No. 19-2051

# In the United States Court of Appeals for the Seventh Circuit

WHOLE WOMAN'S HEALTH ALLIANCE; ET AL.,
*Plaintiffs-Appellees*,

*v.*

CURTIS T. HILL, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF INDIANA, ET AL.,
*Defendants-Appellants.*

On Appeal from the United States District Court
for the Southern District of Indiana
No. 1:18-cv-01904-SEB-MJD

## BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, IDAHO, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General
kyle.hawkins@oag.texas.gov

HEATHER GEBELIN HACKER
Assistant Solicitor General

Counsel for *Amici Curiae*

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici* are the States of Texas, Alabama, Alaska, Arkansas, Idaho, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.[1] All States have a compelling interest in regulating the medical profession, including requiring certain medical facilities to be licensed. At least 25 States, including most *amici* States, specifically require abortion clinics to be licensed, as they do various other medical facilities.[2] To protect the public, many States require applicants for a facility license to demonstrate reputable character and will reject an applicant that fails to provide information relevant to the licensing decision. Consequently, *amici* have an interest in ensuring that state licensing requirements are not set aside lightly by federal courts, as Indiana's were here.

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission.

[2] *See* Ala. Code §§ 22-21-20, 22-21-22; Ariz. Rev. Stat. § 36-449.02; Ark. Code § 20-9-302; Conn. Gen. Stat. § 19a-116; Fla. Admin. Code r. 59A-9.020; Ga. Code § 16-12-141(b)(1); Ind. Code § 16-21-2-10; Kan. Stat. § 65-4a02(a); Ky. Rev. Stat. § 216B.0431, 902 Ky. Admin. Regs. 20:360; La. Stat. § 40:2175.4; Md. Code Regs. 10.12.01.02; Mich. Admin. Code 325.3802(d), 325.3811(1); Miss. Code § 41-75-5; 19 Mo. Code Regs. tit. 19, § 30-30.050; Neb. Rev. Stat. § 71-416(1); N.J. Admin. Code § 8:43A-1.3; N.C. Gen. Stat. § 14-45.1(a1), 10A N.C. Admin. Code § 14E.0106(a); Okla. Admin. Code § 310:600-3-1; 28 Pa. Code §§ 29.31, 29.43; S.C. Code §§ 44-41-10(e), 44-41-75(A); S.D. Codified Laws § 34-23A-46; Tenn. Code §§ 68-11-201(3), 68-11-202(a)(1); Tex. Health & Safety Code §§ 171.002, 245.010(a); Utah Code §§ 26-21-2(1), 26-21-2(23)-(24); 12 Va. Admin. Code §§ 5-412-10, 5-412-20.

Additional States include abortion clinics in general licensing requirements for clinics and medical facilities. *See, e.g.,* Ohio Rev. Code § 3702.30(E)(1), *Founder's Women's Health Ctr. v. Ohio State Dep't of Health*, Nos. 01AP-872, 01AP-873, 2002 WL 1933886, *14 (Ohio Ct. App. 2002); R.I. Gen. Laws §§ 23-17-2(8), 23-17-4(b).

Appellee Whole Woman's Health Alliance (WWH) has a history of jeopardizing the health and safety of its patients by flouting state regulations. The conditions in its clinics would have gone undiscovered—and unremedied—without state licensing and inspection requirements. WWH's track record in other States demonstrates that Indiana is entirely justified in requiring WWH to meet licensing requirements and agree to regulation, inspection, and oversight. WWH's history and actions during the licensing application process also justified Indiana's requests for additional information, especially given that WWH tried to avoid disclosing most of its affiliates that had documented health-and-safety deficiencies.

The district court's decision to override these reasonable state regulations, based on its opinion that they have little benefit, contradicts abortion case law as far back as *Roe v. Wade*. And the recent reminder of what happens when States do not regulate abortion clinics—the case of Pennsylvania abortionist and convicted murderer Kermit Gosnell—provides ample justification for States to require licensure for abortion clinics. *Amici* States urge this Court to vacate the district court's injunction allowing an unlicensed abortion clinic to open notwithstanding Indiana law, and allow Indiana to protect women's health through reasonable facility licensing requirements.

## ARGUMENT

### I. State Regulation of Abortion Providers—Including Whole Woman's Health—Is Constitutional and Necessary to Protect Women.

Contrary to the district court's ruling, not only does binding precedent confirm that requiring abortion clinics to be licensed is constitutional, the benefits of licensure are undeniable. When abortion clinics are left unlicensed and unregulated, women suffer. This has been demonstrated in numerous incidents across the country, a few of which are discussed below. And WWH's own history of deficiencies in multiple States further justifies Indiana's requirement that WWH obtain a license to operate its abortion clinic in South Bend. The district court's injunction should be vacated.

#### A. Binding precedent permits state licensure of abortion clinics, and such licensing requirements are common for medical or health-related facilities.

**1.** The district court held that there is no evidence that licensing WWH's clinic will make it safer, so Indiana could not require a license. *See Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-01904-SEB-MJD, 2019 WL 2329381, *32, *33 (S.D. Ind. May 31, 2019). That is not true. *See* Parts I.B and C *infra*. But aside from that, the district court's decision that the licensing requirement is unconstitutional is contradicted by binding precedent.

