NO. 18-1019

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER,
INDIANA DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief of *Amicus Curiae* Institute for Faith and Family in Support of Petitioners

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INTEREST OF *AMICUS CURIAE*[1]

Institute for Faith and Family, as *amicus curiae*, respectfully urges this Court to grant the Petition and reverse the Seventh Circuit ruling.

Institute for Faith and Family (IFF) is a nonprofit, tax-exempt organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* https://iffnc.com.

IFF has an interest in ensuring that North Carolina women are informed about the risks of abortion before the procedure is performed, and that they have adequate time and information to consider their choices and resources. Like Indiana, North Carolina's ultrasound requirement, adopted in 1994, is a key component of informed consent to abortion. 10A N.C. Admin. Code 14E.0305(d) (2015) ("An ultrasound examination shall be performed and the results, including gestational age, placed in the patient's medical record for any patient who is scheduled for an abortion procedure."). Although North Carolina is not within the Seventh Circuit's jurisdiction, its ruling poses a potential threat to informed consent laws around the nation, at least as persuasive authority,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

even where based on alleged pre-enforcement burdens on abortion providers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Abortion is a medical procedure with a constitutional overlay. This dual status has plagued courts and legislatures for over four decades. When the government emphasizes the constitutional aspect and minimizes the medical concerns, women are at risk. Abortion is the only *medical* procedure that compels states to fight an uphill battle to enact reasonable regulations, including informed consent as well as health and safety. This Court needs to set forth a clear, constitutional standard for informed consent laws specifically, as distinct from health and safety laws.

Confusion has persisted over the years. Even fundamental rights like free speech and voting are subject to reasonable regulation. The state may regulate the practice of medicine to ensure informed consent and public safety. In both cases, there is no government obligation to finance or facilitate. The state need not pay a speaker's printing or airtime costs. The state is not obligated to fund a medical procedure or guarantee its availability—even a life-saving procedure. The same is true of abortion. Many factors are beyond the control of government, including indigency, demographic shifts, and availability of private providers. The government is not required to overcome these obstacles in order to ensure some minimum level of access to abortion. In light of the intertwined public and private forces at work, it can be exceedingly difficult to trace causation. If abortion

clinics close or cannot comply with new regulations, that is not the fault of state legislators. The "undue burden" test developed by courts applies to *women*, not abortion *providers*. The alleged "undue burden" on Planned Parenthood is constitutionally irrelevant. Abortion providers—or in this case, *one* sole provider—cannot dictate what is constitutional or what minimum level of access is required. The circuit court's approach imposes an "undue burden" on state legislatures—not women—by striking down Indiana's informed consent law pre-enforcement without actual data to demonstrate that the law itself causes an undue burden.

States that dare to regulate abortion face the prospect of litigation. Informed consent requirements are common and certainly not unique to abortion. Informed consent is based on longstanding principles of tort law. Ultrasound requirements maximize the information available to an abortion-minded woman before she makes an irrevocable decision. Indiana has chosen to give women time and space between the ultrasound and the procedure, enhancing the probability of a truly informed and voluntary decision. If the Seventh Circuit ruling stands, it poses a threat to similar laws in other states, at least as persuasive authority. This Court's review is warranted to establish a clear constitutional standard for informed consent laws.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO CONSIDER THE UNIQUE STATUS OF ABORTION AS A MEDICAL PROCEDURE WITH A CONSTITUTIONAL OVERLAY.

State legislatures and lower courts need clear guidance from this Court in order to properly regulate the medical aspects of abortion without crossing the constitutional line. Good faith efforts to ensure informed consent, or to protect health and safety, are met with resistance and crippling litigation. The government's regulatory role varies considerably depending on the subject matter. When regulations impact constitutional rights, the paramount concern is not to infringe or unduly burden the exercise of those rights. The government has far greater latitude to regulate the practice of medicine, and indeed an obligation to protect its citizens. When these two intersect, as they do with abortion, tension is inevitable.

Courts have consistently found abortion subject to regulation as a medical procedure. *Roe v. Wade*, 410 U.S. 113, 150 (1973) (state has important interest in the facilities and circumstances in which abortions are performed); *Simopoulos v. Virginia*, 462 U.S. 506, 510-511 (same); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 428-429 (1983) ("*Akron I*") (state has important interests in safeguarding health and maintaining medical standards). Nevertheless, legislators walk a tightrope. They may actively protect women through regulation but must not impose an

"undue burden" on them. There is no comparable restriction hindering state regulation of any other medical procedure.

