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* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and its focus on the dignity of the person, CatholicVote is deeply concerned about the nature and scope of the States' "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). In striking down the ultrasound law at issue in *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Indiana State Department of Health* ("*PPINK*"), the Seventh Circuit affirmed the district court's conclusion that the "burdens [imposed by the ultrasound requirement] are clearly undue when weighed against the almost complete lack of evidence that the law furthers the State's asserted justifications of promoting fetal life and women's mental health outcomes." 896 F.3d 809, 832 (2018) (internal punctuation and citation omitted). In so holding, the Seventh Circuit significantly "undervalue[d] the State's interest in potential life, as recognized in *Roe*," creating a conflict with *Planned Parenthood of Southeastern*

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[1] Pursuant to Rule 37.2(a), counsel of record for each party received notice of the intent to file this amicus brief and consented to its filing. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Pa. v. Casey, 505 U.S. 833 (1992), and *Gonzales*, both of which safeguarded the States' interest in potential life to a far greater degree. CatholicVote, therefore, comes forward to support the right of States to promote their "important interest in potential life" through an ultrasound or other informed consent requirement "to ensure that a woman apprehend the full consequences of her decision." *Casey*, 505 U.S. at 882.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case for at least two reasons. First, the Seventh Circuit's decision in *PPINK* directly conflicts with this Court's decisions in *Casey* and *Gonzales* on an issue of national import— the scope and weight of the States' interest in potential life. Resolution of this conflict has wide-ranging consequences for the numerous States that have enacted ultrasound and other informed consent provisions, the women who seek to make an informed decision whether to have an abortion, the doctors and medical personnel who perform the procedure, and the nation as a whole. *See id*. at 852. Although *Casey* emphasized that decisions after *Roe v. Wade*, 410 U.S. 113 (1973), had wrongly "undervalue[d]" the States' interest in "promoting" and "protecti[ng] … fetal life," *Casey*, 505 U.S. at 873, the Seventh Circuit does just that. Applying the balancing test in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), the Seventh Circuit strikes down Indiana's ultrasound provision even though the interest that it serves and the alleged burdens it creates are virtually identical to the 24-hour waiting period that *Casey* upheld. *See*

Casey, 505 U.S. at 885-86. Moreover, the Seventh Circuit's decision also undermines the States' authority to regulate the practice of medicine under *Whalen v. Roe*, 429 U.S. 589 (1977), by impermissibly infringing on the ability of state legislatures to change the timing and nature of their informed consent provisions.

Second, the Seventh Circuit's decision highlights the wide-spread confusion and uncertainty among lower federal courts as to (1) whether *Hellerstedt*'s balancing test or some other standard applies when States use their "regulatory authority to show [their] profound respect for the life within the woman," *Gonzales*, 550 U.S. at 157, and (2) how the States' important interest in fetal life should be valued and weighed against possible burdens created by informed consent regulations if, as the Seventh Circuit contends, *Hellerstedt*'s balancing test governs all abortion regulations.

I. The Seventh Circuit Contradicts *Casey*, *Gonzales*, and *Whalen* by Undervaluing the States' Interest in Potential Life and Significantly Restricting Their Ability to Determine the Nature and Timing of Informed Consent Provisions.

In *Roe*, this Court recognized the States' "important and legitimate interest in potential life." 410 U.S. at 163. Cases decided in the wake of *Roe*, however, significantly undervalued this interest, striking down a wide range of abortion regulations, such as informed consent requirements and 24-hour waiting periods. *See, e.g.*, *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

The plurality in *Casey* reversed course, rejecting *Roe*'s rigid trimester framework because "in practice it undervalue[d] the State's interest in potential life." 505 U.S. at 873. And *Gonzales* subsequently confirmed this central premise in *Casey*—"that the government has a legitimate and substantial interest in preserving and promoting fetal life." 550 U.S. at 145.

In *PPINK*, the Seventh Circuit ignored these teachings, striking down Indiana's ultrasound regulation after giving minimal weight to the State's interest in potential life under *Hellerstedt*'s balancing test. Not surprisingly, the Seventh Circuit's decision directly conflicts with *Casey*, which upheld a 24-hour waiting period that advanced the same state interest and imposed the same burdens as Indiana's ultrasound provision. Thus, only this Court can resolve whether *Hellerstedt*'s formulation of the undue burden test governs informed consent statutes and, if so, how courts should balance the possible burdens imposed by such regulations against the States' "important and legitimate interest in potential life." *Roe*, 410 U.S. at 163.