*Roe v. Wade* made clear that States may regulate and license the facilities in which abortions are provided. *Roe* did more than merely affirm that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v.*

*Wade*, 410 U.S. 113, 150 (1973); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting same). It also specifically sanctioned licensure of facilities as one way to further that interest:

> Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to *the licensing of the facility*; and the like.

*Roe*, 410 U.S. at 163 (emphasis added).

In the years since *Roe*, the Supreme Court has rejected constitutional challenges to abortion-licensing requirements based on the alleged lack of evidence of benefits. For example, in *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam), the Court summarily reversed the Ninth Circuit because the law allows States to require professional licensing to perform abortions. In the context of upholding a physician-only requirement, the Court explained:

> [T]his line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*."

*Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992) (plurality op.)). The district court's acceptance of that very line of argument in this case is therefore erroneous. Supreme Court precedent makes clear that States may demand that abortion providers and clinics meet basic licensing requirements.

**2.** Because of the well-established legal grounds for doing so, States across the country have required abortion clinics to be licensed for decades. Texas, for example, has required licensure for 34 years.[3] As mentioned above, at least twenty-five States require abortion clinics to be licensed. *See supra* note 2. This is consistent with the common practice of regulating medical facilities in addition to regulating individual physicians. Facility licensing ensures continuous compliance with health-and-safety requirements. Nursing homes, eating disorder centers, funeral homes, mammography facilities, birthing centers, and end-stage-renal-disease facilities commonly require licensure. *See, e.g.,* Ala. Code § 34-20-2; Mont. Code § 50-5-247; Ohio Rev. Code § 4717.06; 35 Pa. Cons. Stat. § 5653; S.C. Code § 44-89-40; Tex. Health & Safety Code § 251.011. Even tanning salons, tattoo parlors, and animal shelters are commonly licensed by States. *See, e.g.,* Kan. Stat. § 65-1926; Tex. Health & Safety Code § 146.002; Wis. Stat. § 173.41.

Licensing is vital to protect the public from harm *before* it occurs, which is why States generally require medical facilities to be licensed. This is particularly crucial in the case of abortion facilities, where women may sustain permanent harm from inadequate care. Binding precedent permits States to require abortion facilities to

[3] *See* Act of May 27, 1985, 69th Leg., R.S., ch. 931, art. 20, 1985 Tex. Gen. Laws 3121, 3173 (enacting former art. 4512.8 of the Revised Civil Statutes); Act of May 18, 1989, 71st Leg., R.S., ch. 678, § 1, sec. 245.001-.016 (enacting Health and Safety Code chapter 245), § 13 (repealing article 4512.8), 1989 Tex. Gen. Laws 2230, 2485, 3165.

obtain a license without running afoul of the Constitution, and the district court's contrary decision was both erroneous and aberrational.

### B. State licensing requirements for abortion clinics are justified.

Not only did the district court ignore binding precedent permitting licensing requirements, it wrongly belittled the State's interest in those requirements. The court below overlooked ample historical evidence that when States do not inspect and regulate abortion clinics, women suffer. Over the years, numerous discoveries of dangerous abortion clinics have prompted States to more closely monitor these facilities to protect patients—and justifiably so.

Take the case of Dr. Raymond Showery, an abortionist who murdered a baby girl born alive after he botched her late-term abortion. *Showery v. State*, 690 S.W.2d 689 (Tex. App.—El Paso 1985, pet. ref'd); *see also Texas Doctor Gets 15 Years For Murder in 1979 Abortion*, N.Y. Times, Sept. 29, 1983, https://www.nytimes.com/1983/09/29/us/texas-doctor-gets-15-years-for-murder-in-1979-abortion.html.[4] While Showery appealed his conviction, he was free on bond and continued to perform abortions, including one on a woman who bled to death after Showery perforated her uterus and uterine artery. *See Showery v. State*, 704 S.W.2d 153, 154 (Tex. App.—El Paso 1986, pet. ref'd); Richard Haitch, *Follow Up on The News; Abortion Sequel 2*, N.Y. Times, Apr. 29, 1984, https://www.nytimes.com/1984/04/29/

[4] When the baby appeared to be breathing and moving her legs, he tried to suffocate her by placing the placenta over her face. *Showery*, 690 S.W.2d at 695. When that did not kill her, he placed her in a bucket of water, and finally in a plastic bag. *Id.* at 695-96.

nyregion/follow-up-on-the-news-abortion-sequel-2.html. Shortly after these incidents, the Texas legislature passed the Texas Abortion Facility Reporting and Licensing Act, which imposed the first licensing requirements on abortion clinics like Showery's. *See supra* note 3.

Other States have also learned that regulating doctors alone is not enough; clinics, too, merit oversight. For example, in the 1980s, Florida inspected and shut down several abortion clinics after investigative reporting revealed deplorable conditions inside. *See* William Saletan, *The Sunshine State: What Reporters and Health Inspectors Found in Florida's Worst Abortion Clinics*, Slate (Feb. 21, 2011, 10:49 p.m.), https://slate.com/news-and-politics/2011/02/unsafe-abortion-clinics-exposed-in-florida-what-health-inspectors-and-reporters-found.html. For instance:

> The clinic's suction equipment had a dark red residue. The staff couldn't recall when it had last been cleaned. Surgical tools were stored in bloody paper towels. . . . "There was actually an abortion-suction device in this place that had green mold growing in it." …"There were dead cockroaches in the sterilizing room … There was no hot water and the hot water taps had been broken for some time. There was no soap at the clinic's three sinks and there wasn't a single sterile surgical glove in the place. A filthy mop that a veteran public health doctor said stunk of dried blood was stored with medical supplies. The air vents were covered with filth."
>
> This was what remained after a cleaning woman had spent a day scouring the clinic. In the trash, inspectors found corroded instruments apparently dumped just before they arrived.

