No. 14-997

In the Supreme Court of the United States

MARY CURRIER, STATE HEALTH OFFICER OF THE MISSISSIPPI DEP'T OF HEALTH, *ET AL.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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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.*

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"),[1] an Illinois nonprofit founded in 1981, consistently defends federalism and supports state and local autonomy in areas – such as public health – of traditionally state and local concern. EFELDF also has longstanding interests in protecting unborn life and in adherence to the

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the respondents' written consent with the Clerk, and petitioners have lodged their blanket consent to all *amicus* briefs. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

Constitution as written. Accordingly, EFELDF has direct and vital interests in the issues raised here.

STATEMENT OF THE CASE

Jackson Women's Health Organization – Mississippi's only abortion clinic – and one of its doctors (collectively, "JWHO") have sued state and county officers (collectively, "Mississippi") to enjoin Mississippi's law requiring that doctors have hospital admitting privileges within 30 miles to perform abortions. In 2012, House Bill 1390, Miss. Gen. Laws 2012, ch. 331 ("HB1390"), imposed this requirement on abortion clinics by eliminating an exemption that they previously enjoyed, Miss. Admin. Code 15-16-1:42.9.7 (2011), from the admitting-privilege requirements applicable to all ambulatory surgical centers ("ASCs"). MISS. CODE §41-75-1. A divided Fifth Circuit panel held that closing a state's last-remaining abortion clinic violated the rights adopted in *Roe v. Wade,* 410 U.S. 113 (1973), and modified in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

Specifically, the panel majority found HB1390 to impose an undue burden on women seeking abortion under *Casey,* based on the limited *intrastate* access to abortions. In doing so, the panel majority refused to weigh nearby abortion clinics in adjacent states in the *Casey* "undue-burden" analysis. To justify not considering these nearby clinics, the panel majority unearthed a separate-but-equal precedent, *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938), for the proposition that states cannot deny a legal education to racial minorities and cure that denial by sending those minorities to law school in another state.

In all material respects except the happenstance that JWHO was Mississippi's only abortion clinic, HB1390 is identical to the pertinent parts of the Texas law that the Fifth Circuit previously upheld in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583 (5th Cir. 2014). The panel found *Abbott* controlling as far as that decision went, but declined to extend *Abbott* to the situation where a state regulation of the abortion industry closes the last abortion clinic in the state.

Amicus EFELDF adopts the facts as stated by Mississippi, Pet. at 5-13, but also relies on the judicially noticeable legislative facts described here. Under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd ("EMTALA"), hospitals must treat emergency-room patients, regardless of their ability to pay for their care. Significantly, Mississippi enacted HB1390 in the wake of the Gosnell prosecution and the accompanying revelations about the abortion industry not only murdering live-born, viable infants but also endangering and even killing women abortion patients. *See In re County Investigating Grand Jury XXIII,* Misc. No. 9901-2008 (Pa. C.P. Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report").

Under the heading "Who Could Have Prevented All this Death and Damage?," the Gosnell grand jury found that Pennsylvania's failure to regulate abortion providers as ASCs contributed to the death of at least one patient:

> Had [the Pennsylvania Department of Health ("DOH")] treated the clinic as the ambulatory surgical facility it was, DOH

> inspectors would have assured that the staff were all licensed, that the facility was clean and sanitary, that anesthesia protocols were followed, and that the building was properly equipped and could, at least, accommodate stretchers. Failure to comply with these standards would have given cause for DOH to revoke the facility's license to operate.

Gosnell Grand Jury Report, at 215; *see also id.* at 21, 45, 77-78, 129, 139-41, 155.

SUMMARY OF ARGUMENT

In our federal system, the police power to protect public health belongs to the states (Section I.A), not to the federal government (Section I.B). Insofar as the abortion industry cannot credibly self-regulate (Section I.C), this Court must resolve the confusion in the lower federal courts (Section I.D).

