No. 14-____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mississippi House Bill 1390 requires that abortion physicians have admitting privileges at a local hospital to handle complications that require emergency hospitalization. Without conducting a factual analysis of the burden imposed on access to abortion as required by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the court of appeals affirmed the district court's determination that H.B. 1390 imposed an "undue burden." Based on a novel application of equal protection precedent, *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the appeals court held that "the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state," thus Respondents had demonstrated a substantial likelihood of proving "undue burden" solely because H.B. 1390 would effectively close the last abortion clinic in Mississippi. Petitioners present the following questions:

1. Whether the Due Process Clause of the Fourteenth Amendment requires Mississippi to exempt physicians at the State's only abortion clinic from complying with a medically legitimate health and safety regulation that applies to physicians at all other outpatient surgical facilities.

2. Whether H.B. 1390 imposes an undue burden under *Casey* regardless of the geographical availability of abortion services in adjoining states in light of the equal protection principle articulated in *Gaines*.

PARTIES TO THE PROCEEDINGS

Petitioners are Mary Currier, M.D., M.P.H., in her official capacity as Mississippi State Health Officer, and Robert Shuler Smith, in his official capacity as the District Attorney for Hinds County, Mississippi.

Respondents are Jackson Women's Health Organization, on behalf of itself and its patients, and one of the clinic's staff physicians, Willie Parker, M.D., M.P.H., M.Sc., on behalf of himself and his patients.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 760 F.3d 448, and is reprinted at Appendix A, 1a-50a. The Fifth Circuit's order denying rehearing is reprinted at Appendix B, 51a-52a. The opinion of the United States District Court for the Southern District of Mississippi is reported at 940 F. Supp. 2d 416, and is reprinted at Appendix D, 58a-74a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343. The Fifth Circuit had appellate jurisdiction under 28 U.S.C. § 1291, and filed its opinion on July 29, 2014. The Fifth Circuit filed its order denying rehearing on November 20, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c), and S. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> 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.

U.S. Const. amend. XIV, § 1.

Section 41-75-1(f) of the Mississippi Code provides, in relevant part:

> "Abortion facility" means a facility operating substantially for the purpose of performing abortions and is a separate identifiable legal entity from any other health care facility. Abortions shall be performed by physicians licensed to practice in the State of Mississippi. All physicians associated with the abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians.

Miss. Code Ann. § 41-75-1(f) (as amended by Miss. Gen. Laws 2012, ch. 331).

INTRODUCTION

Concerned by highly publicized reports of deaths and injuries involving abortion facilities across the country that raised serious doubts as to the safety of women undergoing abortion procedures, the legislatures in numerous states, including Mississippi, increasingly began requiring doctors performing abortions to hold admitting privileges at local hospitals. *See, e.g.*, Wisconsin Stat. § 253.095(2); Tex. Health & Safety Code § 171.0031(a)(1); 1975 Ala. Code § 26.23E.4(c); La. Rev. Stat. § 40:1299.35.2. In 2012, the Mississippi Legislature enacted House Bill 1390 ("H.B. 1390"), which requires, in relevant part, that all doctors performing abortions at licensed abortion facilities hold admitting and staff privileges at a local hospital.

It is well-settled law that a State may further its legitimate interests in protecting the health and welfare of its citizens by regulating the medical profession—including the regulation of facilities and physicians that perform abortions. *Planned*

Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846 (1992). A State's police power in this regard is broad and far-reaching:

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

Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

Mississippi was one of many states to enact an admitting privileges requirement for abortion doctors, but there are two important distinctions in Mississippi: for several years Mississippi had already required doctors performing outpatient procedures *other than abortion* to hold admitting privileges, and Mississippi currently has only one licensed abortion clinic, which complains that it cannot comply with a rational health and safety regulation.

After the clinic and one of its doctors challenged the admitting privileges requirement pursuant to the Due Process Clause of the Fourteenth Amendment, the District Court for the Southern District of Mississippi enjoined the State from enforcing the admitting privileges requirement. A divided panel of the Fifth Circuit affirmed.

Certiorari is called for in this case because the Fifth Circuit has decided important questions of federal constitutional law in a way that so departs from this Court's precedents as to require the Court's review. S. Ct. R. 10(a). This is a case of first impression as to the second question presented, the applicability of equal

protection doctrine in the abortion context, and a perfect vehicle for the Court to address both important questions presented.

Despite the novel circumstances, these questions have national implications. While the Fifth Circuit is the first court of appeals to consider the weight that the out-of-state availability of abortion services should be given in the undue burden analysis, it is highly unlikely to be the last. *See* Robin Marty, *What It's Like to Run the Only Abortion Clinic in Your State*, (Nov. 24, 2014), available at http://www.cosmopolitan.com/politics/news/a33504/only-abortion-clinic-in-state/ (noting "[t]here are six states in this country that have only one clinic where women can go for a safe, legal abortion."). As the first court to rule on this issue, the Fifth Circuit's holding that the Due Process Clause mandates that the only abortion facility in a state be granted an exemption from a legitimate health and safety regulation will undoubtedly be influential when other circuits take up this issue in the future. Further, the Fifth Circuit's confusing and inconsistent applications of *Casey*'s undue burden test—upholding Texas's admitting privileges law while striking down Mississippi's practically identical law—reflect the need for this Court's guidance as to the proper interpretation of *Casey* and *Gonzales* in this context.

For these reasons, Petitioners respectfully request that the Court grant certiorari to review the decision of the Fifth Circuit.

STATEMENT OF THE CASE

BACKGROUND

To ensure that doctors performing abortions in Mississippi meet high professional and ethical standards promoting continuity of surgical care for women, the Mississippi Legislature enacted H.B. 1390, which amended section 41-75-1(f) of the Mississippi Code to require that all doctors performing abortions at Level I Abortion Facilities in Mississippi hold admitting and staff privileges at a local hospital. Miss. Gen. Laws 2012, ch. 331, codified at Miss. Code Ann. § 41-75-1(f) (eff. Jul. 1, 2012).

Mississippi's licensing requirements, specifically the Minimum Standards of Operation for Ambulatory Surgical Facilities, already required doctors practicing at other types of outpatient surgical clinics to hold hospital privileges, but specially exempted Level I Abortion Facilities:

> The members of the medical staff [of an ambulatory surgical facility] shall have like privileges in at least one local hospital; however, in the case of a Level I Abortion Facility, at least one physician member performing abortion procedures in the facility must have admitting privileges in at least one local hospital.

Miss. Admin. Code § 15-16-1:42.9.7 (2011). The effect of H.B. 1390, which provides that "all physicians associated with the abortion clinic must have admitting privileges," was to level the playing field by requiring all doctors on staff at abortion clinics to meet the same professional licensing standards applicable to doctors in other areas of outpatient surgical practice.

Respondent, Jackson Women's Health Organization ("JWHO"), Mississippi's only currently licensed Level I Abortion Facility, cried foul at being required to play by the same rules as other outpatient clinics. JWHO employs three physicians, two of whom are out-of-state doctors who do not have admitting privileges at any Mississippi hospital, but travel to the state to perform abortions. The other doctor associated with JWHO, Dr. Roe, is a Mississippi physician who for several years has had an agreement with JWHO to cover emergencies when the clinic's patients develop complications and require follow-up care. That agreement technically satisfied the old regulatory requirement that at least one of the doctors at the clinic hold admitting privileges. However, Dr. Roe performs very few abortions at JWHO. The vast bulk of the abortions are performed by Dr. Doe, supplemented by Respondent, Dr. Willie Parker. App. 3a.

Dr. Roe's service as a figurehead permitted JWHO to comply with the letter of the old law while evading the spirit, which was for doctors actually performing abortions to be responsible for post-procedure follow-up care for their own patients. Thus, before H.B. 1390, out-of-state physicians who traveled to the state intermittently to perform abortions were held to a lower professional standard than resident physicians living and practicing exclusively in Mississippi.

DISTRICT COURT PROCEEDINGS

Petitioners filed a substantive due process challenge to H.B. 1390 shortly before the admitting privileges requirement was to go into effect on July 1, 2012, asserting jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343. The district court entered a preliminary injunction on July 13, 2012, barring the State from

enforcing the admitting privileges requirement, but also requiring JWHO to continue its efforts to obtain admitting privileges for its doctors. App. 87a.

None of the hospitals to whom JWHO's out-of-state doctors applied were willing to grant either doctor admitting privileges. App. 4a. Respondents then filed a second motion, asking the district court to extend the existing injunction. After JWHO notified the Mississippi State Department of Health that it was not in compliance with the admitting privileges requirement, the Department's Licensing Division set a licensure revocation hearing for April 18, 2013.

On April 15, 2013, the district court entered an order extending the preliminary injunction and barred the State from enforcing the admitting privileges requirement of H.B. 1390 in any way. App. 74a. The district court held that H.B. 1390 imposed an undue burden under *Casey* because it would effectively close the State's only licensed abortion clinic. App. 69a-70a. The district court relied on the distinction between as-applied and facial challenges to discount and discredit the Supreme Court precedent cited by the State. App. 64a. For example, the district court considered irrelevant *Gonzales v. Carhart*'s instruction that abortion doctors are not entitled to special treatment:

> Another example of the State using arguments from facial attacks is the observation that abortionists cannot be elevated above other doctors. While true, *Gonzales* was a facial attack and it noted that circumstances could occur in an as-applied context where the government's right to regulate medical practices gives way to a woman's constitutional right to a certain procedure.

App. 64a (internal citations omitted).

The district court declined to consider the rationality of H.B. 1390, holding that even if the admitting privileges law passed the rational basis test, it imposed an undue burden. App. 62a-63a. The district court also held that requiring interstate travel was not a permissible incidental effect, but was instead an undue burden under *Casey*. Notably, the district court did not limit its grant of injunctive relief to Respondents, instead enjoining Petitioners "from any and all forms of enforcement of the Admitting Privileges Requirement of the Act during the pendency of this litigation." App. 74a.

Petitioners filed a motion pursuant to Fed. R. Civ. P. 52(b), requesting additional findings of fact or conclusions of law to clarify the scope of the district court's ruling. App. 53a. In a succinct order, the district court essentially declined to further explain or modify its ruling, clarifying only that its holding was based on the as-applied nature of Respondent's challenge. App. 54a. Petitioners timely appealed the order extending the preliminary injunction and the order on the Rule 52(b) motion to the Fifth Circuit on August 23, 2013.

THE INTERVENING DECISION IN *PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES V. ABBOTT*

On March 27, 2014, after this appeal had been docketed and briefed in the Fifth Circuit, but shortly before oral argument, a three-judge panel of the Fifth Circuit unanimously rejected a pre-enforcement, facial challenge to Texas's hospital admitting privileges law in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

The *Abbott* court identified two valid purposes served by an admitting privileges requirement: (1) it "promote[s] the continuity of care in all cases, reducing the risk of injury caused by mis-communication and mis-diagnosis when a patient is transferred from one health care provider to another"; and (2) "the credentialing process entailed in the regulation reduces the risk that abortion patients will be subjected to woefully inadequate treatment." *Id*. at 595. Accordingly, the Fifth Circuit held that the law survived rational basis review, concluding that "the State acted within its prerogative to regulate the medical profession by heeding these patient centered concerns and requiring abortion practitioners to obtain admitting privileges at a nearby hospital." *Id*.

Moreover, the Fifth Circuit held that the admitting privileges requirement did not impose an undue burden on Texas women's right to an abortion. The district court in *Abbott* had enjoined the requirement because enforcement would result in the closure of the only two abortion clinics located in Texas's Rio Grande Valley. *Id*. at 597. Although the Fifth Circuit criticized the factual basis for this finding, it determined that even if both clinics would close on account of the admitting privileges requirement, women living in the Rio Grande Valley could still obtain an abortion at a clinic in Corpus Christi by traveling a maximum of 150 miles each way. *Id*.

The court held that "an increase of travel of less than 150 miles for some women is not an undue burden," *id*. at 598 (citation omitted), relying on *Casey*, wherein this Court upheld Pennsylvania's 24-hour waiting period even though it doubled the driving time for women, some of whom lived more than three hours away from the nearest abortion clinic. *Id*. The Fifth

Circuit "conclude[d] that *Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions." *Id*.

FIFTH CIRCUIT DECISION

Notwithstanding the *Abbott* decision, the Fifth Circuit panel in this case issued a 2-1 decision affirming the district court. Constrained by *Abbott's* holding that admitting privileges laws such as Texas's and Mississippi's are legitimate, necessary, and rational medical regulations, the majority concentrated its analysis on one of the two primary distinctions between this case and *Abbott*: application of Mississippi's admitting privileges law to JWHO would effectively close the only abortion clinic in the State.

The majority framed the "ultimate issue . . . [as] whether the State of Mississippi can impose a regulation that effectively will close its only abortion clinic," and concluded "Mississippi may not shift its obligation to respect the established constitutional rights of its citizens to another state." App. 2a. Without undertaking a factual analysis of the actual effect that H.B. 1390 would have on access to abortion for any defined group of women, the majority concluded that the effect of closing the only abortion clinic in the state imposed an undue burden on the abortion right under *Casey*. App. 21a.

The determinative factor in the majority's analysis was whether the court should consider the availability of abortion services in metropolitan areas of states adjoining Mississippi, such as Baton Rouge, New Orleans, Mobile, and Memphis, with the majority expressly conceding that "if these out-of-state clinics are properly considered in the undue burden analysis,

the Act may well be upheld." App. 15a. The majority also conceded that any argument that increased travel distances would impose an undue burden was foreclosed by *Abbott*.

To distinguish this case, the majority found it necessary to import a "principle of federalism" from an equal protection case, *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), to justify ignoring the geographic availability of abortion services just over the Mississippi state line in Tennessee, Alabama, and Louisiana, despite the fact that Respondents did not allege an equal protection violation. Moreover, *Gaines* had never before been cited in the abortion context. App. 20a.

The majority rejected the State's argument that any law which would have the effect of closing the clinic would necessarily be deemed an undue burden (thus placing JWHO beyond the regulatory reach of the State), but attempted to narrow the scope of its holding, stating "[n]othing in this opinion should be read to hold that any law or regulation that has the effect of closing all abortion clinics in a state would inevitably fail the undue burden analysis." App. 22a. However, the majority did not offer any explanation as to when, how, or under what conceivable circumstances a regulation that would close a State's only abortion clinic could possibly survive the majority's rationale for striking down H.B. 1390. Because this action is an as-applied challenge, the Fifth Circuit slightly modified the district court's ruling in one regard, limiting the scope of injunctive relief to Respondents.

In dissent, Judge Garza forcefully disagreed "that the mere act of crossing a state border imposes an 'undue burden'" under *Casey*, or that *Gaines* had any

proper place in the substantive due process analytical framework for abortion rights. App. 25a. "*Gaines* stands for the uncontroversial principle that a state's duty to provide equal protection cannot be altered by the actions or inactions of a neighboring state." App. 36a.

While acknowledging that the principle that "a state may not shift its equal protection duties to another state is '[m]anifestly clear,'" App. 33a, Judge Garza demonstrated that the fundamental differences between equal protection and substantive due process render *Gaines* inapplicable: "[u]nder the Equal Protection Clause, a state must provide equal protection of the laws whenever and wherever it enforces or provides a service under its laws." App. 34a. However, "no state is obligated to provide or guarantee the provision of abortion services within its borders . . . [but] need only . . . ensur[e] that its rational laws do not impose an undue burden." App. 34a-35a. Since each state has the same obligation under the Due Process Clause to women seeking abortions, considering the availability of abortion services in adjoining states would in no way shift Mississippi's *due process* obligations to another state. App. 35a.

Judge Garza criticized the majority's ineffective "attempt to cabin its holding to the facts of this case . . . . The majority simply cannot have it both ways. So long as the undue burden analysis is confined by Mississippi's borders, the closure of that state's sole abortion provider *must* be an undue burden." App. 41a-42a. Judge Garza concluded that the majority had created a bright-line test at odds with its rationale for striking down Mississippi's admitting privileges law:

> Despite the majority's attempt to narrow its reasoning, today's opinion can only be read to mean that a law or regulation causing all of a state's abortion providers to close, such that women must cross a state border to obtain abortion services, imposes an unconstitutional undue burden on the abortion right.

App. 43a.

Petitioners filed a petition for rehearing *en banc* in the court of appeals. Because none of the circuit judges called for a vote, on November 20, 2014, the court issued a summary order denying the State's petition as a request for panel rehearing. App. 51a-52a.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH CONTROLLING AUTHORITY OF THIS COURT.

The Fifth Circuit's decision is in conflict with several relevant decisions of this Court, including *Simopoulos v. Virginia*, 462 U.S. 506 (1983), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Certiorari should be granted to conform the law of the circuit below to this Court's abortion precedents.

A. The Fifth Circuit's Decision Grants Respondents an Exemption from a Legitimate Health and Safety Regulation Contrary to this Court's Rulings That Abortion Clinics May Be Regulated the Same as Comparable Medical Facilities.

