deposition. There, its designee testified that the Department's actions were largely based on disdain for WWHA's President and Chief Executive Officer ("CEO"), Amy Hagstrom Miller, because of her outspoken advocacy for abortion rights. *See* App. to Pls.' Resp. in Opp'n to Defs.' Mot. for

Summ. J. (S.D. Ind. ECF No. 234-1) ("MSJ App.") at 765 ("Amy Hagstrom Miller is a very lightning rod type of person. . . . She's an advocate, a very strong advocate for a particular position. She doesn't shy away from interviews. She makes a lot of very neat quotes from the steps of the Supreme Court and other places."); MSJ App. at 768-69 ("[Y]ou've got a player that, to the extent by October of 2017, Trent [Fox, the Health Department's Chief of Staff,] knew anything about her, it was because she is an incredibly vocal advocate for abortion rights. And maybe it's not a terribly relevant thing to you, but it was to him."); MSJ App. at 769 ("[O]bviously Amy Hagstrom Miller, Amy Hagstrom Miller, Amy Hagstrom Miller, is a big deal. And . . . she is a key player in this process."). The designee further linked the Health Department's treatment of WWHA's license application to Ms. Hagstrom Miller's participation in a case before this Court challenging Texas abortion laws and WWHA's advocacy to destigmatize abortion. *See* MSJ App. at 766-67 ("Trent knew by October of 2017 that [Ms. Hagstrom Miller] had been involved in the Whole Woman's Health case. What we also knew . . . is that Whole Woman's Health Alliance posited itself primarily . . . as an advocacy group meant to relieve the stigma of abortion and secondarily as a clinics provider. That alone would be of concern, that an advocacy group wants to open a couple of clinics, perhaps in South Bend, and Amy Hagstrom Miller's control is obviously pertinent."); *see generally Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S. Ct. 2292 (2016). Plainly, penalizing a license applicant for engaging in protected speech and association disliked by

the licensing authority does not serve a legitimate state interest.

Nevertheless, Indiana's attacks on federal jurisdiction fall short. This Court's precedents establish that Plaintiffs have standing, *infra* at 28-31; the *Rooker-Feldman* doctrine does not apply to decisions by state administrative agencies, *infra* at 33-34; and the preliminary injunction is authorized by *Ex parte Young*, 209 U.S. 123 (1908), *infra* at 31-33, 35-36. Further, Indiana's request that the Court hold this petition pending resolution of *June Medical Services, L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (U.S. Oct. 4, 2019) (No. 18-1323), which includes a question concerning third-party standing, should be denied because Indiana forfeited its third-party standing arguments by failing to raise them in the courts below. *Infra* at 26-27.

STATEMENT OF THE CASE

I. Indiana's Abortion Clinic Licensing Regime.

Prior to July 1, 2015, Indiana permitted clinics to provide medication abortions without a special license. *See* Act of Apr. 30, 2015, Pub. L. No. 92-2015, §§ 1, 4, 2015 Ind. Acts 633, 633, 637 (codified in relevant part at Ind. Code §§ 16-18-2-1.5(a),(b)(3), 16-21-2-2.5(b)).[1]

[1] An earlier statute requiring licensure of clinics providing medication abortions, enacted in 2013, was struck down on constitutional grounds before it took effect. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 64

Indiana has required licensure of clinics providing surgical abortions since 2005. *See* Act of Apr. 26, 2005, Pub. L. No. 96-2005, §§ 2, 5-10, 14, 2005 Ind. Acts 1897, 1899-1903 (codified in relevant part at Ind. Code §§ 16-18-2-1.5(a)-(b), 16-21-2-1(a), 16-21-2-2(4), 16-21-2-2.5(a)-(b), 16-21-2-10(3), 16-21-2-11(a)(2), 16-21-2-14). To obtain an abortion clinic license, a clinic must submit an application and tender a fee to the Health Department, Ind. Code §§ 16-21-2-11, 16-21-2-12, which has broad discretion to determine how much information an applicant must provide and whether a license will ultimately be granted, *see* 410 Ind. Admin. Code 26.5-3-4, 26.5-3-5. The clinic must indicate on the application form whether it intends to provide surgical abortions, medication abortions, or both. 410 Ind. Admin. Code 26-2-3(b)(1); 26.5-3-3(b)(1). Upon approval of its application, the clinic is granted a "provisional license" that remains effective for ninety days. 410 Ind. Admin. Code 26.5-3-4(c). During that period, the Health Department is authorized to inspect the clinic and determine whether a "full license" should be granted. 410 Ind. Admin. Code 26.5-3-4(d)-(e). A full license expires one year after it is issued and may not be assigned or transferred. 410 Ind. Admin. Code 26.5-3-1(b). Licensure is mandatory for abortion clinics, Ind. Code § 16-21-2-10, and operating an abortion clinic

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F. Supp. 3d 1235, 1260 (S.D. Ind. 2014) (granting partial summary judgment to the plaintiffs); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 984 F. Supp. 2d 912, 916, 931 (S.D. Ind. 2013) (entering a preliminary injunction).

without a license constitutes a crime, Ind. Code § 16-21-2-2.5(b)(1).