Casey recognized the tension, rejecting earlier cases holding "that any regulation touching upon the abortion decision must survive strict scrutiny." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992). This Court reaffirmed the state's "legitimate interests from the outset of the pregnancy in protecting the health of the woman" (*id.* at 846) and called it an overstatement to describe abortion as a right to decide "without interference from the State." *Id.* at 875, citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976). Instead, the right recognized by *Roe* is the "right to be free from unwarranted governmental intrusion" in making the abortion decision. *Casey*, 505 U.S. at 875 (citation and internal marks omitted). "Not all governmental intrusion is of necessity unwarranted." *Id.*

II. THIS COURT SHOULD GRANT CERTIORARI TO SET FORTH THE CONSTITUTIONAL STANDARD FOR ABORTION INFORMED CONSENT REQUIREMENTS, INCLUDING THE RELEVANCE OF THE "UNDUE BURDEN" STANDARD.

Informed consent cuts across all sorts of medical procedures and varies depending on factors such as surgical or other risks. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) ("we see no constitutional defect in requiring it only for some types of surgery . . . or where the surgical risk is elevated above a specified mortality level"). In *Casey*, this Court described informed consent requirements for abortion as "no different from a requirement that a doctor give certain specific information about any medical procedure." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 163-164 (2007) (same). Informed consent "facilitates the wise exercise" of the right to abortion and generally "cannot be classified as an interference" or "an undue burden on that right." *Casey*, 505 U.S. at 887. This Court overruled two earlier decisions "to the extent" they held it unconstitutional to require giving "truthful, non-misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." *Id.* at 882; *see Akron I*, 462 U.S. at 444; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762 (1986). Such "truthful, non-misleading information" may include "information about consequences to the fetus," comparable to the

"information about risks to the donor as well as risks to himself or herself" required for the recipient's informed consent to a kidney transplant operation. *Casey*, 505 U.S. at 882-883.

Waiting periods are constitutional. Informed consent may require giving the woman "certain information *as part of obtaining her consent*." Casey, 505 U.S. at 884 (emphasis added). This is "no different from a requirement that a doctor give certain specific information about any medical procedure." *Id*. Here, Indiana's ultrasound is linked to *obtaining the woman's consent*, allowing more time for reflection, rather than being performed in conjunction with the abortion. This requirement tracks *Casey*'s upholding of a mandatory 24-hour waiting period, "as with any medical procedure." *Id* at 881, citing *Danforth*, 428 U.S. at 67. This Court found it was not unreasonable to think "that important decisions will be more informed and deliberate if they follow some period of reflection . . . particularly where the statute directs that important information become *part of the background of the decision*." *Id*. at 885 (emphasis added). In *Casey*, there was actual data showing that women with few financial resources would have to bear increased costs and travel time, but this Court upheld the law even though "th[o]se findings [we]re troubling in some respects." *Id*. at 886.

Persuasion is also constitutional. Under *Casey's* undue burden standard, "a State is permitted to enact persuasive measures which favor childbirth over abortion, *even if those measures do not further a health interest*." *Casey*, 505 U.S. at 886 (emphasis added). This

standard aligns with earlier cases such as *Beal v. Doe*, 432 U.S. 438 (1977) and *Maher v. Roe*, 432 U.S. 464 (1977), but departs from certain intervening rulings. In the mid-1980's, this Court held that "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh*, 476 U.S. at 760, quoting *Akron I*, 462 U.S. at 443-444. The Court reasoned that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Thornburgh*, 476 U.S. at 762, quoting *Akron I*, 462 U.S. at 444. The dissent, foreshadowing *Casey's* reaffirmation of the state's right to persuade, pointed out the departure from earlier cases indicating "that the State may encourage women to make their choice in favor of childbirth" and provide "accurate information regarding abortion and its alternatives." *Thornburgh*, 476 U.S. at 801-802 (White, J., dissenting).

III. IN CRAFTING THE APPROPRIATE CONSTITUTIONAL STANDARD, THIS COURT SHOULD ENSURE THAT NO "UNDUE BURDEN" IS PLACED ON STATE LEGISLATURES.