The decision below squarely conflicts with the Court's holding thirty years ago in *Simopoulos v. Virginia*, that an abortion clinic can be lawfully subjected to the same licensing standards applicable to other, similar medical facilities. The Fifth Circuit's decision requires Mississippi to specially exempt abortion clinics from a licensing requirement applicable to other outpatient surgical facilities.

In *Simopoulos*, this Court upheld a Virginia law requiring that second trimester abortions be performed only at a "hospital," which under Virginia state law encompassed certain outpatient surgical clinics. 462 U.S. at 513, 516-17 ("In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities," which includes the authority to enact regulations which "appear to be generally compatible with accepted medical standards.").

The Court held that a State may apply the same regulations to facilities performing abortions as it does to facilities performing similar outpatient procedures: "[t]he medical profession has not thought that a State's standards need be relaxed merely because the facility performs abortions." *Id*. at 517 ("Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's

office and outpatient clinic or the free-standing and hospital-based ambulatory setting.") (quoting American College of Obstetricians and Gynecologists ("ACOG"), *Standards for Obstetric-Gynecologic Services* 54 (5th ed. 1982)).[1] *Casey* expressed much the same concept: "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." 505 U.S. at 884. *Gonzales* further stressed that "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, *nor should it elevate their status above other physicians in the medical community*." 550 U.S. at 163 (emphasis added).

Thus, read together, *Simopoulos*, *Casey*, and *Gonzales* stand for the principle that abortion facilities and doctors should neither be singled out by a State for more stringent licensing requirements nor granted special exemption from such requirements. The Fifth Circuit decision below conflicts with this principle because it requires Mississippi to grant special treatment to abortion doctors and clinics, "elevat[ing] their status above other physicians in the medical community." *Id*.

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[1] Although ACOG recently stated it "opposes laws or other regulations that require abortion providers to have hospital admitting privileges," *Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Services* (Apr. 25, 2013), available at http://www.acog.org/About ACOG/NewsRoom/NewsReleases/2013/Hospital-Admitting-Privileges-for-Physicians-Providing-Abortion-Services, ACOG's express rationale for opposition is that such laws single out abortion services or are more stringent for abortions than for other outpatient procedures. Neither of those are true of Mississippi's admitting privileges law.

Respondents and the lower courts have consistently ignored the fact that Mississippi's situation is distinctive because it already requires other doctors performing outpatient procedures at freestanding clinics to hold admitting privileges at a local hospital. Unlike the majority, which did not mention the issue, Judge Garza took into account this second crucial distinction between Texas's admitting privileges law and Mississippi's. App. 26a. Notably, in its attempt to limit its holding to the facts of this case, the majority described a laundry list of factors it *did* consider, but the fact that H.B. 1390 only required abortion clinics to comply with an existing licensing standard applicable to other outpatient clinics was not on the list. App. 22a.

In enacting the admitting privileges requirement, the Mississippi Legislature did not "single out abortion services from other outpatient procedures" or impose more stringent requirements on abortion providers than on other facilities. H.B. 1390 nullified existing regulatory language granting abortion clinics (and by extension, abortion doctors) special status and exemption from the admitting privileges regulation, a licensing standard which applied to other doctors. Therefore, the admitting privileges requirement of H.B. 1390 should have been upheld by the Fifth Circuit under *Simopoulos*, *Casey*, and *Gonzales*.

B. The Fifth Circuit Misinterpreted and Misapplied the *Casey* "Undue Burden" Standard.

Contrary to *Casey's* instruction, both the Fifth Circuit and the district court failed to consider the actual effects that the closure of Mississippi's only abortion clinic would have on women seeking to obtain an abortion. Instead, both courts held that

crossing state lines constitutes a *per se* undue burden, irrespective of the real-world impact of H.B. 1390 on Mississippi women's ability to exercise their right to an abortion. This bright-line approach is fundamentally inconsistent with this Court's undue burden analysis in *Casey*, as well as the Fifth Circuit's decision in *Abbott*.

In *Casey*, this Court examined whether a Pennsylvania law mandating a 24-hour waiting period imposed an undue burden on abortion rights. The district court found that over forty percent of Pennsylvania women had to "travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the nearest provider." *Planned Parenthood of S.E. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990) (emphasis in original). Moreover, the district court found that the 24-hour waiting period would force some women to travel significant distances twice since the law required women to visit the doctor two times. *Casey*, 505 U.S. at 885-86. In light of these findings, the district court concluded that the waiting period would be "particularly burdensome" for "women who have the fewest financial resources" and "those who have to travel the longest distances to reach an abortion provider[.]" *Id*. at 886.

Although this Court regarded these findings as "troubling in some respects," it nevertheless held that they did not "demonstrate that the waiting period constitute[d] an undue burden." *Id*. In so holding, the Court noted that the waiting period would have the "effect of increasing the cost of . . . abortions[.]" *Id*. at 886 (internal quotation marks and citation omitted). However, the Court emphasized that a law which "has the incidental effect of making it more difficult or more

expensive to procure an abortion cannot be enough to invalidate it." *Id*. at 874.

The Court engaged in an equally fact-intensive analysis of Pennsylvania's spousal notification law, which required women to obtain consent from their husbands before having an abortion. It reviewed the district court's detailed findings of fact and numerous studies which established that women who are "victims of regular physical and psychological abuse at the hands of their husbands. . . have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion." *Id*. at 893. Importantly, the Court focused on the practical effect that the notification provision would have on the "women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant[.]" *Id*. at 897. In the Court's view, the evidence in the record showed that the law was "likely to prevent a significant number of [these] women from obtaining an abortion," rather than "merely mak[ing] abortions a little more difficult or expensive to obtain[.]" *Id*. at 893. Thus, the Court held that in a "large fraction of the cases in which" the notification requirement was "relevant," the law would impose an "undue burden." *Id*. at 895.

The Court's application of the undue burden standard in *Casey* makes clear that lower courts must conduct a factual analysis of the practical effect that the relevant law or regulation will have on women's decisions to choose abortion. As Judge Garza noted in dissent, "[a] correct analysis under the Due Process Clause requires [courts] to apply *Casey*. . . and consider whether the difficulty of obtaining abortion services under the facts of th[e] case constitutes an undue burden." App. 36a. In *Abbott*, the Fifth Circuit

did consider the practical impact of Texas's admitting privileges requirement and held that "an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*." *Abbott*, 748 F.3d at 598. In stark contrast to *Abbott*, the Fifth Circuit took the position in this case that the increase in cost and difficulty of obtaining an abortion as a result of the closure of JWHO had no bearing on the undue burden analysis, since women would be required to travel to an out-of-state clinic. App. 21a.

The Fifth Circuit not only refused to consider whether having to travel to one of Mississippi's neighboring states to receive abortion services constitutes an undue burden, but conceded that H.B. 1390 might well be constitutional if the out-of-state clinics were included. App. 15a. Thus, by limiting its inquiry to the availability of abortion services within Mississippi, the court was able to avoid an examination of the practical effects of H.B. 1390 on abortion rights. If either the Fifth Circuit or the district court had actually assessed the impact of the anticipated closure of JWHO on women seeking an abortion, they would have concluded that H.B. 1390 imposes a burden no greater than the 24-hour waiting period upheld in *Casey*.

To begin with, a significant number of Mississippi women would be unaffected by the closure of JWHO because there are abortion clinics in Tennessee, Louisiana, and Alabama located in closer proximity to them than JWHO[2] App. 14a, 37a. The women who

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[2] Women residing in southern, southwestern, and southeastern Mississippi would not have to travel farther because there are abortion clinics located closer to them in Baton Rouge, Mobile and New Orleans. Similarly, women in northern Mississippi live closer to Memphis than Jackson, and therefore

would be affected if H.B. 1390 was enforced live in central Mississippi, namely the Jackson metropolitan area. These women would be able to obtain an abortion at a clinic in Baton Rouge, Louisiana. The distance between Jackson and Baton Rouge is approximately 174 miles. App. 37a. Thus, the women most affected by H.B. 1390 would be required to travel less than three hours in order to access abortion services. There is nothing to suggest that the cost of making such a trip amounts to an undue burden. JWHO cannot argue otherwise because it has already acknowledged that many of its patients travel from more than three hours away to seek abortion services.

Further, there is no evidence in the record that traveling to out-of-state abortion clinics is unduly burdensome for women residing in Mississippi. To the contrary, almost sixty percent of Mississippi women who have abortions each year voluntarily choose to travel to clinics in other states. App. 36a. Thus, the Fifth Circuit's decision is not only inconsistent with *Casey*, it also fails to comport with the manner in which women actually exercise their right to abortion and to obtain other healthcare services. Given that the majority of women in Mississippi already travel out-of-state to obtain abortion services, there is no reason to conclude that the availability of abortion services at clinics located within a reasonable distance of Mississippi's borders should be excluded from the undue burden analysis. *Cf. Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 805 n.9 (Manion, J., concurring in part and in the judgment) ("In our economy, crossing state lines to obtain services at a nearby urban center is common. Thus,

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would not see an increase in the distance they must travel to reach an abortion clinic.

state lines are unlikely to affect a woman's decision about where to get an abortion and the availability of abortion at out-of-state clinics should be considered in the undue burden analysis.").

Even more concerning is the fact that the Fifth Circuit's application of the undue burden test in *Abbott*, compared with its application of the same test to a substantively identical law in this case, produced irreconcilable results. Certiorari should be granted to resolve these arbitrary, divergent outcomes.

II. THE FIFTH CIRCUIT'S DECISION THAT OUT-OF-STATE ABORTION SERVICES COULD NOT BE CONSIDERED IN "UNDUE BURDEN" ANALYSIS IS A FEDERAL QUESTION OF EXCEPTIONAL IMPORTANCE.

Whether *Gaines* precludes the courts from considering the out-of-state availability of abortion services, and thus commands a different result from *Abbott*, is a question of exceptional importance because virtually identical laws have been passed throughout the nation,[3] and the Fifth Circuit's

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[3] *See Van Hollen*, 738 F.3d at 799 (affirming preliminary injunction against enforcement of Wisconsin's admitting privileges requirement), *cert. denied*, --- U.S. ----, 134 S. Ct. 2841(2014); *June Medical Servs., LLC v. Caldwell*, 2014 WL 4296679, at *10 (M.D. La. Aug. 31, 2014) (granting temporary restraining order prohibiting enforcement of admitting privileges law against three of Louisiana's five abortion clinics); *Whole Woman's Health v. Lakey*, 2014 WL 4346480, at *12 (W.D. Tex. Aug. 29, 2014) (enjoining enforcement of ambulatory-surgical-center regulations and admitting privileges requirement as applied to abortion clinics in McAllen and El Paso, Texas); *Planned Parenthood S.E., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1341, 1381 (M.D. Ala. 2014) (declaring Alabama's admitting

invocation of equal protection principles leads to an inevitable and untenable result: a State may not regulate its only abortion clinic without imposing an undue burden.

A. Equal Protection Principles Do Not Apply to Respondents' Substantive Due Process Claim.

It is axiomatic that an equal protection claim will lie only if the claimant is being treated differently from others similarly situated. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). Because H.B. 1390 does not treat abortion clinics or doctors any differently than other clinics and doctors in Mississippi's medical community, this case does not implicate the Equal Protection Clause, and Respondents rely instead on the Due Process Clause. App. 20a, 32a-33a.

The Fifth Circuit placed a meaning, weight, and significance on *Gaines* that opinion simply does not support. Judge Garza recognized the flaw in the majority's reasoning, in that *Gaines* was a quintessential equal protection case, and should remain limited to that context: "[a]lthough the correctness of *Gaines*' equal protection holding is beyond question, it has no bearing on this case, which arises under the Due Process Clause." App. 33a. Equal protection analysis is necessarily restricted to consideration of the in-state effects of a law or regulation, as the "laws" of a State never have any

privileges requirement unconstitutional because it would cause three of the five abortion clinics within the State to close).

effect beyond the geographic boundaries of that State. App. 33a.

By injecting equal protection principles into a pure substantive due process case, the Fifth Circuit's decision conflicts with this Court's repeated rejection decades ago of hybrid analysis and overt attempts to integrate other equal protection principles into the substantive due process framework for abortion rights. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 273 (1993) (citing Maher v. Roe, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Craig v. Boren*, 429 U.S. 190 (1976)).[4] There is no reason the principle of federalism in *Gaines* "separate but equal" context should be given any place in the *Casey* undue burden test.

As a result, the decision of the Fifth Circuit majority to rely on an equal protection case to distinguish this case from *Abbott* was especially misplaced. In the seventy-six years since this Court decided *Gaines*, no court has ever cited or relied on that case in the abortion context—until now. App. 20a. Specifically, the Fifth Circuit panel majority held that because of *Gaines*, the ready availability of abortion services in metropolitan areas in states adjoining Mississippi could not be considered in determining whether the

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[4] *But see Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) ("Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.") (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1002 28 (1984)).

Mississippi law imposes an undue burden under *Casey*.

In *Gaines*, an African American student was refused admission to the all-white University of Missouri law school. 305 U.S. at 342. This Court held that Missouri's attempt to deny the student educational benefits that were provided to white students did not satisfy the "separate but equal" standard announced in *Plessy v. Ferguson*, 163 U.S. 1138 (1896), and explained:

> The question here is not of a duty of the State to supply legal training . . . *but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right* . . . . [The issue] is a denial of the equality of [a] legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

305 U.S. at 349-50 (emphasis added).

The majority mischaracterized *Gaines*, which had to do with a State's obligation to provide "separate but equal" privileges under antiquated law, and seized on one isolated passage while ignoring the first sentence of that passage:

> *[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction*. . . . That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an

> obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system.

App. 19a-20a (emphasis added).

The majority initially advanced *Gaines* as "further support" for this principle, but ultimately concluded that *Gaines* was controlling although largely distinguishable, reasoning:

> [A]lthough decided in a different context, we think the principle of *Gaines* resolves this appeal. . . . *Gaines* locks the gate for Mississippi to escape to another state's protective umbrella and thus requires us to conduct the undue burden inquiry by looking only at the ability of Mississippi women to exercise their right within Mississippi's borders. There is no hiding the relevant language in *Gaines*: "[N]o State can be excused from performance by what another state may do or fail to do."

App. 20a-21a. Thus, *Gaines* is the linchpin of the majority's analysis distinguishing this case from *Abbott*.

The majority's decision ostensibly promotes uniformity, at least with regard to the availability of abortion in every state. In actuality, the decision places Mississippi at a disadvantage compared with her sister states. Larger states such as Texas are permitted to require a standard of practice for abortion doctors consistent with the outpatient surgical

profession, whereas Mississippi is prohibited from applying the same standards to abortion doctors that it already applies to other similarly situated physicians. This implies that either Texas has greater authority to protect maternal health or that Texas women are somehow entitled to greater protection than Mississippi women.

According to the Fifth Circuit, Texas can enforce an admitting privileges law that has had the effect of closing many abortion clinics,[5] but the Due Process Clause bars Mississippi from enforcing a virtually identical law because it would close one clinic, an arbitrary consequence resulting from reliance on an equal protection principle in a substantive due process challenge. The Fifth Circuit's reliance on *Gaines*, an inapposite equal protection case, merits this Court's review.

B. The Fifth Circuit's Decision Would Prohibit a State From Regulating Its Only Abortion Clinic.

Despite its protestations to the contrary, the Fifth Circuit majority effectively applied a bright-line test, such that any state law that would have the effect of closing a State's only abortion clinic would create an undue burden under *Casey*. In this case, the Fifth Circuit misinterpreted and misapplied *Gaines*, prohibiting the State from enforcing its licensing standards whenever JWHO does not comply. Preventing a State from enacting any regulation which would, as applied, close the State's only abortion

[5] *See Lakey*, 2014 WL 4346480, at *6 ("[T]here were more than 40 licensed abortion facilities . . . throughout Texas. That number dropped by almost half leading up to and in the wake of enforcement of the admitting privileges requirement[.]").

clinic effectively places the clinic beyond the regulatory reach of the State.

The Fifth Circuit's decision comes perilously close to requiring the State of Mississippi to provide a means by which women seeking abortion may exercise that right, which would directly contradict this Court's public funding cases, which hold that a State may bar the use of public funds and facilities for performing abortions without violating either the Equal Protection Clause or the Due Process Clause. *See*, *e.g*., *Webster v. Reproductive Health Servs*., 492 U.S. 490, 509-12 (1989) (upholding state law prohibiting use of public facilities or employees for performing elective abortions); *Poelker v. Doe*, 432 U.S. 519, 519-21 (1977) (per curiam) (policy permitting use of city-owned public hospital for childbirth, but denying use of public facilities for performing elective abortions did not violate Equal Protection Clause); *Maher*, 432 U.S. at 470-74 (state law providing public funding for childbirth, but not non-therapeutic abortions did not violate either the Equal Protection Clause or the Due Process Clause).

