

FILED
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**IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

EDDIE JEAN CARR, CHANCERY CLERK

BY B. Robinson

AMERICAN ASSOCIATION OF PRO-LIFE
OBSTETRICIANS AND GYNECOLOGISTS,
on behalf of its members

PLAINTIFF

vs.

CIVIL ACTION NO. 62022-1371 M/Y

MISSISSIPPI STATE BOARD OF MEDICAL
LICENSURE; KENNETH CLEVELAND, M.D.,
in his official capacity as Executive Director of
the Mississippi State Board of Medical Licensure

DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT

INTRODUCTION

1. This is an action for an entry of judgment declaring that Miss. Code Ann. § 41-41-45, which prohibits abortion except in cases where necessary for the preservation of the mother's life or where the pregnancy was caused by rape (the "elective abortion ban"), does not violate the Mississippi Constitution.

2. A declaratory judgment is necessary and appropriate in this matter, as the relief sought would remove uncertainty as to the validity of Mississippi's elective abortion ban under the state's constitutional law and would terminate a grave controversy regarding the conscience rights of pro-life physicians to decline to perform or refer patients for elective abortions without facing possible discipline by the Mississippi State Board of Medical Licensure.

3. In 2007, Mississippi adopted the elective abortion ban but predicated its effective date upon a triggering mechanism.

4. Under that mechanism, the elective abortion ban would take effect and be in force only if the Mississippi Attorney General published a determination that (1) the United States

Supreme Court had overruled its decision in *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a federal right to abortion under the U.S. Constitution); and (2) that it was reasonably probable that the elective abortion ban would be upheld by the court as constitutional.

5. On June 24, 2022, the U.S. Supreme Court overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (adopting an “undue burden” standard for assessing abortion regulations), rejecting those decisions’ reasoning as egregiously wrong. *Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

6. Mississippi’s elective abortion ban then took effect on July 7, 2022, ten (10) days after the Mississippi Attorney General published the determinations required by the statutory triggering mechanism.

7. However, the validity of Mississippi’s elective abortion ban remains uncertain.

8. In 1998, before the elective abortion ban was enacted, the Mississippi Supreme Court held in *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998) that the Mississippi Constitution protected “an implicit right to have an abortion” as part of the right to privacy. *Id.* at 653. That conclusion relied heavily upon the U.S. Supreme Court’s holdings and reasoning in *Roe* and *Casey* (see *id.* at 650-55) and thus the overruling of *Roe* and *Casey* should fatally undermine *Fordice*. See *Jackson Women’s Health Organization v. Dobbs*, No. G2022-739, Dkt. No. 39 (Hinds County Ch., July 5, 2022) (order denying motion for temporary restraining order) (“Since *Roe* and *Casey* are no longer the law of the land, reliance upon *Fordice* will almost certainly not be well-founded when pursuing this case in the [Mississippi] Supreme Court. When considering *Fordice*, in light of *Roe*, *Casey* and *Dobbs*, it is more than doubtful that the Mississippi Supreme Court will continue to uphold *Fordice*.”)

9. Nevertheless, the Mississippi Supreme Court has not yet had the opportunity to overrule *Fordice*.

10. As a result, today, elective abortions are illegal under Mississippi's statutory law but simultaneously heralded as a right under a yet-to-be overruled opinion of the Mississippi Supreme Court interpreting the Mississippi Constitution.

11. This untenable situation places Mississippi physicians in an impossible "Catch-22."

12. On one hand, if the elective abortion ban is valid, and a patient requests an unlawful, elective abortion, and her physician illegally refers her to another physician for that unlawful procedure, the referring physician could face criminal prosecution as an accessory to a felony. *See* Miss. Code Ann. §§ 41-41-45; 97-1-3.

13. On the other hand, if the elective abortion ban is invalid, and a patient requests a lawful, elective abortion, and her pro-life physician makes a conscience-based decision to decline to refer her to another physician for that lawful procedure, the physician could potentially be disciplined by the Mississippi State Board of Medical Licensure.

14. Because of this legal uncertainty, physicians must necessarily guess as to the legality of their actions involving abortion, and no matter which guess they make, they could face potential punishment for guessing wrong. Thus, a declaratory judgment is urgently needed.

PARTIES

15. Plaintiff the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is the largest organization of pro-life obstetrician-gynecologists in the world and is headquartered in Michigan. AAPLOG includes obstetrician-gynecologists and other physicians, with over six thousand (6,000) medical professionals nationwide, including thirty-five (35) members in Mississippi. Many of AAPLOG's Mississippi members are also members of the

American College of Obstetrics and Gynecology (ACOG) and the American Medical Association (AMA) and are board-certified by the American Board of Obstetrics and Gynecology (ABOG). AAPLOG members oppose elective abortion and are committed to the care and well-being of their patients including both pregnant women and their unborn children. AAPLOG seeks a declaratory judgment on behalf of its Mississippi members. *See* Affidavit of Donna Harrison, M.D. (attached as Exhibit “1” and incorporated by reference).