The Seventh Circuit improperly elevates the alleged "undue burden" on Planned Parenthood and imposes an "undue burden" on state legislators. The circuit court elevates the rights asserted by abortion providers to maintain their current business model and avoid the costs of new equipment and training. The ruling is pre-enforcement and thus based on speculation about the efficacy of the new law rather than actual data—in

contrast to the post-enforcement *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). No other court since *Casey* has upheld a pre-enforcement undue-burden challenge to an informed consent law. Such a challenge offers no actual data to substantiate the "undue burden." Pet. 20-21 (citing cases).

A. The government has no affirmative obligation to ensure the most convenient or inexpensive means to access abortion, either as a medical procedure or a constitutional right.

America has historically treasured certain fundamental liberties, and the ability to access safe medical care is vitally important. But the government has no affirmative duty to ensure the most convenient or inexpensive means to exercise a constitutional right or to access a medical procedure. A multitude of factors are involved, many beyond state control.

Abortion is not exempt from these principles. Government regulation may "have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure," but that increased difficulty or cost "cannot be enough to invalidate it." *Casey*, 505 U.S. at 874; *see also Gonzales v. Carhart*, 550 U.S. at 157-158. As dissenting Judge Manion explained in an earlier Seventh Circuit case, "there is no constitutional right to obtain an abortion at the clinic of one's choice and at the time of one's convenience." *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908, 932 (7th Cir. 2015) (Manion, J., dissenting). Striking down abortion regulations implies "some affirmative duty both to

provide abortion services and to do so in a manner that is convenient for consumers of abortion." *Id*. There is no such duty. Moreover, informed consent does not "impose[] an undue burden on a woman's ability to make this decision" (*Casey*, 505 U.S. at 874)—on the contrary, it "facilitates the wise exercise" of it (id. at 887).

"[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Case*y, 505 U.S. at 873. State interference must "infringe substantially" or "heavily burden" a right in order to warrant strict scrutiny. *Akron I*, 462 U.S. at 462 (O'Connor, J., dissenting), citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37-38 (1973) (strict scrutiny applicable where legislation has "deprived," "infringed," or "interfered" with a fundamental right). Justice O'Connor's observations in *Akron I* foreshadow the "undue burden" this Court later adopted in *Casey*. Even in the First Amendment context, substantial interference may be required. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("infringe substantially"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment upon personal liberty"). Absent this high level of deprivation, judicial inquiry is limited to rational basis review. Informed consent, including a short period for reflection, is not an irrational requirement.

Similarly, the state is not required to "pay *any* of the medical expenses of indigents," although it is subject to certain constitutional principles of equality if it voluntarily provides medical benefits to alleviate

poverty. *Maher v. Roe*, 432 U.S. at 469-470 (emphasis added). This Court "ha[s] recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

Justice O'Connor pointed out in *Akron I* that *Roe* protects against "drastically limiting the availability and safety" of abortion (*Maher*, 432 U.S. at 473). *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). It prohibits state action imposing an "absolute obstacle" (*Danforth*, 428 U.S. at 70-71, n. 11), "official interference" or "coercive restraint" (*Harris v. McRae*, 448 U.S. 297, 328 (1980) (White, J., concurring)). *Id.* But a regulation is not invalid merely because it might inhibit abortions to some degree. *H. L. v. Matheson*, 450 U.S. 398, 413 (1981). The City of St. Louis committed "no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Poelker v. Doe*, 432 U.S. 519, 521 (1977). These and other precedents in this Court firmly establish that the government has no obligation to commit any resources to financing or facilitating abortions. *See also, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Rust v. Sullivan*, 500 U.S. 173 (1991).

Here, Indiana has combined two independently constitutional requirements—informed consent and ultrasound—so that they are satisfied simultaneously.

If the Planned Parenthood centers in Indiana were all equipped to perform ultrasounds, there would be no additional burden on the women. The "undue burden" falls primarily on the centers that must now purchase equipment and train personnel. This Court "has never required a state to establish a command economy in order to provide abortions." *Schimel*, 806 F.3d at 933 (Manion, J., dissenting). No state is "under [a] compulsory receivership that obligates it to intervene if the market fails to provide qualified abortionists within its boundaries. State inaction is not state action." *Id.* If the will of the private sector is lacking, the state is not obligated to fill the gap, and abortion services will be less available. But there is no "undue burden" under these circumstances.

This Court has long upheld reasonable regulation of other constitutional rights, even those long recognized as fundamental. Time-place-manner restrictions may limit free speech. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Even where the right to vote is at stake, states have "substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote." *Casey*, at 873-874, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Abortion rights are subject to reasonable limitation from both a constitutional and medical perspective.