The States have broad authority and discretion to regulate in the areas of legitimate state interests, including patient health and safety. Since concluding that women have a right to choose to have a pre-viability abortion in *Roe v. Wade*, 410 U.S. 113 (1973), this Court has nevertheless consistently acknowledged and reaffirmed the states' legitimate interest and authority to regulate the provision of abortions. *See*, *e.g*., *City of Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 428-29 (1983) ("[B]ecause a State has a legitimate concern with the health of women who undergo abortions, 'a State may properly assert important interests in safeguarding

health [and] in maintaining medical standards.'") (quoting *Roe*, 410 U.S. at 154) (second alteration in original); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976) ("The State may . . . reasonably regulate the abortion procedure to preserve and protect maternal health"). Similarly, "the government 'has an interest in protecting the integrity and ethics of the medical profession,'" *Gonzales*, 550 U.S. at 157 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)), including "'maintaining high standards of professional conduct' in the practice of medicine." *Id*. at 157. (quoting *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954)). Some "examples of permissible state regulation [include] the qualifications of the person who is to perform the abortion . . . the licensure of that person . . . the facility in which the procedure is to be performed . . . the licensing of the facility; and the like." *City of Akron*, 462 U.S. at 430 n.14 (quoting *Roe*, 410 U.S. at 163-64).

Thus, a state may, without violating the Due Process Clause, require that only licensed physicians perform abortions, "even if an objective assessment might suggest" that the regulation was not medically necessary. *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) (quoting *Casey*, 505 U.S. at 885). Mississippi has such a requirement, as do most other states. *See Mazurek*, 520 U.S. at 969 ("Similar rules exist in 40 other States in the Nation"); *see also* Miss. Code Ann. § 41-75-1(f) ("Abortions shall be performed by physicians licensed to practice in the State of Mississippi.").

However, under the Fifth Circuit's decision below, a physicians-only abortion requirement would be unconstitutional if application of that law would

effectively close the only abortion clinic in the State. JWHO, without any action by the State, could easily be subject to closure for violating Mississippi's physicians-only requirement. JWHO has only three physicians on staff, two of whom perform the vast majority of abortions at the clinic. App. 3a. If those three licensed physicians decide to stop performing abortions at JWHO, regardless of the reason, JWHO would be unable to perform abortions without either recruiting other doctors or using the services of non-physicians in lieu of licensed physicians. Under the rationale employed by the Fifth Circuit majority below, Mississippi would then be unable to enforce its physicians-only law if enforcement would effectively close the clinic—a clearly untenable result.[6]

Thus, the enforceability of the State's regulations of the medical profession against JWHO are subject to the whim of JWHO and its physicians. The manner in which the Fifth Circuit's holding could be readily manipulated by the clinic and its doctors is obvious. The clinic could simply play the decision below as a trump card to avoid complying with any state regulation with which it disagrees.

The Fifth Circuit's bright-line test effectively places the Clinic beyond the regulatory reach of the State,

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[6] Additionally, the regulation which H.B. 1390 superseded required that at least one (but not all) physicians associated with a licensed abortion clinic hold privileges at a local hospital. *See* Miss. Admin. Code § 15-16-1:42.9.7 (2011). Even before H.B. 1390 was enacted, JWHO was only able to comply with the existing regulation because Dr. Roe acted as a figurehead for the clinic. If Dr. Roe were to decide, purely for personal reasons, to terminate his association with JWHO, under the majority's analysis the State would presumably be unable to even enforce the old regulation against JWHO.

granting JWHO a perpetual, unregulated existence. Nothing in this Court's abortion precedents requires such a result—yet the Fifth Circuit's decision below does, placing the State of Mississippi in an untenable position, barred from enforcing the most basic, non-discriminatory licensing standards against JWHO.

The Fifth Circuit's application of a bright-line test under *Casey*, and its unprecedented and unwarranted foray into the equal protection realm to distinguish this case from *Abbott*, are issues of great significance in the abortion arena and warrant review. Only this Court can untangle the Fifth Circuit's confusing and inconsistent application of the undue burden test and restore stability and predictability to this important area of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-60599

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients; WILLIE PARKER, M.D., M.P.H., M.Sc., on behalf of himself and his patients,

Plaintiffs – Appellees

v.

MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health; ROBERT SHULER SMITH in his official capacity as District Attorney for Hinds County, Mississippi,

Defendants – Appellants

Appeal from the United States District Court
for the Southern District of Mississippi

Before JOLLY, GARZA, and HIGGINSON, Circuit Judges. E. GRADY JOLLY, Circuit Judge:

Given that the Supreme Court long ago determined that the Constitution protects a woman's right to choose an abortion, the ultimate issue in this appeal is whether the State of Mississippi can impose a regulation that effectively will close its only abortion clinic. The State of Mississippi, however, argues that Mississippi citizens can obtain an abortion in Tennessee, Louisiana, or Alabama without imposing an undue burden upon Mississippi citizens in the exercise of their constitutional rights.

Today, we follow the principle announced by the Supreme Court nearly fifty years before the right to an abortion was found in the penumbras of the Constitution and hold that Mississippi may not shift its obligation to respect the established constitutional rights of its citizens to another state. Such a proposal would not only place an undue burden on the exercise of the constitutional right, but would also disregard a state's obligation under the principle of federalism—applicable to all fifty states—to accept the burden of the non-delegable duty of protecting the established federal constitutional rights of its own citizens.

In April 2012, the Mississippi Legislature passed House Bill 1390 ("H.B. 1390" or "the Act"). Mississippi Governor Phil Bryant signed the Act, and it was scheduled to take effect on July 1, 2012. As relevant to this appeal, the admitting privileges provision of H.B. 1390 requires that "[a]ll physicians associated with the abortion facility must have

admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians." Before the passage of H.B. 1390, Mississippi law required that abortion facilities have only a transfer agreement with a local hospital, a written agreement for backup care with a physician with admitting privileges, and at least one affiliated doctor with admitting privileges. Miss. Admin. Code 30-17- 2635:2.5(B), (F).

The Jackson Women's Health Organization ("JWHO") operates the only licensed abortion clinic in Mississippi ("the Clinic"). Three doctors are affiliated with the Clinic: Dr. Willie Parker, Dr. Doe, and Dr. Roe.[1] Dr. Parker and Dr. Doe provide the majority of the abortion services, while Dr. Roe provides only "extremely limited abortion services." Neither Dr. Parker nor Dr. Doe have admitting privileges at a local hospital, but Dr. Roe does. The defendants, Mary Currier and Robert Smith (collectively, "the State"), are Mississippi officials. They appeal the district court's entry of a preliminary injunction enjoining the enforcement of the admitting privileges provision of H.B. 1390. We AFFIRM the district court's judgment entering the preliminary injunction, as herein MODIFIED to limit it, in this "unconstitutional as applied" appeal, to these parties and this case.

[1] The district court allowed Dr. Doe and Dr. Roe to participate in this action under pseudonyms.

I.

Several days before H.B. 1390's effective date, JWHO filed this suit in the federal district court. JWHO sought both a temporary restraining order and a preliminary injunction barring the enforcement of the admitting- privileges provision.[2] The district court granted the temporary restraining order. The district court also granted, in part, JWHO's motion for preliminary injunction. Specifically, the district court allowed the State to enforce the admitting-privileges provision, thereby requiring JWHO's doctors to seek admitting privileges. But the district court enjoined the State from imposing any civil or criminal penalties on JWHO for the continuing operation of the Clinic while its doctors sought the privileges.

Consistent with the district court's order, Drs. Parker and Doe sought admitting privileges at seven of the Jackson-area hospitals, but no hospital was willing to grant either of the doctors these privileges.[3] The hospitals maintained this stance despite the doctors' request that they reconsider. The

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[2] JWHO's initial complaint also challenged another portion of H.B. 1390—a requirement that all physicians associated with an abortion clinic be board certified or eligible in obstetrics and gynecology. JWHO did not, however, seek to enjoin this provision, so no challenge to it is before this court.

[3] In denying the doctors' applications for admitting privileges, the local hospitals cited reasons relating to the doctors' provisions of abortion services, such as: "[t]he nature of your proposed medical practice is inconsistent with this Hospital's policies and practices as concerns abortion and, in particular, elective abortion," and "[t]he nature of your proposed medical

State subsequently denied JWHO's request for a waiver for Drs. Parker and Doe, found that the Clinic was not in compliance with H.B. 1390, and sent JWHO an official notice of hearing for revocation of JWHO's license to perform abortions.

In the light of this impending hearing, JWHO filed a second motion for a preliminary injunction. JWHO argued that, by closing the only clinic in Mississippi, the law would impose an undue burden on women's right to choose abortions. The State responded that the law would not impose an undue burden because the Act would, at most, increase travel time and costs for women seeking an abortion. These women could travel to abortion clinics in other states that are not prohibitively far away. Taking the Jackson area as an example, the State pointed to abortion clinics in Baton Rouge, New Orleans, and Memphis that are no farther than three hours away. Because this increase in travel would only be an incidental burden on the right to an abortion, the State argued that H.B. 1390 was constitutional.

The district court granted the preliminary injunction. As a factual matter, the district court found that allowing enforcement of the Act would close the Clinic because JWHO could not comply with the Act. Moving to the legal analysis, the district court held that JWHO had demonstrated a substantial likelihood of success on the merits

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practice would lead to both an internal and external disruption of the Hospital's function and business within this community."

because the Act created an undue burden. Notwithstanding the other clinics that are within a few hours' drive, the district court held that the proper analysis looked to the availability of abortions within the State of Mississippi. Seeing that the only clinic would be closed by enforcing the Act, the district court held that an undue burden would likely result.

Similarly, the district court held that JWHO had established a substantial threat of irreparable harm in the form of the impending closure of the Clinic. Finally, the district court held that the balance of harms cut in favor of JWHO as the preliminary injunction would merely maintain the status quo, and the court held that the injunction would not disserve the public interest because it would prevent constitutional deprivations. Having found the four factors of the preliminary injunction test satisfied, the district court enjoined the State from enforcing the admitting privileges provision.

The State then filed a Rule 52(b) motion to clarify. First, the State asked the district court to clarify whether its legal conclusion was that any regulation that would act to close the Clinic would be "per se unconstitutional." The district court only addressed this argument insofar that it reiterated that the challenge was to the Act as-applied, and therefore was based on the facts before the court. Second, the State asked the district court to clarify a footnote in the original order which highlighted a lack of clarity in abortion jurisprudence related to the necessity of a challenged regulation. In its Rule 52(b) order, the district court reiterated that it did

not undertake any necessity inquiry as it was not something raised by the parties, and that even if it did undertake a necessity inquiry, the Act would not be so medically necessary as to overcome the undue burden it established.

The State now appeals the granting of the preliminary injunction and the district court's motion granting the State's Rule 52(b) motion in part.

II.

We review a district court's grant of a preliminary injunction for an abuse of discretion. *Janvey v. Alguire*, 647 F.3d 585, 591–92 (5th Cir. 2011). "Although the district court may employ informal procedures and rely on generally inadmissible evidence, the record must nevertheless support the district court's decision." *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993). In examining the record, we review a district court's findings of fact for clear error and its conclusions of law of de novo. *Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 692 F.3d 343, 348 (5thCir. 2012).

To support the "extraordinary equitable remedy" of a preliminary injunction, the plaintiff must establish four elements: "(1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will

not disserve the public interest." *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998).

The State argues principally that the district court erred in holding that JWHO had established a substantial likelihood of success on the merits. In this respect, the State questions one finding of fact and two conclusions of law of the district court's order. We begin by touching on the factual issue before moving to the legal arguments.

III.

The district court found that the effect of the law would be to close the Clinic—the only licensed clinic in Mississippi. The State now contends that the district court erred because this fact is disputed, arguing that implementation of the law would not force the Clinic to close.

But we need not tarry long here because the State has waived this argument. All indications from the record are that this issue ultimately was not contested in the district court. *See Pluet v. Frasier*, 355 F.3d 381, 385 (5th Cir. 2004) ("We will not disturb the district court's judgment based upon an argument presented for the first time on appeal."). The State did not present this argument in its response motion in opposition to JWHO's motion for preliminary injunction, and the district court noted that "the State has essentially confirmed that it will revoke the Clinic's license." Additionally, this argument is nowhere to be found in the State's opening brief; it is only in its reply brief that the State "disputes that it is a 'foregone conclusion' that

enforcement of the admitting privileges requirement will close the Clinic." *See Edwards v. Johnson*, 209 F.3d 772, 775 n.1 (5th Cir. 2000) ("[Plaintiff] does not argue in his initial brief on appeal that the district court erred in adopting the magistrate's finding . . . . Therefore, any challenge to these findings has been abandoned on appeal."). Moreover, in its opening brief, the State admits that "if enforced, the admitting privileges requirement would likely require JWHO, the only currently licensed abortion facility in Mississippi, to lose its license." The State's attempt to walk back this statement in the reply brief is too little, too late.[4]

IV.

We now take up the State's legal arguments that JWHO failed to demonstrate a substantial likelihood

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[4] The dissent also argues that H.B. 1390 will not have the effect of closing the Clinic because the closure is actually caused by the actions of private parties—the private hospitals that denied the admitting privileges applications. *See Post* at 1–4. We have no occasion to consider this argument as it too has been waived. As discussed above, the State's opening brief accepts that the Act will force the closure of the Clinic. And to the extent the State has challenged the factual findings of the district court, except with regards to the rational basis issue, the State only provides conclusory challenges without any argument, so these challenges are also waived. *See Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006) (holding that plaintiff failed to adequately brief an issue where "he failed to cite any legal authority for the proposition"); *see also* Fed. R. App. P. 28(a)(8)(A) (requiring that appellant's brief contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

of success on the merits of its case. It is important to note at the outset that JWHO does not seek to have the Act declared unconstitutional for all intents and purposes; JWHO brings only an as-applied challenge to the Act. Consequently, to establish a substantial likelihood of success on the merits, JWHO must demonstrate that H.B. 1390, as applied against JWHO in this case on these facts, likely violates the Constitution.

It is also important to keep in mind that for more than forty years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Beyond this basic premise, however, the controversy seems to have no end as this basic right comes with layers of limitations. Accordingly, a woman's right to an abortion can be regulated by a state consistent with that state's interest in protecting potential life and the health of the mother. *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion) (reaffirming the state's "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"). The Supreme Court has held, however, that such state regulations may not impose an "undue burden" on the basic right to terminate a pregnancy by abortion prior to the fetus's viability. *Id*. at 895 ("[The challenged regulation] is an undue burden, and therefore invalid."); *see also id.* at 877 ("[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a

permissible means of serving its legitimate ends."). A law fails this standard, and is thus unconstitutional, "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (quoting *Casey*, 505 U.S. at 878). Laws that merely have "the incidental effect of making it more difficult or more expensive to procure an abortion" do not impose an undue burden and are thus constitutional. *Casey*, 505 U.S. at 874. In addition to creating no undue burden, an abortion restriction must pass a rational basis test. *Gonzales*, 550 U.S. at 158 ("Where it has a rational basis to act, *and* it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn." (emphasis added)).

In addition to these Supreme Court precedents, we are guided by a recent opinion of our court determining the constitutionality of a similar Texas statute. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014). In *Abbott*, we discussed the constitutionality of a Texas law that, among other things, required that a physician performing an abortion have admitting privileges at a hospital located within thirty miles of the site of the abortion. *Id.* at 587. We held that this requirement satisfied rational basis review. *Id.* at 594–95. We additionally held that the law did not impose an undue burden on a woman's right to an abortion because "an increase of travel of less than

150 miles for some women is not an undue burden under *Casey*." *Id.* at 598.

With these precedents establishing the parameters of our inquiry today, we turn to the State's two principal arguments for reversing the district court. First, the State argues that the district court erred in failing to undertake a rational basis review of the Act, a review that must acknowledge that there is indeed a rational interest of the State in protecting the health of its citizens. Second, the State argues that the district court erred in holding that the Act imposed an undue burden on a woman's right to an abortion because Mississippi women could travel to adjoining states to obtain an abortion. We will discuss the rational basis of the Act first.

A.

In issuing the preliminary injunction, the district court saw the rational basis and no-undue-burden requirements as independent of each other, and both had to be satisfied in order for the Act to survive; that is, a regulation of the constitutional right must be struck if it fails to meet either test. Consequently, once the district court had held that the law created an undue burden on the exercise of the constitutional right, it became superfluous, the district court concluded, to engage in the rational basis inquiry. Conversely, the State argues that the rational basis inquiry is a necessary part of the total analysis, and it cannot be divorced from the undue burden analysis; this is especially true because the rational basis for the law will inform whether any

burden on the right to an abortion is "undue." We hold that we do not need to decide this dispute because, assuming that a rational basis review is a necessary first step, our court in *Abbott* has addressed the rational basis of a virtually identical law, and we are bound by that precedent to accept that the Mississippi statute has a rational basis. [5]

In *Abbott*, we recognized that in determining whether a law is rational, the scales are tipped in a state's favor. *Id.* at 594 ("[C]ourts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest."). A law meets this standard if it is "based on rational speculation" even if that speculation is unsupported by evidence or empirical data. *Id.* We thus held that the Texas regulation satisfied a rational basis review because it was based on the rational speculation that it would "assist in preventing patient abandonment" by the doctor providing the abortion. *Id.* at 594–95. We see no basis for distinguishing the rational basis analysis of H.B. 1390. None of the rationales discussed in *Abbott* was state specific, and each would be equally applicable to H.B. 1390.

