No. _____

In the Supreme Court of the United States

BRAD D. SCHIMEL, ATTORNEY GENERAL OF WISCONSIN, *ET AL.*, PETITIONERS,

v.

PLANNED PARENTHOOD OF WISCONSIN, *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
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QUESTIONS PRESENTED

1. Is a regulation of abortion doctors subject to a facial challenge under *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), when a majority of abortion doctors have already satisfied the requirement, and where the only doctors not already in compliance failed to make diligent efforts?

2. Does a challenge to a regulation of abortion doctors under the Due Process Clause fall within the "very limited and well-defined class of cases," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 n.6 (1991), in which inquiry into the legislature's subjective motives is permissible?

PARTIES TO THE PROCEEDING

Petitioners are Brad D. Schimel, in his official capacity as Attorney General of Wisconsin; Ismael Ozanne, in his official capacity as District Attorney for Dane County and as class representative for all district attorneys in Wisconsin; Dave Ross, in his official capacity as Secretary of the Wisconsin Department of Safety and Professional Services; and the following members of the Wisconsin Medical Examining Board, in their official capacities: Kenneth B. Simons, M.D., Timothy W. Westlake, M.D., Mary Jo Capodice, D.O., Greg Collins, Rodney A. Erickson, M.D., Suresh K. Misra, M.D., Carolyn Ogland Vukich, M.D., Michael J. Phillips, M.D., David M. Roelke, M.D., Sridhar V. Vasudevan, M.D., Russell S. Yale, M.D., and Robert Zondag.[1]

Respondents are Planned Parenthood of Wisconsin, Inc.; Susan Pfleger, M.D.; Kathy King, M.D.; and Milwaukee Women's Medical Services d/b/a Affiliated Medical Services, plaintiffs-appellees below.

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[1] These individuals were all defendants-appellants below, except that two public officers were substituted per Supreme Court Rule 35.3. James Barr, M.D., and Timothy Swan, M.D., defendants-appellants below, are no longer members of the Wisconsin Medical Examining Board and therefore are not included as parties to this proceeding. David M. Roelke, M.D., who replaced one of them, has been substituted as a party. One seat on the Board remains vacant.

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PETITION FOR A WRIT OF CERTIORARI

The Seventh Circuit facially invalidated Wisconsin's requirement that abortion doctors obtain admitting privileges at a local hospital, notwithstanding the fact that most doctors already satisfied that requirement. In addition, the only doctors in Wisconsin who failed to obtain admitting privileges never even sought such privileges at fifteen out of seventeen eligible hospitals. So far as Wisconsin has been able to determine, this case is the only post-*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), instance of a court of appeals facially invalidating a regulation of abortion doctors where most doctors had complied with the law, with the possible exception of the Ninth Circuit decision that this Court properly vacated in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam). This outlier result can only be explained by the Seventh Circuit's improper speculation as to the motives of the Wisconsin legislature, the same error that the Ninth Circuit made in *Mazurek*.

Wisconsin understands that the currently pending merits case in *Whole Woman's Health v. Hellerstedt*, No. 15-274, raises some of the same legal and factual issues as those presented by this Petition. As Wisconsin explained in its amicus brief in *Whole Woman's Health*, the Texas admitting-privileges law should be upheld as lawful, which would also necessarily require upholding Wisconsin's law. Brief of the State of Wisconsin as *Amicus*

Curiae Supporting Respondents, Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. filed Jan. 28, 2016).

But if this Court concludes that Texas's admitting-privileges requirement is unlawful, or that remand proceedings are necessary in that case, Wisconsin respectfully requests that this Petition be granted for full merits briefing and decision, rather than simply remanded. Given that most of Wisconsin's abortion doctors have admitting privileges, the only plausible basis upon which the Seventh Circuit could have facially invalidated the law is what that court has called the "purpose argument." Wisconsin is therefore deeply concerned that, unless this Court makes clear that this "purpose argument" provides no basis for facially invalidating Wisconsin's law, the State will be unable to obtain full review of the objective burden, if any, that its law imposes upon women seeking abortions. *See* Tr. of Oral Arg. at 56:6–8, Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. argued March 2, 2016) (Breyer, J.: "I don't question their purpose. I won't question their purpose.").

OPINIONS BELOW

The Seventh Circuit's decision is reported at 806 F.3d 908. App. 1a–68a. The district court's decision is reported at 94 F. Supp. 3d 949. App. 69a–183a. The Seventh Circuit's decision affirming the district court's grant of a preliminary injunction is reported

at 738 F.3d 786. App. 184a–241a. The district court's order granting a preliminary injunction is unreported. App. 242a–298a.

JURISDICTION

The Seventh Circuit entered its decision on November 23, 2015. App. 1a. On January 29, 2016, Justice Kagan granted Petitioners' application for a thirty-day extension of time to file a petition for writ of certiorari. Application No. 15A784. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

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

The relevant statutory provision, Wis. Stat. § 253.095, is reproduced in full in the appendix to

this petition. App. 299a–301a. The portion of that provision requiring abortion doctors to have admitting privileges at a nearby hospital, *id.* § 253.095(2), provides as follows:

> **(2) Admitting privileges required**. No physician may perform an abortion, as defined in s. 253.10(2)(a), unless he or she has admitting privileges in a hospital within 30 miles of the location where the abortion is to be performed.

STATEMENT

1. In the spring of 2013, the citizens of Wisconsin learned about the shocking atrocities committed by Philadelphia-based abortion doctor Kermit Gosnell.[2] Gosnell "overdosed his patients with dangerous drugs, spread venereal disease among them with infected instruments," and, in his words, "ensured fetal demise" by fully delivering live babies and then "sticking scissors into the back of [each] baby's neck and cutting the spinal cord."[3] Gosnell operated with

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[2] *Jury finds Philadelphia abortion doctor guilty*, Milwaukee Journal Sentinel (May 13, 2013), *available at* http://www.jsonline.com/news/usandworld/verdict-in-philadelphia-abortion-doctor-trial-reported-e09ueg3-207249691.html.