*Id.*

In 1999, the Governor of Louisiana declared a public health-and-safety emergency after investigative reporters revealed shocking deficiencies in one of Louisiana's abortion clinics. The Governor of the State of La., Exec. Order No. MJF 99-5, (Feb. 5, 1999), https://www.doa.la.gov/Pages/osr/other/1999exo.aspx (click "MJF 99-5" link to download). The Governor ordered the State Public Health Officer to ensure such facilities are regulated and inspected. *Id.* In 2011, Louisiana passed its abortion-clinic-licensing law. *See* 2001 La. Acts 391. Mere regulation of physicians was insufficient to prevent these deplorable conditions.

Because of discoveries like these, many States have chosen to regulate abortion clinics more strictly. But dangerous clinics are not relics of the distant past. In 2013, Dr. Kermit Gosnell was convicted of murder for killing babies born alive after attempted abortions. The State had not inspected his clinic for 15 years, even after it was informed of the death of one of Gosnell's patients by the Drug Enforcement Administration (DEA). Grand Jury Report at 20, *In re County Investigating Grand Jury XXIII*, Misc. No. 0009901-2008 (1st Dist. Ct. Pa. C.P.) (Jan. 14, 2011), *available at* https://pafamily.org/wp-content/uploads/2016/01/Report-of-the-Grand-Jury-Gosnell.pdf. As a result, his misdeeds went undetected for years until DEA agents raided his clinic after suspecting him of running a pill mill. What they found was much worse:

> There was blood on the floor. A stench of urine filled the air. A flea-infested cat was wandering through the facility, and there were cat feces on the stairs. Semi-conscious women scheduled for abortions were moaning in the waiting room or the recovery room, where they sat on dirty recliners covered with blood-stained blankets.

> All the women had been sedated by unlicensed staff – long before Gosnell arrived at the clinic – and staff members could not accurately state what medications or dosages they had administered to the waiting patients. . . .
>
> The two surgical procedure rooms were filthy and unsanitary . . . resembling "a bad gas station restroom." Instruments were not sterile. Equipment was rusty and outdated. . . .
>
> The search team discovered fetal remains haphazardly stored throughout the clinic – in bags, milk jugs, orange juice cartons, and even in cat-food containers. . . . Gosnell admitted . . . that at least 10 to 20 percent of the fetuses were probably older than 24 weeks in gestation – even though Pennsylvania law prohibits abortions after 24 weeks. . . .
>
> The investigators found a row of jars containing just the severed feet of fetuses.

*Id.* at 20-21.

Indiana has had its own trouble with substandard facilities. In 2014, Dr. Ulrich Klopfer's medical license was suspended after his abortion clinic was inspected, uncovering several deficiencies with his facility and medical practices. *See* Defs.' Mem. in Opp. to Mot. for Prelim. Inj. at 24-25, *Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-01904-SEB-MJD (S.D. Ind. Apr. 14, 2019), ECF No. 92. Given these practices, one wonders how much worse the situation would have been if Klopfer's clinic had been unregulated. The benefit of requiring abortion clinics to be licensed is clear: Licensure helps prevent harm to women by ensuring oversight, transparency, and compliance with the law.

### C. Whole Woman's Health's history of health-and-safety deficiencies justifies Indiana's licensing requirement.

The district court pointed to the fact that WWH's clinics are still licensed in other States as proof that WWH should be trusted to operate *without* a license. *Whole*

*Woman's Health*, 2019 WL 2329318 at *29. But, as explained below, licensure is exactly what enabled Texas to uncover the lapses in WWH's clinics and require WWH to correct those lapses. In other words, the only reason WWH's clinics are safe enough to operate in other States is *because* of those licensing regulations. And the deficiencies uncovered by state inspectors were not routine or mere technicalities, as suggested by the district court. *Id.* Rather, they were conditions that could have endangered patients if not required to be corrected by the State. This is a reasonable concern, and is indisputably relevant to Indiana's licensing decision.

Further, as discussed below, WWH's lapses were not limited to one clinic, but have been common in WWH's clinics. Some deficiencies were repeated. And WWH has documented deficiencies that affect the safety of chemical abortion in particular, underscoring the importance of licensure and regulation of WWH's Indiana clinic, and of Indiana's reasonable investigation of WWH's affiliates. The district court's contrary conclusion was erroneous.

**1. WWH Austin**

Publicly available inspection reports from WWH Austin show conditions that could endanger patients and violate the law. For example, WWH Austin was fined $22,980 in 2011 by the Texas Commission on Environmental Quality for improper disposal of medical waste and fetal remains. *See* Agreed Order, No. 2011-0954-MSW-E (Tex. Comm'n on Envtl. Quality Feb. 8, 2012), https://www14.tceq.texas.gov/epic/CIO/index.cfm?fuseaction=search.download&agy_dkt_num_txt=2011-0954-MSW-E&agenda_dt=02/08/2012 (click "Commission Issued Order" link to download).