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[5] The Texas law at issue in *Abbott* and H.B. 1390 are substantively identical. Both require that the doctor performing an abortion hold admitting privileges at a nearby hospital. *See Abbott*, 748 F.3d at 587 (explaining that Texas regulation "requires that a physician performing or inducing an abortion have admitting privileges . . . at a hospital no more than thirty miles from the location where the abortion is provided").

Accordingly, we hold that H.B. 1390 satisfies rational basis review based upon our binding precedent in *Abbott*. We now turn to the thornier question: whether JWHO has demonstrated a substantial likelihood of proving that the law imposes an undue burden on the right to choose an abortion. *Gonzales*, 550 U.S. at 158 (requiring that an abortion regulation satisfy rational basis review *and* not impose an undue burden).

B.

A law imposes an undue burden on the right to an abortion when the law "has the purpose or effect of creating a 'substantial obstacle' to a woman's choice." *Abbott*, 748 F.3d at 590 (citing *Casey*, 505 U.S. at 874, 878). The district court did not reach the purpose inquiry, and the parties do not address it. We will therefore limit our discussion to the Act's effects.

1.

Assuming that the Clinic will close, the State argues that this result still would not create an undue burden. The State argues that, at most, an incidental burden will be created as Mississippi women will only be required to travel a further distance to reach an abortion clinic. The State points to clinics in cities in neighboring states such as Baton Rouge, New Orleans, and Memphis. Relying on these neighboring clinics, the State argues that *Abbott* demands reversal in this case because of the nearby clinics, albeit in other states.

JWHO does not argue that the distances involved alone impose an undue burden. Nor could it in the light of *Abbott*. *See id.* at 598 ("We therefore conclude that *Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions."). We thus accept that, if these out-of-state clinics are properly considered in the undue burden analysis, the Act may well be upheld. This question is a central issue upon which the parties disagree: In analyzing whether the Act imposes an undue burden, should the analysis focus only on the availability of abortions in Mississippi, or should it also take into account nearby clinics in neighboring states. We turn now to this dispute.[6]

2.

The district court held that because H.B. 1390 would close the only abortion clinic in Mississippi, women in Mississippi would be forced to travel to a neighboring state for an abortion, which, according to the district court, creates an undue burden notwithstanding that the physical distances may not be unduly burdensome. The district court reasoned

[6] *Abbott* does not speak to this issue. Even if the admitting privileges requirement in *Abbott* were enforced, a number of clinics would remain open in Texas. *Abbott*, 748 F.3d at 598 ("Although some clinics may be required to shut their doors, there is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas. All of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." (emphasis in original)).

that accepting the State's argument would result in "a patchwork system where constitutional rights are available in some states but not in others." The district court also found support in a prior case decided in the same district court—*Jackson Women's Health Org., Inc. v. Amy*, 330 F. Supp. 2d 820 (S.D. Miss. 2004)—and a vacated Fifth Circuit decision—*Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), *superseded on reh'g en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001). The district court held that these two decisions, combined with the practical considerations, demonstrated that closing the only abortion clinic in Mississippi would impose an undue burden on the constitutional right.

The State attacks the district court's conclusion by pointing out that there is no reason that traveling a given distance is made more burdensome by simply crossing a state line during the trip. Crossing a state line, it argues, does not increase the time or money required for a trip of a given length. Thus, for the State, reasonable travel distances to other states' facilities should end further discussion.

JWHO supports the district court's conclusion that state lines do matter by pointing out that courts do not look to the availability of abortions in neighboring states to determine whether a regulation imposed an undue burden. For instance, in *Casey*, the Supreme Court did not consider the availability of abortions in states surrounding Pennsylvania in invalidating the spousal notification law. The Court held that the law was likely to impose an undue burden because a "significant number of women . . . are likely to be deterred from

procuring an abortion as surely as if [Pennsylvania] had outlawed abortion in all cases." *Casey*, 505 U.S. at 893–94. The Court found it significant that the regulation mirrored the effect of a law outlawing abortion *in Pennsylvania*. The Court did not mention or consider the potential availability of abortions without spousal notification in surrounding states.

Similarly, in *Jane L. v. Bangerter*, the Tenth Circuit considered the constitutionality of a Utah law that significantly restricted abortions after twenty weeks gestation. 102 F.3d 1112, 1114 (10th Cir. 1996), *cert denied*, 520 U.S. 1274 (1997). The district court in the case held that the restriction did not impose an undue burden on a woman's right to choose an abortion because the record did not contain evidence that any woman had wanted or attempted to obtain an abortion after twenty weeks gestation. *Id*. at 1117. Reversing the district court, the Tenth Circuit cited a declaration by the director of a Utah abortion clinic stating that in "the Clinic routinely refers to another state those Utah residents needing an abortion after twenty weeks," and that in 1990 "the Clinic referred out of state ten to fifteen women who needed such abortions." *Id*. In view of this fact, the court did *not* engage in any further analysis of the travel time and costs to women who were required to travel to those out of state clinics. *Id*. Instead, the panel moved directly to conclude that "a group of women exists in Utah for whom [the statute] actually operates as an impermissible ban on the right to abort a nonviable fetus." *Id*. at 1117–18. The panel found dispositive that women were forced to leave the state to exercise their constitutional right.

Jane L. stands out as the clearest example of an appeals court focusing its analysis on a regulation's effect within the regulating state. We also note, however, that other courts, in striking down abortion regulations, have failed to consider the availability of abortions in neighboring states. *See, e.g.*, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 200–10 (6th Cir. 1997) (invalidating Ohio abortion regulations because they imposed an undue burden on the right to an abortion without discussion of availability in neighboring states).[7] These cases strongly suggest that courts have limited the undue burden analysis to the burden imposed within the state.[8]

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[7] A panel of this court embraced a similar theory in *Okpalobi*. The panel in *Okpalobi* held that a Louisiana statute imposed an undue burden because "[a] measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." *Okpalobi*, 190 F.3d at 357. The panel opinion in *Okpalobi* was later vacated on jurisdictional grounds. *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc).

[8] These authorities are supported by the practical effects that would follow from the State's proposed rule. It would be exceedingly difficult for courts to engage in an as-applied analysis of an abortion restriction if we were required to consider not only the effect on abortion clinics in the regulating state, but also the law, potential changes in the law, and locations of abortion clinics in neighboring states. This concern is not farfetched. Both Alabama and Louisiana have passed similar admitting privileges regulations for abortion providers, which could lead to the closure of clinics in those states.

3.

JWHO's position finds additional support in *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *Gaines*, the University of Missouri's law school denied Gaines admission because he was African-American. *Id*. at 342. In denying admission to its law school, the state advised Gaines that he could take advantage of Missouri's statutory scheme through which the University of Missouri board of curators would provide him, as an African- American Missouri resident, a tuition stipend for use at a law school in an adjacent state. *Id*. at 342–43. Gaines rejected this offer and sought a writ of mandamus to compel the University of Missouri to grant him admission, which the Missouri Supreme Court denied. *Id*. at 342.

The Supreme Court of the United States reversed, holding that Missouri's tuition stipend program could not relieve the State of Missouri of its obligations to its citizens under the Fourteenth Amendment. In a passage worth quoting at length, the Court reasoned that:

> [T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. . . . That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be

> excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system.

Id. at 350.

To be sure, there are distinctions between *Gaines* and the instant case, which the State points out. First, *Gaines* was an Equal Protection case, which addresses the discriminatory distribution of a service provided by the state government; and second, *Gaines* has never been cited in the abortion context. In contrast, this appeal addresses rights arising under the Due Process Clause, in which the state government is not providing any service. The State is only regulating a privately provided service that is protected by the United States Constitution.

Although cognizant of these serious distinctions, and although decided in a different context, we think the principle of *Gaines* resolves this appeal. *Gaines* simply and plainly holds that a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights, a principle that obviously has trenchant relevance here. Pre-viability, a woman has the constitutional right to end her pregnancy by abortion. H.B. 1390 effectively extinguishes that right within Mississippi's borders. *Gaines* locks the gate for Mississippi to escape to another state's protective umbrella and thus requires us to conduct the undue burden inquiry by looking only at the ability of

Mississippi women to exercise their right within Mississippi's borders. There is no hiding the relevant language in *Gaines*: "[N]o State can be excused from performance by what another state may do or fail to do." *Id*.

Consistent with *Gaines*, we hold that the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state—here, Mississippi. Under this formulation, JWHO has demonstrated a substantial likelihood of proving that H.B. 1390—effectively closing the one abortion clinic in the state—has the effect of placing a substantial obstacle in the path of a woman seeking an abortion in Mississippi, and is therefore unconstitutional as applied to the plaintiffs in this case.[9]

V.

Having reached this conclusion, we close with two observations. First, the State argues that our analysis bars the State from enforcing any regulation against JWHO that would close the Clinic simply because it is the only clinic in Mississippi. For instance, the State argues that our opinion would preclude the State from closing the

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[9] Consistent with this holding, we also hold that the district court did not abuse its discretion in finding that the injunction would not disserve the public interest because it will prevent constitutional deprivations. *See, e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

Clinic for sanitation violations because, like H.B. 1390, such action would impose an undue burden on the right to an abortion by closing the only clinic in Mississippi.

Nothing in this opinion should be read to hold that any law or regulation that has the effect of closing all abortion clinics in a state would inevitably fail the undue burden analysis. Whether the State's hypothetical sanitation regulation would impose an undue burden is not a question before this court, and is not a question that can be answered without reference to the factual context in which the regulation arose and operates. Here, we hold only that JWHO has demonstrated a substantial likelihood of proving that H.B. 1390, on this record and as applied to the plaintiffs in this case, imposes an undue burden on a woman's right to choose an abortion. In reaching this determination, we look to the entire record and factual context in which the law operates, including, but not limited to, the statutory provision in question, the Clinic's status as the sole abortion clinic in Mississippi, the ability of the Clinic to comply with H.B. 1390, Dr. Parker's and Dr. Doe's efforts to obtain admitting privileges, the reasons cited by the hospitals for denying admitting privileges to Dr. Parker and Dr. Doe, the absence of a Mississippi law prohibiting hospitals from discriminating against physicians who perform abortions when granting admitting privileges, and the nature and process of the admitting-privileges determination. *See Casey,* 505 U.S. at 887-95 (looking to factual context in striking down Pennsylvania's spousal notification provision).

Finally, this case is an as-applied challenge to H.B. 1390. The district court's judgment granting the preliminary injunction enjoined "any and all forms of enforcement of the Admitting Privileges Requirement of the Act during the pendency of this litigation." To the extent that this language extends the preliminary injunction to actions by the State against parties other than JWHO and the other plaintiffs, it was an overly broad remedy in an as-applied challenge. We modify the preliminary injunction to enjoin the State from enforcing the admitting privileges provision of H.B. 1390 against the plaintiffs in this case.

VI.

In this opinion we hold that, assuming a rational basis inquiry is a necessary first step in deciding the constitutionality of an abortion regulation, H.B. 1390 satisfies rational basis review. We hold that *Gaines* instructs us to consider the effects of H.B. 1390 only within Mississippi in conducting an undue burden analysis. As a result, we hold that JWHO has demonstrated a substantial likelihood of success on its claim that H.B. 1390's admission- privileges requirement imposes an undue burden on a woman's right to choose an abortion in Mississippi, and is therefore unconstitutional as applied to the plaintiffs in this case. Finally, we hold that, to the extent the district court's preliminary injunction enjoined enforcement of H.B. 1390 against parties other than the plaintiffs in this case, it was overly broad and is modified to apply only to the parties in this case.

Accordingly, the judgment of the district court granting the preliminary injunction is

AFFIRMED as modified.

EMILIO M. GARZA, Circuit Judge, dissenting:

The majority holds that the mere act of crossing a state border imposes an "undue burden" on a woman's right to choose to obtain abortion services. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992). Because the undue burden test requires an assessment of the difficulty of obtaining abortion services, whether in a woman's own state or a neighboring state, and because neither the district court nor the majority has undertaken this assessment, I respectfully dissent.

A

The majority claims that "the district court found that the *effect* of the law would be to close the Clinic" operated by the Jackson Women's Health Organization ("JWHO"). *Ante* at 6 (emphasis added).[1]

The direct, legal effect of House Bill 1390 ("H.B. 1390" or "the Act") is only to mandate that "[a]ll

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[1] Preliminarily, the district court made no such finding. The district court found only that "the State has essentially confirmed that it will revoke the Clinic's license . . . ." The undisputed fact that the Clinic's closure was imminent, *see ante* Part III, says nothing about the legal cause of such closure. Even if the district court implicitly found that House Bill 1390 would cause the Clinic's closure, the majority errs in relying on this finding because it is not supported by this record, notwithstanding any concerns about waiver, *ante* at 7 n.4. *See Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998) ("[T]he reviewing court may assume that the [lower] court impliedly made a finding consistent with its general holding so long as the implied finding is *supported by the evidence*." (emphasis added)).

physicians associated with [an] abortion facility must have admitting privileges at a local hospital . . . ." Miss. Code Ann. § 41- 75-1(f). Mississippi had previously required all doctors affiliated with outpatient ambulatory surgical facilities to have admitting privileges at a local hospital, but expressly exempted Level I abortion facilities, which are authorized to perform abortions after the first trimester. *See* Miss. Admin. Code 15-16-1:42.9.7 (2011). H.B. 1390 eliminated this exemption.[2] Because the Clinic is a Level I abortion facility, all of its doctors must obtain admitting privileges under the Act. Critically, however, the Act neither directly closes the Clinic, prevents the Clinic's physicians from obtaining admitting privileges, nor authorizes the State to intervene in the hospitals' decision-making.[3]

Moreover, the Act, as the majority correctly holds, is amply supported by a rational basis. *Ante* Part IV.A. In ascertaining whether "any conceivable rationale" underlies a law, we are compelled to judge the words of the statute, not the motives of those who passed it. *Planned Parenthood of Greater Tex.*

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[2] JWHO does not challenge the admitting-privileges requirement on procedural due process grounds, and in any event, *Abbott* has foreclosed such an argument. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014) (citing *Women's Health Ctr. of West Cnty., Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989)).

[3] Also unchanged by H.B. 1390 is the authority of hospital officials to "evaluate the professional competence of . . . applicants for medical staff membership and/or clinical privileges." Miss. Admin. Code 15-16-1:41.6.6.

Surgical Health Servs. v. Abbott, 748 F.3d 583, 594 (5th Cir. 2014). Such a rational basis is plainly present: The admitting-privileges requirement both strengthens regulation of the medical profession and protects maternal health. *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("[T]he State has a significant role to play in regulating the medical profession."); *Casey*, 505 U.S. at 846 (explaining states' "legitimate interes[t] from the outset of the pregnancy in protecting the health of the woman"). In sum, the purpose of H.B. 1390 is to protect women seeking abortion services from the known risks of complications.[4]

The independent decisions of private hospitals have no place in our review of state action under the Constitution. *Cf. Lugar v. Edmondson Oil Co., Inc.*,

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[4] The *Abbott* panel concluded that *Casey*'s "purpose" prong remains an independent inquiry, and we are bound by that prior panel's decision. *See Abbott*, 748 F.3d at 590 ("In *Gonzales*, the Court *added* that abortion restrictions *must also* pass rational basis review." (emphasis added)); *ante* at 8 (explaining that rational basis review functions as a third inquiry "in addition" to *Casey*'s two-part test of whether the challenged law has a purpose or effect of imposing an undue burden). However, in my view, *Gonzales v. Carhart* re-stated *Casey*'s purpose inquiry as rational basis review. *See Gonzales*, 550 U.S. at 156–60 (concluding that purpose of ban on particular abortion method was not to impose an undue burden on abortion right because state has "a rational basis to act"). Thus, after *Gonzales*, the undue burden test consists of two (and not three) inquiries—whether the challenged law has a rational basis and whether it has the effect of imposing an undue burden on the abortion right. *See Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 799 (7th Cir. 2013) (Manion, J., concurring in part and in the judgment) (stating "two-part test").

457 U.S. 922, 937 (1982) (articulating state-action requirement for § 1983 suits).[5] Here, five hospitals rejected the JWHO doctors' applications out of hand because they performed elective abortions. As the majority notes, each of these five hospitals issued letters explaining that "[t]he nature of [the applicant's] proposed medical practice is inconsistent with [the] Hospital's policies and practices as concerns abortion and, in particular, elective abortions." *See ante* at 3 n.3. Federal law, however, prohibits entities receiving certain funding or contracts from discriminating "in the extension of staff or other privileges to any physician . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion . . . ." 42 U.S.C. § 300a–7(c).[6] Thus, when a state affords

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[5] Under *Lugar*'s two-part test for determining whether a deprivation of a federal right is fairly attributable to the state, (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible"; and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor," and "[t]his may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005) (quoting *Lugar*, 457 U.S. at 937).