[3] Report of the Grand Jury at 1, 4, *In re County Investigating Grand Jury XXIII* (Pa. Ct. Common Pleas 2011) (Misc. No. 9901-2008), http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf.

impunity for over forty years due to an abject failure of oversight and accountability.[4] Wisconsin's citizens reasonably asked: "Could Kermit Gosnell Happen in Wisconsin?"[5]

"In light of the nationwide attention that Dr. Gosnell's shop of horrors attracted, the Wisconsin State Assembly acted swiftly to pass . . . the admitting-privileges requirement at issue, in order to protect the health and safety of pregnant women who have chosen an abortion." App. 38a (Manion, J., dissenting). Specifically, on July 5, 2013, Wisconsin enacted a law that requires abortion doctors to have "admitting privileges in a hospital within 30 miles of the location where the abortion is to be performed." Wis. Stat. § 253.095(2). The law provides for a penalty and civil remedies against a violating doctor, while declaring that no liabilities apply against the woman. *Id.* § 253.095(3), (4). The law did not specify an effective date and thus, by default, it would have taken effect on July 7, the day after publication. App. 6a; *see* Wis. Stat. § 991.11 ("Every act . . . which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication.").

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[4] Grand Jury Report at 8–13, 16–17, 137–217, 248–261.

[5] Collin Roth, Right Wisconsin (April 18, 2013), *available at* http://www.rightwisconsin.com/perspectives/203416811.html.

2. On the day the legislature enacted the law, two abortion doctors and two abortion clinics ("Plaintiffs")[6] filed suit in the Western District of Wisconsin. Compl., D. Ct. Dkt. 1 (filed July 5, 2013). Plaintiffs sought facial invalidation of the law's admitting-privileges requirement. Compl. at 17, D. Ct. Dkt. 1. Plaintiffs did not ask for as-applied relief limited to doctors who lacked admitting privileges or for a stay of the requirement until they could obtain such privileges. Compl. at 17, D. Ct. Dkt. 1.

The district court entered a temporary restraining order on July 8, 2013, D. Ct. Dkt. 21, and then granted the Plaintiffs' motion for a preliminary injunction on August 2, 2013, blocking the law even as to those doctors who already had admitting privileges. App. 242a–98a. In justifying this holding, the district court reasoned that the law was likely to burden access to abortion—"*at least in the near term*"—because admitting privileges can take months to obtain. App. 288a–97a (emphasis added). The court also disparaged the motives of Wisconsin's legislature, speculating that the legislature's "real purpose" could not have been to improve physician quality or women's health. App. 267a–69a.

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[6] The plaintiffs were the same as the respondents here, with one exception. The original plaintiffs included Fredrik Broekhuizen, M.D., who had been Planned Parenthood's medical director. D. Ct. Dkt. 107. He was replaced by Kathy King, M.D., when she became Planned Parenthood's medical director. D. Ct. Dkt. 107.

On appeal, the Seventh Circuit upheld the district court's state-wide preliminary injunction. During oral argument, the Seventh Circuit concentrated its questions on what it described as the "purpose argument." Oral Argument at 32:53, No. 13-2726.[7] The court called the law "goofy" and suggested that the legislature must not "actually care[ ] about health." *Id*. at 12:30, 13:27. "Why did [the legislature] start with abortion," the court asked, "is it because it begins with the letter A?" *Id*. at 5:20. Then, in its decision on December 20, 2013, a two-judge panel majority upheld the preliminary injunction and urged the district court on remand to engage in a "fuller enumeration" of the Wisconsin legislature's motives for enacting the law. App. 192a–93a.

3. On remand, the State presented substantial evidence demonstrating that Plaintiffs were not entitled to relief on their facial claim against Wisconsin's admitting-privileges law.

a. By the time of trial, five out of seven abortion doctors in Wisconsin that sought admitting privileges had been able to obtain them. *See* App. 153a–59a; Compl. ¶ 33, D. Ct. Dkt. 1; Joint Stipulations ¶¶ 3, 6, D. Ct. Dkt. 200.[8] There are four

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[7] Seventh Circuit oral arguments are generally available at: http://media.ca7.uscourts.gov/.

[8] An eighth doctor, who works for Planned Parenthood and is designated as "P5" in the referenced documents, did not have

abortion clinics in Wisconsin: three Planned Parenthood clinics, in Appleton, Madison, and Milwaukee, and Affiliated Medical Services ("AMS"), also in Milwaukee. App. 245a–46a.[9] In 2013, Planned Parenthood's clinics performed approximately 3,300 abortions, and AMS performed approximately 2,500 abortions. App. 81a–84a. By the time of trial, all five of Planned Parenthood's physicians that sought admitting privileges had obtained them, satisfying the requirements of the law. App. 153a, 156a–57a. Only AMS's two physicians—Dr. Bernard Smith and Dr. Dennis Christensen—have not

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admitting privileges in Appleton, but apparently never sought them. D. Ct. Dkt. 218 at 59. This doctor has admitting privileges in Madison and performs abortions there. D. Ct. Dkt. 219 at 108.