This Court should reject JWHO's claims because *Casey* applies a different test for state laws that restrict abortions in the interest of maternal health than it applies to state laws that do so in the interest of the unborn child, and because HB1390 meets the test applicable here. Specifically, challenges to state regulations that protect maternal health require the plaintiff to establish both of two elements: (1) the regulation is *unnecessary;* and (2) the regulation has either the purpose or effect of presenting a *substantial* obstacle (*i.e.,* an undue burden). If the regulation is necessary (*i.e.,* not "unnecessary"), however, there is no *Casey-Roe* violation (Section II.A). Further, by expanding the *Casey* substantive-due process right without the analysis required by *Washington v. Glucksberg,* 521 U.S. 702, 720-21

(1997), the panel majority violated *Glucksberg* by judicially creating new rights (Section II.B).

Relying on *Gaines* to compel Mississippi – and thus every state – to provide an in-state abortion clinic would tear *Gaines* from its equal-protection moorings and create unlimited additional, unrelated due-process rights that states must also now satisfy (Section III.A). Rather than accept that result, this Court should reject JWHO's claim to preferential treatment vis-à-vis other medical practices (Section III.B.1) and afford future abortion patients the same protections that Mississippi law provides to patients in other ASC settings (Section III.B.2).

ARGUMENT

I. THIS COURT HAS AN OBLIGATION TO REVIEW THE LOWER FEDERAL COURTS' RULINGS AGAINST STATE ABORTION REGULATIONS BECAUSE NO OTHER AUTHORITY CAN REVIEW THEM

The states are the traditional regulators of public health and safety, and our federal system denies both the federal Executive Branch and Congress the police-power authority to regulate in place of the states. If Mississippi cannot regulate the abortion industry's excesses, and the federal government cannot, that leaves only the judiciary and the abortion industry as possible regulators, which leaves no one who is both qualified and unbiased to protect public health.

At the outset, *amicus* EFELDF respectfully submits that the judiciary is ill-suited in training to determine or second-guess what procedures are safe or necessary: federal courts are not "the country's *ex*

officio medical board." *Gonzales v. Carhart,* 550 U.S. 124, 164 (2007) (interior quotations omitted); *cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice medicine than they are to practice social engineering. Further, "[i]t is not the mission of this Court or any other to decide whether the balance of competing interests … is wise social policy." *Harris v. McRae,* 448 U.S. 297, 325-26 (1980). Nonetheless, because *Roe* and its progeny have inserted this Court and the federal judiciary into this issue, it is imperative for this Court to resolve the issues that its prior decisions have left unresolved or unclear.

Too often, however, this Court appears to avoid hearing abortion issues, even when the circuits are split on relevant issues. *Compare, e.g., Planned Parenthood Ariz., Inc. v. Humble,* 753 F.3d 905, 914 (9th Cir.), *cert. denied* 135 S.Ct. 870 (2014) *with Planned Parenthood Sw. Ohio Region v. DeWine,* 696 F.3d 490, 514-15 (6th Cir. 2012); *Abbott,* 748 F.3d at 601-05. *Amicus* EFELDF respectfully submits that this Court owes it to the sovereign states – and to the citizens they are obligated to protect – to hear any abortion case that raises substantial federal questions and would resolve either uncertainty in this Court's prior decisions or new issues not previously decided by this Court.

A. Dubious Lower-Court Rulings Displace the States' Police Power to Protect Public Health and Constitutionalize Substandard Medical Care

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, matters of local concern." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (interior quotations and alterations omitted). "That [police] power belonged to the States when the Federal Constitution was adopted," "[t]hey did not surrender it, and they all have it now." *Mugler v. Kansas,* 123 U.S. 623, 667 (1887) (internal quotations omitted). Significantly, *Mugler* and the authorities on which it relied defended states' residual police power against challenges under the Fourteenth Amendment. *Id.; Northwestern Fertilizing Co. v. Village of Hyde Park,* 97 (7 Otto) U.S. 659, 667 (1878). The generation that ratified the Fourteenth Amendment thus recognized that the states' police power continued in effect.

