No. 13-60599

In the United States Court of Appeals for the Fifth Circuit

JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS; WILLIE PARKER, M.D., M.P.H., M.SC., ON BEHALF OF HIMSELF AND HIS PATIENTS,
Plaintiffs-Appellees,

v.

MARY CURRIER, M.D., M.P.H., IN HER OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEP'T OF HEALTH; ROBERT SHULER SMITH, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR HINDS COUNTY, MISSISSIPPI,
Defendants-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
CIVIL NO. 3:12-CV-436, HON. DANIEL P. JORDAN, III

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITION FOR REHEARING *EN BANC* AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is 13-60599. The case is styled as *Jackson Women's Health Organization v. Currier*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the list of persons and entities having an interest in the outcome of this case in the Defendants-Appellants' petition is complete, with the addition of the following:

- Eagle Forum Education & Legal Defense Fund, *amicus curiae;* and
- Lawrence J. Joseph, counsel for *amicus* Eagle Forum Education & Legal Defense Fund.

The undersigned counsel also certifies that Eagle Forum Education & Legal Defense Fund has no parent corporation, and no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: August 15, 2014

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus Eagle Forum Education & Legal Defense Fund ("Eagle Forum") seeks leave to file this brief by motion. As the motion explains, Eagle Forum is a nonprofit corporation headquartered in Saint Louis, Missouri. For more than thirty years, Eagle Forum has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, Eagle Forum has a longstanding interest in protecting unborn life. For these reasons, Eagle Forum has vital interests in the issues raised here.

STATEMENT OF THE CASE

Mississippi's sole abortion clinic and a doctor there (collectively, "JWHO") have sued state and county officers (collectively, "Mississippi") to enjoin enforcement of the requirement that only doctors with hospital admitting privileges within 30 miles may perform an abortion. House Bill 1390, Miss. Gen. Laws 2012, ch. 331 ("HB1390"), imposed this requirement on JWHO by eliminating an exemption that abortion clinics had enjoyed, Miss. Admin. Code 15-16-1:42.9.7 (2011), from the admitting-privilege requirements that applied to all ambulatory surgical centers ("ASCs"). MISS. CODE §41-75-1. In all material respects other than

[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

the happenstance that JWHO is Mississippi's sole abortion clinic, HB1390 is identical to portions of the Texas law upheld in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583 (5th Cir. 2014). The question presented is whether the fact that HB1390 might close Mississippi's only abortion clinic distinguishes *Abbott,* notwithstanding that nearby clinics in neighboring states would ameliorate any practical burden.

STATEMENT OF FACTS

Eagle Forum adopts the facts as stated by Mississippi, Pet. at 1-3, and also relies on the judicially noticeable legislative facts described here. Under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd ("EMTALA"), Mississippi hospitals must treat people in emergency rooms, regardless of their ability to pay for their care. Significantly, Mississippi enacted HB1390 in the wake of the Gosnell prosecution and the accompanying revelations about the abortion industry not only for murdering live-born, viable infants but also for endangering and even killing women abortion patients. *See In re County Investigating Grand Jury XXIII,* Misc. No. 9901-2008 (Pa. C.P. Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report").

SUMMARY OF ARGUMENT

JWHO claims that HB1390 violates the undue-burden test of *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), and thus

unconstitutionally limits the abortion rights found in *Roe v. Wade*, 410 U.S. 113 (1974). This Court should reject JWHO's claims because *Casey* applies a different test for state laws that restrict abortions in the interest of the pregnant woman's health than it applies to state laws that do so in the interest of the unborn child, and because HB1390 meets the test applicable here (Section I.A). Contrary to the majority's cited authorities, no court with jurisdiction ever held otherwise (Section I.B). By expanding the *Casey* substantive-due process right without the analysis required by *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the majority violated that Supreme Court precedent on judicially created rights (Section I.C).

Similarly, the majority's invocation of *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), to require Mississippi – and, with it, every state – to provide an in-state abortion clinic tears that equal-protection decision from its moorings and creates unlimited additional, unrelated due-process rights that states must also now satisfy (Section II.A). Regulated industries do not – and cannot – have a heckler's (or slacker's) veto over reasonable state regulation, allowing even the laxest operator to invalidate regulations by threatening to quit (Section II.B).

ARGUMENT

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

Even assuming that JWHO would close *and that no other abortion provider would arise to fill that market void*, the closure would not violate *Casey*.