[6] By contrast, Mississippi law protects only physicians who choose *not* to perform abortions, not those who do. *See* Miss. Code Ann. § 41-107-7(3) ("It shall be unlawful for any person, public or private institution, or public official to discriminate against any health care institution, or any person, association, corporation, or other entity . . . in any manner, including . . . any denial . . . [of] staff privileges . . . because such health care institution, or person, association, or corporation . . . *declines to*

private hospitals the authority to grant admitting privileges, those hospitals must faithfully exercise their authority in a non-discriminatory manner.[7]

Regardless of the propriety or the legality of the hospitals' actions, what matters for this substantive due process analysis is that JWHO has not shown that the Clinic's closure would result directly from H.B. 1390, as opposed to the independent decisions of local hospitals—non-state actors. Because JWHO failed to demonstrate that the Act could have "the *effect* of placing a substantial obstacle in the path of a woman's choice" to obtain abortion services, *Casey*, 505 U.S. at 877 (emphasis added), it has not shown a substantial likelihood that it will prevail on the merits.

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participate in a health care service which violates the health care institution's conscience." (emphasis added)).

[7] The Second Circuit has held that this statutory provision does not imply a private right of action. *See Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698–99 (2d Cir. 2010). However, if the hospitals are indeed entities covered under 42 U.S.C. § 300a–7(c), JWHO would likely have a remedy under 42 U.S.C. § 1983 for a violation of its statutory right to be free from discrimination in seeking admitting privileges. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that because § 1983 by its plain text "broadly encompasses violations of federal statutory as well as constitutional law," plaintiffs could bring suit for violation of Social Security Act); *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 609 (5th Cir. 2001) (explaining that § 1983 suits alleging violation of federal statute must be for "violation of a federal *right*, not merely a violation of federal *law*" and applying three-factor test for determining existence of "right" (quoting *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997))).

B

Even assuming that H.B. 1390 itself would cause the Clinic to close, I would still disagree with the majority's holding. The majority, following the lower court, holds that "the proper formulation of the undue burden analysis focuses solely on the [challenged law's] effects within the regulating state." *Ante* at 16. Accordingly, the majority concludes that H.B. 1390, which "effectively clos[es] the one abortion clinic in the state," would impose an undue burden because Mississippi women would need to travel to a neighboring state to obtain abortion services. *Id.* Put differently, in the majority's view, to require a woman to cross a state border in order to obtain abortion services would unduly burden her right to choose an abortion. I disagree.

Two errors infect the majority's analysis—an impermissible reliance on silence and a misunderstanding of the holding of *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In the majority's view, the *Casey* Court's failure to "mention or consider the potential availability of abortions . . . in surrounding states" implies that we must confine our undue burden analysis to Mississippi. *Ante* at 13.[8] Such an inference is legally nonsensical: No such rule exists. *Casey* dealt with the constitutionality of a Pennsylvania statute imposing various informed

[8] *See also ante* at 14 (explaining that "other courts, in striking down abortion regulations, have failed to consider the availability of abortions in neighboring states").

consent and spousal notification requirements on women seeking abortion services in that state, and the Court had no occasion to consider abortion access in nearby states. *See Casey*, 505 U.S. at 879–901. The lack of a squarely applicable precedent means only that the question remains open. "In constitutional adjudication, as in the common law, rules of law often develop incrementally as earlier decisions are applied to new factual situations." *Williams v. Taylor*, 529 U.S. 362, 384–85 (2000). Here, we are called upon to apply substantive due process principles to a novel factual situation—the closure of a state's sole abortion provider as a result of a law regulating physician qualifications. The absence of binding authority addressing similar facts merely frees us to derive the rule of law that resolves this dispute.[9]

Of course, we do not write on a blank slate. *Casey* teaches that a state may regulate abortion to further its interests in protecting the health and safety of women, though "[u]nnecessary health regulations that have the purpose or effect of presenting a

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[9] The majority discusses certain language in *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), suggesting that a law's closure of all of a state's abortion providers would constitute an undue burden. But as the majority acknowledges (and as the district court, too, recognized), that panel opinion was later vacated in its entirety by the *en banc* court for lack of Article III jurisdiction and is therefore not binding precedent. *See ante* at 14 n.7 (citing *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc)). Similarly, to the extent that the Tenth Circuit decision in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), stands for the proposition that causing women to leave the state to obtain abortion services imposes an

substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Casey*, 505 U.S. at 878. Moreover, "[t]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 874. Applying *Casey*, a panel of this Court recently concluded that "an increase of travel of less than 150 miles for some women is not an undue burden . . . ." *Abbott*, 748 F.3d at 598. The majority gives these binding principles a passing nod, *ante* at 8–9, before setting them aside for the sole reason that this case happens to involve the crossing of state borders to obtain abortion services, *id.* at 12 n.6.

The majority's second, and more grievous, error is its reliance on the wholly inapposite case of *Gaines*. In that equal protection case, Gaines was refused admission to the University of Missouri's law school because he was African-American. *Gaines*, 305 U.S. at 343. Missouri's statutory scheme would have provided Gaines a stipend to attend law school in a neighboring state. Rather than apply for the stipend, Gaines filed a petition for a writ of mandamus to compel the University to admit him, on the grounds that his rejection was "a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment . . . ." *Id.* at 342. The state court denied his petition, and the Supreme Court of Missouri affirmed. *Id.* The Supreme Court of the United States reversed, holding that the Equal Protection Clause required Missouri, which had already established a law school, to "furnish [Gaines] within its borders facilities for legal education substantially equal to those which the State there

afforded for persons of the white race . . . ." *Id.* at 351.

That a state may not shift its equal protection duties to another state is "[m]anifestly" clear. *Id.* at 350. The text of the Equal Protection Clause requires that "[n]o state shall . . . deny to any person *within its jurisdiction* the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). As the *Gaines* Court explained, the reason for this jurisdictional qualification is elementary: A state's duty to give equal protection of the laws "can be performed only where its laws operate, that is, within its own jurisdiction." *Gaines*, 305 U.S. at 350. The "separate responsibility" to provide equal protection falls upon each and every state "within its own sphere," for the power of each state's laws extends no farther. *Id.*

Although the correctness of *Gaines*'s equal protection holding is beyond question, it has no bearing on this case, which arises under the Due Process Clause. The majority concedes that "*Gaines* has never been cited in the abortion context." *Ante* at 15. Nonetheless, the majority proceeds to transpose *Gaines*'s maxim that "[n]o State can be excused from performance by what another State may do or fail to do," *Gaines*, 305 U.S. at 350, into a broader principle that "a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights," thereby concluding that "H.B. 1390 effectively extinguishes [the abortion] right within Mississippi's borders," *ante* at 16. The majority misreads *Gaines*. A state's obligation "*to give the protection of equal laws*" does not depend on "what another State may do or fail to do." *Gaines*,

305 U.S. at 350 (emphasis added). *Gaines* thus governs each state's obligations solely under the Equal Protection Clause, not under the Constitution at large, much less the substantive component of the Due Process Clause. *See Ayers v. Thompson*, 358 F.3d 356, 360 (5th Cir. 2004) (applying *Gaines*'s holding that "the Fourteenth Amendment guarantees to individuals the *equal protection of the laws*" (emphasis added)).

Additionally, the state's equal protection obligation is fundamentally different from its obligation under *Casey*. The majority concedes that in the abortion context, "the state government is not providing any [abortion] service," *ante* at 15, but fails to grasp the doctrinal consequence: The duty not to unduly burden the abortion right could *never* be "cast by one State upon another," *Gaines*, 305 U.S. at 350, because this duty does not require a state to *take* any action, but rather to *refrain* from taking unconstitutional actions. Under the Equal Protection Clause, a state must provide equal protection of the laws whenever and wherever it enforces or provides a service under its laws. In *Gaines*, Missouri had to provide equal protection of its laws to Gaines in Missouri, where it had elected to offer a law school education to white students. To require Gaines to attend law school in another state would indeed cause the equal protection duty to be "cast by one State upon another." *Gaines*, 305 U.S. at 350. By contrast, no state is obligated to provide or guarantee the provision of abortion services within its

borderss.[10] Rather, a state need only "regulat[e] [the] privately provided service" of abortion in accordance with the Due Process Clause, *ante* at 15, ensuring that its rational laws do not impose an undue burden. *See Casey*, 505 U.S. at 878; *Gonzales*, 550 U.S. at 158. Mississippi owes this duty to its female residents whether the Clinic is open or not. Absent any evidence and factual findings on the Act's impact on costs and travel distances for accessing abortion services, JWHO has failed to demonstrate a substantial likelihood of proving a constitutional violation.

The inapplicability of *Gaines* is even more apparent in light of the text of the Due Process Clause. If all states are required to refrain from unduly burdening the abortion right of "any person," Casey, 505 U.S. at 846 (quoting U.S. Const. amend. XIV), then it is impossible for this obligation to be "cast by one State upon another," *Gaines*, 305 U.S. at 350. Here, Mississippi could not possibly "shift its obligation" under the Due Process Clause, *ante* at 2, because its neighboring states (and all other states) *already* owe the same due process obligation to "any person"—including Mississippi women.

The majority's cited authorities do not resolve this case. *Casey* did not contemplate whether the availability of abortion in neighboring states affects

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[10] *See Casey*, 505 U.S. at 887 ("Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand. Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State." (citation omitted)).

the undue burden analysis. Similarly, *Gaines* stands for the uncontroversial principle that a state's duty to provide equal protection cannot be altered by the actions or inactions of a neighboring state. The majority sheds no light on a state's duties under the Due Process Clause, let alone its duty to refrain from unduly burdening the right to choose an abortion.

A correct analysis under the Due Process Clause requires us to apply *Casey* and *Abbott* and consider whether the difficulty of obtaining abortion services under the facts of this case constitutes an undue burden. On this record, JWHO has not shown a substantial likelihood that any such burden actually exists—that the Act results in more than an "incidental effect of making it more difficult or more expensive to procure an abortion." *Casey*, 505 U.S. at 874. In 2011, prior to the Act's passage, nearly sixty percent of Mississippi women who obtained abortions already traveled to other states for those services.[11] Thus, the Act would likely not impose any undue burden on their access to those very same out-of-state providers. As for women in the Jackson area, who would be most affected by the Clinic's closure, a proper undue burden analysis must assess the costs of obtaining abortion services at the closest facility in a neighboring state. As the district court did not conduct this analysis, the question of the permissible costs or travel distance under the substantive

[11] Mississippi State Department of Health statistics show that in 2011, Mississippi women obtained 3,188 abortions in other states and only 2,224 abortions in Mississippi. *See* Defs.' Resp. Opp'n Pls.' Second Mot. Prelim. Inj. at 24 n.27.

component of the Due Process Clause is not before us on this appeal. In any event, to support its request for a preliminary injunction, JWHO had to show a substantial likelihood that these travel costs would constitute an undue burden, and it has failed to do so.[12]

The majority claims that requiring courts to examine abortion availability in other states would be "exceedingly difficult" as a practical matter. *Ante* at 14 n.8. The majority cannot imagine how courts undertaking as-applied analyses could account for "the law, potential changes in the law, and locations of abortion clinics in neighboring states." *Id.* This concern is unfounded. Here, the parties are fully prepared and able to develop the record concerning the presence of abortion providers in neighboring states.[13] Although the majority suggests that access to these providers might change in the future, the essence of adjudication is the application of law to a set of facts at a particular point in time, regardless of

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[12] The district court did not make findings on the distance that Mississippi women would need to travel or costs they would incur to obtain an abortion in a neighboring state following the Clinic's potential closure; instead, the district court concluded, as the majority does as well, that the closure of a state's only abortion provider would be a *per se* undueburden.

[13] The State has already submitted data on distances from Jackson to abortion facilities in West Monroe, Louisiana (121 miles); Tuscaloosa, Alabama (185 miles); Baton Rouge, Louisiana (174 miles); and Memphis, Tennessee (209 miles). *See* Defs.' Resp. Opp'n Pls.' Second Mot. Prelim. Inj. at 24 n.27.

how those facts might later be altered.[14] And to the extent that neighboring states' abortion laws would be relevant at all, federal courts are more than competent to survey the laws of many or even *all* states.[15]

The majority also echoes the district court's fear of a "patchwork system where constitutional rights

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[14] *Cf. Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 72 (1993) ("The basic rationale behind our ripeness doctrine is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements, when those disagreements are premised on contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks and citation omitted)). Furthermore, as discussed above, because all states owe due process obligations to "any person," without regard to state borders, if a neighboring state is later poised to close an abortion provider upon which a Mississippi woman relies, she could sue to enjoin that closure. *See Ex parte Young*, 209 U.S. 123, 129, 149, 155–56 (1908) (holding that citizens of Iowa and Wisconsin could bring suit to enjoin Minnesota officials from enforcing state law setting railroad rates that allegedly deprived them of property without due process of law). For the same reason, there is no basis for JWHO's fear of a "domino effect," in which a state closes all in-state abortion facilities in reliance on an adjacent state's facilities, only to prompt that adjacent state to do the same in reliance on abortion availability in a third state.

[15] *See, e.g.*, *SMI Owen Steel Co., Inc. v. Marsh USA, Inc.*, 520 F.3d 432, 437 (5th Cir. 2008) ("In making the *Erie* guess, we may consider, among other sources, treatises, decisions from other jurisdictions, and the 'majority rule.'"); *Nijhawan v. Holder*, 557 U.S. 29, 39–40 (2009) (opting to apply circumstance-specific approach to federal aggravated felony fraud provision when only eight states had fraud statutes with a monetary threshold consistent with that of the federal offense, such that categorical approach would result in "limited and . . . haphazard" application of federal statute).

are available in some states but not in others." *Ante* at 12. The majority's belief that the mere closure of the Clinic would abrogate the State's obligation not to unduly burden abortion access again illustrates its misunderstanding of *Gaines*. *See supra*. Moreover, the majority has unwittingly instituted its own "patchwork system": If all undue burden analyses must stop at state borders, the existence of an undue burden will depend, in part, on a plaintiff's location relative to those boundaries. For instance, women in northern Mississippi who live a mere fifteen miles from the heart of Memphis, Tennessee, could never enjoin the closure of the clinic in that city, lest Mississippi be "excused from [its] performance." *Gaines*, 305 U.S. at 350. But women just across the border in Tennessee could do so, if they demonstrate that the closure would impose an undue burden. This result is logically and practically untenable—all the more so in regions where populations are denser and urban areas often straddle state borders. The majority's state-by-state undue burden analysis cannot be squared with the duty of all states to refrain from unduly burdening the right of "any person" to choose an abortion. *See Casey*, 505 U.S. at 846 (quoting U.S. Const. amend. XIV).

Lastly, the sole act of crossing a state border cannot, standing alone, constitute an unconstitutional undue burden on the abortion right because the Constitution envisions free mobility of persons without regard to state borders.[16] The

[16] *See Van Hollen*, 738 F.3d at 805 n.9 ("In our economy, crossing state lines to obtain services at a nearby urban center is common. Thus, state lines are unlikely to affect a woman's

majority's conceptual approach runs headlong into the well- established "constitutional right to travel from one State to another." *Saenz v. Roe*, 526 U.S. 489, 498 (1999). This right arises directly from our Constitution's goal of integrating distinct sovereigns into a single, federal polity. The Supreme Court has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 499 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)).

By arbitrarily confining its undue burden analysis to Mississippi, the majority departs not only from the concept of a constitutional right to travel, but importantly from the text "any person" in the Due Process Clause. In assessing whether a state law unduly burdens the abortion right, courts must be able to consider the availability of abortion services in neighboring states. Accordingly, I cannot conclude, as the majority does, that our analysis must "focu[s] solely on the effects within the regulating state," *ante* at 16, or that JWHO has shown a substantial likelihood H.B. 1390 imposes an undue burden merely by causing women to travel to an adjacent state to obtain abortion services.

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decision about where to get an abortion and the availability of abortion at out-of- state clinics should be considered in the undue burden analysis.") (Manion, J., concurring in part and in the judgment).

The majority concludes by denying that it establishes any *per se* rule. "Nothing in this opinion," the majority declares, "should be read to hold that any law or regulation that has the effect of closing all abortion clinics in a state would inevitably fail the undue burden analysis." *Ante* at 17. Attempting to narrow its holding to the specific facts of this case, the majority claims to base its holding on "the entire record and factual context in which the law operates," including "the statutory provision in question," "the ability of the Clinic to comply with H.B. 1390," "the reasons cited by the hospitals for denying admitting privileges," and the "nature and process of the admitting-privileges determination." *Id.* In so doing, the majority professes to leave open the possibility that some law, such as the "hypothetical sanitation regulation" discussed in the State's briefing, could cause the closure of all abortion providers within a state and yet still be constitutional. *Id.* at 16–17.

The majority's attempt to cabin its holding to the facts of this case betrays its awareness that crossing Mississippi's borders cannot be dispositive. Yet notwithstanding this attempt, today's opinion concludes in no uncertain terms: "*Gaines* instructs us to consider the effects of H.B. 1390 only within Mississippi in conducting an undue burden analysis." *Id.* at 18. The majority simply cannot have it both ways. So long as the undue burden analysis is confined by Mississippi's borders, the closure of that

state's sole abortion provider *must* be an undue burden.[17]

Even accepting that the majority's factors somehow narrow its holding, I find its *ad hoc* approach to be unworkable. The majority does not even attempt to explain how this case's "factual context," the "statutory provision" at issue, and the "nature and process" of the admitting-privileges requirement purportedly combine to make this burden "undue."[18] *Ante* at 17. The message for future courts and litigants is that a law causing the closure of all abortion providers in a state imposes an undue burden—unless it does *not* impose such a burden. The use of such an unprincipled approach to strike down as unconstitutional a state's exercise of its sovereign power to protect its citizens is particularly troubling.