[9] A fifth clinic in Green Bay ceased providing abortion services the day before the preliminary injunction, "for reasons unrelated to the Act." App. 246a. The closure of the Green Bay facility was part of a larger market trend in Wisconsin, which saw the number of abortion clinics in the State decrease from sixteen a decade ago to four today. App. 140a–141a. Abortions have similarly declined, going from 10,557 in 2003 to 6,462 in 2013, and dropping further to 5,800 in 2014. *See* 2014 *Reported Induced Abortions In Wisconsin*, Wis. Dep't of Health Servs., *available at* https://www.dhs.wisconsin.gov/publications/p45360-14.pdf (The 2014 report was not available at the time of trial, but the parties stipulated to including these reports from prior years, App. 79a–80a).

obtained admitting privileges from hospitals within 30 miles of their clinic.[10]

The State demonstrated that the two AMS doctors—unlike the three doctors at the Milwaukee Planned Parenthood clinic less than two miles away—failed to make diligent efforts to obtain admitting privileges. App. 155a; App. 65a–67a (Manion, J., dissenting). In the ten months between the law's passage and the trial, Dr. Smith applied for admitting privileges at only one of the seventeen hospitals within 30 miles of AMS. App. 66a (Manion, J., dissenting). He initially inquired in July, shortly after the law's passage, but did not follow up in writing until December. Trial Tr., Day 1, at 61–63, D. Ct. Dkt. 243. The hospital eventually informed Dr. Smith that he was not eligible. App. 155a. AMS's manager also sent an email on Dr. Smith's behalf to one other hospital, but never heard

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[10] While the bill was being considered by the Wisconsin legislature, AMS reported to the media that its physicians already had admitting privileges. *See* Michael Phillis, *Bill would require an ultrasound before an abortion*, Milwaukee Journal Sentinel (June 5, 2013), *available at* http://www.jsonline.com/news/statepolitics/bill-would-require-an-ultrasound-before-an-abortion-b9927582z1-210326851.html. Planned Parenthood reported only that the physicians at its Appleton clinic lacked admitting privileges. *See* Michael Phillis, *Appleton abortion clinic could close under bill headed to Senate*, Milwaukee Journal Sentinel (June 10, 2013), *available at* http://www.jsonline.com/news/statepolitics/abortion10-b9930745z1-210896651.html.

back and did not follow up. Trial Tr., Day 1, at 69–70, D. Ct. Dkt. 243. Neither Dr. Smith nor anyone at AMS ever researched any hospital's bylaws or spoke with a lawyer about how to pursue admitting privileges. Smith Dep. 46–48, D. Ct. Dkt. 211. Dr. Christensen, on the other hand, has held—and continues to hold—admitting privileges at a hospital in Madison. App. 153a.[11] Nevertheless, Dr. Christensen inexplicably sought admitting privileges at only two of the seventeen hospitals within 30 miles of AMS. App. 153a; App. 66a (Manion, J., dissenting).[12]

b. The State also put forth substantial evidence regarding the benefits from abortion providers having admitting privileges at a local hospital.

Credentialing to avoid a Wisconsin Gosnell. The State presented expert witnesses explaining how admitting privileges serve as an important cre-

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[11] Dr. Christensen opened and ran the abortion clinic in Madison from 1980 until 2008, when he donated it to Planned Parenthood. App. 82a.

[12] After prodding by the district court at trial, AMS made belated inquiries to Milwaukee-area hospitals regarding Drs. Smith's and Christensen's eligibility for admitting privileges. The Plaintiffs moved to supplement the record with this correspondence after trial, D. Ct. Dkt. 247, but the district court denied their request because this evidence "could and should have been obtained sooner," and because the State would have no opportunity to challenge the evidence or present rebuttal evidence. App. 92a.

dential to ensure the high quality of physicians. *E.g.*, D. Ct. Dkts. 126 ¶¶ 8–10; 127 ¶¶ 7, 13–14; 128 ¶ 4; 129 ¶¶ 21–22; 131 ¶¶ 3, 23; 163 ¶ 5; Trial Tr., Day 3, at 232–33, 239–40, D. Ct. Dkt. 244. This credentialing function can weed out the worst-of-the-worst abortion providers, like Gosnell, Dr. Leroy Carhart, Dr. Steven Brigham, and other infamous examples. D. Ct. Dkt. 126 ¶ 17, D. Ct. Dkt. 126-2.

Peer review to increase doctor quality. The State's experts also testified that doctors with admitting privileges are held accountable through the peer review process, and that this improves physician quality. *E.g.*, D. Ct. Dkts. 126 ¶ 9; 127 ¶ 13; 128 ¶ 12; 129 ¶¶ 3–4; 163 ¶ 5; Trial Tr., Day 2, at 113–14, D. Ct. Dkt. 233; Trial Tr., Day 3, at 234–37, D. Ct. Dkt. 244.

Continuity of care. Finally, the State presented substantial evidence that admitting privileges help to maintain continuity of care, a critical factor to women's health. Five experts presented by the State explained why admitting privileges advance continuity of care. *See*, e.g., D. Ct. Dkts. 126–129, 131, 163–64; Trial Tr., Day 2, at 36–41, 44–45, 114–16, 134–38, D. Ct. Dkt. 233; Trial Tr., Day 3, at 62–64, 232–33, 238–39, D. Ct. Dkt. 244. Even the court-appointed expert, when asked whether admitting privileges were beneficial, replied: "[T]he obvious answer is *yes*. . . . probably 90% of the time it would be [beneficial]." Trial Tr., Day 3, at 59–60, D. Ct. Dkt. 244. The State also identified guidance from

the National Abortion Federation stating that abortion doctors should have admitting privileges. Defs. Ex. 1054; Trial Tr., Day 3, at 237–40, D. Ct. Dkt. 244.