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

The panel misreads *Casey* to require the same undue-burden review of abortion regulations that protect the *life of the child* that *Casey* requires of abortion regulations that protect the *pregnant woman's health.* Under that reading, *Casey* would have weakened the states' police power to protect citizens in an area of traditional state and local concern (namely, public health) where the federal government lacks a corresponding police power. That would leave only the judiciary and abortion providers to protect the public from abortion providers, which would leave no one who is both qualified *and* disinterested to protect public health. Eagle Forum respectfully submits that that is not – and cannot be – the law.

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matter[s] of local concern." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (interior quotations omitted; second and third alterations in *Medtronic*). "Th[e police] power belonged to the States when the Federal Constitution was adopted," "[t]hey did not surrender it, and they all have it now." *Mugler v. Kansas,* 123 U.S. 623, 667 (1887) (internal quotations omitted). For their part, the federal Executive and Congress lack a corresponding police power to take up the slack in supplanting the states: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police

power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000). If states cannot regulate the abortion industry's failures and excesses, and the federal government cannot, that would leave only the judiciary and the abortion industry itself.

The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Gonzales v. Carhart*, 550 U.S. 124, 163-64 (2007); *cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are less qualified to practice medicine than they are to practice social engineering. *Gonzales*, 550 U.S. at 164 (federal courts are not "the country's *ex officio* medical board") (interior quotations omitted). Because the judiciary is not a credible regulator, JWHO's narrow reading of states' flexibility under *Casey* would make abortion a self-regulated industry.

Perhaps because of the politicization of this issue in the United States – caused in great part by the unprecedented *Roe* decision – some view abortion as exempt from otherwise-applicable legal standards, and some abortion providers regard themselves more as civil-rights warriors than as medical providers. Thus, many abortion providers simply cannot disclose anything negative about their abortion mission:

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

> American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis*, ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted); *see also* Gosnell Grand Jury Report, at 137-207 (nonenforcement by state and local regulators). For these reasons, the abortion industry's lack of transparency calls out for *heightened regulation*, vis-à-vis other, less-politicized medical practices. Under the facts here, however, Mississippi merely removed an exemption that the abortion industry heretofore enjoyed, vis-à-vis similarly situated ASC practices.

All that Mississippi has done, then, is to require "medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997); *Roe*, 410 U.S. at 150. Under the circumstances, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales*, 550 U.S. at 164 (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. That holding from *Gonzales* applies even more so here.

Indeed, as Eagle Forum reads *Casey*, that is precisely what the Supreme

Court intended in balancing state and individual interests. On the application of the police power to protecting the *pregnant woman's* health,[2] the Supreme Court has never ruled that the right to a particular abortion method trumps the states' interest in public health. To the contrary, for regulations that *protect the women's health*, the undue-burden test does not even arise for "necessary" regulation of abortion procedures. *See Casey*, 505 U.S. at 878 (only *unnecessary* regulations of women's health trigger further inquiry under *Casey*). Specifically, following *Roe, Menillo,* and *Mazurek*, *Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey*, 505 U.S. at 878. The only prohibition that *Casey* applied to laws that protect pregnant women is that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (emphasis added).

Unpacking this language, an undue-burden violation for woman-focused state regulation requires that the plaintiff establish both of two elements: (1) the regulation is *unnecessary;* and (2) the regulation has either the purpose or effect of presenting a *substantial* obstacle. If the regulation is necessary (*i.e.,* not "unnecessary"), however, that ends the analysis: there is no *Casey-Roe* violation.

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[2] Whereas *Roe* concerned states' ability to *prohibit* abortions in the interest of the *infant* and the state's interest in that new life, HB1390 merely *regulates* abortions to protect *pregnant women* who contemplate and receive abortions.

B. Silence in *Casey* and the Inapposite Alternate Holding in *Jane L.* Do Not Establish an In-State Right of Access to Abortion Clinics

The majority relies on other courts' failure to consider out-of-state clinics – as well as a vacated Fifth Circuit decision and an inapposite alternate holding in a Tenth Circuit decision – to infer that the *Casey* undue-burden analysis ignores out-of-state clinics. Slip Op. 13-14. None of these authorities carry any weight.

First, the failure of *Casey* and the Sixth Circuit to consider clinics in other states is not precedential: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Simply put, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). The contrary suggestion is absurd.

Second, the fact that a panel of this Court "embraced a similar theory," Slip Op. at 14 n.7, is irrelevant because this Court, *en banc*, subsequently held that Article III jurisdiction was lacking: "lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case." *U.S. v. Troup*, 821 F.2d 194, 197 (3d Cir. 1987) (*quoting Ala. Hosp. Ass'n v. U.S.*, 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original); *Orff v. U.S.*, 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same). As Judge Garza explains in dissent (Slip Op. at 23 n.9), the merits

discussion by the *Okpalobi* panel is irrelevant not only here, but everywhere.