Accordingly, the Due Process Clause poses no barrier to Mississippi's right – indeed, its duty – to protect its citizens via this police power. *City of Chicago v. Sturges,* 222 U.S. 313, 322 (1911); *cf. Mississippi State Bar v. Collins,* 214 Miss. 782, 800 (Miss. 1952) (under police power, legislature has a "duty to protect the public against imposition and incompetence of persons professing to be qualified to practice law"). Here, HB1390's ASC provisions are intended to save lives, and federal courts should not second-guess Mississippi's exercise of its police power on this public-health issue. Significantly, the Gosnell

grand jury identified regulating abortion clinics as ASCs as one action that could save lives. Gosnell Grand Jury Report, at 215; *see also id.* at 21, 45, 77-78, 129, 139-41, 155. Insofar as federal courts are not "the country's *ex officio* medical board," *Gonzales,* 550 U.S. at 164 (interior quotations omitted), they have no legitimate authority to block Mississippi here based on the Due Process Clause. That result would merely constitutionalize substandard medical care *as a matter of federal law,* when the power to regulate lies with the states under our federal system.

B. Congress Lacks the Police-Power Authority to Regulate the Abortion Industry

For their part, the federal Executive and Congress lack a corresponding police power to take up any slack from Mississippi's displacement: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000); *U.S. v. Lopez,* 514 U.S. 549, 566 (1995) ("[t]he Constitution … withhold[s] from Congress a plenary police power"). Thus, while "[t]he States have broad authority to enact legislation for the public good – what we have often called a 'police power,' … [t]he Federal Government, by contrast, has no such authority and can exercise only the powers granted to it." *Bond v. U.S.,* 134 S.Ct. 2077, 2086 (2014) (internal quotations and citations omitted). Because the federal Executive and Legislature lack the police-power authority to regulate abortions, federal courts

displacing the states necessarily set up either the federal judiciary or the abortion industry itself as the regulator responsible for that industry.[2]

C. The Abortion Industry Is Incapable of Self-Regulation and Cannot Have Veto Authority over Reasonable State Regulations

Amicus EFELDF respectfully submits that few industries are less qualified to self-regulate than the abortion industry. Perhaps as a result of the politicization of this issue in the United States – caused in great part by the unprecedented *Roe* decision – abortion providers appear to regard themselves more as civil-rights warriors than as medical providers. Sadly, many abortion providers simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted). Under

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[2] Of course, to the extent that Congress would regulate abortion under the Commerce Power, those regulations would be subject to the same judicial restrictions that Mississippi faces here.

the circumstances, states would be irresponsible to allow the abortion industry to regulate itself.

Certainly, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (opposition to disclosing abortion's correlation with suicide ideation); *K.P. v. LeBlanc,* 729 F.3d 427 (5th Cir. 2013) (abortion industry opposed Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). Similarly, the U.S. abortion industry also has sought to deny the well-established correlation between breast cancer and abortion:

> [I]t will surely be agreed that open discussion of risks is vital and must include the people – in this case the women – concerned. I believe that if you take a view (as I do), which is often called "pro-choice," you need at the same time to have a view which might be called "pro-information" without excessive paternalistic censorship (or interpretation) of the data.

Stuart Donnan, M.D., *Abortion, Breast Cancer, and Impact Factors – in this Number and the Last,* 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 605 (1996). The industry's lack of transparency calls out for heightened regulation, vis-à-vis other, less-politicized medical practices.

Alternatively, state legislatures could reasonably conclude regulatory oversight of the abortion industry is insufficient due to "agency capture"[3] or "political correctness" in the regulators:

> [Pennsylvania Department of Health Senior Counsel Kenneth] Brody confirmed some of what [Janice] Staloski [the Director of the Pennsylvania Department of Health unit responsible for overseeing abortion clinics] told the Grand Jury. He described a meeting of high-level government officials in 1999 at which a decision was made not to accept a recommendation to reinstitute regular inspections of abortion clinics. The reasoning, as Brody recalled, was: "there was a concern that if they did routine inspections, that they may find a lot of these facilities didn't meet [the standards for getting patients out by stretcher or wheelchair in an emergency], and then there would be less abortion facilities, less access to women to have an abortion."

Gosnell Grand Jury Report, at 147 (fourth alteration in original). A legislature seeking to protect public health might well conclude that it needed to take extra legislative action to counteract regulatory inertia.

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[3] "'[C]apture' … is … where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." *Wood v. GMC,* 865 F.2d 395, 418 (1st Cir. 1988); Richard B. Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975).