The State supported these general arguments with specific examples of how admitting-privileges requirements could prove beneficial to women suffering from abortion-related complications. In a five-year period, nineteen women in Wisconsin received hospital treatment following abortions at two Planned Parenthood clinics, four of whom needed to be transferred by ambulance from the clinic to the hospital. D. Ct. Dkt. 198 ¶¶ 11–12. Eight women had to be transferred directly to the hospital from AMS to treat "serious abortion complications," three of whom received hysterectomies and two of whom required other surgeries. D. Ct. Dkt. 198 ¶¶ 24, 26. It is unknown how many more women sought hospital treatment after leaving AMS following abortion procedures. App. 11a. For example, one of the State's expert physicians recounted a woman who, after receiving an abortion from AMS, was sent directly to his emergency room with severe complications that resulted in a hysterectomy. Trial Tr., Day 2, 36–41, D. Ct. Dkt. 233. Another emergency room physician tried to call AMS to learn about the case, but the AMS doctor was unavailable and never called back—which the State's expert found "appalling." Trial Tr., Day 2, 39–40, D. Ct. Dkt. 233.

4. On March 20, 2015, the district court ruled in favor of the Plaintiffs on their facial challenge, permanently enjoining the admitting-privileges law. App. 69a–183a. In justifying this facial invalidation, the district court relied entirely upon its conclusion that the requirement would cause AMS to close. App. 160a–61a, 163a.[13] Although the court criticized Drs. Smith and Christensen for their "failure to exhaust all opportunities, and to push for final decisions on outstanding [admitting-privileges] applications," the court credited their assertions that they probably would not be able to obtain such privileges. App. 155a–56a. The district court then held that AMS's closure would increase wait times at Planned Parenthood's Milwaukee clinic, lead some women to travel out of state to obtain abortions, and eliminate the only Wisconsin provider who performed abortions after eighteen weeks and six days. App. 163a–70a.[14] The court also disregarded the State's evidence in favor of the admitting-privileges requirement, App. 118a–21a & n.24, 124a n.25, 127a

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[13] While the district court speculated that some Planned Parenthood doctors could lose their admitting privileges at some unspecified point of time in the future, App. 157a–159a, the court did not base its holding on such speculation, *see* App. 163a–170a.

[14] AMS is the only abortion clinic in Wisconsin that performs abortions after eighteen weeks and six days, including up to 22 weeks and occasionally beyond. App. 81a–83a. A clinic in Chicago, roughly 85 miles away, performs abortions up to 23 weeks. App. 86a, 169a–170a.

& n.27, relying heavily on the fact that other outpatient procedures have higher complication rates, App. 101a–18a.

Finally, the district court held that the Wisconsin legislature's purpose "was to prevent women from accessing abortion." App. 175a. The court recognized the perils of ascribing motives to a legislative body: "I would much prefer to default to a finding that such a discovery [of subjective legislative purpose] is 'impossible,' being highly reticent to presume both for personal and public policy reasons to discern the 'collective intent' of another branch of government." App. 175a. But then, following the Seventh Circuit's "instruct[ions]," the court conducted this purpose-based inquiry and proclaimed that there was "no reasonable doubt" as to the legislature's ulterior motives. App. 70a–72a, 174a–77a.[15]

5. On appeal, the Seventh Circuit continued its attack upon the legislature's alleged motives for enacting the law. During oral argument, the court accused the Wisconsin legislature of "[not] car[ing] about" poor women. Oral Argument at 8:55, No. 15-1736. The court dug even further into

[15] The district court also invalidated the law on "unconstitutional delegation" and equal protection grounds. App. 178a–182a. The Seventh Circuit did not adopt these rationales, which are entirely meritless in any event. *See* Br. of Defs.-Appellants 42–48, App. Dkt. 13, No. 15-1736.

subjective motives, asking: "Governor [Scott] Walker before he withdrew from the Presidential competition said that he thought abortion should be forbidden even if the mother[ ] dies as a result of not having an abortion. Is that kind of official Wisconsin policy?" *Id*. at 52:33.

Then, in its decision on November 23, 2015, a two-judge majority upheld the permanent injunction. The majority, like the district court, based its undue-burden analysis entirely upon its conclusion that the admitting-privileges requirement would lead to AMS closing. App. 19a–24a. When addressing the fact that AMS's doctors never applied to fifteen out of seventeen hospitals within 30 miles of their clinic, the panel majority found it appropriate to comment that one hospital "requires applicants for obstetrics/gynecology admitting privileges to have delivered 100 babies in the previous two years, by which of course they mean live babies; and *delivering live babies is not what abortion doctors do*." App. 20a–21a (emphasis added). The majority devoted a substantial portion of its opinion to comparing the complication rates of abortion with those of other outpatient procedures, App. 9a–15a, and only two paragraphs discussing the State's justifications for the law. App. 15a–17a. It also characterized the State's evidence of health benefits as "nonexistent," despite the substantial record of evidence described above. App. 32a; *supra*, Statement Part 3.

The majority's opinion made clear that its holding—including the extraordinary facial invalidation of a provision that most doctors had already complied with—was driven by its view of the Wisconsin legislature's motives. The majority placed great emphasis on the law's initial implementation time, a consideration entirely irrelevant to whether any actual burdens caused by the law justified facial invalidation two years after the law was enacted. "[T]he legislature's *intention* to impose the two-day deadline," the majority wrote, "is difficult to explain save as a method of preventing abortions." App. 8a (emphasis added). The two-day deadline is "[c]onfirmatory evidence" of the legislature's "purpose . . . to restrict the availability of safe, legal abortion." App. 17a (citation omitted). "[M]aking its law . . . effective immediately," the majority believed, "is [not] likely to have been an accident." App. 31a. The majority concluded that legislators "reveal[ed] their true objectives" by requiring only abortion providers to have admitting privileges. App. 31a.