The licensure requirement for abortion clinics operates independently of other statutes regulating the provision of abortion care. For example, Indiana law independently provides that only licensed physicians may provide abortions. Ind. Code § 16-34-2-1(a)(1)(A), (a)(2). Violation of this requirement is a felony. Ind. Code § 16-34-2-7(a). To obtain a license to practice medicine in Indiana, a physician must satisfy rigorous requirements concerning the physician's character and professional competence. *See* Ind. Code § 25-22.5-3-1; 844 Ind. Admin. Code 4-4.5-7. Likewise, Indiana law authorizes the Health Department to inspect abortion clinics regardless of their licensure status. Ind. Code § 16-21-2-2.6 ("[The Health Department] shall inspect an abortion clinic at least one (1) time per calendar year and may conduct a complaint inspection as needed."); *see WWHA I*, 388 F. Supp. 3d at 1023 ("The Department refers to . . . inspections as 'surveys.' . . . Nothing in the cited statutes or rules makes the Department's authority or ability to conduct such surveys contingent on the abortion clinic's licensure. . . .").[2]

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[2] The definition of "abortion clinic" is not limited to licensed facilities. Instead, it encompasses any "health care provider" that "performs surgical abortion procedures" or "provides an abortion inducing drug for the purpose of inducing an abortion" except a licensed hospital, a licensed ambulatory outpatient surgical center, or "[a] health care provider that provides, prescribes, administers, or dispenses an abortion inducing drug to fewer than five (5) patients per year for the purposes of inducing an abortion." Ind. Code § 16-18-2-1.5. "Health care provider" is in turn defined,

Indiana does not require licensure of doctor's offices and clinics unless they provide abortion care. *See WWHA I*, 388 F. Supp. 3d at 1021; MSJ App. at 761-62. Such office-based settings may provide medical interventions of equal or greater risk than medication abortion without obtaining a license from the Health Department. *WWHA I*, 388 F. Supp. 3d at 1042-43; *see* MSJ App. at 159-60. Indeed, doctor's offices and clinics are permitted to use precisely the same regimen of medications used to induce a medication abortion to treat patients experiencing an incomplete miscarriage without having to obtain a license. *WWHA I*, 388 F. Supp. 3d at 1042-43; Appellees' Suppl. App. (7th Cir. ECF No. 34) at 7.

II. WWHA's Efforts to Obtain an Abortion Clinic License.

WWHA is a nonprofit organization with a mission to provide abortion care in underserved communities and eradicate the stigma surrounding abortion. Appellants' App. (7th Cir. ECF No. 25) at 59. On August 11, 2017, WWHA applied to the Health Department for a license to operate an abortion clinic in South Bend, Indiana, that would provide medication abortions. *See WWHA I*, 388 F. Supp. 3d at 1025. At the Health

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in relevant part, as "[a]n individual . . . authorized by the state to provide health care or professional services as a licensed physician." Ind. Code § 16-18-2-163(d)(1). Thus, any doctor's office or clinic in which a licensed physician performs a surgical abortion or five or more medication abortions in a year is subject to inspection by the Health Department.

Department's request, it submitted a revised application containing additional information on October 6, 2017. *See id.* On October 27, 2017, the Health Department asked WWHA to provide more information, including "a complete ownership structure or description pertaining to the applicant, including, but not limited to, any individuals and/or any parent, affiliate or subsidiary organizations." *Id.* at 1026. The Health Department also requested a "list of all the abortion and health care facilities currently operated by the applicant, including its parent, affiliate or subsidiary organizations." *Id.* at 1026-27.

On December 8, 2017, WWHA responded to the Health Department in writing, explaining that it is a nonprofit corporation, it has no owners, and its governing authority is vested in its Board of Directors. *Id.* at 1027. WWHA also provided the addresses and state license numbers of the abortion clinics it operates in Texas and Virginia, *id.*, and gave the Health Department copies of its governance documents, including its Certificate of Formation and Bylaws, *see* Appellees' Suppl. App. at 80-107. In addition, WWHA disclosed that it contracts with Whole Woman's Health, LLC (the "Management Company"), a healthcare management company that services abortion clinics across the country, *WWHA I*, 388 F. Supp. 3d at 1027, and provided the Health Department a copy of the agreement governing the Management Company's services to the South Bend Clinic, *see* Appellees' Suppl. App. at 101-07. The Management Company is part of a consortium of limited liability companies involved in the provision of

abortion care that do business under the name "Whole Woman's Health." *See* Appellants' App. at 60. These companies are owned by a common holding company, which in turn is owned by Ms. Hagstrom Miller. *WWHA II*, 937 F.3d at 871. Although Ms. Hagstrom Miller is also the President and CEO of WWHA, Whole Woman's Health and WWHA are legally and financially independent organizations that conduct business at arm's length.[3] Appellants' App. at 58, 62; Appellees' Suppl. App. at 31.

On January 3, 2018, the Health Department denied WWHA's license application after finding that the organization's failure to characterize WWHA and Whole Woman's Health as "affiliates" in its written responses to the Health Department reflected a lack of "reputable and responsible character." *WWHA I*, 388 F. Supp. 3d at 1028.

On January 22, 2018, WWHA lodged an administrative appeal with the Health Department concerning the denial of its license application. *Id.* In response to

[3] Indiana erroneously refers to Plaintiffs in this case as "Whole Woman's Health" throughout the petition. Whole Woman's Health is not a party to this action. *See* Appellants' App. at 4-6. In addition, Indiana erroneously states that Ms. Hagstrom Miller's role as President and CEO of WWHA "gives her unlimited, unilateral control over" the organization. Pet. at 6. In fact, WWHA's bylaws provide that the President and CEO is subject to the supervision of the Board of Directors, Appellees' Suppl. App. at 90; *see WWHA I*, 388 F. Supp. 3d at 1024, and WWHA's conflict-of-interest policy requires Ms. Hagstrom Miller to recuse herself from all decisions concerning transactions between WWHA and Whole Woman's Health, Appellants' App. at 62; Appellees' Suppl. App. at 32.

discovery requests from the Department, WWHA identified its Board members, Appellees' Suppl. App. at 162; described Ms. Hagstrom Miller's relationship to WWHA and Whole Woman's Health, *id.* at 142-48, 151-56; and produced agreements between WWHA and the Management Company, *see id.* at 121. The Health Department also sought documents from Whole Woman's Health, which voluntarily produced over 130 pages in response, including certificates of formation, ownership ledgers, and articles of operation concerning its constituent companies. *See* Appellants' App. at 66-67. On August 22-23, 2018, an administrative law judge ("ALJ") for the Health Department held a hearing at which the Health Department examined three of WWHA's corporate officers, including Ms. Hagstrom Miller, under oath. *See WWHA I*, 388 F. Supp. 3d at 1029; Appellees' Suppl. App. at 110.