Third, this Court should reject the majority's reliance on the Tenth Circuit's *Jane L.* decision. At the outset, the undue-burden analysis fundamentally differs for the abortion law there (which protected the child) and the one here (which protects the pregnant woman). *See* Section I.A, *supra*. But even if that court's rejection of out-of-state, second-trimester abortions in its undue-burden analysis applied here, HB1390 would be distinguishable from the Utah law. There, Utah went "beyond creating a hindrance and impose[d] an outright ban" on certain abortions, which the Tenth Circuit found contrary to Supreme Court precedent in and of itself. *Jane L. v. Bangerter*, 102 F.3d 1112, 1114 (10th Cir. 1996). For that reason, the Tenth Circuit recognized that "[r]ather than apply [*Casey*] …, it may be more appropriate simply to conclude that the section is invalid as contrary to controlling Supreme Court precedent." *Id.* n.4. Reflexive reliance on extra-circuit decisions "substantially thwart[s] the development of important questions of law." *Virginia Soc'y for Human Life, Inc. v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001) (interior quotations omitted). Accordingly, this Court should not adopt the Tenth Circuit's ill-reasoned alternate and unnecessary constitutional holding, particularly when that holding does not apply to woman-focused laws like HB1390.

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

As indicated, *Casey* did not find a right to intrastate access to abortion

clinics, and as Judge Garza therefore recognizes in dissent (Slip Op. at 35), the panel therefore *expands* the substantive due-process rights recognized in *Casey.* In doing so, the majority recognized a new substantive due-process right without the analysis that *Glucksberg* requires. Under that analysis, no such right exists.

After *Casey*, the Supreme Court prospectively foreclosed using the Due Process Clause to create new substantive rights without a painstaking analysis, requiring "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Glucksberg,* 521 U.S. at 720. Under that analysis, to "extend[] constitutional protection to an asserted right or liberty interest," the right or interest must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Even those who believe that a right to intrastate access to abortion clinics could meet the second prong must admit that it cannot meet the first. Under *Glucksberg,* therefore, the panel cannot expand *Casey*, at the expense of limiting states' reserved police-power and Tenth Amendment rights: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink." *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001) (declining to expand an existing implied right of action after having prospectively rejected the creation of such rights of action). Similarly here, this Court cannot expand *Casey* without satisfying *Glucksberg.*

II. NEITHER *GAINES* NOR *CASEY* GUARANTEE INTRASTATE ACCESS TO ABORTION CLINICS

The majority's reliance on *Gaines* to infer an unprecedented right to in-state abortions is misplaced and would give substandard and dangerous operators a veto over reasonable state police-power regulations of public health. That is not the law.

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

Amicus Eagle Forum wholly supports Mississippi's and Judge Garza's able demonstration why the Court cannot import fragments from the equal-protection rights at issue in *Gaines* to this substantive due-process case. *See* Pet. at 7-13; Slip Op. at 24-27. Simply put, a right or privilege that the state itself provides to one group within its jurisdiction must be provided to all similarly situated groups in that jurisdiction, unless the denial can meet equal-protection scrutiny. Here, Eagle Forum provides additional equal-protection reasons why *Gaines* cannot apply here.

The then-perceived legality of "separate but equal" "rest[ed] wholly upon the equality of the privileges which the laws give to the separated groups *within the State.*" *Gaines,* 305 U.S. at 349 (emphasis added). In that context, the "question [t]here [was] *not of a duty of the State to supply legal training,* or of the quality of the training which it [did] supply," but only the state's "duty when it provide[d] such training to furnish it to the residents of the State upon the basis of an equality of right." *Id.* (emphasis added); *Heckler v. Mathews,* 465 U.S. 728, 740 (1984) ("when the right invoked is that to equal treatment, the appropriate remedy is a

mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class") (emphasis in original, interior quotations omitted). Even under current equal-protection principles, restrictions on attending School A are evaluated independent of whether alternate schools (*e.g.*, School B) exist in the same state. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (U.S. 1982). Fragments from equal-protection cases (where the state may *terminate* its services equally as an alternative to providing them equally) cannot credibly be imported, out of context, to abortion cases, where JWHO claims that states cannot terminate access.

The level of judicial scrutiny is another key distinction between state laws restricting educational opportunity by race and those regulating abortion providers for public health. Unlike the heavy burden that race-based restrictions would face, restrictions of abortion need only meet the rational-basis test, *Harris v. McRae,* 448 U.S. 297, 322 (1980); *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 271 (1993), which even the majority recognized is met here. Slip Op. at 11. The within-state fragment quoted from *Gaines,* then, is not a *per se* bar, but rather a *prima facie* case, which the *Gaines* defendants could not rebut. Here, by contrast, Mississippi has rebutted that *prima facie* case with its rational basis for HB1390.