In both his partial concurrence at the preliminary injunction stage and his dissent as to the permanent injunction, Judge Manion exposed numerous flaws in the majority's legal analysis. The majority's facial invalidation of the law departed from every other court of appeals to consider an admitting-privileges law. App. 43a–47a (Manion, J., dissenting). The "novel legal standard crafted by the majority" conflicted with "well-established Supreme Court precedent." App. 36a (Manion, J., dissenting). The

majority required the State to win a war of competing medical and statistical evidence, even though this Court "has rejected as misguided arguments that an abortion law is unconstitutional because the medical evidence contradicts the claim that the law has any medical basis." App. 215a–16a (Manion, J., concurring). And the majority "disregard[ed]" out-of-state abortion providers in its undue-burden analysis, even though this Court has never held the abortion right to be "intrastate in nature." App. 59a, 63a–64a (Manion, J., dissenting).

Judge Manion also demonstrated how the majority misapplied the law to the facts. Unlike the majority, he reviewed the State's evidence in detail and concluded that the Wisconsin legislature "beyond a doubt . . . had a rational basis to act." App. 47a–55a (Manion, J., dissenting). As to any burdens from the law, Judge Manion pointed out that AMS's physicians "made minimal efforts to obtain admitting privileges." App. 65a–67a (Manion, J., dissenting). And even if AMS were to close, longer wait times or travel distances do not constitute "undue burdens." App. 57a–64a (Manion, J., dissenting).

Finally, with respect to the allegations of improper legislative motives, Judge Manion explained that regulating abortion providers was a reasonable reaction to the Gosnell scandal and that the failure to include an explicit grace period may

well have been "a simple oversight." App. 38a–40a, 50a n.4 (Manion, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Departed From The Uniform Holdings Of The Courts Of Appeals, And Violated This Court's Caselaw, By Facially Invalidating A Regulatory Qualification For Abortion Doctors That The Majority Of Doctors Already Satisfied

The Seventh Circuit facially invalidated Wisconsin's admitting-privileges law, striking it down for all doctors, including those that had already obtained such privileges. App. 35a. In reaching this holding, the Seventh Circuit departed from the decisions of three other courts of appeals, all of which upheld admitting-privileges requirements against facial challenges. Indeed, so far as Wisconsin has been able to determine, other than arguably the Ninth Circuit's decision that this Court vacated in *Mazurek*, 520 U.S. 968, no post-*Casey* court of appeals has ever held that a regulatory qualification for abortion doctors is facially invalid when the majority of the doctors in the State had already fully complied. The Seventh Circuit reached this unprecedented result without even citing—let alone faithfully applying—the two competing tests for facial invalidation in the abortion regulation context: "no set of circumstances" or "large fraction."

A. Before the Seventh Circuit's decision here, three courts of appeals—the Fourth, Fifth, and Eighth Circuits—had upheld admitting-privileges requirements against facial challenges. In contrast, no other court of appeals had facially invalidated an admitting-privileges requirement.

In *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (*Greenville I*), and *Greenville Women's Clinic v. Commissioner, South Carolina Department of Health & Environmental Control*, 317 F.3d 357 (4th Cir. 2002) (*Greenville II*), the Fourth Circuit upheld South Carolina regulations requiring abortion doctors to have admitting privileges or an emergency transfer agreement with a local hospital. S.C. Code Regs. 61-12 § 305(A). In reaching this result, the court stressed the plaintiffs' "heavy burden in bringing a facial challenge" because "[anticipating] the impact of the Regulation" is "generally not . . . appropriate" in the context of facial challenges. *Greenville I*, 222 F.3d at 163–64; *accord Greenville II*, 317 F.3d at 362.

In *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014), the Fifth Circuit upheld Texas's admitting-privileges law against a facial challenge. Texas's law, like Wisconsin's, requires doctors performing abortions to have admitting privileges at a hospital within 30 miles. *See* Tex. Health & Safety Code § 171.0031(a). The court explained that the plaintiffs' facial attack "should not have been

entertained in the first place, because 'the proper means to consider exceptions is by as-applied challenge.'" *Id.* at 604 (quoting *Gonzales*, 550 U.S. at 167).

In *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989), the Eighth Circuit upheld a Missouri law that required abortion doctors to maintain surgical privileges at a hospital within the state. Mo. Stat. § 188.080. The court held that the law "further[ed] important state health objectives" and did "not impose any significant burden on the abortion decision," even though one doctor—who had performed over 50,000 abortions—did not have surgical privileges and had to cease performing abortions until he obtained them. *Id.* at 1380–81 & n.5.

As a more general matter, Wisconsin has not been able to locate any other post-*Casey* court-of-appeals decision facially invalidating a regulatory qualification for abortion doctors where a majority of those doctors had already come into compliance with the qualification, other than—arguably—the Ninth Circuit's decision this Court vacated as wrongly decided in *Mazurek*, 520 U.S. 968.

B. In reaching its unprecedented result in this case, the Seventh Circuit did not explain what standard—if any—it used to determine the facial validity of Wisconsin's law. An overview of this

Court's facial review standard in the abortion-regulation context is therefore instructive.

As-applied challenges are the "building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168 (citations omitted). Facial challenges, on the other hand, are "disfavored for several reasons": they "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "short circuit the democratic process." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008). "[T]he normal rule"—including in the abortion context—is that "a statute may be declared invalid to the extent that it reaches too far, but [must] otherwise [be] left intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citations omitted). If a "discrete and well-defined" remedy can address any undue burden, then a facial attack "should not . . . [be] entertained." *Gonzales*, 550 U.S. at 167.

Facial challenges traditionally require the plaintiff to establish that "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (applying this standard to a facial challenge to an abortion regulation). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, however, this Court facially invalidated a spousal-consent requirement because "in a large fraction of the cases in which [the requirement] is relevant, it will operate

as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. 833, 895 (1992). *Casey* generated uncertainty as to whether it had replaced *Salerno* for any facial challenge to an abortion regulation. *See Greenville I*, 222 F.3d at 164–65. This Court acknowledged the uncertainty in *Gonzalez*, but declined to clarify the issue. 550 U.S. at 167.