In 2017, according to publicly available documents, WWH Austin failed to ensure that medical instruments were being sterilized properly. *See* Tex. Dep't of State Health Servs. (DSHS) Statement of Deficiencies and Plan of Correction (SDPC), WWH Austin (Jul. 24, 2017), https://checkmyclinic.org/wp-content/uploads/2018/03/TX-WWH-Austin-2017.pdf. The report states that WWH Austin failed to properly account for narcotics and failed to give patients the name and telephone number of the nearest hospital to them, as required by state law. *Id.* Noted in the 2018 report, WWH Austin again failed to properly account for narcotics and failed to give patients the name and phone number of the nearest hospital. *See* DSHS SDPC, WWH Austin (Oct. 15, 2018), https://checkmyclinic.org/wp-content/uploads/2018/03/TEXAS-WWH-Austin.pdf. The report notes the facility had a leaking roof in the recovery room. *Id.*

Pertinent to the South Bend clinic, inspectors found that WWH Austin failed to adhere to FDA protocol when using mifepristone, the drug used to cause chemical abortions. In 2017, the report notes that WWH Austin failed to schedule follow-up appointments with patients receiving chemical abortions. *See* DSHS SDPC, WWH Austin (July 24, 2017), *supra*. This is "very important," according to the FDA, and is required by the drug protocol. *Mifeprex Label* 4, Food and Drug Administration (Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf.

### 2. WWH Beaumont

WWH operated a clinic in Beaumont, Texas for several years. According to publicly available documents, the deficiencies at that clinic were glaring, and again, not mere technicalities. The clinic eventually closed.

A 2011 inspection report noted:

- "[N]umerous rusty spots on the suction machine used on the patient for evacuation of the products of conception[,]"
- "[F]loor[s] were stained and discolored[,]"
- "[A] hole in the procedure room[,]"
- "[S]taff #2 did not know what a sterilization indictor was . . . . nor did she know how to properly seal the peel pouch[,]"
- "[T]he facility failed to staff the clinic with a registered nurse(s) or licensed vocational nurse(s),"
- "[T]he facility failed to provide a safe and sanitary environment[,]"
- "[A] hole . . . in the floor right in front of the patient's bed[,]"
- "[T]he facility failed to provide safe equipment in the patient's procedure rooms[,]"
- "[T]he facility failed to ensure staff was trained in CPR[.]"

DSHS SDPC, WWH Beaumont (Nov. 17, 2011), http://www.texasallianceforlife.org/wp-content/uploads/imported/issues/hb2/DSHS_inspection_WWH_Beaumont_11_17_2011.pdf.

Similar problems were noted the following year:

- "[S]taff members failed to perform the correct procedure for sterilization of surgical instruments[,]"
- "[F]acility failed to maintain the sterility of the surgical instruments before coming into contact with the sterile field[,]"
- "[T]he sterilizer had a gasket leak and the door on the autoclave was not opening properly. Questioned when the safety checks were completed why were these problems not identified? He stated 'that . . . . the facilities do not want to pay for the functional check.'"

DSHS SDPC, WWH Beaumont (Dec. 19, 2012), http://www.texasallianceforlife.org/wp-content/uploads/imported/issues/hb2/DSHS_inspection_WWH_Beaumont_12_19_2012.pdf.

The deficiencies continued according to a 2013 report:

- "[T]he facility failed to provide a safe environment for patients and staff[,]"
- "[N]umerous rusty spots on the suction machines used on the patient for evacuation of the products of conception[,]"
- "[A] 6 inch[] . . . . hole in the flooring had the likelihood to allow rodents to enter the facility,"
- "[T]he facility failed to have the electrocardiograph monitoring equipment ready if an emergency situation occurred in the facility."

DSHS SDPC, WWH Beaumont (Oct. 3, 2013), http://www.texasallianceforlife.org/wp-content/uploads/imported/issues/hb2/DSHS_inspection_WWH_Beaumont_10_03_2013.pdf.

### 3. WWH San Antonio

WWH also operated an abortion clinic in San Antonio. According to publicly available documents, inspectors noted several deficiencies during its annual inspection on October 16, 2018. In addition to yet other deficiencies regarding the tracking of narcotics and failing to give women the name and address of the hospital closest to her home in case of emergency, the report notes the facility "failed [to] ensu[r]e that policies on decontamination, disinfection, and sterilization, and storage of sterile supplies were implemented." DSHS SDPC, WWH San Antonio (Oct. 16, 2018), https://checkmyclinic.org/wp-content/uploads/2018/11/WHOLE-WOMANS-HEALTH-OF-SAN-ANTONIO2__Redacted.pdf.

Like the reports for the Austin and Beaumont clinics, the report notes that WWH San Antonio failed to comply with FDA protocol and state law regarding chemical abortions by failing to schedule required follow-up appointments. *Id.* The clinic closed its doors two months later, complaining about state regulations. *See* Jim Lefko, *Closure of Whole Woman's Health Leaves San Antonio with Two Abortion Clinics*, News4SanAntonio (Jan. 18, 2019), https://news4sanantonio.com/news/local/closure-of-whole-womans-health-leaves-san-antonio-with-2-abortion-clinics.