On September 14, 2018, the ALJ issued an order recommending that the Health Department grant WWHA's license application because WWHA had shown that its responses to the Health Department's October 27, 2017, requests were complete and accurate. *WWHA I*, 388 F. Supp. 3d at 1029. The Health Department objected to the ALJ's order and asked an internal administrative appeals panel to review it. *Id.* at 1030. On November 28, 2018, a divided panel reversed the ALJ's order. *Id*.

At the Health Department's invitation, WWHA reapplied for an abortion clinic license on January 16, 2019. *Id.* at 1031; *WWHA II*, 937 F.3d at 872. In connection with its application, WWHA provided all

information that the Indiana Code then required.[4] *See* Ind. Code § 16-21-2-11(d); *WWHA I*, 388 F. Supp. 3d at 1032. Among other things, WWHA affirmed that it had never operated an abortion clinic that closed due to patient health and safety concerns; none of its Board members or clinic staff members had ever been convicted of a felony; and none of its Board members or clinic staff members had ever been employed by a facility owned or operated by WWHA that closed as a result of administrative or legal action. Appellees' Suppl. App. at 50. Additionally, WWHA provided copies of all inspection reports and plans of correction concerning its Austin and Charlottesville clinics and the names and addresses of all clinics owned by Whole Woman's Health. Appellants' App. at 67.

On February 25, 2019, the Health Department notified WWHA that it would not evaluate WWHA's license application further unless WWHA satisfied a set of broad document demands concerning Whole Woman's Health. *See WWHA I*, 388 F. Supp. 3d at 1031. On March 15, 2019, WWHA informed the Health Department that its document demands were overbroad and unduly burdensome, calling for the production of hundreds of thousands of pages, including privileged

[4] Indiana amended the requirements for an abortion clinic license in 2018. *See* Act of Mar. 25, 2018, Pub. L. No. 205-2018, §§ 3, 6, 2018 Ind. Acts 2930, 2931, 2934. The district court found that "[t]he content of [the new] provisions and the timing of their enactment strongly suggest that they were adopted in response to the first license application WWHA submitted for the South Bend Clinic." *WWHA I*, 388 F. Supp. 3d at 1022.

materials.[5] *Id.* With cooperation from Whole Woman's Health, WWHA nevertheless produced a subset of responsive documents. *See*, *e.g.*, Appellees' Suppl. App. at 47, 53-56. Further, Ms. Hagstrom Miller attested under penalty of perjury that: Whole Woman's Health operates clinics in three states that require abortion clinics to be licensed; no Whole Woman's Health clinic has ever been denied a state license; and except for a quickly corrected error by the Texas Department of State Health Services ("Texas Department"), no Whole Woman's Health clinic has ever had its license suspended or revoked.[6] *WWHA II*, 937 F.3d at 872;

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[5] For example, one of the demands sought "all orders, submissions, correspondence and other documents that concern, mention, or relate to any regulatory or administrative enforcement action, or administrative, civil or criminal court action involving the affiliate at any time since January 1, 2014." *WWHA I*, 388 F. Supp. 3d at 1031. Whole Woman's Health was involved in several civil court actions challenging the constitutionality of abortion laws during that time period, including a case that made it all the way to this Court. *See*, *e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2292; *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330 (5th Cir. 2014); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017).

[6] On November 29, 2006, the Texas Department issued an Emergency Order revoking the license of a Whole Woman's Health clinic in Beaumont, Texas, based on erroneous inspection findings. After Whole Woman's Health notified the Texas Department of the errors, it lifted the revocation order on December 7, 2006—eight days after the revocation order had been issued. *See* Appellants' App. at 68; Appellees' Suppl. App. at 52-56; *see also WWHA II*, 937 F.3d at 872 ("Hagstrom Miller furnished [the Health Department] the pertinent documents from the Texas Department of State Health Services concerning the incident. Those

Appellants' App. at 68; Appellees' Suppl. App. at 52. The Health Department nevertheless refused to proceed on WWHA's license application, causing a "stalemate[]." *See WWHA I*, 388 F. Supp. 3d at 1032.

III. The Proceedings Below.

A. The Proceedings in the District Court.

On June 21, 2018, WWHA joined All-Options, Inc. ("All-Options"), and Dr. Jeffrey Glazer in a lawsuit challenging the constitutionality of certain Indiana abortion laws, including Indiana Code §§ 16-21-2-2(4), 16-21-2-2.5(b), 16-21-2-10 (collectively, the "Licensing Law"). *See* Appellants' App. at 1-44. All-Options is a nonprofit organization that operates a pregnancy resource center in Bloomington, Indiana. MSJ App. at 267-68. The services provided by All-Options include financial assistance and logistical support for Indiana residents seeking abortion care. MSJ App. at 268. Dr. Glazer is a Board-certified obstetrician-gynecologist ("ob-gyn") with more than three decades of experience practicing medicine. Appellants' App. at 77. He has provided abortion care in Indiana for more than five years and currently serves as the Medical Director of WWHA's South Bend Clinic. *See* Appellants' App. at 78.