16. Defendant Mississippi State Board of Medical Licensure has the authority to discipline physicians licensed in Mississippi pursuant to Miss. Code Ann. § 73-25-83(c), if, among other things, such physicians have disciplinary action taken against them by their peers in any professional medical association or society (such as the American College of Obstetrics and Gynecology or the American Medical Association) or if they lose their hospital privileges (by, for example, being decertified by the American Board of Obstetrics and Gynecology) – either of which could potentially result from a physician’s refusal to refer patients for lawful, elective abortions. While the statutory grounds for physician discipline by the Mississippi State Board of Medical Licensure could potentially result from a physician’s refusal to perform or refer patients for lawful, elective abortions, those same grounds for discipline could categorically not be met based on a physician’s refusal to serve as an accessory to a felony by illegally referring patients for illegal, elective abortions. The Mississippi State Board of Medical Licensure is located at 1867 Crane Ridge Drive, Suite 200-B, Jackson, Mississippi 39216.

17. Defendant Kenneth Cleveland, M.D., is the Executive Director of the Mississippi State Board of Medical Licensure. He is responsible for the day-to-day operations of the Board, pursuant to 30 Code Miss. R. Pt. 2645, R. 1.2; and is vested with all the authority of Board when it is not in session, pursuant to Miss. Code Ann. § 73-43-13. He is also responsible for assisting

in determining whether complaints against physicians warrant further investigation, pursuant to 30 Code Miss. R. Pt. 2645, R. 1.3; determining, upon conclusion of an investigation, whether there is a violation of the Mississippi Medical Practice Act and whether disciplinary action should be initiated, pursuant to 30 Code Miss. R. Pt. 2645, R. 1.4; issuing subpoenas for purposes of disciplinary hearings, pursuant to 30 Code Miss. R. Pt. 2645, R. 1.5; and accepting, rejecting, or modifying the terms of consent orders entered into in lieu of a disciplinary hearing by the Board, pursuant to 30 Code Miss. R. Pt. 2645, R. 1.10. He is sued in his official capacity only.

JURISDICTION AND VENUE

18. This Court has jurisdiction of the parties and jurisdiction of the subject matter of this proceeding pursuant to Miss. Const. art. VI, § 159 and Miss. Code Ann. § 9-5-81, as the declaratory relief sought in this action sounds in equity.

19. Venue is proper in this county and district pursuant to Miss. Code Ann. § 73-43-17, which establishes venue for suits against the Mississippi State Board of Medical Licensure, and because the seat of state government of the State of Mississippi is located in this county and district.

20. Declaratory judgment is appropriate in this matter, as the statute in question affects the rights, status, or other legal relations of the parties; the validity of that statute is uncertain; and the relief sought would terminate a controversy or remove an uncertainty. *See* Miss. R. Civ. P. 57.

21. An action for a declaratory judgment may properly seek a declaration that a statute is constitutional. *See e.g. Alexander v. State By & Through Allain*, 441 So. 2d 1329, 1333–34 (Miss. 1983), overruled on other grounds by *5K Farms, Inc. v. Miss. Dep't of Revenue*, 94 So. 3d 221 (Miss. 2012).

22. Plaintiff relies exclusively on state law grounds in this Complaint for Declaratory Judgment and expressly disavows and repudiates any and all federal causes of action or federal remedies which may be available to AAPLOG or to its members in this matter.

FACTS

MISSISSIPPI'S ELECTIVE ABORTION BAN AND THE *FORDICE* OPINION

23. Mississippi has long sought to protect human life by restricting and regulating abortion. In 1839, state law made it a crime to “administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever” – or to “use or employ any instrument or other means” – “with intent thereby to destroy such child,” unless “necessary to preserve the life of the mother.” Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, § 9 (cleaned up).

24. In 1952, the Legislature removed the quickening element but continued to make it a crime to “willfully and knowingly cause any woman pregnant with child to abort or miscarry, or attempt to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother’s life.” 1952 Miss. Laws p. 289, § 1 (cleaned up).

25. However, in *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court held that the U.S. Constitution protects a right to abortion. It ruled that the right of privacy protected by the U.S. Constitution “encompasses a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 153 (cleaned up).

26. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the U.S. Supreme Court reaffirmed that the U.S. Constitution protects a right to abortion and adopted a rule that a state may not place an “undue burden” on women seeking an abortion. *Id.* at 853; 876-77 (plurality opinion).

27. After *Casey* was decided, the Mississippi Supreme Court held in *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998), that the Mississippi Constitution protected “an implicit right to have an abortion” as part of the right to privacy. *Id.* at 653.

28. The Mississippi Supreme Court’s holding in *Fordice* relied heavily upon the U.S. Supreme Court’s holdings and reasoning in *Roe* and *Casey*. *See id.* at 650-55. *Fordice* explained that *Roe* based a right to abortion on a federal constitutional “right of privacy,” that the Mississippi Supreme Court had “recognized the same important right” of privacy in the Mississippi Constitution, and that the Mississippi Constitution thus protected a “right to have an abortion.” *Id.* at 653. *Fordice* also “adopted” the “decision in *Casey*” and its “undue burden standard” for analyzing abortion regulations. *Id.* at 655 (cleaned up).

29. In 2007, the people of Mississippi, through their elected representatives, enacted a triggering mechanism for the elective abortion ban, Miss. Code Ann. § 41-41-45. While the triggering mechanism went into effect that year, the statute explicitly provided that its substantive prohibitions would not become effective unless the U.S. Supreme Court overruled *Roe*. 2007 Miss. Laws Ch. 441 (S.B. 2391) § 6.