### 4. WWH McAllen

According to publicly available reports, WWH's McAllen clinic has also had deficiencies. A November 2015 inspection report notes that the facility "failed to enforce written policies governing the facility's total operation, to provide health care in a safe and professionally acceptable environment[,]" and "failed to have a safe and sanitary environment[.]" DSHS SDPC, WWH McAllen (Nov. 10, 2015),

https://checkmyclinic.org/wp-content/uploads/2017/12/TEXAS-WWH-McAllen-2015.pdf. The reports notes products of conception were stored in unlabeled Ziploc bags in a freezer instead of in biohazard bags. *Id.* Inspectors noted the vinyl cover on an exam table was torn, "which can harbor bacteria and prevent the exam table from being completely cleaned." *Id.*

In 2016, a report again notes that the facility failed to maintain a "clean and sanitary environment" because a laminate countertop in the pathology room, which was also used to clean and pack surgical instruments, was "warped and bowed away from the particle board" beneath. DSHS SDPC, WWH McAllen (Sept. 13, 2016), https://checkmyclinic.org/wp-content/uploads/2017/12/TX-WWH-McAllen-2016.pdf. The countertop "was no longer a wipeable surface which could harbor bacteria and infectious matter." *Id.*

In 2017, like the reports for the Austin and San Antonio clinics, the McAllen report notes the clinic failed to give patients the name and phone number of the nearest hospital emergency room to their home. DSHS SDPC, WWH McAllen (Oct. 31, 2017), https://checkmyclinic.org/wp-content/uploads/2017/12/TX-WWH-McAllen-2017.pdf.

**5. WWH Peoria**

Lest the Court believe that WWH's problems are limited to Texas, WWH also operated an abortion clinic in Peoria, Illinois that had multiple deficiencies that could impact patient health, according to publicly available state inspection reports. A January 2017 inspection report indicated that the facility "failed to ensure medical equipment is inspected and maintained to ensure safety. This has the potential to

affect all patients receiving care from [the facility].” Ill. Dep’t of Pub. Health SDPC, WWH Peoria (Jan. 5, 2017), https://checkmyclinic.org/wp-content/uploads/2018/02/ILLINOIS-1704913060-Responsive-Records_Redacted.pdf. The report notes the facility failed to properly store medication. *Id.*

A March 2018 inspection report included multiple deficiencies which had “the potential to affect all patients serviced by the facility.” Ill. Dep’t of Pub. Health SDPC, WWH Peoria (Mar. 23, 2018), https://checkmyclinic.org/wp-content/uploads/2018/02/WWH-Peoria-Mar-2018-1.pdf. According to the report, the clinic failed to ensure that all three of the clinic’s physicians were properly credentialed, and failed to ensure that a registered nurse was on duty when patients were present. *Id.* It also failed to maintain the required AED in working order, despite it being on the emergency crash cart. *Id.* The report states that the facility also “failed to ensure patient care equipment was appropriately sterilized prior to patient use[,]” and “failed to ensure its policy on multidose vials [of medication] was followed to prevent the potential for cross[]contamination.” *Id.* The report further notes that “the Facility failed to ensure IV conscious sedation was administered and/or supervised only by” appropriately credentialed physicians. *Id.*

WWH announced the closure of the Peoria clinic in May 2019. Andy Kravetz, *Whole Woman’s Health to Close in Peoria*, Peoria Journal-Star (May 29, 2019), https://www.pjstar.com/news/20190530/whole-womans-health-to-close-in-peoria.

* * *

In sum, WWH has a history of deficiencies in safety protocol in other States. These deficiencies were discovered and required to be rectified because of licensing regulations. WWH's history of deficiencies is common over multiple locations over multiple years—they are not isolated occurrences nor mere technicalities. WWH's patients are safer *because* of licensing regulations. Indiana's licensing requirement is eminently reasonable as applied to WWH and has clear benefits. The district court's injunction allowing WWH to operate an unlicensed abortion clinic in Indiana could endanger patients and should be vacated.

## II. Indiana's Licensing Process Is Constitutional and Reasonable.

WWH's main argument is that it should not be required to have a license to provide abortions in Indiana. As explained above in Part I, federal law forecloses such an argument, and WWH's track record shows that requiring WWH's clinic to be licensed is reasonable.

WWH also complains about Indiana's requests for further documentation in support of its license application, which it chose not to provide. This is no concern for a federal court. If the licensing requirement itself comports with the Constitution—and it does—this Court lacks jurisdiction to correct Indiana's implementation and interpretation of state law in assessing licensing applications, unless WWH can show that the state action itself violates the Constitution. It cannot do so. Regardless, Indiana's request for information and licensing standards are reasonable and mirror those found across the country. The district court erred in exempting WWH from compliance.

### A. This Court lacks jurisdiction to resolve disputes over the interpretation and implementation of state law where no federal right is implicated.

Although WWH complains about Indiana's request for documents, the vagaries of state medical licensing procedures are typically not policed by federal courts. Instead, the licensing and regulation of the practice of medicine is traditionally a matter of state control. *Dent v. West Virginia,* 129 U.S. 114, 122 (1889). "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar,* 421 U.S. 773, 792 (1975); *see also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.") To justify this Court's involvement in its complaint over document requests, WWH must demonstrate that federal law is violated by Indiana's administrative request for further documents as part of the licensing process. It cannot do so. This Court should therefore retain its proper role and refrain from "instruct[ing] state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

WWH has never asserted that Indiana's document requests are unconstitutional, only that they are overbroad under state law. WWH Supp. Mem. 6. But "treat[ing] a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State[s] rather than federal courts are

the appropriate institutions to enforce state rules." *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc).