Lastly, certain factors by which the majority purports to narrow its approach undermine its holding as to the Act's rational basis. As already explained, I fully join in the majority's conclusion that H.B. 1390 has a rational basis. *See supra* Part A; *ante* Part IV.A. Yet the majority, by faulting the

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[17] To be sure, this case involves JWHO's as-applied challenge to H.B. 1390. But as- applied challenges still establish important rules of law, and the majority attempts to obscure the necessary implications of its own rule.

[18] Tellingly, at oral argument, when JWHO was asked to clarify how courts should assess whether the closure of a state's only abortion clinic due to a "valid regulation" constitutes an undue burden, JWHO's perfectly tautological suggestion was to apply the "undue burden" test. The majority apparently agrees.

"statutory provision" and the "nature and process of the admitting-privileges determination," without any explanation, in essence mounts a back-door attack on the purpose of H.B. 1390. *Ante* at 17.[19] And to the extent that the majority's litany of factors is an indictment of the local hospitals for their improper discrimination,[20] it is those hospitals—not the State or H.B. 1390— that should be held accountable. *See supra* Part A.

Despite the majority's attempt to narrow its reasoning, today's opinion can only be read to mean that a law or regulation causing all of a state's abortion providers to close, such that women must cross a state border to obtain abortion services, imposes an unconstitutional undue burden on the abortion right.

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[19] The question of whether H.B. 1390 has a purpose of imposing an undue burden (under *Abbott*, a question distinct from the rational basis inquiry, *see supra* note 4) is not before us on this appeal, and the district court made no relevant factual findings. If, in the majority's view, ascertaining the Act's purpose is indeed so crucial, then for this reason alone, vacatur is proper.

[20] The majority claims to base its holding on certain facts that seem to implicate the local hospitals' actions, including "the ability of the Clinic to comply with H.B. 1390, Dr. Parker's and Dr. Doe's efforts to obtain admitting privileges, the reasons cited by the hospitals for denying admitting privileges to Dr. Parker and Dr. Doe, [and] the absence of a Mississippi law prohibiting hospitals from discriminating against physicians who perform abortions when granting admitting privileges . . . ." *Ante* at 17.

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The majority reminds us that "the Supreme Court long ago determined that the Constitution protects a woman's right to choose an abortion . . . ." *Ante* at 1. We are then reminded that "the right to an abortion was found in the penumbras of the Constitution . . . ." *Id.* at 2. Proceeding further, and following the Supreme Court's direction, the majority relies on *Casey* for its "undue burden" test. *Id.* at 8.[21]

In addition to announcing the undue burden standard, however, *Casey* also advanced a new interpretation of substantive due process by which the judiciary can now interpret the "full scope of the liberty guaranteed by the Due Process Clause." *Casey*, 505 U.S. at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). In taking blockquotes from Justice Harlan's dissent in *Poe v. Ullman* to explain its new theory, *see Casey*, 505 U.S. at 848–50, the *Casey* joint opinion notably omitted portions capturing the full extent of his departure from the Constitution's text:

> [T]he imperative character of Constitutional provisions…must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words,

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[21] To support its theory of unenumerated substantive due process rights, the *Casey* joint opinion shifted the underlying theory from a right of privacy, *see Roe v. Wade*, 410 U.S. 113, 152–53 (1973), to a substantive due process liberty interest as originally articulated by Justice Harlan in his dissent in *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

> but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.

Poe, 367 U.S. at 542–43 (Harlan, J., dissenting).[22] We now follow Justice Harlan: Interpretation in this "larger context" is an enterprise "not of words, but of history and purposes." *Id.* Importantly, "history" and "purposes"— severed from the words of the Constitution and the explicit guarantees they provide—have either no definite meaning or, even more conveniently for some, any desired meaning

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[22] In concluding, the *Casey* joint opinion likewise concedes that it is unconstrained by the niceties of constitutional text, explaining that "[e]ach generation must learn anew that the Constitution's written terms embody *ideas and aspirations* that must survive more ages than one." *Casey*, 505 U.S. at 901 (emphasis added). *Compare Casey*, 505 U.S. at 849 ("[A]djudication of substantive due process claims may call upon the Court . . . to exercise . . . reasoned judgment."); *id.* at 986 (describing undue burden standard as "inherently manipulable") (Scalia, J., concurring in the judgment in part and dissenting in part), *with Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("That [an attempt to uphold a law notwithstanding an express constitutional prohibition] thus reduces to nothing what we have deemed the greatest improvement on political institutions—a *written constitution*—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction." (emphasis added)); *id.* at 176 ("That *the people* have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected." (emphasis added)).

whatsoever. History, purpose, and tradition are not *legal* concepts; rather, they are elements of a new *political* lexicon. In this, the will of the People, as expressed in their written Constitution, gives way to the political choices of the judiciary.[23]

Consistent with its substantive due process theory, *Casey* gives full play to political preferences in its "undue burden" standard. By defining in circular fashion an "undue burden" as a "substantial obstacle," *Casey*, 505 U.S. at 878, the *Casey* joint opinion's "verbal shell game . . . conceal[s] raw judicial policy choices concerning what is 'appropriate' abortion legislation," *id.* at 987 (Scalia, J., concurring in the judgment in part and dissenting in part). At bottom, because *Casey*'s "undue burden" is a standard-less standard, a "concept [that] has no principled or coherent legal basis," courts are left to their own devices. *Id.* Yet even under *Casey*, our judicial discretion is not totally unfettered. Here, the text of the Due Process Clause and the fundamental constitutional right to travel demonstrate that courts must not stop the undue burden analysis at state borders, without considering access to abortion services in neighboring states. But the fact that the majority disagrees, fabricates new rules from *Casey*'s silence, and overextends *Gaines*—an equal protection case— evinces *Casey*'s ultimate failure to explain

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[23] "The absolute is not attained nor, above all, created through history. . . . History can then no longer be presented as an object of worship." Albert Camus, The Rebel: An Essay on Man in Revolt 302 (Anthony Bower trans., Vintage Books 1956) (1951).

when a burden is "undue." In the end, under *Casey*, the majority's maneuvers are not legal, but political.

Worse still, *Casey* allows judicial policy choices to be cloaked in the specific facts of any given case. The *Casey* decision, by limiting its assessment of the Pennsylvania abortion statute to the "evidence on th[e] record" without explaining the legal significance of particular facts, *id.* at 884, rendered itself wholly *sui generis*, bound to that record and incapable of establishing any "generally applicable principle," *id.* at 988 (Scalia, J., concurring in the judgment in part and dissenting in part).[24] Like the *Casey* joint opinion, the majority here claims that its holding depends on a meandering list of factors "including, but not limited to," certain facts present

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[24] *See also Casey*, 505 U.S. at 887 ("[O]n *the record before us*, and in the context of this facial challenge, we are not convinced that the 24–hour waiting period constitutes an undue burden." (emphasis added)); *id.* at 901 ("While at some point increased cost [resulting from recordkeeping and reporting requirements of the challenged statute] could become a substantial obstacle, there is no such showing *on the record before us*." (emphasis added)); *id.* at 991–92 ("[T]he approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a 'substantial obstacle' or an 'undue burden.' We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate." (citations omitted)) (Scalia, J., concurring in the judgment in part and dissenting in part).

in this case. *Ante* at 17. In this way, the majority purports to hold that while the closure of all abortion providers in a state is not necessarily unconstitutional, the burden created by H.B. 1390 in Mississippi simply happens to be "undue." *Id. Casey*'s logic is perverse indeed: Courts can make policy decisions about which abortion restrictions are "undue," and then escape any jurisprudential ramifications of those decisions by taking refuge in the purportedly distinct factual context of that particular application.

By its jarring opinion, the majority has affirmed the district court's decision to enjoin enforcement of H.B. 1390, enacted by the Mississippi legislature—the people's elected representatives—to regulate physicians' services. That this injunction flows from the policy choices of judges, who must fill the vacuum that is now the Due Process Clause's "liberty" interest, is a profoundly troubling consequence of current constitutional jurisprudence under *Casey*.[25]

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[25] Professor Hamburger has commented on this aggrandizement of judicial power:

> [M]any Americans, in their desire to prevent the people from abusing the power above law, have invited their judges to exercise it. . . . [N]ot unlike some kings and Parliament when they claimed to be the final arbiter, American judges have acquired a taste for power above the law. Perhaps every society needs this sort of power, but in denying absolute power to Parliament, Americans did not give it to the judges, and although it is questionable whether the people, being merely human, will always act wisely and justly in exercising their power above the law of the land, it is even more doubtful whether the judges

"[T]he boundaries of substantive due process are less than pellucid," and even the Supreme Court has "had difficulty in fixing [the] outer perimeter" of these rights. *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1115 (5th Cir. 1997) (Garza, J., specially concurring). We here confront the quandary of "boundaries" and "perimeters" in a starkly literal sense—under *Casey*, how far is too far to travel to an abortion clinic?

Ultimately, I await a return to legal theory that recognizes principled limits.[26] Even the majority accepts that the "controversy [over the scope of the abortion right] seems to have no end . . . ." *Ante* at 8. But in the absence of meaningful guidance from

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> or any other persons in government can be trusted with such a power. Men will ever be discontent with law and ambitious for power, and judges will ever be vain enough to aspire to a justice above human law, but it is therefore all the more important for judges to recall the common law ideals of law and judicial duty.

Philip Hamburger, Law and Judicial Duty 620–21 (2008), *accord* Emilio M. Garza, *Judicial Duty and the Future: Two Issues of Fundamental Law*, 6 J. L. Phil. & Culture 147, 156 (2011).

[26] Government must be guided by "thought that recognizes limits." Camus, *supra* note 23, at 294. Moreover, when a representative government subverts the Constitution, it runs the risk of being superseded by a new (and potentially less representative) government. *See* Eric Voegelin, The New Science of Politics 49 (1952). The Supreme Court has subjected substantive due process theory only to the "[a]ppropriate limits" of "respect for the teachings of history" and "solid recognition of the basic values that underlie our society," which in practice are not limits at all. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.) (citation omitted).

Casey and its progeny, the solution cannot be what the majority has proffered. Here, JWHO has not shown that the Clinic's closure would be the direct effect of H.B. 1390, given the independent decisions of the local hospitals. And even if causation were established, because merely crossing a state line would not constitute an undue burden, closure of the only abortion provider in Mississippi would not necessarily be unconstitutional; the district court failed to make findings about abortion access in neighboring states. Accordingly, because JWHO has not demonstrated a substantial likelihood of success on the merits, I would vacate the preliminary injunction.

Respectfully, I dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-60599

JACKSON WOMEN'S HEATH ORGANIZATION, on behalf of itself and its patients; WILLIE PARKER, M.D., M.P.H., M.Sc., on behalf of himself and his patients,

Plaintiffs - Appellees

v.

MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health; ROBERT SHULER SMITH, in his official capacity as District Attorney for Hinds County, Mississippi,

Defendants - Appellants

Appeal from the United States District Court for the South District of Mississippi, Jackson

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ON PETITION FOR REHEARING EN BANC

(Opinion ______, 5 Cir., ______, ______, F. 3d ______)

Before JOLLY, GARZA, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ E. Grady Jolly
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, et al. — PLAINTIFFS

v. — CIVIL ACTION NO. 3:12cv436-DPJ FKB

MARY CURRIER, MD., M.P.H., et al. — DEFENDANTS

ORDER

This matter is before the Court on the Rule 52(b) Motion to Clarify [89] filed by Defendants Mary Currier and Robert Schuler Smith. The Court will address the issues to some extent.

Defendants seek clarification under Federal Rule of Civil Procedure 52, which governs findings of fact and conclusions of law. Rule 52(a)(2) requires the Court, "[i]n granting or refusing an interlocutory injunction, [to] state the findings [of fact] and conclusions [of law] that support its action." The findings and conclusions required by Rule 52 "may appear in an opinion or a memorandum of decision filed by the court." Fed. R. Civ. P. 52(a)(1). Consistent with Rule 52, the Court in this case set forth its findings and conclusions in a 13-page opinion addressing the factual and legal arguments raised by the parties and concluding that, on the record before it, Plaintiffs had met their burden to justify preliminary injunctive relief.

Defendants ask the Court to "amend its findings—or make additional findings" to clarify the ruling in two primary respects. First, Defendants seek clarification as to whether the Court concluded "that any regulation which would close a state's only abortion clinic is *per se* unconstitutional—regardless of whether the regulation is medically necessary…." Defs.' Mem. [90] at 2. Second, Defendants ask the Court to clarify whether it concluded, in footnote three, "that necessity analysis is not required because the law would impose an undue burden, whether the Court is also making a preliminary finding of fact that the admitting privileges requirement is 'unnecessary,' or both." *Id*. at 3.

As to the first issue, the Court made clear, at the outset of its discussion of the constitutionality of the Act, that Plaintiffs pursued an "as-applied" challenge to the law. Order [81] at 6. Thus, its conclusion that "Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim" related solely to Plaintiffs' claim that *this* Act, as-applied to *this* clinic, on the particular facts before the Court, is likely to be found unconstitutional. No further clarification is needed.

On the second point, the footnote in question states in its entirety:

> As JWHO notes, [*Planned Parenthood of Se. Pa. v.*] *Casey*'s summary of the standard states, "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the

> right." 508 U.S. [833,] 878 [(1992)]. How the term "unnecessary" factors into the analysis is not entirely clear because since *Casey* the Supreme Court has consistently proceeded to the purpose and effect side of the equation without considering whether a particular regulation is "unnecessary." In any event, the State did not address the issue in its response, and based on the present record, the Court agrees that JWHO has established a likelihood of success on the merits, even assuming a necessity inquiry.

Order [81] at 8 n.3.

Defendants assert that the footnote is inconsistent with the Court's observation that "this Act might survive a facial attack," *id.* at 5, contending that the latter observation implied a ruling that the Act *is* medically necessary. Defs.' Mem. [90] at 4. No such ruling was intended from the Court's statement. The Act might survive a facial attack—as similar statutes have in other jurisdictions—if Plaintiffs failed to establish "that no set of circumstances exists under which [the Act] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170, 175 (4th Cir. 2000) (rejecting facial attack and finding no undue burden). But given the facts of this as-applied attack, Plaintiffs are entitled to relief.

Footnote three was probably unnecessary because Defendants offered no argument or analysis based on the term "unnecessary" as used in *Casey*. They

instead argued in the alternative that a rational-basis test applies, or if undue burden does apply, then no impermissible purpose or effect has been shown. Because Defendants did not offer a legal analysis based on the "necessity," *vel non*, of the statute, the Court focused on the arguments Defendants pursued and found that they would not prevent the injunction.

Nevertheless, the Court elected to include footnote three to alert the parties to this issue and observe that the test is not entirely clear. The word "unnecessary" appears in the summary of the controlling *Casey* opinion, but not in the analysis. And since *Casey*, there has been no clear indication how the necessity of a regulation affects the undue-burden test. *See generally Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 539–41 (9th Cir. 2004) (discussing test and applying undue burden); *Greenville Women's Clinic*, 222 F.3d at 170, 175 (indicating that regulation was necessary, but still considering "whether the cost imposed by the lawfully directed regulation presents a substantial obstacle to a woman seeking an abortion" (citation and quotation omitted)). As originally noted, "the Supreme Court has consistently proceeded to the purpose and effect side of the equation without considering whether a particular regulation is 'unnecessary.'" Order [81] at 8 n.3.

Defendants now argue that the word "unnecessary" in the *Casey* summary "requires a court to balance a state's interest in enacting a particular regulation to promote health and safety against a woman's right to terminate a pre-viability pregnancy." Defs.' Mem. [90] at 3. But they cite

Casey for this argument, and *Casey* does not explain a balancing test. Defendants cite no other authority for this test, and at most Plaintiffs have merely offered the factual argument that the Act is not necessary.[1] Though the Court may need to better address the applicable test in the future, it was not necessary given the arguments in the initial briefs, and even now the parties have not provided sufficient analysis to reach any legal conclusions on that point. Nevertheless, even accepting, *arguendo*, Defendants' balancing approach, the record fails to show that the Act is so necessary as to overcome the undue-burden Plaintiffs established.

For the foregoing reasons, Defendants' Rule 52(b) Motion to Clarify [89] is granted in part to the extent that this order clarifies its previous ruling, but the Order [81] remains the ruling of the Court.