In any event, even outside the specific abortion context, the panel majority's reasoning is plainly insupportable for substantive-due-process rights. For example, the right to private property is a fundamental right, *McCoy v. Union Elevated R. Co.,* 247 U.S. 354, 365 (1918); *Hendler v. U.S.,* 175 F.3d 1374, 1376 (Fed. Cir. 1999), which would allow any industry to challenge any reasonable police-power regulations that the industry subjectively views as costing too much. Where a regulation's financial impact would force an industry to cease operating in that state, the majority's reasoning suggests that the industry's veto – *i.e.,* its threat to close down – would invalidate any regulation of that industry. Regulated industries do not and cannot have a heckler's (or slacker's) veto over reasonable state regulation, allowing even the laxest operator to invalidate state regulations by threatening to quit

In summary, claims that states have targeted the abortion industry for *unwarranted* scrutiny have it precisely backwards. Here, Mississippi has regulated an industry that cuts corners and hides information by requiring that the industry comply with generally applicable safety measures, as opposed to laxer measures put forward by the industry itself.

D. This Court Must Not Shirk Its Duty to Resolve the Complications that *Roe* and Its Progeny Have Created

If neither the federal Executive nor Congress can regulate the abortion industry and the industry itself cannot be trusted to self-regulate, either Mississippi or this Court must authoritatively address the issues presented here. Accepting *arguendo* that this Court

will not reverse *Roe* and *Casey* in this case does not mandate the result reached by the Fifth Circuit. Instead, there are numerous intermediate positions in which this Court could reconcile the states' interest in protecting the health of their citizens with the personal interests first advanced in *Roe*. Having entered this fray, the Court cannot credibly now shirk its duty to resolve the confusion in the lower federal courts and the resulting intrusions into the police power of the sovereign states.

II. JWHO'S CLOSURE WOULD NOT IMPOSE AN "UNDUE BURDEN" UNDER *CASEY*

Even assuming that JWHO would close *and that no other abortion provider would arise to fill that market void,* the closure would not violate *Casey*. *Amicus* EFELDF fully supports Mississippi's analysis of why HB1390 does not impose an "undue burden" on *Roe-Casey* rights. *See* Pet. at 16-21. For two distinct reasons, however, EFELDF respectfully submits that the undue-burden test does not apply as the panel majority invoked it. First, for "necessary" regulations to protect maternal health – as opposed to protecting unborn life – the undue burden test does not even apply. Second, because the *Roe-Casey* line of cases never recognized a right to in-state access to abortion clinics, the panel majority has, in effect, created a new substantive right, with no attempt to satisfy the *Glucksberg* test for creating such new rights. Because that in-state access right cannot meet the *Glucksberg* test, this Court should – indeed, must – reverse.

A. As a Necessary Protection of Pregnant Women's Health, HB1390 Does Not Even Trigger Undue-Burden Review

Significantly, HB1390's focus differs from the focus of the state laws at issue in *Roe* and *Casey*. The *Roe-Casey* line of cases concerned states' ability to *prohibit or restrict* abortions in the interest of the *unborn child* and the state's interest in that new life. By contrast, this litigation concerns the states' power to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. Although *Casey* laid out a test for this category of maternal-health regulations, the language in *Casey* not only has been poorly understood by the lower courts but also is *dicta* in any event. For both reasons, this Court should review the panel decision here to clarify the law, now that an actual case or controversy has reached this Court.

Casey promulgated a five-part test for reconciling individual rights to an abortion with states' rights both to regulate maternal health and safety and to protect the life of the unborn child:

> (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, 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.

(b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. *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.*

(d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade,* and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment,

> for the preservation of the life or health of the mother."

Casey, 505 U.S. at 878-79 (emphasis added; citations omitted). Significantly, only clause (c), on maternal-health, asks whether a state regulation is necessary.