This Court recently reaffirmed that "the Eleventh Amendment prohibits a federal court from ordering any relief against a state agency based on state law." *EOR Energy LLC v. Ill. Envtl. Prot. Agency*, 913 F.3d 660, 664 (7th Cir. 2019) (citing *Pennhurst*, 465 U.S. at 100-01, 106). As Indiana's requests for documents are unrelated to a constitutional claim, federal relief is improper and should not be entertained. "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty." *Pennhurst*, 465 U.S. at 106.

If WWH were now—for the first time—to attempt to argue that Indiana's document requests somehow violate the Constitution, its arguments would fail. WWH asserted three constitutional claims in its preliminary injunction briefing: that the licensing requirement is unconstitutionally vague; that the application of the licensing requirement violates its patients' substantive due process right to abortion;[5] and

[5] WWH has no substantive-due-process-abortion right of its own. "Under existing precedent any protection for . . . abortion provider[s] is 'derivative of the woman's position.'" *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 987 (7th Cir. 2012) (quoting *Casey*, 505 U.S. at 844 (plurality op.)); *see also Casey*, 505 U.S. at 846 (plurality op.); *Harris v. McRae*, 448 U.S. 297, 314 (1980); *accord Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) ("The Supreme Court has never identified a freestanding right to perform abortions. To the contrary, it has indicated that there is no such thing.") WWH's standing to assert claims on behalf of "patients" is attenuated because WWH South Bend would have *no* actual patients but for the district court's

that the application of the law violates both its and its patients' right to equal protection. Mem. Supp. Mot. for Prelim. Inj. at 21-38, *Whole Woman's Health Alliance v. Hill*, No. 1:18-CV-01904-SEB-MJD (S.D. Ind. Mar. 27, 2019), ECF No. 77. None of these claims implicate Indiana's document requests.

WWH has never articulated any basis for a vagueness claim or an equal-protection violation caused by document requests. And the document requests do not implicate WWH's prospective patients' right to an abortion because it was WWH's decision to refuse to provide the requested documentation. WWH chose to abandon the administrative process that would enable WWH to become licensed. Thus, even if there is a woman in South Bend that currently wants an abortion but cannot receive one unless WWH is licensed, her inability to obtain an abortion is the fault of WWH, not Indiana. *See June Med. Servs. LLC v. Gee*, 905 F.3d 787, 807 (5th Cir. 2018), *reh'g en banc denied*, 913 F.3d 573 (5th Cir. 2019), *granting stay*, 139 S. Ct. 663 (Feb. 7, 2019), *pet. for cert. filed*, No. 18-1323 (U.S. Apr. 17, 2019) (abortion doctors' lack of good faith effort to obtain admitting privileges "severs the chain of causation" for patients' undue burden claim). There is no viable substantive-due-process claim.

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improper injunction allowing it to operate. *See Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (denying third-party standing for lawyers to bring claims on behalf of future clients because they lacked the requisite "close relationship" with the clients). Moreover, WWH's interest in operating an unlicensed clinic is undeniably at odds with patients' interest in safety. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 14-15, & 15 n.7 (2004) (disallowing third party standing for a father on behalf of his child, noting their interests were "potentially in conflict").

In sum, WWH has brought no federal constitutional challenge to Indiana's document requests. WWH is therefore limited to pursuing any remedies against those document requests through state administrative and judicial channels. It may not make an end-run around those procedures and obtain relief from this Court instead.

### B. Indiana's licensing process is reasonable and typical of that found in other States.

Indiana's request for information in the context of its licensing procedures is reasonable and typical among States. WWH has no right to refuse to engage in that process if it desires a license to open an abortion clinic.

**1.** Indiana denied a license to WWH because it failed to disclose relevant information—what other clinics it operates—and failed to show reputable character. Rather than being forthcoming, WWH attempted to play a corporate shell game, claiming that the other WWH clinics (noted for deficiencies numerous times during state inspections, *see supra* Part I.C) were not affiliated with "Whole Woman's Health Alliance." Not even the district court bought the idea that "Whole Woman's Health" and "Whole Woman's Health Alliance" are unrelated entities. *Whole Woman's Health*, 2019 WL 2329381 at *28 ("[I]n all areas other than this litigation (including the *Hellerstedt* litigation) the 'Whole Woman's Health' 'consortium' draws no such technical organizational distinctions as Plaintiffs now insist are controlling here. It cannot be said that how those clinics operate is not instructive as to how WWHA will operate the South Bend Clinic, nor to WWHA's 'reputable and responsible character.'"). When WWH failed to provide this information, its license

was denied. And when it resubmitted its application, Indiana asked for documentation to allow it to ascertain WWH's fitness for a license—based on the way WWH operated the other clinics that it previously failed to disclose—and to assess the truthfulness of its application materials.

Even the district court acknowledged that information relating to the other WWH clinics is "clearly germane to the Department's [licensing evaluation] and advances the Licensing Law's purposes." *Id.* It instead concluded that the application of the entire Licensing Law to Whole Woman's Health produced "slight" benefits, on the ground that WWH's history of deficiencies under other state licensing regimes did not justify further inquiry because WWH is still licensed in some of those locations. *Id.* at *29. But every State has different regulations. Just because a clinic is qualified to operate in one State does not mean an affiliate in another State is qualified to operate. Indiana is not obligated—much less *constitutionally* required—to grant WWH a license just because other States have done so.