As a result, lower courts remain divided as to which test to apply to determine the facial validity of abortion regulations. The First, Third, Sixth, Eighth, Ninth, and Eleventh Circuits apply the "large fraction" test. *See Planned Parenthood Of N. New Eng. v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004), *vacated on other grounds sub nom. Ayotte*, 546 U.S. 320; *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142–43 (3d Cir. 2000); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 367–69 (6th Cir. 2006); *Planned Parenthood of Minn. v. Rounds*, 653 F.3d 662, 667–68 (8th Cir. 2011), *vacated in nonrelevant part on reh'g en banc*, 662 F.3d 1072; *Isaacson v. Horne*, 716 F.3d 1213, 1230–31 (9th Cir. 2013); *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002). The Fifth Circuit has applied *Salerno*'s "no set of circumstances" test, *see Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993), although more recently it articulated both tests, *see Abbott,* 748 F.3d at 588–89. The Fourth and Seventh Circuits have declined to take a position in this dispute. *See Richmond Med. Ctr. for Women v.*

Herring, 570 F.3d 165, 173–74 (4th Cir. 2009); *Zbaraz v. Madigan*, 572 F.3d 370, 381 n.6 (7th Cir. 2009).

C. Wisconsin's admitting-privileges requirement would easily survive a facial challenge under either the "large fraction" or "no set of circumstances" test, for several independently sufficient reasons.[16]

First, Wisconsin's law is not facially invalid because a court should not "nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 329. It is undisputed that all five of Planned Parenthood's abortion doctors who previously lacked and sought admitting privileges have been able to obtain them, so applying the admitting-privileges requirement to those doctors imposes no burden on abortion access. App. 156a–57a. Accordingly, even accepting all of the Seventh Circuit's flawed premises, *but see infra* pp. 24–25, Plaintiffs' facial challenge necessarily fails. Given that an as-applied remedy enjoining the admitting-privileges requirement only as to Drs. Smith and Christensen would have remedied any arguable burden, a facial attack simply "should not . . . [have been] entertained." *Gonzales*, 550 U.S. at 167.

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[16] While Wisconsin would prevail in this case under either test, this Court could choose to settle the division of lower court authority as to the proper standard for facial challenges to abortion regulations by adding an additional question presented.

Second, Plaintiffs failed to demonstrate that Drs. Smith and Christensen made diligent efforts to seek admitting privileges. App. 153a–55a. Dr. Smith applied at only one of the seventeen hospitals within 30 miles of the clinic. App. 66a (Manion J., dissenting). Dr. Christensen applied at only two hospitals, despite having successfully held admitting privileges at a hospital in Madison for 30 years. App. 153a; App. 66a (Manion, J., dissenting).

Third, even if Drs. Smith and Christensen would fail to obtain admitting privileges in Milwaukee after diligent efforts, this would not create a "substantial obstacle" to abortion access for a "large fraction" of women, *Casey*, 505 U.S. at 895, or, alternatively, violate women's rights in every "circumstance[ ]," *Salerno*, 481 U.S. at 745. Abortions in Wisconsin have been declining for years, from 10,557 in 2003 to 5,800 in 2014. *Supra* n.9. So the inability of Dr. Smith to perform abortions would likely be mitigated by this steadily decreasing demand. Dr. Christensen, in turn, holds admitting privileges in Madison, just 80 miles away, App. 23a, and could perform abortions at Planned Parenthood's Madison clinic, a clinic that he opened and ran for almost 30 years. *See* App. 82a, 153a. And some of the additional abortions currently performed by Drs. Smith and Christensen in Milwaukee could be serviced by not only Planned Parenthood's Wisconsin clinics, but also clinics in Chicago, which

is only 90 miles away. App. 24a.[17] In addition, even if Drs. Smith's and Christensen's inability to perform abortions in Milwaukee leads some women to experience somewhat longer wait times or increased travel to avoid delays, such difficulties do not generally constitute undue burdens. *See Casey*, 505 U.S. at 885–86; *Abbott*, 748 F.3d at 598; *Greenville I*, 222 F.3d at 170; *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 604–05 (6th Cir. 2006).

Fourth, the Seventh Circuit made many additional errors, as articulated in Judge Manion's opinions below. The Seventh Circuit's "novel legal standard," App. 36a (Manion, J., dissenting)—"weigh[ing] . . . burdens against the state's justification," App. 27a (citations omitted)—conflicts with this Court's decision in *Gonzales*, which allows regulation of abortion where the State has "a rational basis to act, and [ ] does not impose an undue burden." 550 U.S. at 158. The Seventh Circuit required the State to win a war of competing medical and statistical evidence, even though this Court has held that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other

[17] With respect to abortions past eighteen weeks and six days—the only abortions that the Planned Parenthood clinic just two miles from AMS does not currently perform—there is an abortion clinic in Chicago that performs abortions up to 23 weeks and could serve all of such late-term abortions currently performed at AMS. App. 86a, 169a–170a.

contexts." *Gonzales*, 158 U.S. at 164; *see also, Mazurek* 520 U.S. at 972–73. The Seventh Circuit "disregard[ed]" out-of-state abortion providers in its undue-burden analysis, even though this Court has never held the abortion right to be "intrastate in nature." App. 59a, 63a–64a (Manion, J., dissenting). And the Seventh Circuit held that the admitting-privileges requirement "lack[s] . . . any demonstrable medical benefit," App. 18a, against the State's substantial evidence to the contrary, *supra* Statement Part 3, and contrary to every other court of appeals to consider admitting-privileges laws, App. 43a–45a (Manion, J., dissenting).