Amicus EFELDF respectfully submits that only maternal-health-based regulations include the "necessity" inquiry because only such regulations protect the holders of the *Roe*-based right to an abortion, which justifies placing that inquiry *before* determining whether the regulation presents an undue burden.[4] Were it otherwise, states would be hard-pressed to prohibit even "back-alley" abortions, which plainly is not the law. *Connecticut v. Menillo,* 423 U.S. 9, 10-11 (1975). As *Menillo* recognized contemporaneously with *Roe,* states may require that "abortion [be] performed by *medically competent personnel* under conditions insuring *maximum safety* for the woman." *Id.* (emphasis added); *accord Roe,* 410 U.S. at 150; *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997). Of course, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," which "provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales,* 550 U.S. at 164 (emphasis added). *Amicus* EFELDF respectfully submits that Mississippi has done no more here.[5]

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[4] *Amicus* EFELDF emphatically does not support lesser protections for the unborn child. *Amicus* EFELDF is merely describing this Court's holdings.

[5] Mississippi has sovereign interests both in protecting the public health and in conserving the public fisc with regard to the women patients dumped into Mississippi emergency rooms

As *Casey* itself recognizes, "disagreement is inevitable," "[e]ven when jurists reason from shared premises," and "[w]e do not expect it to be otherwise with respect to the undue burden standard." *Casey,* 505 U.S. at 878. As *amicus* EFELDF understands *Casey* – and contrary to how the panel majority understood *Casey* – the undue-burden analysis does not enter the equation for "necessary" regulation of abortion procedures to protect women seeking an abortion. *Compare Casey,* 505 U.S. at 878 (only *unnecessary* regulations of women's health trigger the substantial-obstacle inquiry) *with* Pet. App. 10a-11a (any regulation of abortion triggers the substantial-obstacle inquiry). As indicated, only the *Casey* maternal-health clause – clause (c), quoted *supra* – alone among the *Casey* clauses includes the limitation that only *unnecessary* regulations trigger

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by the abortion industry. Either ground provides a vital basis for requiring the abortion industry to comply with HB1390. Mississippi intended HB1390 to increase the level of care provided to women seeking abortions in Mississippi and to avoid the operation of substandard clinics like the one operated in Philadelphia by Kermit Gosnell. By making it more difficult for Mississippi-based Gosnells to continue such practices, HB1390 enables Mississippi to meet its police-power obligation to ensure the health and safety – indeed, the lives – of Mississippians. Gosnell Grand Jury Report, at 215 (regulating abortion clinics as ASCs would avoid unnecessary death); *accord id.* at 21, 45, 77-78, 129, 139-41, 155. Moreover, EMTALA requires Mississippi hospitals to treat women suffering from abortion-related complications, even if they are unable to pay for their care. 42 U.S.C. §1395dd. In that way, JWHO passes the downside costs of its abortion practices onto the Mississippi medical system, in which Mississippi obviously has an interest.

the undue-burden inquiry. *Id.* at 878. As such, the question of whether burdens are "undue" does not even arise for *necessary* maternal-health regulations.

Specifically, following *Roe, Menillo,* and *Mazurek, Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey,* 505 U.S. at 878. The only prohibition that *Casey* applied to laws that protect pregnant women is that "*[u]nnecessary* 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." *Id.* (emphasis added). To unpack this language to its constituent parts, an undue-burden violation for state maternal-health regulation requires that the plaintiff establish both of two elements: (1) a maternal-health regulation is *unnecessary;* and (2) that regulation either has the purpose or effect of presenting a *substantial* obstacle. If a regulation is necessary (*i.e.,* not unnecessary), that ends the inquiry: there is no *Casey-Roe* violation.

B. The Panel Majority Impermissibly Expanded Substantive Due-Process Rights without the Analysis that *Glucksberg* Requires

Although, by its own terms, the *Casey* undue-burden test does not even apply to maternal-health regulations like HB1390 under the circumstances here, *see* Section II.A, *supra,* this Court must not *expand* the *Casey* test – assuming *arguendo* that it applied – to create a new right to intrastate access to abortion clinics.

Casey did not find a right to intrastate access to abortion clinics, and – as Judge Garza recognized in dissent – the panel majority therefore expanded the substantive due-process rights recognized in *Casey*. Pet. App. 40a (Garza, J., dissenting). In doing so, the panel majority recognized a new substantive due-process right without the analysis required by *Glucksberg*. Under *Glucksberg,* however, no such right exists.