**2.** Regardless, Indiana's licensing law and process are reasonable. Indiana's licensing statute does not single out abortion clinics; it treats them like other facilities, as it applies on its face to both abortion clinics and birthing centers. Ind. Code §§ 16-21-2-2, 16-21-2-2.5. Indiana's requirement that a license applicant demonstrate "reputable and responsible character" applies to licenses for hospitals, ambulatory outpatient surgical centers, and birthing centers, as well as abortion clinics. *Id.* § 16-21-2-11. Indiana also requires applicants for licenses to operate a health facility or private mental health institutions to meet the "reputable and responsible character" requirement. *Id.* §§ 12-25-1-4, 16-28-2-2.

Indiana is not alone in requiring applicants to demonstrate "reputable and responsible character" to obtain a license to provide health-related services to the public, or services to vulnerable populations. *See, e.g.,* Ala. Code § 22-21-23; Cal. Gov't Code § 22854(a)(1); Cal. Health & Safety Code §§ 1212(a)(1), 1265(e), 1265.3(a)(1), 1405(l), 1416.22(a), 1520(b), 1569.15(a)(2), 1575.2(a), 1596.95(b), 1597.54(g), 1796.19(a)(2); Cal. Wel. & Inst. Code § 14095(a)(1); Ga. Code § 43-27-6(b)(2); Haw. Rev. Stat. §§ 321-15.2(b), 346-97(b) & (c), 346-154(a), 352-5.5(a), 353C-5(a), 571-34; Md. Code, Health-Gen. §§ 19-319(b)(2), 19-906(b)(2); Minn. Stat. § 144.51; Nev. Rev. Stat. §§ 449.040(8), 449.4311(5); N.D. Cent. Code § 23-17-02; Okla. Stat. tit. 10, § 1430.14(D)(1), tit. 63, §§ 1-703, 1-865.4(C)(1), 1-1904(D)(1)(a), 330.53(B)(1)(b); S.C. Code § 40-35-40(A)(3); Tenn. Code §§ 33-2-406(b), 68-11-206(a)(1), 71-2-404(1); W. Va. Code § 16-5B-2. And aside from the many state statutes using that exact phrase, other States have similar requirements for health-related licenses. *See, e.g.,* 225 Ill. Comp. Stat. 60/9(B)(1) ("good moral character"); Md. Code, Health Occ. § 3-305.1(c) (same); Miss. Code § 73-21-85 (same); N.J. Stat. § 45:9-6 (same).

The district court suggested that Indiana's 2018 statutory amendment spelling out documentation requirements designed to demonstrate "reputable and responsible character" for abortion clinics may have been added in response to WWH's license application, though it acknowledged it is generally beneficial. *Whole Woman's Health*, 2019 WL 2329381 at *8, *28. The district court also disapproved of Indiana's attempt to get further information with respect to WWH affiliates. *Id.* at *29. But such requirements and requests are not unique to Indiana.

Texas, for example, also requires information regarding an applicant's track record of compliance for licenses to operate freestanding emergency care facilities, ambulatory surgical centers, and birthing centers, in addition to abortion clinics. *See* 25 Tex. Admin. Code §§ 131.25, 135.20, 137.11, 139.23. California also does for health facilities. *See* Cal. Health & Safety Code § 1265.3 (State "shall" consider evidence of the facility's history of complying with the laws of other States in determining "reputable and responsible character" for purposes of licensing decision). Indiana's character requirement is reasonable and constitutional.

**3.** States will also commonly deny a license if an applicant fails to submit required information. For example, in Texas, "fail[ure] to provide timely and sufficient information . . . required by the department" of State Health Services "that is directly related to the application" is grounds for denial of a license. 25 Tex. Admin. Code § 131.102 (freestanding emergency medical care facilities); *see also id.* § 135.24(a)(1)(G) (allowing license denial for ambulatory surgical centers "fail[ing] to provide an adequate application or renewal information"); § 139.32(b)(9) (same as to abortion facilities); *accord id.* § 137.22 (the Department may deny, suspend, or revoke a license if the birthing center licensee "fails to meet a requirement of this chapter"). The same is true in other States. *See, e.g.,* Haw. Rev. Stat. § 436B-10 (failure to provide information "the licensing authority may require to investigate the applicant's qualifications for [professional] licensure" is grounds for denial); Iowa Code § 135C-10(11)(b) (preventing the department from "[e]xamining any relevant books or records of a health care facility unless otherwise protected from disclosure by operation of law" is grounds for denial); Minn. Stat. § 245C.09, Subd. 1 (license

for human services provider may be denied if applicant "fail[s] to provide additional information required" for the background study); Miss. Code § 73-11-57 (failure to timely provide information required by the Board is grounds for denial of funeral home license). In Texas, if an applicant or licensee "misrepresent[s]" or "conceal[s] a material fact on any documents required to be submitted," the Department of State Health Services will deny a license. *See, e.g.,* 25 Tex. Admin. Code § 131.101 (free-standing emergency medical care facilities); *id.* § 137.22(a)(9) (birthing centers); § 139.32(b)(1) (abortion facilities).