SO ORDERED AND ADJUDGED this the 13th day of August, 2013.

s/ *Daniel P. Jordan III*
UNITED STATES DISTRICT JUDGE

[1] The Court would also seek guidance on how "necessary" should be defined. Should it receive the dictionary meaning "absolutely needed?" *Merriam-Webster.com*. Merriam-Webster, 2013.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JACKSON WOMEN'S HEALTH
ORGANIZATION, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:12cv436-DPJ-FKB

MARY CURRIER, MD.,
M.P.H., et al. DEFENDANTS

ORDER

This matter is before the Court on Plaintiffs' Second Motion for Preliminary Injunction [46]. After the Court's July 13, 2012 Order granting in part Plaintiffs' original Motion for Preliminary Injunction, Plaintiffs unsuccessfully exhausted all available avenues to comply with Mississippi House Bill 1390 ("the Act"). As such, the State has indicated that it will revoke the Jackson Women's Health Organization's license following a hearing set for April 18, 2013. Plaintiffs now ask the Court to preliminarily enjoin the State from going forward with license revocation proceedings. After considerable deliberation, the Court concludes that Plaintiffs are entitled to preliminary injunctive relief. The State will be enjoined from enforcing the admitting privileges portion of the Act.

I. Facts and Procedural History

The Act requires that all physicians associated with abortion clinics have admitting and staff privileges at a local hospital and be board certified in obstetrics and gynecology. At all relevant times, Jackson Women's Health Organization ("JWHO" or "the Clinic") has been the only abortion clinic in the State of Mississippi, and only one of its doctors holds admitting privileges. That doctor has a separate, private OB/GYN practice and provides only minimal care at the Clinic. The two doctors providing the vast majority of the Clinic's abortions lacked admitting or staff privileges when the Act passed.

On June 27, 2012, Plaintiffs filed this lawsuit challenging the constitutionality of the Act against the head of the Mississippi Department of Health and the Hinds County District Attorney (collectively, for ease of reference, "the State"). That same day, Plaintiffs moved for a temporary restraining order to block the July 1, 2012 effective date of the Act. The Court entered a TRO on July 1, 2012, ordered additional briefing, and set a hearing on Plaintiffs' first Motion for Preliminary Injunction for July 11, 2012. Following the hearing, the Court entered an order granting in part and denying in part the motion for preliminary injunction. The Court allowed the Act to take effect, required Plaintiffs to continue to seek admitting privileges, and enjoined Defendants from exposing Plaintiffs to civil or criminal penalties for continued operation while privileges were being sought.

On November 28, 2012, Plaintiffs filed their Second Motion for Preliminary Injunction, reporting that the two doctors who provide the majority of the care at the Clinic had applied for privileges at every local hospital. Two hospital refused to provide applications, and all others rejected the doctors' applications because they perform elective abortions. Pls.' Mot. [46] Ex. A at App. 6–11. As a result, the State sent the Clinic an official notice of hearing for revocation of the Clinic's license to operate an abortion facility. It later stated that no waivers would be granted, so the result of the hearing is a foregone conclusion. The State will close the Clinic.

Plaintiffs now request "that the Court enjoin all forms of enforcement of the Admitting Privileges Requirement" of the Act and "respectfully request that the Court resolve this matter before the [State] holds an administrative hearing on revocation of the Clinic's license." Pls.' Mem. [47] at 2. Following an extended briefing period, the issues raised are now ripe for consideration.

II. Analysis

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008) (citation omitted). To obtain this relief, Plaintiffs must demonstrate four familiar requirements:

> (1) [a] substantial likelihood of success on the merits; (2) [a] substantial threat that plaintiff[s] will suffer irreparable injury; (3) [that the] injury outweighs any harm the

> injunction might cause the defendant[s]; and (4) [that the] injunction is in the public interest.

Women's Med. Ctr. of Nw. Hous. v. Bell, 248 F.3d 411, 419 n.15 (5th Cir. 2001) (citing *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)). The Court finds that JWHO has met its burden.

A. Substantial Likelihood of Success on the Merits

1. The Applicable Standards

The Court must construe statutes in a way that "avoid[s] constitutional doubts." *Stenberg v. Carhart*, 530 U.S. 914, 941 (2000) (citation omitted). In the abortion-regulation context, the United States Supreme Court has developed the following legal framework:

> Before [fetal] viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878, 879 (1992)).

Until recently, the State has agreed with JWHO that the Court must apply this undue burden analysis. But now that the hospitals have denied admitting privileges, the State reverses course, contending that the "undue burden analysis is inapplicable." Defs.' Mem. [54] at 12 (capitalization altered). Relying on *Gonzales v. Carhart*, the State asserts that "a mere rational basis review pertains when a court considers a legitimate health and safety regulation of abortion." *Id.* at 13. This argument finds little support in *Gonzales* or other post-*Casey* opinions from the Supreme Court.

Casey reaffirmed the state's "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." 505 U.S. at 846. Yet contrary to the State's current position, the Supreme Court did not stop there, noting that "a statute which, while furthering the interest in potential life *or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." 505 U.S. at 877 (emphasis added).

Though *Casey* was a plurality opinion, the United States Supreme Court has consistently applied the undue-burden test, even when finding that a disputed law was adopted with a rational purpose based on the state's legitimate interests. For example, in *Gonzales*, the case upon which the State relies, the Court observed:

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

550 U.S. at 158 (emphasis added); *see also Stenberg*, 530 U.S. at 921 (summarizing *Casey*'s undue-burden standard as establishing that "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional" (quoting *Casey*, 505 U.S. at 877)); *see also Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 603 (6th Cir. 2006) (rejecting rational-basis test in admitting-privileges context). In line with this precedent, the undue-burden test applies.

Having identified the controlling test, the Court next considers whether to apply it in an as-applied or facial context. The two are dramatically different. In a facial attack, a plaintiff ordinarily must demonstrate "that no set of circumstances exists under which [the Act] would be valid." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). It therefore comes as little surprise that regulations requiring admitting privileges have passed facial attacks in cases like *Greenville Women's Clinic v. Bryant* (*Greenville I*), 222 F.3d 157, 165 (4th Cir. 2000). Indeed, this Act might survive a facial attack. But "[i]t is axiomatic that a statute may be invalid as

applied to one state of facts and yet valid as applied to another." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citation and quotations omitted).

Drawing this distinction is necessary because many of the State's arguments are built on cases addressing facial challenges. *See, e.g.*, Defs.' Resp. [54] at 17 (noting cases holding that similar regulations "easily withstand a facial constitutional challenge"); *see also id.* at 29 (citing standards under facial challenge). Nevertheless, the State correctly informed the Court during oral argument that this is an as-applied challenge because the law affects only this clinic and will force its closure. *See* Hr'g Tr. at 48.[1]

2. As-Applied Constitutionality of the Act

The as-applied analysis in this case has proved shifty because the facts have evolved. When the matter was first presented in JWHO's Motion for Preliminary Injunction, JWHO had not yet applied for admitting privileges so its ability to comply was unknown. For that reason, the Court granted narrow injunctive relief and required Plaintiffs to seek privileges. But even the State recognized that JWHO's success in obtaining privileges could be

[1] Another example of the State using arguments from facial attacks is the observation that abortionists cannot be elevated above other doctors. *See Gonzales*, 550 U.S. at 163. While true, *Gonzales* was a facial attack, and it noted that circumstances could occur in an as-applied context where the government's right to regulate medical practices gives way to a woman's constitutional right to a certain procedure. 550 U.S. at 167.

determinative. As the State's counsel candidly noted in oral argument, "If they don't [receive admitting privileges], it's going to cut against us, quite frankly, in my opinion." *Id.* at 72. That day has now arrived. No hospital would consider the applications, and the Clinic cannot comply with the Act.[2]

Though the State has essentially confirmed that it will revoke the Clinic's license, it contends that no undue burden exists—assuming the Court rejects

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[2] Count Three of the Amended Complaint [30] asserts that the State violated JWHO's due process rights by delegating authority to the hospitals to determine whether the clinic can be licensed. Those hospitals all denied admitting privileges, and most did so because the Clinic performs abortions. The State acknowledges that under certain circumstances such delegation could cause due-process concerns. Defs.' Resp. [54] at 29 (citing *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117–18 (1928) (finding that delegation to non-governmental decisionmakers was "repugnant to the due process clause of the Fourteenth Amendment")). But the State asserts that the delegation argument must fail because state law precludes arbitrary denials. It then cites two cases that rejected the delegation argument. *Id.* (citing *Baird*, 438 F.3d 595; *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555–56 (9th Cir. 2004)). Neither case supports the State's position. The regulation in *Baird* survived because, unlike Mississippi's law, the regulation allowed waivers. 438 F.3d at 610. *Eden* presented a facial attack where the court assumed privileges would not be denied. 379 F.3d at 555–56; *see also Greenville Women's Clinic v. Commissioner (Greenville II)*, 317 F.3d 357, 362–63 (4th Cir. 2002) (rejecting facial attack because plaintiffs held privileges and possibility of rejection was deemed "remote"). But while JWHO may have a valid due-process claim, it expressly reserved the claim in its Reply, which may indicate that it is somehow infirm. The Court will stop here, but to avoid piece-meal adjudication, the Court advises Plaintiffs to assert their arguments if they deem them worthy.

the rational-basis test the State urges. The State offers two arguments: (1) the Act does not prevent abortions from taking place in facilities providing fewer than ten abortions a month, such as physicians' offices and hospitals; and (2) Mississippi women seeking abortions have reasonable access to one of several abortion providers in neighboring states.

As to the first argument, the State has not identified any willing abortion providers other than the Clinic. The record does, however, demonstrate that elective abortions are anathema to the policies of the hospitals in the Jackson metropolitan area, which prompted them to reject the doctor's applications out of hand. Pls.' Mot. [46] Ex. A at App. 7–11. And even the State seems to concede the "practical effect" of closing the Clinic is women in Central Mississippi may have to travel to another state to obtain abortions. Defs.' Mem. [54] at 24. Thus, on the record before the Court, the State has not demonstrated that the Act's ten-per-month caveat would actually remove the substantial obstacle closing the Clinic would cause.

On the second point, the State asserts that while the closure of the Clinic might make it "more difficult or more expensive" to obtain an abortion insofar as it requires travel to a neighboring state, that fact does not establish an undue burden. Defs.' Mem. [54] at 23 (citing *Casey*, 505 U.S. at 874). The State identifies at least four abortion facilities ranging from 121 to 209 miles from Jackson, asserts that closing the Clinic would "require an additional two to three hours of travel" for Mississippi women

seeking abortions, and argues that this "[m]inimal additional travel is a minor inconvenience, not an unconstitutional 'undue burden.'" *Id.* at 24 n.27.

The State builds this argument from the following statement in *Casey*: "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874. But in the very next sentence, the Supreme Court states that a law will "reach into the heart of the liberty interest" "where state regulation imposes an undue burden on a woman's ability to make this decision . . . ." *Id.* An "[u]ndue burden" is "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. So the question remains whether closing the State's only abortion clinic creates a "substantial obstacle."[3]

There are two components to the "substantial obstacle" question in this case: (1) the mere burden

[3] As JWHO notes, *Casey*'s summary of the standards states, "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." 505 U.S. at 878. How the term "unnecessary" factors into the analysis is not entirely clear because since *Casey* the Supreme Court has consistently proceeded to the purpose and effect side of the equation without considering whether a particular regulation is "unnecessary." In any event, the State did not address the issue in its response, and based on the present record, the Court agrees that JWHO has established a likelihood of success on the merits, even assuming a necessity inquiry.

of travel caused by closing the facility; and (2) the burden attendant to forcing travel to another state. The Supreme Court has never addressed the latter in a post-*Casey* opinion, and it has not directly answered the former. The closest case is *Mazurek v. Armstrong*, where the disputed law would not require women "to travel to a different facility than was previously available." 520 U.S. 968, 974 (1997). The Supreme Court viewed this fact as "strongly support[ing] the District Court's finding…that there was insufficient evidence that the law created a 'substantial obstacle' to abortion." *Id.*; *see also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981). Thus, the *Mazurek* Court viewed the possibility of travel to a different facility as a factor in the "substantial obstacle" analysis. And here the closure will indisputably have that effect. *Casey*, on the other hand, allowed a waiting period that could require some to make two trips to a clinic. No clinics were closed as a result, but the Court held that "in the context of this facial challenge," and based "on the record before us," the additional travel was not an undue burden. 505 U.S. at 886–87.

Post-*Casey* and *Mazurek*, "[v]ery few courts have addressed whether requiring women to travel further for an abortion constitutes an undue burden." *Baird*, 438 F.3d at 604. The State relies on some of these cases to argue that travel is merely incidental. Defs.' Resp. [54] at 25 (citing *Baird*, 438 F.3d at 598; *Greenville I*, 222 F.3d at 170; and *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994)). But none supports the argument. *Greenville I* was a facial attack with a substantially

shorter distance. 222 F.3d at 165. *Schafer* involved no closures and merely found that calling ahead and driving was not an undue burden. 18 F.3d at 533. In *Baird*, the court found that a trip of less than 55 miles—less than half the distances here—was not an undue burden. But it also noted that "potential patients of the Dayton clinic could still obtain an abortion *in Ohio* and, more significantly, could obtain an abortion at a WMPC-owned clinic within a reasonable distance from the Dayton clinic." 438 F.3d at 605 (emphasis added). Neither of the two *Baird* qualifiers exists in this case. JWHO has but one facility. And as the record now stands, the Clinic is the only known provider of abortions in the State. Closing its doors would—as the State seems to concede in this argument—force Mississippi women to leave Mississippi to obtain a legal abortion.

Looking then to the interstate travel issue, the State offers no authority suggesting that closing its only identified abortion provider is a mere incidental effect. As stated in *Okpalobi v. Foster*, "A measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." 190 F.3d 337, 357 (5th Cir. 1999) (citation omitted), *superseded on reh'g en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001).[4] That observation rings

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[4] *Okpalobi* was vacated on other grounds and therefore lacks precedential value. *Pines Land Co. v. United States*, 274 F.3d 881, 894 (5th Cir. 2001). It is, however, consistent with *Casey* and other authority. *See Eden*, 379 F.3d at 541 ("A significant

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

Finally, the Court notes that another judge in this district and division rejected this same argument when faced with an earlier attempt to close JWHO. *See Jackson Women's Health Org., Inc. v. Amy*, 330 F. Supp. 2d 820, 823 (S.D. Miss. 2004) (Lee, J.) ("[T]he court is not persuaded that this burden is adequately ameliorated by the possible availability of abortions in surrounding states. . . . [P]laintiff has persuaded the court that the complete unavailability of early second-trimester abortions in Mississippi serves as a substantial obstacle to a woman's choice whether to seek such an abortion."). The State has provided no basis for reaching a different result in this instance. The Court concludes that Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim.[5]

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increase in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion.").

[5] Because of its conclusion as to the effect of the Act, the Court need not consider the thorny question whether public statements from numerous State officials lauding the Act as a ban on abortion in Mississippi are alone sufficient to demonstrate unconstitutional purpose.

B. Substantial Threat of Irreparable Injury

The Fifth Circuit has explained the standard for establishing a substantial threat of irreparable injury:

> a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown. However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis.

United States v. Emerson, 270 F.3d 203, 262 (5th Cir. 2001). "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). On the other hand, "it is not necessary to demonstrate that harm is inevitable . . . . The plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986).

Plaintiffs allege four imminent, irreparable injuries that would result if the Act is not now enjoined: (1) the impairment of the Clinic's patients' constitutional rights; (2) the interruption and resulting permanent cessation of the Clinic's business; (3) reputational harms arising from the license revocation proceedings; and (4) the potential

that Dr. Doe's privacy and safety could be compromised in the public revocation proceedings. The State addresses only the first asserted injury, leaving the others unrebutted in the record. The third argument appears to have merit.[6] The second would have merit if closure occurred. The Court will not address the fourth.

As to the Clinic's first argument, the parties agree that the April 18, 2013 hearing will result in an order to close the Clinic. Nonetheless, the State contends that no irreparable harm would flow from that ruling until the Clinic fully exhausts its judicial appeals, presumably to the United States Supreme Court. *See* Miss. Code Ann. § 41-75-23. During oral argument, the State conceded that the Clinic's claim would become "ripe" upon notice of closure—an event that has now occurred. And the only speculative, future event that could result in anything other than closure is a ruling from another court finding the Act unconstitutional based on the precise legal questions presented in this lawsuit.[7]

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[6] *See* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 ("Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable. . . . [And w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (footnotes omitted)).

[7] This matter falls outside the *Younger* abstention doctrine and the deference given pending state proceedings because the federal suit was filed first. *Younger v. Harris*, 401 U.S. 37 (1971). But if the case were to proceed into the state courts, it would further complicate the issues and potentially preclude further action in this venue. *See* 28 U.S.C. § 1738; *Gammage v.*

The Court does not believe the Clinic must exhaust its appeals in other fora before seeking injunctive relief. *Cf. City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 34 (1934) (holding that despite plaintiff's right to appeal in state court, where state "officers plainly intend to perform what they consider their duty, and will, unless restrained," take adverse action against plaintiff in alleged violation of due process, injury "appears sufficiently imminent and certain to justify the intervention of a court of equity"); *Humana*, 804 F.2d at 1394 ("Humana need not exhaust the administrative remedies available through HHS before seeking a preliminary injunction against Jacobson."). The State has plainly informed the Clinic that it will be closed pursuant to a statute that appears to fail the undue-burden test. Considering this, and the other articulated and unrebutted harms, the Court concludes that the irreparable injuries alleged are sufficiently imminent to justify preliminary injunctive relief at this time.