30. On June 24, 2022, the U.S. Supreme Court overruled *Roe* and *Casey* in *Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022). The Court explained that *Roe* was “egregiously wrong” and that *Casey* “perpetuated its errors.” *Id.* at 2237. The Court thus “returned the authority” to “regulate or prohibit abortion” “to the people and their elected representatives.” *Id.* at 2239 (cleaned up).

31. The prohibitions of Mississippi’s elective abortion ban, Miss. Code Ann. § 41-41-45, took effect on July 7, 2022, “ten (10) days following” publication in the Secretary of State’s administrative bulletin that “the Attorney General has determined that the United States Supreme

Court has overruled the decision of *Roe v. Wade*, 410 U.S. 113 (1973), and that it is reasonably probable that” Miss. Code Ann. § 41-41-45 “would be upheld by the court as constitutional.” 2007 Miss. Laws Ch. 441 (S.B. 2391) § 6.

32. The elective abortion ban makes it a felony, punishable by not less than one (1) year nor more than ten (10) years of imprisonment in the penitentiary, for any person, except the pregnant women, to purposefully, knowingly or recklessly perform or attempt to perform or induce an abortion, except where necessary for the preservation of the mother’s life or where the pregnancy was caused by rape. Miss. Code Ann. §§ 41-41-45; 1-3-11.

33. Because the Mississippi Supreme Court’s decision in *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998) – recognizing abortion as a right protected by the Mississippi Constitution – relied heavily upon the U.S. Supreme Court’s holdings and reasoning in *Roe* and *Casey*, the overruling of *Roe* and *Casey* should fatally undermine *Fordice*. See *Jackson Women’s Health Organization v. Dobbs*, No. G2022-739, Dkt. No. 39 (Hinds County Ch., July 5, 2022) (order denying motion for temporary restraining order) (“Since *Roe* and *Casey* are no longer the law of the land, reliance upon *Fordice* will almost certainly not be well-founded when pursuing this case in the [Mississippi] Supreme Court. When considering *Fordice*, in light of *Roe*, *Casey* and *Dobbs*, it is more than doubtful that the Mississippi Supreme Court will continue to uphold *Fordice*.”).

34. However, the Mississippi Supreme Court’s opinion in *Fordice* has not been overruled.

35. The conflict between the elective abortion ban and the *Fordice* opinion places AAPLOG physicians in an impossible “Catch-22”.

THE “CATCH-22” FACING AAPLOG PHYSICIANS

36. AAPLOG and its members object to ending the life of a human being in the womb for no medical reason. The objections are both ethical and medical and stem from the purpose of medicine itself, which is to heal and not to electively kill human beings regardless of their location.¹

37. Under Mississippi law, any person who is an accessory to the commission of a felony, before the fact, is indictable and subject to the same punishment as the principal. Miss. Code Ann. § 97-1-3.

38. Under Mississippi’s elective abortion ban and accessory-to-felony statute, a physician who referred a patient to another medical provider for the performance of an unlawful, elective abortion, could be indicted and imprisoned.

39. Thus, if Mississippi’s elective abortion ban is constitutional as a matter of state law, and a patient requested an elective abortion, AAPLOG’s members could be imprisoned if they referred the patient to another medical provider for the performance of an elective abortion or if they provided information or guidance to the patient regarding how to obtain an elective abortion.

40. However, the elective abortion ban conflicts with the Mississippi Supreme Court’s opinion in *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998) and has already been subject to a state constitutional challenge based on the *Fordice* opinion. See *Jackson Women’s Health Organization v. Dobbs*, No. G2022-739, Dkt. No. 2 (Hinds County Ch., June 27, 2022) (complaint for declaratory and injunctive relief) (voluntarily dismissed after subsequent actions taken by plaintiffs rendered their claims moot).

¹ See “Committee Opinion 1. ‘Hippocratic Objection to Killing Human Beings in Medical Practice.’” AAPLOG, available at: https://aaplog.org/wp-content/uploads/2019/07/AAPLOG_1-1.pdf (last visited on Nov. 14, 2022) (attached as Exhibit “2” and incorporated by reference).

41. If Mississippi's elective abortion ban is unconstitutional as a matter of state law, AAPLOG's members could be punished if they declined to refer a patient for a lawful, elective abortion or declined to provide guidance regarding how the patient could obtain a lawful, elective abortion.

42. This is because the Mississippi State Board of Medical Licensure and its Executive Director have the authority to discipline physicians licensed in Mississippi pursuant to Miss. Code Ann. § 73-25-83(c), if, among other things, such physicians have disciplinary action taken against them by their peers in any professional medical association or society (whether any such association or society is local, regional, state or national in scope) or if they lose their hospital privileges.

43. Several professional medical societies, associations, and board-certification organizations have adopted formal policies which make physicians who refuse to perform or refer for elective abortions vulnerable to discipline or de-certification by those organizations, and thus, vulnerable to discipline by the Mississippi State Board of Medical Licensure.

44. If the elective abortion ban is ever declared unconstitutional, no formal policy of these organizations prevents them from disciplining or de-certifying their members retroactively for conduct which, at the time, may have appeared to have been required by Mississippi's elective abortion ban, especially if the *Fordice* opinion had not been overruled or recognized as no longer good law at the time of that conduct. See Affidavit of Donna Harrison, M.D. (Exhibit "1").