Of course, if Indiana's ultrasound requirement does not impose a substantial obstacle on a woman's access to abortion (either because Indiana's interest in potential life outweighs the burdens imposed or because a different undue burden standard applies), then *Casey* and *Whalen* instruct that only rational basis review applies. And Indiana's ultrasound regulation would appear to easily meet this deferential standard. Furthermore, *PPINK*'s interpretation significantly restricts a State's ability to alter the timing and content of its informed

consent provisions, thereby undermining *Whalen*'s recognition that States have broad authority to regulate the medical profession. By considering only specific, quantifiable benefits to potential life that flow from having the ultrasound at least 18-hours before (instead of immediately prior to) the abortion procedure, *PPINK* makes it nearly impossible for Indiana to move the ultrasound earlier even if it determines the woman's decision would "be more informed and deliberate if [it] follow[ed] some period of reflection." *Casey*, 505 U.S. at 885.

A. By narrowly construing the States' interest in potential life, the Seventh Circuit directly contradicts *Casey* and, in the process, reintroduces reasoning from *Akron* that *Casey* expressly rejected.

In *PPINK*, Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") did not challenge the fact that Indiana requires women to have an ultrasound prior to the abortion procedure; rather, it contested only the change in the timing of the ultrasound. According to PPINK, the undue burden on women resulted from mandating that the ultrasound occurred at least 18-hours before the procedure. 896 F.3d at 813. And the Seventh Circuit agreed, focusing specifically on the burdens resulting from women having to make two trips to a clinic: "It is the burden of travelling twice which becomes the obstacle to access." *Id.* at 827. In particular, the Seventh Circuit highlighted the "additional travel expenses, childcare costs, loss of entire days' wages, risk of losing jobs, and potential danger from an abusive partner" for women who must make two

visits to PPINK facilities to comply with the law. *Id.* at 827.

The Seventh Circuit's burden analysis, however, is strikingly similar to the district court's evaluation of the burdens resulting from Pennsylvania's 24-hour waiting period in *Casey*, which burdens also resulted from a woman's having "to make a minimum of two visits to an abortion provider." *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1351 (1990); *PPINK*, 896 F.3d at 819 ("All of the burden in this case originates from the lengthy travel that is required of some women who have to travel far distances for an ultrasound appointment at least eighteen hours prior to an abortion."). In both cases, the courts emphasized that the regulations burdened women seeking an abortion by:

- Delaying the procedure longer than the state-mandated waiting period. *See Casey*, 744 F. Supp. at 1351 (noting that because most clinics "do not perform abortions on a daily basis," most women will face "delays far in excess of 24 hours"); *PPINK*, 896 F.3d at 820 (describing how "women had to wait longer to have an abortion" given that the clinics that perform abortions are available "at limited times").
- Increasing travel distances. *See Casey*, 744 F. Supp. at 1352 (explaining that many women "must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider"); *PPINK*, 896 F.3d at 819 (noting that for women in Fort Wayne, Indiana "the closest

ultrasound machine is 87 miles away in Mishawaka (174 miles round trip)").

- Increasing costs from the additional travel. *See Casey*, 744 F. Supp. at 1352 (describing how doubling the travel time "will necessarily add either the costs of transportation or overnight lodging or both to the overall cost of her abortion"); *PPINK*, 896 F.3d at 820 (setting out the anticipated costs of the ultrasound requirement "above and beyond the cost of the abortion itself").
- Causing the loss of wages and increasing the costs for food and child care. *See Casey*, 744 F. Supp. at 1352 (expressing concern that the added delay may cause women to "lose additional wages or other compensation" or "to incur additional expenses for food and child care"); *PPINK*, 896 F.3d at 819 (describing how "[a] second lengthy trip" would require "a second missed day of work" and "child care for an additional day").
- Increasing the threat to battered women of physical or psychological abuse. *See Casey*, 744 F. Supp. at 1352 (stating that the burden would be felt most heavily by those "who have the least financial resources" and those who "have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave"); *PPINK*, 896 F.3d at 821 (discussing the "impact on victims of domestic violence" who now had "to arrange to be away for all or most of two days").

- Failing to provide any offsetting medical benefit from waiting. *See Casey*, 744 F. Supp. at 1352 (concluding that the waiting period "serves no legitimate medical interest"); *PPINK*, 896 F.3d at 831 (upholding the district court's conclusion "that the ultrasound law 'imposes significant burdens against a near absence of evidence that the law promotes either of the benefits asserted by the State'").

In *PPINK*, the Seventh Circuit determined that these burdens were "undue" because Indiana did not provide "any evidence that [the ultrasound requirement] serves the intended goal of persuading women to carry a pregnancy to term." *Id*. at 833. Instead of considering the importance of Indiana's interest in potential life generally and how the ultrasound provision advanced that interest, the Seventh Circuit demanded specific evidence that having an ultrasound 18-hours before an abortion (as opposed to immediately before) led some unspecified number of women to continue their pregnancies. *Id*. at 828-29.