On March 27, 2019—after nearly two years of seeking licensure through Indiana's administrative

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documents confirm that the license was restored eight days after its revocation.").

process—WWHA asked the district court to preliminarily enjoin the defendant Indiana officials from enforcing the Licensing Law against the South Bend Clinic pending final judgment in this case. *WWHA I*, 388 F. Supp. 3d at 1032.

On May 31, 2019, the district court granted WWHA's motion on due process and equal protection grounds. *Id.* at 1049. The district court's opinion includes the following findings of fact:

- "According to the American College of Obstetricians and Gynecologists (ACOG), most medical abortions in the United States today are performed by administering the drug mifepristone in conjunction with the drug misoprostol," *id.* at 1014;
- "In addition to their use as abortifacients, mifepristone and misoprostol are also used together in the treatment of incomplete or difficult miscarriages," *id.*;
- "The patient first takes a dose of mifepristone orally. The mifepristone blocks the further growth and development of the fetus. Between 24 to 48 hours later, she takes a dose of misoprostol buccally 'at a location appropriate for the patient.' Often, this location is the patient's home. The misoprostol causes the uterus to contract and expel its contents in a process 'resembl[ing] a miscarriage,'" *id.* at 1015 (citations omitted);
- "If there were a major complication associated with a medication abortion, it would occur

after the patient left the abortion facility since the medications take time to exert their effects," *id.* (citation omitted);

- "Abortion generally has a low risk of fatal and nonfatal complications," *id.*;
- "The risk of death is lower than that from a penicillin injection, as well as that from childbirth," *id.* (citation omitted);
- "One study of more than 230,000 medical-abortion patients found an overall complication rate of 0.65 percent. The rate of complications requiring hospital admission was found to be 0.06 percent; of complications requiring emergency-room treatment, 0.10 percent," *id.* (citations omitted);
- "There is an unmet demand for abortion services in and around South Bend, and more broadly in north-central and northeastern Indiana," *id.* at 1016;
- "No direct lines of public transportation connect South Bend to Merrillville, Indianapolis, Lafayette, or Bloomington," the only Indiana cities that housed abortion clinics prior to entry of the preliminary injunction, *id.* at 1017; *id.* at 1016; and
- "The obstacles to obtaining abortions in northern Indiana are such that women find it easier to travel out of state to Chicago, bypassing nearby Merrillville, to obtain abortions there," *id.* at 1018 (citations omitted).

The petition does not contend that these findings are clearly erroneous. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous. . . ."); *accord Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

Applying the undue burden standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.), and *Whole Woman's Health*, 136 S. Ct. at 2309-10, the district court concluded that the Health Department's application of the Licensing Law to prevent WWHA from providing abortion care at the South Bend Clinic likely violated the Due Process Clause of the Fourteenth Amendment. *WWHA I*, 388 F. Supp. 3d at 1039, 1048-49 ("[T]he Department's application of the Licensing Law to WWHA's license application for the South Bend Clinic places a substantial obstacle in the path of northern Indiana women seeking previability abortions without promoting women's health (indeed, tending to increase the risks to women's health) and without promoting informed decisionmaking or any other admissible state interest."). The district court also concluded that the Health Department's application of the Licensing Law likely violated the Equal Protection Clause of the Fourteenth Amendment by treating abortion patients differently from miscarriage patients. *Id.* at 1047, 1049 ("The Licensing Law's disparate treatment of miscarriage patients versus abortion patients also presents a

substantial obstacle to the abortion decision without any offsetting state benefits.").

Finding the other requirements for entry of a preliminary injunction to be satisfied, the district court enjoined the defendants from enforcing the Licensing Law against WWHA pending entry of final judgment. *Id.* at 1048-49. Indiana moved for a stay of the injunction pending appeal on June 2, 2019, Mot. to Stay (S.D. Ind. ECF No. 119), and the district court denied the motion on June 7, 2019, Order Denying Defs.' Mot. to Stay (S.D. Ind. ECF No. 125) at 1.

Nearly ten months have elapsed since the district court entered the preliminary injunction. During that time, the South Bend Clinic has provided abortion care to over one hundred patients. *See* MSJ App. at 291-92. In addition, discovery has concluded, Case Management Plan (S.D. Ind. ECF No. 41) at 7, *as modified by* Order (S.D. Ind. ECF No. 177) at 1 & Order on Mot. to Quash (S.D. Ind. ECF No. 195) at 6, and Indiana has filed a motion for summary judgment that is now fully briefed and awaiting decision by the district court, Defs.' Mot. for Summ. J. (S.D. Ind. ECF No. 217). Trial, if necessary, is set to begin on August 17, 2020. Order (S.D. Ind. ECF No. 42) at 1.

Notably, Indiana did not seek to obtain any of the information sought in its February 25, 2019, document demands through discovery in this case. Although the Federal Rules of Civil Procedure authorized it to compel Whole Woman's Health and/or its constituent companies to produce non-privileged documents that are

relevant to the parties' claims and defenses and proportional to the needs of the case, *see* Fed. R. Civ. P. 26, 45, Indiana did not serve any subpoenas on those companies during the discovery period. Its failure to do so is a strong indication that the February 25, 2019, document demands, which caused the stalemate over WWHA's second license application, *see supra* at 11-13, were merely a pretext to prevent WWHA from providing abortion care to Indiana residents, rather than a genuine effort to obtain vital information.