C. Balance of Harms and Public Interest

As for the final two factors for injunctive relief, the Court concludes that the threatened injury outweighs any harm that will result if the injunction is granted. This order essentially continues the status quo. Finally, the grant of an injunction will

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W. Jasper Sch. Bd. of Educ., 179 F.3d 952, 954 (5th Cir. 1999); *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) ("A preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court's power to render a meaningful decision . . . .").

not disserve the public interest, an element that is generally met when an injunction is designed to avoid constitutional deprivations. Plaintiffs have met the burden to establish entitlement to further preliminary injunctive relief.

III. Conclusion

The Court has considered all the parties' arguments. Those not specifically addressed would not have changed the result. For the foregoing reasons, Plaintiffs' Second Motion for Preliminary Injunction [46] is granted. Defendants are hereby enjoined from any and all forms of enforcement of the Admitting Privileges Requirement of the Act during the pendency of this litigation. This Order does not affect other portions of the Act.

SO ORDERED AND ADJUDGED this the 15th day of April, 2013.

s/ Daniel P. Jordan III
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:12cv436-DPJ-FKB

MARY CURRIER, MD., M.P.H., et al. DEFENDANTS

ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [5]. Having conducted oral argument and having fully considered the parties' submissions, the Court finds that the injunctive relief provided in its previously entered TRO should be modified. The key issue at this early stage is whether Plaintiffs have demonstrated irreparable harm justifying preliminary injunctive relief pending final resolution of the case. This Order protects Plaintiffs from the limited irreparable harm they have asserted, but allows Mississippi House Bill 1390 ("the Act") to take effect, at least for now. The Order requires Plaintiffs to continue to seek admitting privileges—as they said they would—and enjoins Defendants from exposing Plaintiffs to criminal or civil penalties for continued operation—something Defendants have no immediate plans to pursue. The motion will therefore be granted in part.

I. Facts and Procedural History

The Act requires that all physicians associated with abortion clinics have admitting and staff privileges at a local hospital and be board certified in obstetrics and gynecology. At the time the Act was passed, Jackson Women's Health Organization ("JWHO" or "the Clinic") was the only abortion clinic in the State of Mississippi, and only one of its doctors had such privileges. That remains the case, and the one doctor with privileges has a regular, private OB/GYN practice and does not provide the majority of abortions. The two doctors providing the majority of the Clinic's services do not have admitting or staff privileges, though they have sought such privileges since the passage of the Act.

Plaintiffs previously sought a TRO to block the July 1, 2012, effective date of the Act. But before that date arrived, the State took several actions to address Plaintiffs' concerns, to include renewing the Clinic's license and offering assurances that Plaintiffs would not be prosecuted for any violations of the Act at this time. Plaintiffs nevertheless argued that irreparable injury would occur and they were granted a TRO on July 1, 2012. Extensive briefing and oral argument followed. The parties agreed to forego an evidentiary hearing and rely on the affidavits and other record evidence. The Court has personal and subject matter jurisdiction.

II. Analysis

This case is before the Court on a motion for preliminary injunction. To obtain such relief, the moving party must establish four elements:

> (1) substantial likelihood of success on the merits; (2) substantial threat that plaintiff will suffer irreparable injury; (3) injury outweighs any harm the injunction might cause the defendant; and (4) injunction is in the public interest.

Women's Med. Ctr. of Nw. Houston v. Bell, 248 F.3d 411, 419 n.15 (5th Cir. 2001). The key issue before the Court at this time is the second element—irreparable injury.

The case presents in a somewhat unusual posture. As an initial point, we do not yet know whether the Clinic will be able to comply with the Act. Presently, it does not, but under section 41-75-16 of the Mississippi Code, it must be given "a reasonable time, under the particular circumstances not to exceed six (6) months from the date [newly-enacted licensing requirements] are duly adopted, within which to comply with such rules and regulations and minimum standards." According to Defendants, the "duly adopted" date is the date the administrative rules promulgated under the Act took effect, which was July 11, 2012. Thus, it is certainly possible that when the Clinic's deadline to comply finally arrives it will be in full compliance. Or, it may not be. This begs the question whether any alleged harm constitutes irreparable injury *at this time*.

The "decision regarding irreparable injury to the plaintiff must not be based on the ultimate issue of the constitutionality of the statute." *Manning v. Hunt*, 119 F.3d 254, 264 (4th Cir. 1997). Even if an act is unconstitutional, it will not be preliminarily enjoined unless the plaintiff proves an irreparable harm. This standard was summarized in *United States v. Emerson*: four elements:

> a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown. However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis.

270 F.3d 203, 262 (5th Cir. 2001). In *Holland America Insurance Co. v. Succession of Roy*, the court noted that "[s]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." 777 F.2d 992, 997 (5th Cir. 1985). On the other hand, cases like *Humana, Inc. v. Jacobson* hold that "it is not necessary to demonstrate that harm is inevitable…. The plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." 804 F.2d 1390, 1394 (5th Cir. 1986). *Humana* is distinguishable in some respects, but it at least stands for the proposition that an imminent threat of deprivation is sufficient. So the question is whether there now exists enough of a threat to justify injunctive relief pending final resolution.

In this case, the State has acted to remove most of the threats originally challenged in the Complaint. It has, for example, renewed JWHO's license for another year. It has also obtained assurances from various officials that Defendants will not be prosecuted at this time. These actions undeniably removed most of the more tangible threats Plaintiffs originally feared. But they continue to argue irreparable injury in two ways.

First, Plaintiffs contend that merely subjecting them to the administrative process of enforcing the Act will cause irreparable harm. The Court is not persuaded. As noted above, the Clinic will be given "reasonable time" to comply with the new law. Miss. Code Ann. § 41-75-16. During that time, there will be no burden on the Plaintiffs whatsoever because they have already completed—or nearly completed—the application process. Thus, they have nothing to do but sit back and wait. And because Plaintiffs could obtain privileges, it is simply too speculative to say that they will at some point be forced to defend their lack of compliance through the administrative process outlined in Mississippi Code section 41-75-11. If that day comes, then the issue can be revisited as the threat may become imminent. As for now, Plaintiffs conceded at the hearing that they should be required to continue the application process.[1]

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[1] The Court cited *Deerfield Medical Center v. City of Deerfield Beach* in its TRO regarding the threat of the administrative process, but required additional briefing as to whether *Deerfield* supported a finding of irreparable injury here. 661 F.3d 328, 338 (5th Cir. 1981). Plaintiffs' defense of their position on that point was not persuasive, and *Deerfield* is

Plaintiffs' second and primary contention is that they face the uncertainty of criminal or civil prosecution for operating the Clinic out of compliance with state law. Thus, according to them, they must choose between incurring that risk or shutting down. In *Concerned Citizens of Vicksburg v. Sills*, the court noted that injunctive relief can be appropriate to avoid placing a plaintiff "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what (they believe) to be constitutionally protected activity in order to avoid being enmeshed in (another) criminal proceeding." 567 F.2d 646, 651 (5th Cir. 1978) (citing *Wooley v. Maynard*, 430 U.S. 705, 710 (1977), quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)).

If Plaintiffs were truly faced with criminal prosecution for acts occurring during the administrative process, then they would present a sufficiently imminent irreparable injury because JWHO is the sole abortion clinic—and essentially the only abortion provider—in the state. Without delving too deeply into the analysis at this point, where a state has a "rational basis to act, and it *does not impose an undue burden*, [it] may use its regulatory power" to control the manner in which abortions are provided. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (emphasis added). An undue burden "exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Id*. at 146 (quoting *Planned Parenthood of Se. Pa. v. Casey*,

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distinguishable because the plaintiff there had already been denied the right to operate.

505 U.S. 833, 878 (1992)). Cases such as *Mazurek v. Armstrong* have asked whether the law would require a woman to travel to a different clinic to obtain an abortion. 520 U.S. 968, 974 (1997). And here that is clearly the case. So if these two doctors stop performing abortions for non-speculative fear of prosecution, it would create an "undue burden" and irreparable harm. *See Jackson Women's Health Org. Inc. v. Amy*, 330 F. Supp. 2d 820, 823 (S.D. Miss. 2004) (enjoining regulation that would have effect of closing JHWO).

Defendants essentially agree that the harm would be irreparable if the doctors faced a credible threat of prosecution or closure but argue that the risk here is not immediate enough, observing that various officials have agreed not to prosecute until the administrative process concludes. Plaintiffs obviously disagree, and observe certain undisputed facts. First, if the Act is allowed to take effect, they will not yet meet the new qualifications for licensing. Second, the statutes provide both civil and criminal sanctions for operating out of compliance. Third, the statutes have never been interpreted. And fourth, Defendants have never rebutted, despite several opportunities, Plaintiffs' concern that the officials' assurances to abstain from prosecution until later would not preclude future prosecution for operating the Clinic while Plaintiffs seek admitting and staff privileges.

Looking first to the statutory framework, it seems that some of the Plaintiffs' concerns are not credible. When the State finds the Clinic in non-compliance, it will give notice within 10 days and

give the Clinic 10 days to propose a "Plan of Correction" outlining how and when it will correct the deficiencies. Under section 41-75-16, the Clinic must be given a "reasonable time, under the particular circumstances not to exceed six (6) months from [July 11, 2012], within which to comply with [the Act.]" If at the end of that period, the doctors still do not have admitting privileges, then the State will officially notify JWHO of its intent to revoke the license and initiate the administrative revocation proceedings. The procedure to revoke JWHO's license is governed by section 41-75-11 of the Mississippi Code, which provides for a hearing and appellate process which would take at least 60 days to complete. Plaintiffs' ability to operate the Clinic would continue through any appeal of the final revocation decision of the Department of Health because the statutory section allowing for an appeal specifically provides that "[p]ending final disposition of the matter, the status quo of the applicant or licensee shall be preserved, except as the court otherwise orders in the public interest." Miss. Code Ann. § 41-75-23.

Finally, section 41-75-26 criminalizes operation of an abortion clinic out of compliance with the licensing requirements and provides a civil remedy for injunctive relief against violations of the abortion licensing law: elements:

> any violation of any provision of this chapter regarding abortion facilities or of the rules, regulations and standards promulgated in furtherance thereof . . . shall be punishable by a fine not to exceed One Thousand Dollars

> ($1,000.00) for each such offense. Each day of continuing violation shall be considered a separate offense.

While this statute could be interpreted to permit prosecution or civil litigation over any knowing operation of an abortion facility that fails to comply with applicable standards even while corrective action is sought, the statute must be read together with the other sections pertaining to licensing requirements governing abortion facilities. *See United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995) (noting *in pari materia* rule of statutory construction which "allows [the Court] to consider all statutes that relate to the same topic; therefore, if a thing in a subsequent statute comes within the reason of a former statute, [the Court] transpose[s] the former statute's meaning to the thing in the subsequent statute").

When read in harmony, the relevant statutes contemplate (1) that abortion facilities are given a period of time within which to comply with newly-adopted licensing standards and (2) "the status quo of the applicant or licensee shall be preserved" during that process—i.e., it shall retain its license and be able to continue to operate lawfully pending final disposition of an appeal of a revocation decision. Miss. Code Ann. §§ 41-75-16, 41-75-23. The Court reads these provisions together to mean that no prosecution or civil proceeding may be maintained for operating an abortion facility out of compliance with the licensing standards while the state administrative and appeal process are ongoing. If

this were not the case, the maintenance of the status quo during an appeal would be meaningless.

But that does not necessarily resolve the issue because ambiguity remains as to whether Plaintiffs could face sanctions for current practices after the administrative process concludes. Granted, Defendant Smith has stated that "a clinic's violation of licensure requirements does not become subject to criminal or civil penalty until" the administrative process runs its course. Def. Smith's Resp. [15] a 1–2. He offers no further explanation, but seemingly relies on section 41-75-23, which protects Plaintiffs by maintaining the status quo pending final disposition of the matter. But section 41-75-23 also states that the status quo shall be preserved "except as the court otherwise orders in the public interest." Miss. Code Ann. § 41-75-23.

As used in this context, a state court could, based on the "public interest" exception in the statute, revoke the status quo and thereby subject Plaintiffs to criminal and civil liability for having operated out of compliance. "Public interest" is vague in this context. *See Women's Med. Ctr. of Nw. Houston*, 248 F.3d at 422 ("Especially in the context of abortion, a constitutionally protected right that has been a traditional target of hostility, standardless laws and regulations such as these open the door to potentially arbitrary and discriminatory enforcement.").

And the possibility of a "public interest" exception to the protection section 41-25-23 provides lends additional credence to Plaintiffs' argument that the Defendants, while saying they will not prosecute

now, have never promised to abstain from future prosecution for the days of non-compliance that will begin when the Act takes effect. Defendants had an opportunity to extinguish that argument in their supplemental response but did not. When the issue was raised again at the hearing, Defendants' counsel merely stated, "I would almost venture to say that there's no intent on prosecuting any of these doctors and taking their license away."[2] Given the highly charged political context of this case and the ambiguity still present, the Court finds that there would be a chilling effect on the Plaintiffs' willingness to continue operating the Clinic until they obtained necessary privileges. Therefore, an irreparable injury currently exists.[3]

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[2] It should be noted as well that there is no record evidence that Defendant Smith would not prosecute. Although he made that assurance in a response filed by counsel, there was no affidavit provided due to the emergency nature of the motion for TRO, and Smith did not personally appear at the hearing.

[3] Plaintiffs also make peripheral reference to the possibility that disciplinary penalties may at some future time be levied against the doctors and nurses who staff the Clinic for their actions in continuing to provide abortions while pursuing compliance with the Act. *See*, *e.g.*, Pls.' Supplemental Mem. [19] at 5 (referencing "the prospect of criminal *and disciplinary* penalties") (emphasis added). They have, however, produced no record evidence, despite many opportunities to do so, showing a credible threat of disciplinary action that is not entirely speculative. *See Holland Am. Ins. Co.*, 777 F.2d at 997 ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant."). Plaintiffs have also failed to demonstrate that they face a legitimate threat of any negative repercussions for having operated as sections 41-75-16 and 41-75-23 allow them to do. That said, if circumstances change and the threat of disciplinary

As for the other factors for injunctive relief, the Court finds that there exists a substantial likelihood of success on the merits and that the threatened injury—the closure of the state's only clinic creating a substantial obstacle to the right to choose—outweighs any harm that will result if the injunction is granted. This is especially true in light of the Defendants' promises that they have no intention to pursue civil or criminal sanctions at this time. Finally, the grant of an injunction will not disserve the public interest, an element that is generally met when an injunction is designed to avoid constitutional deprivations. A preliminary injunction should therefore be entered.

Such a finding does not, however, necessitate enjoining the entire Act at this time. In *Ayotte v. Planned Parenthood of N. New England*, the Court observed that "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." 546 U.S. 320, 328–29 (2006) (citations omitted). Undertaking this task requires the Court to consider three "interrelated principles": (1) "we try not to nullify more of a legislature's work than is necessary"; (2) the Court should not rewrite state law; and (3) the Court should not strike portions of the law if the State would prefer that the entire statute fail. *Id*. at 329–30.

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proceedings or penalties materialize, the Court's order can at that time be modified to reflect a then-substantial threat of irreparable harm.

In this case, the Defendants stated that if injunctive relief is provided, they would want an order requiring Plaintiffs to continue their efforts to comply with the Act. Plaintiffs likewise agreed that they should be required to continue that process. Accordingly, the Court enjoins Defendants from (1) seeking to employ the judicial override found in section 41-75-23 in order to initiate criminal or civil penalties for operating the clinic without the privileges the Act requires and (2) later enforcing those penalties for operating without privileges while engaged in the administrative process.

III. Conclusion

For these reasons, the motion for preliminary injunction [5] is granted in part. The Act will be allowed to take effect, but Plaintiffs will not be subject to the risk of criminal or civil penalties at this time or in the future for operating without the relevant privileges during the administrative process. This will maintain the status quo in this litigation because the Defendants will be precluded from taking action that they do not now contemplate while Plaintiffs will be permitted to operate lawfully while continuing their efforts to obtain privileges as they said they would.[4]

Finally, it should be observed that this case presents a fluid situation. As noted, we do not yet

[4] Defendants observe that enjoining the entire Act would actually alter the status quo because Plaintiffs would be disincentivized to continue seeking privileges, and their success or failure in obtaining privileges could impact the ultimate analysis.

know whether the Clinic will obtain admitting and staff privileges. As both parties stated during the hearing, the resolution of that issue will impact the ultimate issues in this case. Should changed circumstances warrant further or different preliminary injunctive relief before this matter proceeds to trial, this Order would not prevent any party from seeking such other relief.

SO ORDERED AND ADJUDGED this the 13th day of July, 2012.

s/ Daniel P. Jordan III
UNITED STATES DISTRICT JUDGE