B. Factors beyond the government's control impact access to abortion and do not per se render its regulations unconstitutional.

The availability of abortion depends heavily on the willingness and ability of private parties. Medical clinics, including those that perform abortions, are typically set up by private parties who are willing and able to raise the necessary capital and oversee operations. Individual health care professionals must acquire certain training so they can meet state licensing requirements. Financial investment is necessary, as it would be with any other business.

The state is not responsible for every circumstance that may limit access to abortion. The state is not the cause of an "undue burden" when access is limited by factors beyond its control. Indigency and all that normally accompanies it, including issues with transportation, child care, and employment, exemplifies this type of factor. "The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation." *Maher v. Roe*, 432 U.S. at 474 (upholding Connecticut Medicaid regulation that funded childbirth but not non-therapeutic abortions). The government is not required to remove obstacles it did not create, such as indigency. "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Harris v.*

McRae, 448 U.S. at 316-317 (emphasis added). The Due Process Clause protects against "unwarranted government interference. . .it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id*. at 317-318. Even the dissent admitted the state has no "affirmative obligation to ensure access to abortions for all who may desire them." *Id*. at 330 (Brennan, J., dissenting).

When outside factors restrict access to abortion, the state is not the cause. As a result, state action is absent and there is no constitutional violation. The multiplicity of factors, both within and outside the state's control, render it difficult to trace causation precisely and thus to know whether the state has imposed an unconstitutional "undue burden." A woman's inability to access abortion may be due to a lack of qualified professionals willing to perform abortions, lack of clinics in the area where she lives, her own indigence, and/or a declining rate in demand. State regulation is only one factor among many.

Even with factors that are within government control, not all burdens are necessarily unconstitutional. State regulation may increase the cost or decrease the availability of "abortion or any other medical procedure." *Casey*, 505 U.S. at 874. It is erroneous to suggest that the undue burden standard requires the state to guarantee access to abortion in a particular region or state. *Schimel*, 806 F.3d at 931 (Manion, J., dissenting).

C. *Roe v. Wade* unleashed a prolonged wave of litigation challenging medical regulations as unduly burdening abortion rights.

The Seventh Circuit placed the burden on the State of Indiana to justify a reasonable informed consent law and found it unconstitutional prior to enforcement. Abortion is the only *medical* procedure where states must fight an uphill battle to ensure the informed consent, safety, and health of women who choose it. Post-*Roe* litigation highlights the unique character of abortion and its overlap between medical and constitutional concerns. In *Akron I*, this Court recognized that "abortion is a medical procedure"—but also lumped it in with "fundamental rights" demanding that state restrictions be supported by a compelling interest. *Akron I*, 462 U.S. at 427. *Thornburgh's* reasoning was similar, drawing harsh criticism from Justice O'Connor. Under that decision, now overruled by *Casey*, "the mere possibility that some women w[ould] be less like to choose to have an abortion" was sufficient to invalidate "any regulation touching on abortion." *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting) (internal citations quotation marks omitted). In cases of that era, e.g., *Akron I* and *Thornburgh*, this Court discarded its traditional deference to legislatures regulating medical practices, to the dismay of some Justices. Justice White sharply criticized the *Thornburgh* majority for abandoning the Court's deference to state legislatures in regulating the practice of medicine. *Thornburgh*, 476 U.S. at 802 (White, J., dissenting). If strict scrutiny were consistently applied to medical procedures, "there is no

telling how many state and federal statutes (not to mention principles of state tort law) governing the practice of medicine might be condemned." *Id*.

In setting the constitutional standard for informed consent laws, this Court should set a high bar requiring actual evidence that the law itself—and not merely one abortion provider's unwillingness or inability to comply—has in fact created a substantial obstacle. Justice O'Connor's dissenting opinion in *Akron I* is helpful. Anticipating *Casey*'s standard, O'Connor observes that "[t]he abortion cases demonstrate that an 'undue burden' has been found for the most part in situations involving *absolute obstacles or severe limitations* on the abortion decision." *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting) (emphasis added). *See also Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (heightened scrutiny should be "reserved for instances in which the State has imposed absolute obstacles or severe limitations on the abortion decision").

CONCLUSION

This Court should grant the Petition for Certiorari and reverse the Seventh Circuit decision.

Respectfully submitted,

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