45. Many of AAPLOG's Mississippi members are currently declining to perform or refer patients for elective abortions and are thus vulnerable to discipline or de-certification by several professional medical societies, associations, and board-certification organizations, and are thus, vulnerable to discipline by the Mississippi State Board of Medical Licensure. See *id.*

**THE AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGY (ACOG)
ENDANGERS PRO-LIFE PHYSICIANS**

46. The American College of Obstetrics and Gynecology (ACOG) is a professional medical society and purports to be “the premier professional membership organization for obstetrician–gynecologists.”²

47. Many of AAPLOG’s Mississippi members are also members of ACOG. *See* Affidavit of Donna Harrison, M.D. (Exhibit “1”).

48. ACOG takes disciplinary action against its members who violate ACOG’s Code of Professional Ethics, Bylaws, or policies.³

49. On August 30, 2005, ACOG sent a letter to United States Senators requesting them to enact a federal law that would “require doctors with moral objections to refer for abortions,” stating that “doctors who morally object to abortion should be required to refer patients to other physicians who will provide the appropriate care.”⁴

50. In November of 2007, ACOG adopted Ethics Committee Opinion Number 385, entitled “The Limits of Conscientious Refusal in Reproductive Medicine.”⁵

² *See* “About Us,” ACOG, available at: <https://www.acog.org/about> (last visited on Nov. 14, 2022) (attached as Exhibit “3” and incorporated by reference).

³ *See* “Grievance Committee,” ACOG, available at: <https://www.acog.org/about/leadership-and-governance/committees> (last visited on Nov. 14, 2022) (attached as Exhibit “4” and incorporated by reference).

⁴ *See* August 30, 2005, Letter from ACOG to U.S. Senators, available at: <https://aaplog.org/wp-content/uploads/2022/05/Mennuti-to-Senator-8-05054.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “5” and incorporated by reference) (cleaned up).

⁵ *See* “ACOG Committee on Ethics Opinion Number 385, ‘The Limits of Conscientious Refusal in Reproductive Medicine,’” ACOG, available at: <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2007/11/the-limits-of-conscientious-refusal-in-reproductive-medicine> (last visited on Nov. 14, 2022) (attached as Exhibit “6” and incorporated by reference).

51. ACOG's Ethics Committee Opinion Number 385 directs that, in the context of providing lawful abortions, "physicians and other health care professionals have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive service that patients request." *See* Footnote 5, *supra* (cleaned up).

52. ACOG's Ethics Committee Opinion Number 385 also directs that, in the context of providing lawful abortions, "in an emergency in which referral is not possible or might negatively have an impact on a patient's physical or mental health, providers have an obligation to provide medically indicated and requested care." *Id.* (cleaned up).

53. In January of 2008, shortly after publishing Ethics Committee Opinion number 385, ACOG published a new edition of its Code of Professional Ethics, which continued to state, as prior editions had, that "the obstetrician-gynecologist should consult, refer, or cooperate with other physicians, health care professionals, and institutions to the extent necessary to serve the best interests of their patients."⁶ ACOG's Code of Professional Ethics still contains this directive to this day.

54. On February 6, 2008, following the adoption of ACOG's Ethics Committee Opinion Number 385, AAPLOG vigorously and publicly opposed the Opinion by issuing a statement condemning the Opinion and requesting that ACOG rescind the Opinion.⁷

⁶ *See* "Code of Professional Ethics of the American College of Obstetricians and Gynecologists," ACOG, available at: <https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/acog-policies/code-of-professional-ethics-of-the-american-college-of-obstetricians-and-gynecologists.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "7" and incorporated by reference) (cleaned up).

⁷ *See* "AAPLOG Response to the ACOG Ethics Committee Opinion #385, Titled 'The Limits of Conscientious Refusal in Reproductive Medicine,'" AAPLOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-02-06-AAPLOG-statement-on-ACOG-385.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "8" and incorporated by reference).

55. Many other medical associations and individuals similarly objected to Ethics Committee Opinion Number 385.

56. On December 7, 2007, numerous medical associations and other organizations sent a joint letter of protest to ACOG urging the repudiation and withdrawal of Ethics Committee Opinion Number 385.⁸

57. On February 28, 2008, the Catholic Medical Association sent a letter to ACOG denouncing Ethics Committee Opinion number 385 and urging ACOG to rescind it immediately.⁹

58. On February 29, 2008, the Catholic Medical Association issued a Press Release publicly calling on ACOG to immediately rescind Ethics Committee Opinion Number 385.¹⁰

59. On March 6, 2008, the then-President of ACOG responded to this widespread criticism by sending a letter to ACOG's members which acknowledged the "uncertain and mixed interpretation" of Ethics Committee Opinion Number 385 and promised that ACOG would reevaluate the Opinion.¹¹

⁸ See December 7, 2007, Joint Letter of Protest, available at: <https://www.consciencelaws.org/ethics/ethics079-002.aspx> (last visited on Nov. 14, 2022) (attached as Exhibit "9" and incorporated by reference).

⁹ See February 28, 2008, Letter from Catholic Medical Association to ACOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/CMA-Response-to-ACOG-Committee-on-Ethics-Opinion-Final-Draft.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "10" and incorporated by reference).

¹⁰ See February 29, 2008, Press Release from the Catholic Medical Association, available at: <https://aaplog.org/wp-content/uploads/2022/05/Press-Release-on-ACOG-Ethics-Opinion-Final.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "11" and incorporated by reference).