II. The Seventh Circuit Deepened A Circuit Split Regarding Whether Alleged Subjective Legislative Motivations Can Serve As An Appropriate Basis For Facially Invaliding An Otherwise Valid Regulation Of Abortion Doctors

This Court in *Casey*, 505 U.S. 833, explained that the Due Process Clause prohibits an abortion regulation having "the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Id*. at 877 (joint plurality opinion) (emphasis added). *Casey* did not delineate the function of this "purpose" language. In *Mazurek*, 520 U.S. 968, this Court called into question whether subjective motives could serve as the basis for invalidating an otherwise lawful abortion regulation. *Id*. at 972. This led the courts of appeals to adopt a

variety of approaches to analyzing *Casey*'s purpose language.

Wisconsin respectfully submits that this Court should grant review to settle this division of authority, and to make clear that, where the "natural and reasonable effect" of a law does not impose an undue burden on abortion access, that law is constitutional without regard to "whatever may have been the motives upon which legislators acted." *New York v. Roberts*, 171 U.S. 658, 681 (1898) (Harlan, J., dissenting); *accord Whole Woman's Health v. Hellerstedt*, No. 15-274, Oral Ar. Tr. 56:6–8 (Breyer, J.: "I don't question their purpose. I won't question their purpose.").

A. The courts of appeals are divided has to how to interpret and apply *Casey*'s purpose language. *See* Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317, 377–385 (2006); Lucy E. Hill, Note, *Seeking Liberty's Refuge: Analyzing Legislative Purpose Under Casey's Undue Burden Standard*, 81 Fordham L. Rev. 365, 391–400 (2012); Jenny K. Jarrard, Note, *The Failed Purpose Prong: Women's Right to Choose in Theory, Not in Fact, Under the Undue Burden Standard*, 18 Lewis & Clark L. Rev. 469, 499–508 (2014).

On one side of this circuit split sit the Fourth and Sixth Circuits. Those Circuits have, in effect, concluded that *Casey*'s purpose language is satisfied

where the "natural and reasonable effect" of the law does not impose an undue burden on abortion access. *New York*, 171 U.S. at 681 (Harlan, J., dissenting). In *Greenville I*, 222 F.3d 157, the Fourth Circuit discussed the objective benefits of certain abortion regulations, including an admitting-privileges requirement. After concluding that those regulations served objectively reasonable goals and did not impose an undue burden on abortion access, the court held that there was no constitutional violation. *Id*. at 166–69; *accord* Jarrard, 18 Lewis & Clark L. Rev. at 504 (*Greenville* "did not pursue an examination of the regulation's purpose, but did emphasize that it viewed the proper inquiry as whether the regulation is rationally related to a valid government purpose.") (quotation omitted). Similarly, in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006), the Sixth Circuit concluded that a requirement that clinics have transfer agreements with local hospitals did not violate *Casey*'s purpose language because the requirement was a "facially neutral regulation" and served an objectively "valid purpose." *Id*. at 607.

On the other side of the circuit split, the Fifth and Tenth Circuits perform a searching review of the subjective legislative motives behind an abortion regulation. For example, in *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), *vacated on jurisdictional grounds on reh'g en banc*, 244 F.3d 405 (5th Cir, 2001), the Fifth Circuit engaged in a detailed examination of the motivations of the Louisiana

legislature for imposing liability on abortion providers, relying upon this Court's Establishment Clause caselaw. *Id.* at 354–57. Similarly, in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), the Tenth Circuit engaged in a subjective motives-based inquiry, concluding that the "specific purpose" of the Utah legislature was sufficient, standing alone, to find "an unconstitutional undue burden." *Id.* at 1116–17. This approach is also consistent with the Ninth Circuit's vacated decision in *Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996), and the analysis of several recent district court decisions, *see Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1291, 1297–98 (M.D. Ala. 2014); *June Med. Servs. LLC v. Kliebert*, No. 14-CV-00525, 2016 WL 320942 ¶¶ 348–52 (M.D. La. Jan. 26, 2016), *appeal filed*, No. 16-30116 (5th Cir. 2016).

In the present case, the Seventh Circuit firmly staked its position in favor of the Fifth and Tenth Circuits' inquiry into subjective legislative motives. In its opinion, the panel majority claimed to have discovered the "true objectives" of Wisconsin's legislature. App. 31a. The court based this view primarily on the fact that the legislature did not specifically provide a grace period for obtaining admitting privileges. The court found this to be "difficult to explain save as a method of preventing abortions" and "[c]onfirmatory evidence" of an illicit purpose. App. 8a, 18a. The majority also suggested three other reasons for concluding that the legislature's "true objectives" were improper: the

"lack" of supporting medical evidence in the legislative history, "the differential treatment of abortion vis-à-vis [other] medical procedures," and the private remedy that did not require a showing of harm. App. 31a, 17a–18a; App. 193a. The panel majority also demonstrated the nature of its inquiry into subjective motives through the types of questions it asked at oral argument, accusing the legislature of not "actually car[ing] about health" and "[not] car[ing] about" poor women. Oral Argument at 12:30, No. 13-2726; Oral Argument at 8:55, No. 15-1736. The court even asked: "Governor [Scott] Walker before he withdrew from the Presidential competition said that he thought abortion should be forbidden even if the mother dies as a result of not having an abortion. Is that kind of official Wisconsin policy?" *Id*. at 52:33.[18]

B. The Seventh Circuit's approach to analyzing subjective legislative motives in this area of law is wrong for three reasons: it runs contrary to this Court's opinions in *Mazurek* and *Gonzales*, it does not comply with this Court's general rule for when subjective-motives inquiries are permissible, and, as

[18] Before this case, the Seventh Circuit had held that "inquiry into the legislative purpose [behind abortion regulations] is necessarily deferential and limited," and that "such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose." *Karlin v. Foust*, 188 F.3d 446, 493, 496 (7th Cir. 1999).

this case demonstrates, it leads courts to disparage erroneously the People's representatives.