B. The Proceedings in the Court of Appeals.

On June 10, 2019, Indiana moved for a stay pending appeal in the court of appeals. Mot. for Stay of Prelim. Inj. Pending Appeal (7th Cir. ECF No. 3). The next day, the court of appeals directed Plaintiffs to file a response by June 14, 2019. Order (7th Cir. ECF No. 4). On June 21, 2019, the court of appeals issued an order modifying the preliminary injunction to make clear that it applies only "to facilities that provide medical abortions, as provided by Ind. Code § 16-18-2-1.5(a)(2), and only with respect to the proposed clinic in South Bend." Order (7th Cir. ECF No. 10) at 2. The order also directed the parties to file supplemental briefs on the motion to stay and set oral argument on the motion for July 11, 2019. *Id.* at 2-3.

Indiana filed four briefs in the court of appeals in total: an initial brief in support of its motion to stay, Mot. for Stay of Prelim. Inj. Pending Appeal (7th Cir. ECF No. 3); an opening supplemental brief and reply

supplemental brief in support of its motion to stay, Suppl. Br. of Appellants in Supp. of Mot. for Stay of Prelim. Inj. Pending Appeal (7th Cir. ECF No. 12); Suppl. Reply Br. of Appellants in Supp. of Mot. for Stay of Prelim. Inj. Pending Appeal (7th Cir. ECF No. 19); and a brief on the merits of its appeal, Appellants' Br. (7th Cir. ECF No. 24). Not one of those briefs raised issues concerning Plaintiffs' standing, the *Rooker-Feldman* doctrine, or sovereign immunity.[7]

Indiana filed its merits brief on July 15, 2019. Among other things, it argued that the preliminary injunction bars the Health Department from inspecting the South Bend Clinic because, in its view, the

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[7] Prior to WWHA's motion for a preliminary injunction, Indiana filed a motion to dismiss in the district court asserting, among other things, that Plaintiffs lack Article III standing. *See* Mem. in Supp. of Mot. to Dismiss (S.D. Ind. ECF No. 38) at 8-13. It did not argue, however, as it does in the petition that WWHA or any Plaintiff in this case fails to satisfy the requirements for third-party standing. *See id*. Instead, Indiana's standing arguments in the district court concerned whether any Plaintiff had suffered an injury in fact as a result of the challenged laws, *see id.* at 8-10; whether Plaintiffs' vagueness claims could be redressed by a favorable ruling, *see id.* at 10-11; and whether a favorable ruling against the Attorney General could redress Plaintiffs' injuries, *see id.* at 11-13; *Whole Woman's Health All. v. Hill*, 377 F. Supp. 3d 924, 934 (S.D. Ind. 2019) ("Defendants contend that Plaintiffs have not alleged injury-in-fact redressable by a favorable ruling."). Indiana's motion to dismiss likewise failed to raise the *Rooker-Feldman* and sovereign immunity arguments that Indiana raises in the petition, *see* Mem. in Supp. of Mot. to Dismiss at 1-13, and Indiana did not raise any of the petition's arguments in its opposition to WWHA's motion for a preliminary injunction, *see* Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. (S.D. Ind. ECF No. 92) at i.

Department may only inspect licensed abortion clinics. *See* Appellants' Br. (7th Cir. ECF No. 24) at 29-30. Plaintiffs filed their merits brief on August 14, 2019. Appellees' Br. (7th Cir. ECF No. 31). They explained that the plain language of the relevant statutes authorizes the Health Department to inspect the South Bend Clinic regardless of its licensure status. *Id*. at 29-30; *see also supra* at 6 n.2. They further stated that:

> If there were any doubt, this Court could direct the district court to add language to the preliminary injunction stating that it shall not be construed to prevent the Department from inspecting the South Bend Clinic to the extent otherwise authorized by section 16-21-2-2.6 of the Indiana Code. WWHA does not contest the Department's authority to inspect the South Bend Clinic pursuant to section 16-21-2-2.6 of the Indiana Code while the preliminary injunction is in force.

Appellees' Br. at 30.

On August 22, 2019, a unanimous panel of the court of appeals issued an opinion denying Indiana's motion to stay and affirming entry of the preliminary injunction with modifications. *WWHA II*, 937 F.3d at 868. The court of appeals explained that "Indiana is entitled to protect patient safety and fetal life through its licensing scheme, but if it is doing little more than throwing up one hurdle after another in an effort to keep the Alliance's doors closed, it has gone beyond constitutional boundaries." *Id.* at 878. It declared that the record "paints a troubling picture" of the Health

Department's actions, including "scorch-earth tactics" that resulted in "a moving target of wide-ranging requests for information." *Id.* at 868, 877-78 ("[T]here comes a point where record requests become so duplicative, or marginally (if at all) relevant, that they are nothing but harassment.").

The court of appeals recognized that the Health Department's actions harmed not just WWHA, but low-income individuals across northern Indiana seeking access to abortion care. *See id.* at 869. Relying on the record evidence and district court's findings, the court of appeals found that "[p]ublic transportation is not a realistic option for travel between South Bend and Merrillville (or any of the other cities with an abortion clinic)." *Id.* It concluded that "[t]he absence of a South Bend clinic thus makes access to abortion care more costly because of the increased time, money, and social isolation experienced by low-income women who live in northern Indiana." *Id.* The court of appeals further noted that, "[a]ccording to evidence presented to the district court, the travel and time costs led some women to skip bills, pawn belongings, or take out payday loans to cover the costs of abortion care, including not just the medical fees, but also the costs of transportation and lodgings." *Id.* In addition, "[p]atients often must travel alone, because of their own financial limitations or those of their families and friends, as well as for privacy reasons." *Id.*

After examining this Court's abortion precedents, including *Doe v. Bolton*, 410 U.S. 179 (1973); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Casey*, 505 U.S. at