¹¹ See March 6, 2008, Letter from Kenneth L. Noller, MD, MS, FACOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-03-26-ACOG-letter-to-fellows.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "12" and incorporated by reference).

60. However, ACOG never rescinded or changed Ethics Committee Opinion Number 385, and instead, reaffirmed it, most recently in 2016.¹²

61. The widespread criticism of ACOG's Ethics Committee Opinion Number 385 did not abate following the March 6, 2008, letter from ACOG's then-President.

62. On March 14, 2008, The U.S. Department of Health and Human Services ("HHS") issued a News Release expressing disappointment in ACOG's adoption of Ethics Committee Opinion Number 385, stating that "unless changes are made, physicians could be forced to refer patients for abortions even if it violates their conscience."¹³

63. On March 14, 2008, sixteen (16) Members of the United States Congress sent a letter to ACOG expressing concern that Ethics Committee Opinion Number 385 would force pro-life obstetricians and gynecologists to "disregard their moral, ethical or religious objections to abortion and instructs them to perform or refer for abortion."¹⁴

64. On March 23, 2018, AAPLOG filed a Civil Rights Discrimination Complaint against ACOG with the U.S. Department of Health and Human Services' ("HHS"), Office for Civil Rights ("OCR"), requesting the OCR to investigate, among other things, the systematic and

¹² See "2016 Reaffirmed ACOG Committee on Ethics Opinion Number 385, 'The Limits of Conscientious Refusal in Reproductive Medicine,'" ACOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "13" and incorporated by reference).

¹³ See March 14, 2008, HHS News Release available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-03-14-HHS-Press-release-ACOG-385-ABOG-MOC.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "14" and incorporated by reference).

¹⁴ See March 14, 2008, Letter from Members of Congress to ACOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-03-14-Congressional-Letter-to-ACOG-on-385.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "15" and incorporated by reference).

continued violation of conscience rights of physicians authorized by ACOG's adoption and continued advancement of Ethics Committee Opinion Number 385.¹⁵

65. To this day, ACOG has neither rescinded Ethics Committee Opinion Number 385 nor adopted any formal policy to prevent current or future officers of ACOG from disciplining physicians who do not perform or refer patients for elective abortions. *See* Affidavit of Donna Harrison, M.D. (Exhibit "I").

66. While the March 6, 2008, letter from ACOG's former-President to the members of ACOG insisted that ACOG Ethics Committee Opinion Number 385 is not a part of ACOG's Code of Professional Ethics and is not intended to be a rule of ethical conduct which could be used to affect an individual's membership in ACOG, this disclaimer provides no legally binding assurance to ACOG members, either now or in the future, since it does not constitute a formally adopted, legally binding policy of ACOG.

67. To the contrary, shortly after adopting Ethics Committee Opinion Number 385, ACOG published a new edition of its Code of Professional Ethics which continued to require ACOG members to "consult, refer, or cooperate with other physicians, health care professionals, and institutions to the extent necessary to serve the best interests of their patients."

68. ACOG's Ethics Committee Opinions are frequently published together with ACOG's Code of Professional Responsibility, indicating that ACOG's Ethics Committee Opinions are either meant to inform ACOG's Code of Professional Responsibility or that ACOG's Ethics Committee Opinions represent logical conclusions from ACOG's Code of Professional Responsibility. *See* Affidavit of Donna Harrison, M.D. (Exhibit "I").

¹⁵ *See* March 23, 2018 Civil Rights Discrimination Complaint, available at: <https://aaplog.org/wp-content/uploads/2022/06/AAPLOG-formal-complaint-with-HHS-against-ACOG.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "16" and incorporated by reference).

69. Thus, AAPLOG members who are also members of ACOG are in constant danger of ACOG applying the directive in the ACOG Code of Professional Conduct that obstetrician-gynecologists must “consult, refer, or cooperate” with others to “serve the best interest of their patients,” together with the directives in ACOG’s Ethics Committee Opinion Number 385 that, in the context of providing lawful abortions, obstetrician-gynecologists “have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive service that patients request” and that obstetrician-gynecologists “have an obligation to provide medically indicated and requested” abortions in emergencies, to discipline ACOG physicians who neither perform nor refer for elective abortions.

70. Despite repeated requests from AAPLOG for ACOG to adopt binding policy clarifying that no such disciplinary action would be taken against ACOG members, ACOG has refused to do so. *See* Affidavit of Donna Harrison, M.D. (Exhibit “1”).

71. As such, AAPLOG members continue to be vulnerable to discipline by ACOG.

72. Disciplinary action taken by ACOG against AAPLOG members could result in those AAPLOG members being disciplined by the Mississippi State Board of Medical Licensure, pursuant to Miss. Code Ann. § 73-25-83(c).

73. However, if Mississippi’s elective abortion ban is declared valid, AAPLOG’s pro-life members who are also members of ACOG would not be vulnerable to disciplinary action by ACOG because of their conscience-based refusal to perform or refer patients for elective abortions (and thus, would not be vulnerable to discipline by the Mississippi State Board of Medical Licensure), as ACOG’s Code of Professional Ethics states unequivocally that “the obstetrician-gynecologist should respect all laws.”¹⁶

¹⁶ *See* Footnote 6, *supra*, “Code of Professional Ethics of the American College of Obstetricians and Gynecologists,” Section V, Paragraph 2 (Exhibit “7”) (cleaned up).