There are at least two problems with this analysis. First, if the Seventh Circuit is correct that *Hellerstedt*'s balancing test applies to all abortion regulations, then *PPINK*'s application of that test directly conflicts with *Casey* and *Gonzales*. If this Court upheld the regulations in *Casey* and *Gonzales* were subject to a balancing test, this Court must have concluded that the States' interest in potential life outweighed the burdens imposed by the 24-hour waiting period and the federal ban on partial-birth abortion. *Casey*, 505 U.S. at 886 (upholding the 24-

hour waiting period despite its being "particularly burdensome" "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others"). That is, contrary to the Seventh Circuit, *Casey* and *Gonzales* must have given considerable weight to the State's "legitimate and substantial interest in preserving and promoting fetal life," *Gonzales*, 550 U.S. at 145, even though those cases required very little in terms of direct, quantifiable benefits from the regulations.

For example, *Casey* upheld Pennsylvania's 24-hour waiting period because of "[t]he *idea* that important decisions will be more informed and deliberate if they follow some period of reflection." 505 U.S. at 885 (emphasis added). Unlike the Seventh Circuit, the plurality did not demand specific evidence showing that "the additional time to reflect advanced [the State's] interests." *PPINK*, 896 F.3d at 830. Rather, *Casey* concluded that Pennsylvania could "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest," 505 U.S. at 886, and even though there was no evidence that any women changed their minds after receiving the information 24-hours before (instead of immediately before) the procedure. *See id.* at 885 (rejecting *Akron*'s invalidation of a 24-hour notice period, which was based on the fact that the *Akron* Court was "[not] convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course"). Because the 24-hour waiting period—like Indiana's ultrasound requirement—

"facilitates the wise exercise of th[e] right [to decide to terminate a pregnancy free of undue State regulation], it cannot be classified as an interference with the right *Roe* protects." *Id.* at 887. Under *Casey*, even if requiring an ultrasound 18-hours prior to the abortion procedure has not yet persuaded a woman to continue her pregnancy, it remains "a reasonable measure to ensure an informed choice, one which *might* cause the woman to choose childbirth over abortion." *Id.* at 883 (emphasis added).

Similarly, *Gonzales* upheld the federal ban on partial-birth abortion based on a "reasonable inference" about its "necessary effect … and the knowledge it conveys." 550 U.S. at 160. Moreover, in so holding, the *Gonzales* Court did not demand specific evidence supporting the government's interest: "While we find *no reliable data* to measure the phenomenon, it seems *unexceptionable* to conclude some women come to regret their choice to abort…." *Id.* at 159 (emphasis added); *Casey*, 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."). Consequently, if *Casey* and *Gonzales* applied a balancing test, Indiana's ultrasound regulation must be able to survive that test because it promotes the same interest in potential life as those cases and because it is based on the same "idea that important decisions will be more informed and deliberate if they follow some period of reflection." *Id.* at 885.

The Seventh Circuit, however, requires much more, effectively reintroducing *Akron*'s discredited analysis of a 24-hour waiting period. In *Akron*, the Court identified the same burdens as *Casey* and *PPINK*—the costs and delay created "by requiring the woman to make two separate trips to the abortion facility." *Id.* The majority rejected the government's 24-hour waiting period because "Akron has *failed to demonstrate that any legitimate state interest is furthered* by an arbitrary and inflexible waiting period." *Akron*, 462 U.S. at 450 (emphasis added). And the Court relied heavily on its determination that "[t]here is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." *Id.*

The Seventh Circuit made the same argument in *PPINK*, emphasizing the lack of evidence that the 18-hour waiting period would produce the benefits the State claimed: "A statute that curtails the constitutional right to an abortion … cannot survive challenge without evidence that the curtailment is justifiable by reference to the benefits conferred by the statute." *PPINK*, 896 F.3d at 831 (quoting *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015) (alteration in *PPINK*); *id.* at 828 (taking "the minimal putative effects of the State's action" to tip the balance against Indiana's ultrasound regulation because "[t]he more feeble the state's asserted interest, 'the likelier the burden, even if slight, to be "undue" in the sense of disproportionate or gratuitous'")

(quoting *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013)).

Casey, however, expressly rejected *Akron*'s reasoning and, *a fortiori*, is inconsistent with *PPINK* as well. *Casey*, 505 U.S. at 885 ("We consider [*Akron*'s] conclusion to be wrong."); *Akron*, 462 U.S. at 473 (O'Connor, J., dissenting) ("Although the waiting period may impose an additional cost on the abortion decision, this increased cost does not unduly burden the availability of abortions or impose an absolute obstacle to access to abortions."). Given that the Indiana and Pennsylvania regulations are almost identical in terms of the burdens and the States' interests, the different outcomes must result from the Seventh Circuit's improper weighing of Indiana's interest in potential life. That is, even if *Hellerstedt*'s balancing test applies to regulations promoting potential life, the Seventh Circuit (like the *Akron* majority before it) "undervalue[d] the State's interest in potential life" and, therefore, reached an outcome that is inconsistent with *Casey*'s application of the undue burden test. *Id*. at 873.