833; *Mazurek v. Armstrong*, 520 U.S. 968 (1997); and *Whole Woman's Health*, 136 S. Ct. at 2292, the court of appeals concluded that Plaintiffs had demonstrated a likelihood of success on the merits of their claim that the Licensing Law—as applied in the circumstances of this case—imposed an undue burden on abortion access in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 874-78 ("At this stage of the litigation, on this record, we agree with the district court that the reasons Indiana asserts in support of its handling of the South Bend license are unsupported and outweighed by the substantial burden the state is imposing on women in northern Indiana.").[8]

Nevertheless, to "accommodate the state's legitimate interest in licensing" and ensure that the preliminary injunction does not "tie its hands in an unwarranted way," the court of appeals further modified the preliminary injunction. *Id.* at 879. It directed the district court to enter a revised injunction requiring "the state either to 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" pending entry of a final judgment on the merits. *Id.* The court of appeals explained that "[t]his modification of the injunction will ensure that the state continues to have its normal regulatory power over the clinic, including the power to conduct

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[8] The court of appeals determined that it "need not address [WWHA's] equal protection arguments," which served as an independent ground for the district court's judgment. *WWHA II*, 937 F.3d at 880.

inspections pursuant to IND. CODE § 16-21-2-2.6." *Id.* It went on to state that:

> Almost all the harms Indiana cites have to do with its ability to enforce the rest of its regulatory scheme on licensed clinics. Since we uphold its ability to do so pursuant to the Alliance's *de facto* or real provisional license for the South Bend clinic, the harm to the state of imposing the preliminary injunction as modified by our earlier order and this opinion is *de minimis*, compared to the significant harm the Alliance and its clients would experience from closure of the clinic.

Id. at 880.

Subsequently, the district court entered a modified preliminary injunction stating that "Defendants are PRELIMINARILY ENJOINED to treat Whole Woman's 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." Entry of Modified Prelim. Inj. (S.D. Ind. ECF No. 186) at 2.

Indiana sought and was granted an extension of time to file a petition for rehearing *en banc*, Order (7th Cir. ECF No. 46), but it never filed one. It then sought and was granted an extension of time to file a certiorari petition. It filed the petition on December 9, 2019, well over three months after the court of appeals entered its judgment, and more than six months after the district court initially entered the preliminary injunction.

IV. The Health Department's Subsequent Inspection of WWHA's South Bend Clinic.

On November 6-7, 2019, the Health Department conducted an inspection of the South Bend Clinic. On December 20, 2019, the Health Department sent its inspection findings to WWHA in the form of a twelve-page statement of deficiencies, which included a column for WWHA to enter a plan of correction. *See generally* 410 Ind. Admin. Code 26.5-4-2(c), 26.5-4-4. WWHA did so and returned the completed document to the Health Department on January 3, 2020. On January 31, 2020, Plaintiffs filed a motion in the district court seeking leave to supplement the record with the statement of deficiencies and plan of correction. Pls.' Mot. for Leave to Suppl. the Record (S.D. Ind. ECF No. 249). Indiana opposed the motion, Resp. to Pls.' Mot. for Leave to Suppl. the Record (S.D. Ind. ECF No. 257), and the district court denied it, Order Denying Pls.' Mot. for Leave to Suppl. the Record (S.D. Ind. ECF No. 261). Accordingly, that document is not part of the official court record. Should this Court nevertheless wish to review it, it is available on the district court's public docket as an attachment to Plaintiffs' motion for leave to supplement the record.

The statement of deficiencies indicates that the Health Department's inspection served as both a licensure survey and an investigation of three complaints against the clinic. *See generally* 410 Ind. Admin. Code 26.5-4-3(c). It reports that all of the complaints were unsubstantiated. It then identifies sixteen "deficiencies" or alleged instances of non-compliance with an

applicable regulation. None concerns the provision of patient care. Rather, each concerns failure to document certain information in employee personnel files or the clinic's policy and procedure manual. In many instances, the allegedly missing documentation is not actually required by Indiana law. For example, the first deficiency alleges that the clinic violated 410 Indiana Administrative Code 26.5-5-1(c)(5) because two physicians' personnel files lacked documentation that the clinic's governing body had approved their appointment to the medical staff. But the regulation provides only that "[t]he governing body shall . . . [a]pprove all appointments to or contracts with medical staff." 410 Ind. Admin. Code 26.5-5-1(c)(5). It does not require that the clinic maintain documentation of such approval in a staff member's personnel file. *See id.* Nevertheless, WWHA agreed, in its plan of correction, to maintain all of the documentation requested by the Health Department on a prospective basis, whether required by law or not. The Health Department, consistent with its treatment of WWHA throughout the licensure process, rejected its plan of correction. *See* Resp. to Pls.' Mot. for Leave to Suppl. the Record at 5, Ex. 1.

REASONS FOR DENYING THE PETITION

I. The Procedural Posture of This Case Makes It a Poor Vehicle for Resolving the Questions Presented.

The Court is "ordinarily reluctant to exercise [its] certiorari jurisdiction" to review a nonfinal judgment. *Mazurek*, 520 U.S. at 975. This case—concerning the preliminary grant of narrow, as-applied relief based on the application of well-settled legal standards, *see supra* at 20-23—presents no exceptional circumstances that warrant departure from this norm.

Moreover, Indiana's failure to act promptly in seeking review of the court of appeals' judgment makes this case an especially poor vehicle for resolution of the questions presented. Indiana waited more than three months following entry of judgment before filing its petition for certiorari. *Supra* at 23. Discovery in this case has now closed; Indiana's motion for summary judgment is fully briefed and pending with the district court; and trial is scheduled to commence in August of this year. *Supra* at 17. As a result, the preliminary injunction, which has been in place for nearly ten months, will very likely be superseded by a final judgment before the Court could hear and decide the merits of the case. The Court should therefore deny the petition and allow the district court proceedings to conclude.