**THE AMERICAN BOARD OF OBSTETRICS AND GYNECOLOGY (ABOG)
ENDANGERS PRO-LIFE PHYSICIANS**

74. The American Board of Obstetrics and Gynecology (ABOG) is the body that provides board certification for practicing obstetricians and gynecologists in the United States. ABOG's purported mission is to define the standards, certify obstetricians and gynecologists, and facilitate continuous learning to advance knowledge, practice, and professionalism in women's health.¹⁷

75. Many hospitals in Mississippi, including hospitals which have provided privileges to AAPLOG's Mississippi members, require obstetricians and gynecologists to be board certified by ABOG in order to obtain and maintain hospital privileges. *See* Affidavit of Donna Harrison, M.D. (Exhibit "I").

76. Certificates awarded by ABOG after 1986 expire on a yearly basis. Thus, practicing obstetricians and gynecologists who were first board certified after 1986 and wish to maintain their board certification must regain certification each year.¹⁸

77. In November of 2007 – the same month and year that ACOG published Ethics Committee Opinion Number 385 – ABOG revised its Bulletin for Maintenance of Certification to provide that obstetricians and gynecologists could be denied board certification or have their board certification revoked if they “violated any of the ‘Ethical Considerations in the Practice of

¹⁷ See “About ABOG,” ABOG, available at: <https://www.abog.org/about-abog/about-abog> (last visited on Nov. 14, 2022) (attached as Exhibit “17” and incorporated by reference).

¹⁸ See “Time Limitations and Ineligibility,” ABOG, available at: <https://www.abog.org/maintenance-of-certification/eligibility-requirements/time-limitation-and-ineligibility> (last visited on Nov. 14, 2022) (attached as Exhibit “18” and incorporated by reference).

Obstetrics and Gynecology’ currently published by the American College of Obstetricians and Gynecologists [ACOG]” which would include ACOG’s Ethics Committee Opinion Number 385.¹⁹

78. On March 14, 2008, Michael Leavitt, then-Secretary of the U.S. Department of Health and Human Services (“HHS”), sent a letter to ABOG expressing concern that “the actions taken by ACOG and ABOG could result in the denial or revocation of Board certification of physicians who – but for his or her refusal, for example to refer a patient for an abortion – would be certified. These actions, in turn, could result in certain State and local governments, institutions, or other entities that require Board certification taking action against the physician based just on the Board’s denial or revocation of certification.”²⁰

79. On March 19, 2008, the then-Executive Director of ABOG sent a letter responding to the letter from then-Secretary Leavitt. In that letter, ABOG’s then-Executive Director denied that ABOG had “ever asked anyone to violate their own ethical or moral standards,” but did not commit to pursue any official policy statement from ABOG clarifying that ABOG would not rely on ACOG’s Ethics Committee Opinion Number 385 when determining whether to grant or revoke board certifications.²¹

80. On April 4, 2008, AAPLOG sent a letter to ABOG requesting that ABOG issue an “official written statement” clarifying that the November, 2007, revisions to the ABOG Bulletin

¹⁹ See November, 2007 “*Bulletin for 2008 Maintenance of Certification*,” Page 31, Section 3, Paragraph F, ABOG, available at <https://aaplog.org/wp-content/uploads/2022/05/2007-11-00-revision-effective-MOC2008.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “19” and incorporated by reference).

²⁰ See March 14, 2008, Letter from Secretary Leavitt to ABOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-03-14-HHS-letter-to-ABOG-1.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “20” and incorporated by reference) (cleaned up).

²¹ See March 19, 2008, Letter from Norman F. Grant, M.D., available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-03-19-ABOG-letter-response-to-HHS.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “21” and incorporated by reference).

for Maintenance of Certification (predicating the receipt or maintenance of board certification upon compliance with ACOG's ethical rules) would not be used, either then or in the future, to deny or revoke board certification because of a physician's conscience-based refusal to perform or refer for abortions, based upon either:

(1) The directive in the ACOG Code of Professional Conduct that obstetrician-gynecologists must "consult, refer, or cooperate" with others to "serve the best interest of their patients;" or

(2) The directive in ACOG's Ethics Committee Opinion Number 385 that, in the context of providing lawful abortions, obstetrician-gynecologists "have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive service that patients request;" or

(3) The directive in ACOG's Ethics Committee Opinion Number 385 that, in the context of providing lawful abortions, obstetrician-gynecologists "have an obligation to provide medically indicated and requested" abortions in emergencies.²²

81. ABOG never issued the formal written statement requested by AAPLOG. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1").

82. On August 21, 2008, the U.S. Department of Health and Human Services ("HHS") issued a news release calling on ABOG to reject ACOG's Ethics Committee Opinion Number 385, stating: "it appears that the interaction of the ABOG Bulletin for 2008 Maintenance of Certification with the ACOG ethics report would force physicians to violate their conscience by referring

²² *See* April 4, 2008 Letter from AAPLOG to ABOG, available at: <https://aaplog.org/wp-content/uploads/2022/05/2008-04-04-AAPLOG-letter-to-ABOG.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit "22" and incorporated by reference).

patients for abortions or taking other objectionable actions, or risk losing their board certification.”²³

83. On August 22, 2008, the then-Executive Director of ABOG sent a letter to Michael Leavitt, then-Secretary of HHS, again denying that ABOG was currently using ACOG’s Committee Opinion Number 385 to deny or revoke board certification, but again refusing to commit to pursue any official policy statement from ABOG clarifying that ABOG would not rely on the Committee Opinion, either then or in the future, when determining whether to grant or revoke board certification.²⁴