After *Casey,* this Court prospectively foreclosed using the Due Process Clause to create new substantive rights without a painstaking analysis, requiring "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Glucksberg,* 521 U.S. at 720. Under that analysis, to "extend[] constitutional protection to an asserted right or liberty interest," the right or interest must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Even those who believe that a right to intrastate access to abortion clinics could meet the second prong must admit that it cannot meet the first.

Under *Glucksberg,* then, federal courts cannot expand *Casey,* at the expense of limiting States' reserved police-power and Tenth Amendment rights: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink." *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001) (declining to expand an existing implied right of action after having prospectively

rejected the creation of such rights of action).[6] Similarly here, federal courts cannot expand *Casey* without satisfying *Glucksberg*.

Indeed, the case for incrementally expanding the judicially-recognized right in *Sandoval* was stronger than the case for recognizing an expanded abortion right here. In *Sandoval,* if it disagreed with a decision expanding rights, Congress easily could amend the statute. Here, by contrast, the question is not one of amending a statute, but rather the more difficult one of amending the Constitution.

This Court should use this litigation as an opportunity to hold that the panel majority failed to apply the *Glucksberg* analysis when considering the expansion of a substantive-due-process right.

III. THIS COURT SHOULD REJECT THE PANEL MAJORITY'S INVOKING EQUAL-PROTECTION RATIONALES INTO THE *ROE-CASEY* ANALYSIS

In addition to failing under *Roe-Casey* abortion precedents, the Fifth Circuit's *Gaines*-based analysis also fails under equal-protection precedents. *Amicus* EFELDF respectfully submits that the majority's

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[6] *Sandoval,* 532 U.S. at 287, declined to expand the existing implied right of action for Title VI statutory violations to include an implied right of action for Title VI *regulatory* violations. As with *Glucksberg* and new substantive-due-process rights, this Court had rejected its prior practice of reading implied rights into statutes. *Cannon v. Univ. of Chicago,* 441 U.S. 677, 689 (1979). In *Cannon* and *Glucksberg,* the rejection applied *prospectively* to finding new rights or expanding existing ones, without undoing precedents in which this Court previously had acted under the now-rejected policy of judicially creating or implying rights.

strained and flawed reliance on long-outdated equal-protection precedent provides another reason for this Court to review (and to reject) the decision.

A. Equal-Protection Precedents Do Not Advance *Roe-Casey* Rights

Amicus EFELDF wholly supports Mississippi's and Judge Garza's able demonstration why the Court cannot import fragments from the equal-protection rights at issue in *Gaines* to this substantive due-process case. *See* Pet. at 22-26; Pet. App. 32a-43a. Simply put, a right or privilege that the state itself provides to one group within its jurisdiction must be provided to all similarly situated groups in that jurisdiction, unless the denial can meet equal-protection scrutiny. EFELDF now provides further equal-protection reasons why *Gaines* cannot apply.

The then-perceived legality of "separate but equal" "rest[ed] wholly upon the equality of the privileges which the laws give to the separated groups *within the State*." *Gaines,* 305 U.S. at 349 (emphasis added). In that context, the "question [t]here [was] *not of a duty of the State to supply legal training,* or of the quality of the training which it [did] supply," but only the state's "duty when it provide[d] such training to furnish it to the residents of the State upon the basis of an equality of right." *Id.* (emphasis added). Even under current equal-protection principles, courts evaluate restrictions on attending School A independently from whether alternate in-state schools (*e.g.,* School B) exist. *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 729 (1982). Fragments from equal-protection cases (where the state may *terminate* its services equally

as an alternative to providing them equally[7]) cannot credibly be imported, out of context, to abortion cases, where JWHO claims that states cannot terminate access.

The level of judicial scrutiny is another key distinction between state laws restricting educational opportunity by race and those regulating abortion providers for public health. Unlike the heavy burden that race-based restrictions would face, restrictions of abortion need only meet the rational-basis test, *Harris,* 448 U.S. at 322; *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 271 (1993), which even the majority recognized is met here. Pet. App. at 27a. The within-state fragment quoted from *Gaines,* then, is not a *per se* bar, but rather a *prima facie* case, which the *Gaines* defendants could not rebut. Here, by contrast, Mississippi has rebutted that *prima facie* case with its rational basis for HB1390.