Further, none of the issues raised in the petition were raised in or addressed by the district court or court of appeals. *See supra* 18-19 & n.7. Indiana has

forfeited its third-party standing arguments by failing to raise them in the courts below. The limitation on third-party standing is a prudential rule, not a constitutional constraint on federal court jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 498-500 (1975). Accordingly, arguments concerning third-party standing, unlike arguments concerning Article III standing, may be waived or forfeited. *See Craig v. Boren*, 429 U.S. 190, 193 (1976); *cf. Hamer v. Neighborhood Hous. Servs. of Chi.*, ___ U.S. ___, 138 S. Ct. 13, 17 (2017) (distinguishing between statutory time limits, which are jurisdictional and therefore not subject to waiver or forfeiture, and time limits created by court rule, which may be waived or forfeited).

While Indiana's other arguments concern jurisdictional defenses that are not subject to forfeiture, *see Hamer*, 138 S. Ct. at 17; *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), the Court generally refrains from considering issues that have not been decided by the lower courts in the first instance, *see*, *e.g.*, *Frank v. Gaos*, ___ U.S. ___, 139 S. Ct. 1041, 1046 (2019) (*per curiam*) ("We 'are a court of review, not of first view.' Resolution of the standing question should take place in the District Court or the Ninth Circuit in the first instance." (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005))); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Adams v. Robertson*, 520 U.S. 83, 92 n.6 (1997) (*per curiam*) ("[B]y adhering scrupulously to the customary limitations on our discretion regardless of the significance of

the underlying issue, we promote respect for the Court's adjudicatory process." (internal quotation marks and alterations omitted)).

Finally, none of the issues raised in the petition implicate a split in authority among the lower federal courts. To the contrary, all issues raised in the petition concern the application of undisputed legal rules to the particular facts of this case. Accordingly, they do not warrant review by the Court, particularly at this stage of the proceedings when the factual record is preliminary.

II. This Court's Precedents Establish That Plaintiffs Have Standing.

As explained above, Indiana has forfeited its third-party standing arguments. *See supra* at 26-27. Those arguments also fail on their merits. Indeed, Indiana's contention that WWHA lacks third-party standing to assert the constitutional rights of abortion patients is contrary to nearly a century of this Court's jurisprudence. Under deeply rooted principles concerning third-party standing, WWHA, a nonprofit organization that operates an abortion clinic, and its fellow plaintiffs, a physician who provides abortion care and a nonprofit organization that provides financial and logistical support to people seeking abortion care, all have standing to assert the constitutional rights of abortion patients against state laws restricting abortion access. *See*, *e.g.*, *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) ("We have recognized the right of litigants to

bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.' " (citations omitted)) (holding that criminal defendant had third-party standing to assert the rights of prospective jurors excluded from jury service); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 (1983), *overruled on other grounds by Casey*, 505 U.S. at 833 (holding that physician had third-party standing to assert the rights of prospective abortion patients); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 683 (1977) (holding that company selling nonmedical contraceptives had third-party standing to assert the rights of prospective customers, including minors); *Craig*, 429 U.S. at 194 (holding that beer vendor had third-party standing to assert the rights of prospective customers); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (holding that physician had third-party standing to assert the rights of prospective abortion patients); *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality) (same); *Doe*, 410 U.S. at 188 (same); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (holding that physicians had third-party standing to assert the rights of patients seeking access to contraceptives); *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (holding that white property owners had third-party standing to assert the rights of prospective black purchasers); *Pierce v. Soc'y of the Sisters*

of the Holy Names of Jesus & Mary, 268 U.S. 510, 536 (1925) (holding that religious school and private military academy had third-party standing to assert the rights of parents and guardians of prospective students); *see also Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (holding that criminal defendant had third-party standing to assert the rights of prospective grand jurors).

Indiana notes that the Court has already agreed to consider a question concerning third-party standing in the abortion context this Term. *See* Pet. at 16 (citing *June Med. Servs.*, 905 F.3d at 787). But there is no reason for the Court to hold the petition in this case pending its resolution. First, Indiana forfeited its arguments about third-party standing by failing to raise them below. *See supra* at 26-27. Second, even if the Court were to treat third-party standing as jurisdictional—and therefore not subject to forfeiture—the procedural posture of this case weighs against holding the petition. The district court has not yet entered final judgment on the merits of Plaintiffs' claims. Should the decision in *June Medical Services* call subject-matter jurisdiction in this case into question, Indiana could promptly file a motion to dismiss in the district court, *see* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); a grant-vacate-remand from this Court would not be necessary to facilitate district court consideration of the issue.

Additionally, Indiana's contention that abortion providers can only have standing to seek facial relief—

and not as-applied relief—from abortion restrictions is contrary to this Court's precedents. Pet. at 20-24; *see*, *e.g.*, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (concerning a constitutional challenge to an abortion restriction brought by abortion providers on behalf of their patients) ("When a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief? Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force. . . ."). Indiana's further contention that the appropriate remedy for the constitutional violation proven here is an injunction or series of injunctions that would permit the South Bend Clinic to provide abortion care to certain patients but not others based on a case-by-case assessment of the extent to which each patient would be burdened by having to travel elsewhere is nonsensical and wholly unsupported by precedent.

III. This Court's Precedents Establish That Federal Courts Have the Authority to Enjoin State Officials from Violating Federal Law.