84. In September of 2008, AAPLOG wrote to the U.S. President’s Council on Bioethics and requested it to issue a written opinion concerning ABOG’s decision to make compliance with ACOG’s controversial Ethics Committee Opinion Number 385 grounds to deny or revoke board certification.²⁵

85. On September 11, 2008, the U.S. President’s Council on Bioethics met and discussed the implications of ACOG’s Ethics Committee Opinion Number 385.²⁶

86. Despite repeated requests from AAPLOG for ABOG to issue a formal written statement or other binding policy clarifying that board certification would not be withheld or

²³ See March 14, 2008, HHS News Release, available at: <https://web.archive.org/web/20090109023601/http://www.hhs.gov/news/press/2008pres/03/20080314a.html> (last visited on Nov. 14, 2022) (attached as Exhibit “23” and incorporated by reference) (cleaned up).

²⁴ See August 22, 2008, Letter from Norman F. Gant, M.D., available at: <https://aaplog.org/wp-content/uploads/2022/05/ABOG-to-leavitt.Resp17A15E.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “24” and incorporated by reference).

²⁵ See September, 2008, Letter from AAPLOG to the U.S. President’s Council on Bioethics, available at: <https://aaplog.org/wp-content/uploads/2022/05/AAPLOG-to-Presidents-Council.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “25” and incorporated by reference).

²⁶ See Transcript of September 11, 2008, Panel Discussion of the U.S. President’s Council on Bioethics, available at: <https://aaplog.org/wp-content/uploads/2022/05/Bioethics-Council-Session-3.pdf> (last visited on Nov. 14, 2022) (attached as Exhibit “26” and incorporated by reference).

revoked, then or in the future, based upon any physician's refusal to comply with ACOG's controversial ethical rules, ABOG has steadfastly refused to do so. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1").

87. As such, AAPLOG members continue to be vulnerable to decertification by ABOG.

88. Loss of ABOG board certification by AAPLOG members would also result in the loss of hospital privileges, as hospitals which have provided privileges to AAPLOG's Mississippi members require obstetricians and gynecologists to be board certified by ABOG in order to obtain and maintain hospital privileges. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1").

89. The loss of hospital privileges by AAPLOG's Mississippi members could result in those Mississippi AAPLOG members being disciplined by the Mississippi State Board of Medical Licensure, pursuant to Miss. Code Ann. § 73-25-83(c).

90. However, if Mississippi's elective abortion ban is declared valid, AAPLOG's pro-life members would not be vulnerable to decertification, loss of hospital privileges, and discipline by the Mississippi State Board of Medical Licensure, as those AAPLOG members would remain in compliance with ACOG's Code of Professional Ethics, which states unequivocally that "the obstetrician-gynecologist should respect all laws." *See* Footnote 16, *supra* (cleaned up).

**THE AMERICAN MEDICAL ASSOCIATION (AMA)
ENDANGERS PRO-LIFE PHYSICIANS**

91. The American Medical Association (AMA) is the largest and only national association that convenes over one hundred and ninety (190) state and specialty medical societies and other critical stakeholders. AMA's purported mission is to promote the art and science of medicine and the betterment of public health.²⁷

²⁷ *See* "About," AMA, available at: <https://www.ama-assn.org/about> (last visited on Nov. 14, 2022) (attached as Exhibit "27" and incorporated by reference).

92. Some of AAPLOG's Mississippi members are also members of AMA. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1").

93. AMA takes disciplinary action against members who violate AMA's constitution, bylaws, rules, or Principles of Medical Ethics.²⁸

94. AMA also publishes the AMA Code of Medical Ethics, which is "widely recognized as the most comprehensive ethics guide for physicians." The Opinions in the AMA's Code of Medical Ethics "represent AMA policy."²⁹

95. AMA's Principles of Medical Ethics is published as a part of AMA's Code of Medical Ethics, indicating that the Medical Ethics Opinions published in the Code of Medical Ethics are either meant to inform AMA's Principles of Medical Ethics or that AMA's Medical Ethics Opinions represent logical conclusions from AMA's Principles of Medical Ethics. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1").

96. AMA Code of Medical Ethics Opinion 1.1.7, entitled "Physician Exercise of Conscience," directs that "in general, physicians should refer a patient to another physician or institution to provide treatment the physician declines to offer. When a deeply held, well-considered personal belief leads a physician also to decline to refer, the physician should offer impartial guidance to patients about how to inform themselves regarding access to desired services."³⁰

²⁸ *See* "General Rules of the Council on Ethical and Judicial Affairs (CEJA)," AMA, available at: <https://www.ama-assn.org/councils/council-ethical-judicial-affairs/governing-rules-council-ethical-and-judicial-affairs-ceja> (last visited on Nov. 14, 2022) (attached as Exhibit "28" and incorporated by reference).

²⁹ *See* "Ethics," AMA, available at: <https://www.ama-assn.org/delivering-care/ethics> (last visited on Nov. 14, 2022) (attached as Exhibit "29" and incorporated by reference).