1. The Seventh Circuit's inquiries into the subjective motivations of the Wisconsin legislature conflict with this Court's explanations of *Casey*'s purpose language. In *Mazurek*, only five years after *Casey*, this Court questioned whether motives alone could invalidate an otherwise constitutional regulation of abortion doctors. *Id*. More recently, in *Gonzales*, 550 U.S. 124, this Court explained that an abortion regulation's purpose must be "measured by [the] text," rejecting the dissent's call for a motives-based inquiry. *Compare id*. at 156–60, *with id*. at 191 (Ginsburg, J., dissenting). As Judges Manion and Garza have explained, *Gonzales* appears to have "simplified *Casey*'s description of an undue burden by collapsing the purpose inquiry into the effects test." App. 56a (Manion, J., dissenting); *accord Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 460 n.4 (5th Cir. 2014) (Garza, J., dissenting).

2. The Seventh Circuit's approach is also wrong because it violates the principle, dating back to the founding generation, that if a law "is supported by valid neutral justifications, those justifications should not be disregarded simply because [other considerations] may have provided one motivation for the votes of individual legislators." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 204 (2008) (plurality opinion); *see also Fletcher v. Peck*, 10 U.S. 87, 130 (1810).

This Court has made an exception to this general principle "only in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry.'" *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968). Specifically, this Court has only permitted inquiry into legislative motives where the constitutional provision singles out individuals, *see United States v. Lovett*, 328 U.S. 303, 307 (1946) (Bill of Attainder Clause), racial minorities, *City of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–71 (1977) (Equal Protection Clause); *Hunt v. Cromartie*, 526 U.S. 541, 546–47 (1999) (same), women, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–53 (1975) (same), and religions, *Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.) (Establishment Clause).

This "very limited" exception does not logically apply to Due Process Clause challenges to abortion regulations. The Due Process Clause prohibits a State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This language does not indicate any need to ferret out legislators' motivations for enacting an otherwise lawful abortion regulation. Notably, the few areas where this Court has permitted inquiry into legislative motives have been where the motivations themselves—e.g., discrim-

ination against racial minorities, women, or religions—are so repugnant to our constitutional order that a law driven by such views raises grave constitutional concerns on that basis alone. In contrast, legislatures have the authority to express a "preference for normal childbirth" over abortion, *Casey*, 505 U.S. at 872 (joint plurality opinion), and "many decent and civilized people" oppose at least some abortions. *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting). It follows that "decent" opposition to abortion is of an entirely different constitutional character from, for example, discrimination against racial minorities, and does not justify the same type of subjective inquiry into legislative motives.

3. Finally, this case demonstrates that assessing legislative motives—especially in the highly charged area of abortion regulations—can lead courts to wrongly ascribe illicit legislative motives. Legislative motives are often "difficult or impossible" to determine, *Palmer v. Thompson*, 403 U.S 217, 225 (1971), and attempting to do so undermines the "confidence and respect" owed to legislative bodies, *McCray v. United States*, 195 U.S. 27, 54–55 (1904). After all, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 384; *accord* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1086, p. 533 (1st ed. 1833).

The Seventh Circuit believed that it had unearthed the Wisconsin legislature's "true objectives," App. 31a, such that the court felt comfortable accusing the legislature of not "car[ing] about health" or poor women. Oral Argument at 12:30, No. 13-2726; Oral Argument at 8:55, No. 15-1736. A more charitable understanding of the legislative process, consistent with the respect owed to legislators in our system of government, would have yielded an entirely different conclusion.

The Seventh Circuit's primary basis for finding an illicit purpose was the law's so-called "two-day deadline." App. 6a–7a, 17a–18a, 31a; *see supra* Statement Part 5. But the law was silent as to its effective date, so this "deadline" was simply the default operation of Wisconsin law. *See* 2013 Wis. Act 37; Wis. Stat. § 991.11; App. 50a n.4 (Manion J., dissenting); App. 6a. Legislators were reacting swiftly to the Gosnell crisis, passing the law after the national scandal broke in less than a month. App. 36a–40a (Manion, J., dissenting). And the legislature devoted almost all of its attention to an ultrasound requirement in the same bill, which needed no grace period, *see* App. 13a, meaning that the failure to build in a grace period for the entire law is most reasonably explained as a simple oversight. App. 50a n.4 (Manion, J., dissenting). In addition, some legislators reasonably may have believed that abortion doctors already had or could easily obtain admitting privileges. After all, when the law was being considered by the legislature, the

State's most widely read newspaper reported that AMS's physicians had admitting privileges and that only Planned Parenthood's Appleton-based physicians lacked such privileges. *Supra* p. 9 n.10.

The Seventh Circuit's remaining justifications for finding an illicit purpose are similarly insubstantial. The Seventh Circuit believed that legislators "reveal[ed] their true objectives" by requiring abortion doctors, and not other outpatient physicians, to have admitting privileges. App. 31a; App. 193a. But there was no Gosnell-like crisis in other outpatient procedures. The people of Wisconsin were not presented with any example of a colonoscopist—to use the Seventh Circuit's example—"overdos[ing] his patients with dangerous drugs, spread[ing] venereal disease among them with infected instruments," and killing live babies by "sticking scissors into the back of [their] necks and cutting [their] spinal cord[s]." *Supra*, p. 4 n.3. State legislatures often respond prophylactically to crises in other States that garner their citizens' attention and demand for action. *See Greenville I*, 222 F.3d at 169. The Seventh Circuit also pointed to the "lack of any demonstrable medical benefit" from the law in the legislative history, App. 17a–18a; App. 192a–93a, but this Court's decision in *Mazurek* makes plain that this does not suggest improper motive, 520 U.S. at 972–73. Finally, the presence of a private enforcement mechanism that is available *before* doctors cause harm, App. 18a; App. 193a, can

reasonably be explained by the important goal of preventing harm from occurring in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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