Finally, the real equal-protection issue here is not whether the undue-burden analysis under *Casey* must exclude out-of-state clinics – and thus, for the first time,

require each state to have an abortion clinic, no matter what – but whether abortion doctors deserve their preferential exemption from the admitting-privilege requirements that Mississippi imposes on other ASCs. Given that the Constitution does not "elevate [abortion doctors'] status above other physicians in the medical community," *Gonzales*, 550 U.S. at 163, this Court must answer "no."

B. JWHO Cannot Have a Veto over Reasonable Health Regulations

The majority's reliance on *Gaines* to require in-state access to abortion clinics puts extraordinarily inappropriate veto power over state regulation in the hands of regulated industries. Eagle Forum respectfully submits that the majority did not consider the implications of its decision. The *en banc* Court should do so.

Before addressing the specific abortion context, this Court should first consider the other substantive due-process rights affected here. The *Roe-Casey* right to an abortion is not, after all, the only substantive due-process right. For example, the right to private property is a fundamental right. *McCoy v. Union Elevated R. Co.*, 247 U.S. 354, 365 (1918); *Hendler v. U.S.*, 175 F.3d 1374, 1376 (Fed. Cir. 1999). Does that mean that any industry can claim that reasonable police-power regulations that cost too much are unconstitutional? At least if the regulations would force the industry to close down in the state, the majority's reasoning suggests that the industry's veto – *i.e.*, the threat to close down – would invalidate any regulation of that industry.

Moving to the abortion context, this Court should not give the abortion industry – or more specifically, JWHO – a veto over HB1390 for at least two reasons: (1) HB1390 is objectively necessary, and (2) JWHO's closure would not necessarily end in-state access to abortions.

1. HB1390 Is Necessary

Mississippi has sovereign interests both in protecting the public health and in conserving the public fisc with regard to the women patients dumped into Mississippi emergency rooms by the abortion industry. Either ground provides a vital basis for requiring the abortion industry to comply with HB1390.

Mississippi intended HB1390 to increase the level of care provided to women seeking abortions in Mississippi and to avoid the operation of substandard clinics like the one operated in Philadelphia by Kermit Gosnell. By making it more difficult for Mississippi-based Gosnells to continue such practices, HB1390 enables Mississippi to meet its police-power obligation to ensure the health and safety of Mississippians. Moreover, as indicated, EMTALA requires Mississippi hospitals to treat the women suffering from complications due to abortion, even if they are unable to pay for their care. 42 U.S.C. §1395dd. In that way, JWHO passes the downside costs of its abortion practices onto the Mississippi medical system, in which Mississippi obviously has an interest. For example, in *Howard v. Garland*, 917 F.2d 898, 900-01 (5th Cir. 1990), this Court held that government

does not violate the rational-basis test when discriminating between accredited and unaccredited providers (in *Howard*, private and commercial daycare and schools), based on a variety of beneficial inferences that the accreditation process would provide. Similarly here, requiring admitting privileges satisfies the rational-basis test because Mississippi is entitled to decide that the "non-accredited [providers] do[] not" "out-weigh[] the attendant negative externalities" of their operations, vis-à-vis the accredited providers.[3] *Id.* JWHO is not entitled to operate under a business plan that shunts the cost of its hard cases onto society.

2. If It Creates a Right to In-State Access, this Court Should Apply an Objective Standard, which JWHO Cannot Meet

The majority held that Mississippi waived the right to dispute that HB1390 would close JWHO, but that is not the relevant inquiry, even under the majority's new in-state right of access. Instead, the question is whether no HB1390-compliant practices would open, once HB1390 closes any marginal operators. JWHO has not proved that element of its claim, so Mississippi should prevail here. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*).

CONCLUSION

The petition for rehearing should be granted.

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[3] "Negative externalities occur when the private costs of some activity are less than the total costs to society of that activity," which allows the "private parties engaging in that activity essentially [to] shift some of their costs onto society as a whole." *McCloud v. Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996).

Dated: August 15, 2014

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CERTIFICATE OF COMPLIANCE

No. 13-60599, *Jackson Women's Health Organization v. Currier*.

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains fifteen pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: August 15, 2014

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CERTIFICATE OF SERVICE

No. 13-60599, *Jackson Women's Health Organization v. Currier*.

I hereby certify that, on August 15, 2014, I electronically filed the foregoing amicus brief – as an exhibit to the accompanying motion for leave to file – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Lawrence J. Joseph

Lawrence J. Joseph