³⁰ *See* "Code of Medical Ethics Opinion 1.1.7. 'Physician Exercise of Conscience,'" AMA, available at: <https://www.ama-assn.org/delivering-care/ethics/physician-exercise-conscience> (last visited on Nov. 14,

97. Many of AAPLOG's Mississippi members do not refer patients for elective abortions or offer "impartial guidance" to patients about how they can obtain an elective abortion. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1"). Many of AAPLOG's Mississippi members believe that offering such "impartial guidance" would constitute material cooperation with the killing one of their patients and thus would violate their Hippocratic Oath. *See id.*³¹

98. AMA Code of Ethics Opinion 4.1.2, entitled "Genetic Testing for Reproductive Decision Making," directs that "physicians who provide reproductive health care should refer the individual to another qualified physician when personal moral values prohibit the physician from providing lawful abortion services when this is a service that the person desires, in keeping with ethics guidance."³²

99. It is unclear to AAPLOG's Mississippi members whether elective abortions are currently "lawful" within Mississippi, given the conflict between the elective abortion ban and the *Fordice* opinion. *See* Affidavit of Donna Harrison, M.D. (Exhibit "1").

100. Many of AAPLOG's Mississippi members are currently declining to refer patients to other health care providers within or outside of Mississippi for elective abortions. *See id.*

101. As such, AAPLOG members are vulnerable to disciplinary action by AMA.

102. Disciplinary action by AMA against AAPLOG members could result in discipline by the Mississippi State Board of Medical Licensure, pursuant to Miss. Code Ann. § 73-25-83(c).

2022) (attached as Exhibit "30" and incorporated by reference) (cleaned up).

³¹ *See also* Footnote 1, *supra*, "Committee Opinion 1, 'Hippocratic Objection to Killing Human Beings in Medical Practice,'" AAPLOG (Exhibit "2").

³² *See* "Code of Medical Ethics Opinion 4.1.2, 'Genetic Testing for Reproductive Decision Making,'" AMA, available at: <https://www.ama-assn.org/delivering-care/ethics/genetic-testing-reproductive-decision-making> (last visited on Nov. 14, 2022) (attached as Exhibit "31" and incorporated by reference) (cleaned up).

103. However, if Mississippi's elective abortion ban is declared valid, AAPLOG's pro-life members who are also members of AMA would not be vulnerable to disciplinary action by AMA because of their conscience-based refusal to perform, refer, or provide "impartial guidance" to patients seeking elective abortions (and thus, would not be vulnerable to discipline by the Mississippi State Board of Medical Licensure), as AMA's Code of Medical Ethics states unequivocally that physicians only have a duty to refer or provide impartial guidance for "lawful" abortions. See Exhibits "30" and "31".

CLAIMS

CLAIM I: THE ELECTIVE ABORTION BAN DOES NOT VIOLATE THE MISSISSIPPI CONSTITUTION

104. Plaintiff incorporates and re-alleges all of the allegations set forth above.

105. The Mississippi Constitution does not protect a right to an abortion.

106. *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998) (recognizing abortion as a right protected by the Mississippi Constitution) relied heavily upon the U.S. Supreme Court's holdings and reasoning in *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the U.S. Constitution protected a right to abortion) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (adopting an "undue burden" standard for assessing abortion regulations).

107. In light of the United States Supreme Court's opinion in *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022) (overruling *Roe* and *Casey* and rejecting those decisions' reasoning as egregiously wrong), the Mississippi Supreme Court's opinion in *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998) is no longer good law.

108. If the elective abortion ban is enforced, it will not violate the state constitutional rights of persons desiring to obtain an elective abortion in the State of Mississippi.

CLAIM 2: IF AN ADVERSE OPINION IS ENTERED IN THIS MATTER, THIS COURT SHOULD ENTER AN ORDER STAYING THE OPINION PENDING APPEAL TO THE MISSISSIPPI SUPREME COURT

109. Plaintiff incorporates and re-alleges all of the allegations set forth above.

110. If this Court finds that the *Fordice* opinion is still good law which this Court is not empowered to overrule, the Court should enter an order staying its opinion pending appeal to the Mississippi Supreme Court, pursuant to Miss. R. Civ. P. 62(d).

111. If an adverse opinion is entered in this matter, AAPLOG is likely to succeed on the merits of its appeal.

112. If an adverse opinion is entered in this matter, AAPLOG's Mississippi members will suffer irreparable injury unless a stay is granted.

113. If an adverse opinion is entered in this matter, an order staying the opinion pending appeal will not cause substantial harm to other interested parties.

114. If an adverse opinion is entered in this matter, an order staying the opinion pending appeal will do no harm to the public interest.

REQUEST FOR RELIEF

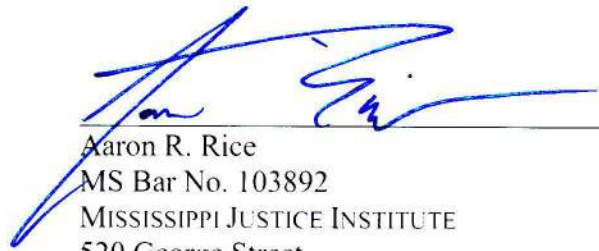
WHEREFORE, Plaintiff respectfully requests the following relief:

A. An entry of an order declaring that the elective abortion ban, Miss. Code Ann. § 41-41-45, does not violate the Mississippi Constitution;

B. If an adverse opinion is entered against Plaintiff, an entry of an order staying this Court's opinion, pending appeal to the Mississippi Supreme Court; and

C. Any other relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED, this the 14th day of November, 2022.



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