The preliminary injunction entered in this case bars Indiana officials from enforcing the Licensing Law against WWHA in a manner that violates the Due Process Clause of the Fourteenth Amendment. *See supra* at 16-17, 21-23. It is therefore authorized by *Ex parte Young*, 209 U.S. at 155-56, which creates an

exception to the doctrine of sovereign immunity for suits against state officials seeking prospective injunctive relief from ongoing violations of federal law. *See Green v. Mansour*, 474 U.S. 64, 68 (1985). "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.*

In general, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citations omitted); *accord Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Those criteria are satisfied here: WWHA sought a preliminary injunction barring state officials from continued enforcement of the Licensing Law in a manner alleged to violate the Due Process Clause—namely, by preventing the South Bend Clinic from providing medication abortions to northern Indiana residents. *See supra* at 13-17. The modified preliminary injunction entered by the district court at the court of appeals' direction does no more than that. *See supra* at 22-23.

Notably, the modified preliminary injunction does not require the Health Department to grant WWHA a provisional license for the South Bend Clinic. It requires only that Indiana treat the South Bend Clinic as if it were provisionally licensed. *Supra* at 23. In other words, it prevents Indiana from denying the

South Bend Clinic the benefits of licensure, including the ability to provide abortion care to patients who want it, pending entry of final judgment, while at the same time ensuring that the Health Department retains the authority to regulate and inspect the clinic.

Indiana's contention that the preliminary injunction undermines the Health Department's inspection authority, *see* Pet. at 26, is belied by the fact that, after its entry, the Health Department conducted a thorough inspection of the South Bend Clinic over a two-day period, *see supra* at 24. Notably, inspectors found no issues related to the provision of patient care and determined that all complaints made against the clinic were unsubstantiated. *Supra* at 24-25.

A. The Preliminary Injunction Does Not Violate the *Rooker-Feldman* Doctrine.

Indiana's contention that the *Rooker-Feldman* doctrine deprived the district court of jurisdiction over WWHA's motion for a preliminary injunction, Pet. at 27-30, misapprehends the nature of the doctrine. The *Rooker-Feldman* doctrine is derived from 28 U.S.C. § 1257, which vests exclusive jurisdiction in this Court to review certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a); *see Lance v. Dennis*, 546 U.S. 459, 463 (2006). The *Rooker-Feldman* doctrine "is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court

proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). It "has no application to judicial review of executive action, including determinations made by a state administrative agency." *Verizon Md., Inc.*, 535 U.S. at 644 n.3; *accord Lance*, 546 U.S. at 464.

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), is not to the contrary. That case, as its name suggests, concerned final judgments of the highest court in the District of Columbia, not an administrative agency. *See id.* at 468, 472; 28 U.S.C. § 1257(b). There, the Court suggested that whether a state court judgment is subject to the *Rooker-Feldman* doctrine depends in part on whether it is "judicial in nature." *Feldman*, 460 U.S. at 476 (recognizing that some state court decisions may be "administrative or ministerial" in nature). The *Rooker-Feldman* doctrine never applies to judgments of state administrative agencies, however, because 28 U.S.C. § 1257 does not vest exclusive jurisdiction in this Court to review them. *See* 28 U.S.C. § 1257(a); *Lance*, 546 U.S. at 463. Indiana's contention that Health Department licensure proceedings are "judicial in nature," Pet. at 27, is therefore beside the point.

Because the *Rooker-Feldman* doctrine does not apply to judicial review of determinations made by a state administrative agency, *Lance*, 546 U.S. at 464; *Verizon Md., Inc.*, 535 U.S. at 644 n.3, it did not deprive the district court of jurisdiction to enter the preliminary injunction.

B. The Preliminary Injunction is Consistent with *Pennhurst*.

Contrary to Indiana's assertions, entry of the preliminary injunction in this case did not run afoul of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *see* Pet. at 30-33. There, the Court held that the Eleventh Amendment bars federal courts from enjoining state officials from violating state law. *Pennhurst*, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law."). Here, the preliminary injunction requires state officials to conform their conduct to the Due Process Clause of the Fourteenth Amendment, not state law. *See WWHA II*, 937 F.3d at 880; *WWHA I*, 388 F. Supp. 3d at 1049. Accordingly, *Pennhurst* is inapposite.

Notwithstanding Indiana's arguments to the contrary, neither the district court nor the court of appeals made any determination about whether the Health Department faithfully applied Indiana law in denying WWHA an abortion clinic license. Instead, both courts concluded that, by preventing WWHA from providing abortion care in an otherwise underserved community, the Health Department's application of the Licensing Law to WWHA likely deprived northern Indiana residents of their rights under the federal Constitution. *See WWHA II*, 937 F.3d at 868; *WWHA I*, 388 F. Supp. 3d at 1049.

Indiana's claim that the preliminary injunction entered in this case involves ongoing federal intrusion,

Pet. at 31-32, ignores the limited, carefully crafted nature of the relief. As explained above, *supra* at 22-23, the court of appeals directed the district court to modify its original injunction in response to Indiana's concerns—unfounded in Plaintiffs' view—that an injunction barring the defendant Indiana officials from enforcing the Licensing Law against WWHA would deprive them of enforcement authority over all of Indiana's abortion laws. The court of appeals reasoned that "modification of the injunction" to require that the Health Department either grant WWHA a provisional license or treat it as if it were provisionally licensed "will ensure that the state continues to have its normal regulatory power over the clinic," *WWHA II*, 937 F.3d at 879, including the power to inspect, *see* Ind. Code § 16-21-2-2.6, and the power to take enforcement action, including the imposition of civil penalties, *see* 410 Ind. Admin. Code 26.5-3-8.

Finally, the preliminary injunction, by its nature, will terminate upon the district court's entry of final judgment. Indiana's concerns about the relief that the district court may order then, Pet. at 32, are premature and speculative.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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