B. Equal Protection Cuts *Against* JWHO

Contrary to the panel majority's pro-JWHO equal-protection analysis, equal-protection principles cut precisely the opposite way. *Amicus* EFELDF respectfully submits that the abortion industry that

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[7] "[W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews,* 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). The state in *Gaines* thus could have ended in-state legal training for *everyone,* as an alternative to providing "equal" in-state legal training to minorities.

JWHO represents is not entitled to looser standards than similarly situated ASC practices in other medical fields and that allowing the panel majority's decision to stand would deny abortion patients equal protection of the law.

1. Abortion Is Not Privileged over All Other Types of Medical Practice

Notwithstanding the panel majority's reliance on *Gaines, amicus* EFELDF respectfully submits that the more-relevant equal-protection question here is not whether the undue-burden analysis under *Casey* must exclude out-of-state clinics – and thus, for the first time, require each state to have an abortion clinic, no matter what – but whether abortion doctors deserve that preferential treatment, vis-à-vis other medical practices. Specifically, there appears to be no good reason to exempt abortion clinics from the admitting-privilege requirements that Mississippi imposes on other ASCs. After all, the Constitution does not "elevate [abortion doctors'] status above other physicians in the medical community." *Gonzales,* 550 U.S. at 163. Accordingly, this Court should reject JWHO's attempt to leverage an exemption from state regulation on the *Roe-Casey* rights of future patients.

2. The Panel Majority's Flawed Decision Improperly Denies Abortion Patients Equal Protection of the Laws

Although she may have difficulty establishing liability for damages against the responsible federal officers, a future abortion patient injured by JWHO could claim that the lower courts' decisions denied

her equal protection of the laws. All medical patients – except abortion patients – would enjoy the protections of the state regulatory regime for ASCs. When injured as the result of that exception, a future patient will feel injured by the federal judiciary. Indeed, the prospect that JWHO's victory would injure *Roe-Casey* rights holders begs the question why JWHO can assert the *Roe-Casey* rights of its future patients.[8]

While *amicus* EFELDF does not dispute that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between JWHO and its *future* patients who may seek abortions at the JWHO clinic: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski,* 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortionists in abortion clinics.

Under *Kowalski,* hypothetical future relationships can no longer support third-party standing. As such, JWHO cannot assert its future patients' *Roe-Casey* rights. JWHO's invoking those patients' rights also fails for two reasons beyond the limits *Kowalski* imposes upon hypothetical future relationships.

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[8] With third-party standing, federal courts limit plaintiffs' ability to assert absent third parties' rights unless the plaintiffs have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004).

First, JWHO's challenge to HB1390 seeks to undermine legislation that Mississippi enacted to protect women from abortion-industry practices, a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from the required "identity of interests"[9] – the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow,* 542 U.S. at 15 n.7. Under *Newdow,* abortion providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of the lawsuit is to enjoin the state from protecting those very same women from the abortion providers' substandard care.

Second, the instances where this Court has found standing for abortion doctors involve laws that apply equally to *all abortions* and to *all abortion doctors,* so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Mississippi regulates in the interest of pregnant women who contemplate

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[9] *Lepelletier v. FDIC,* 164 F.3d 37, 44 (D.C. Cir. 1999); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.,* 280 F.3d 278, 288 (3d Cir. 2002); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 810 (11th Cir. 1993).

abortions and imposes no pertinent restrictions either on hospital-based abortions or on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, doctors and patients potentially may have sufficiently aligned interests. Here, all abortion doctors do not share the same interests as future abortion patients. Indeed, at least one JWHO doctor has admitting privileges (Pet. at 6), and JWHO undoubtedly could hire additional doctors with admitting privileges. Consequently, the JWHO clinic and the plaintiff JWHO doctor do not even share identical interests. Without an identity of interests between JWHO and future abortion patients, the doctor-patient relationship is not close enough to allow JWHO to assert the *Roe-Casey* rights of absent third parties.[10]

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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[10] JWHO has its own standing to challenge HB1390 under the rational-basis test, without the *Roe-Casey* rights holders' elevated scrutiny. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977).

March 23, 2015

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