During investigations of grounds to revoke or deny a license, document requests are commonplace. In Texas, if the Department of State Health Services is investigating a ground for denial of an application or revocation of a license, such as concealment of a material fact relevant to the application or failure to provide adequate information, it is entitled to records "necessary to determine or verify compliance" with state statutes and regulations, *id.* § 131.81(d)(1), and is entitled to all documents "maintained by or on behalf of the facility to the extent necessary to enforce" state law, *id.* § 131.81(d)(2); s*ee also id.* § 139.31(a)(2) (abortion facilities); § 442.102(i) (investigative powers of Health and Human Services Commission for violations of state health statutes or regulations includes "access to all documents, evidence, and individuals related to the alleged violation[.]")

There are similar examples in other States. *See, e.g.*, Del. Code tit. 16, § 1107 ("All licensees are required to provide immediate access to Department personnel to conduct inspections. Such inspections may include any of the following: . . . . (3)

Reviewing and photocopying any records and documents maintained by the licensee."); Ill. Admin. Code tit. 89, § 430.60 (Office of Inspector General "may impound the original of any record, file, document or paper necessary for the investigation from any Department office, licensed child care facility, or private agency that is pertinent to an investigation"); Mich. Comp. Laws § 333.20155 ("a health facility or agency shall give the department access to books, records, and other documents maintained by a health facility or agency to the extent necessary" to ensure compliance with state licensing requirements); 62 Pa. Cons. Stat. § 1016 ("For the purpose of determining the suitability of the applicants and of the premises or whether or not any premises in fact qualifies as a facility as defined in … this act or the continuing conformity of the licensees to this act and to the applicable regulations of the department, … the department shall have the right to enter, visit and inspect any facility licensed or requiring a license under this act and shall have full and free access to the records of the facility and to the individuals therein[.]"); R.I. Gen. Laws § 23-17-10(b) ("The licensing agency shall make, or cause to be made, any inspections and investigations that it deems necessary, including medical records.")

Further, requiring documentation that requirements are met, rather than just accepting an attestation of the applicant, is not unheard of in state licensing regimes. To obtain a law license, for instance, most States require applicants to prove—and not just attest to—good moral character by providing transcripts, personal references and submitting to a background check. The documentary requirements are intended to assess the honesty of the applicant through comparison with the applicant's answers.

As one example, in Illinois, applicants for a law license must certify truthfulness in their application materials, but must also undergo a state police background check, provide six personal references, two educational references, furnish proof of legal education, and even include information about any outstanding parking tickets.[6] Applicants are required to submit their driving records for the past ten years, and any pertinent court records or police reports.[7] Applicants must "report fully and completely to the Board of Admissions to the Bar and to the Committee on Character and Fitness all information required to be disclosed pursuant to any and all application documents and such further inquiries prescribed by the Board and the Committee." Ill. R. S. Ct. 708(e). These are strict and extensive requirements, yet lawyers do not perform medical procedures on the public like abortion facilities do.

In sum, Indiana's licensing requirements and requests for further information from WWH are eminently reasonable. They are in step with the licensing requirements of many other States, especially for applicants proposing to perform medical procedures. And given WWH's attempt to avoid disclosing its affiliates, and the track record of health-and-safety deficiencies of those affiliates, *see* Part I.C *supra*,

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[6] *See generally* Ill. Bd. of Admissions to the Bar, *Police Form,* https://www.ilbaradmissions.org/browseform.action?applicationId=1&formId=5; *supra*, *Bar Exam Application* sections F, G, H, https://www.ilbaradmissions.org/browseform.action?applicationId=1&formId=2; *supra*, *Certification of Juris Doctorate*, https://www.ilbaradmissions.org/getpdfform.action?id=19.

[7] *See generally supra*, *Bar Exam Instructions*, https://www.ilbaradmissions.org/browseform.action?applicationId=1&formId=1.

Indiana's requests for further information are even more reasonable. While the propriety of the State's specific informational requests should not be an issue here, *see* Part II.A *supra*, Indiana has done nothing out of the ordinary. This case simply involves an applicant that believes it should not have to be licensed to provide abortions in Indiana—a claim foreclosed by binding precedent. Eschewing other avenues of relief, WWH has run to federal court instead of complying with reasonable state requests for information, working within the administrative system, or pursuing relief through judicial review in state court. This end-run around state administrative procedure and request for this Court to exceed its jurisdiction should not be tolerated.

## Conclusion

The Court should vacate the district court's preliminary injunction.

Respectfully submitted.

Steve Marshall
Attorney General of Alabama

Kevin G. Clarkson
Attorney General of Alaska

Leslie Rutledge
Attorney General of Arkansas

Lawrence G. Wasden
Attorney General of Idaho

Jeff Landry
Attorney General of Louisiana

Jim Hood
Attorney General of Mississippi

Tim Fox
Attorney General of Montana

Doug Peterson
Attorney General of Nebraska

Dave Yost
Attorney General of Ohio

Mike Hunter
Attorney General of Oklahoma

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General

Heather Gebelin Hacker
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for *Amici* States

ALAN WILSON
Attorney General of South Carolina

JASON RAVNSBORG
Attorney General of South Dakota

HERBERT H. SLATERY III
Attorney General of Tennessee

SEAN D. REYES
Attorney General of Utah

PATRICK MORRISEY
Attorney General of West Virginia

## Certificate of Word Count

I verify that this brief complies with Circuit Rule 29 because it contains 6988 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

## Certificate of Service

I hereby certify that on July 22, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Kyle D. Hawkins
Kyle D. Hawkins