Second, this Court has upheld abortion regulations directed at maternal health (*Mazurek*) and the promotion of potential life (*Gonzales*) even when there was no empirical evidence that the regulations advanced the State's asserted interest. In *Mazurek*, the Court upheld a Missouri law requiring physicians to perform abortions even though (1) there were no legislative findings supporting the law, and (2) those challenging the law alleged that "all health evidence contradict[ed] the claim that there is any health basis for the law." *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per

curiam). The Court explained that "this line of argument"—that the law should be struck down because of its alleged lack of benefits—"is squarely foreclosed by *Casey* itself." *Id*. Moreover, *Mazurek* confirmed that *Casey* "emphasized that '[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*.'" *Id*. (quoting *Casey*, 505 U.S. at 885) (emphasis in *Mazurek*). Put another way, the requirement fell within the range of permissible legislative judgment because it had a reasoned basis.

In a similar fashion, *Gonzales* upheld the federal ban on partial-birth abortion even though, as Justice Ginsburg warned, the regulation "saves not a single fetus from destruction, for it targets only a *method* of performing abortion." *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting) (emphasis in original). The *Gonzales* Court concluded that the ban was a permissible measure that would encourage some women to choose childbirth over abortion because it also had a reasoned basis. *See id*. at 160 ("It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term…."); *Casey*, 505 U.S. at 883 (concluding that Pennsylvania's informed consent requirement was "a reasonable measure to ensure an informed choice, one which *might* cause the woman to choose childbirth over abortion") (emphasis added).

Supreme Court review is required, therefore, because the Seventh Circuit's opinion (1) directly

conflicts with *Casey* and *Gonzales*, and (2) severely limits a State's ability to regulate based on its interest in potential life.

B. Given the States' substantial interest in potential life, Indiana's ultrasound regulation easily survives rational basis review under *Casey* and *Whalen* regardless whether *Hellerstedt*'s balancing test or some other undue burden standard applies.

As discussed above, the States' interest in potential life is "weighty enough" or "important enough" to overcome the burdens created by the 24-hour waiting period in *Casey* and the ultrasound requirement in *PPINK*. Thus, whether *Hellerstedt*'s balancing test or some other standard is used, Indiana's ultrasound requirement need only be rationally related to the promotion or preservation of potential life: "Unless [a regulation imposes a substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal." *Id*. at 878.

This rational basis standard flows from *Casey*'s recognition that informed consent provisions, such as Indiana's ultrasound provision, are "part of the practice of medicine," which is "subject to reasonable licensing and regulation by the State." *Id*. at 884. The plurality cited *Whalen* in support of this position. In *Whalen*, this Court upheld a New York law that required physicians to prepare prescriptions for certain drugs in triplicate and to file at least one of the copies with the State. The Court determined

that the statute was "manifestly the product of an orderly and rational legislative decision," that there "was nothing unreasonable in the assumption" that the statute might help officials enforce laws designed to reduce the use of dangerous drugs, and that the law "could reasonably be expected to have a deterrent effect on potential violators." 429 U.S. at 597–98.

In the section of *Whalen* to which *Casey* refers, this Court held that States have broad latitude to regulate the practice of medicine provided that such regulations do not: (1) preclude public access to a legitimate medical procedure or treatment, (2) prevent a patient from deciding, in consultation with her physician, whether to pursue the procedure or treatment, or (3) condition the doctor's ability to pursue a particular procedure on government consent. *Id.* at 603. In *Whalen*, as in *Casey*, this Court explained that what "is at stake" is the ability of a patient to make the ultimate decision in consultation with her physician. *Casey*, 505 U.S. at 877; *Whalen*, 429 U.S. at 603. As long as "the decision … is left entirely to the physician and patient," the State has substantial freedom to adopt reasonable regulations that may affect the decision-making process. *Id.*

Casey directly applied the principles articulated in *Whalen* to the abortion context. This is not surprising given that *Casey* expressly stated that "the doctor–patient relation here is entitled to the same solicitude it receives in other contexts." *Casey*, 505 U.S. at 884. And both cases confirmed that the doctors' "right to practice medicine free of unwarranted state interference … is derivative from,

and therefore no stronger than, the patients'." *Whalen*, 429 U.S. at 603; *Casey*, 505 U.S. at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position.").

The Seventh Circuit's reasoning marks a significant departure from *Casey* and *Whalen*. Whereas *Casey* concluded that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure," *id*., the Seventh Circuit determined that Indiana lacked the regulatory authority to require that the ultrasound be performed 18-hours prior to the abortion procedure—even though *Casey* confirmed that Pennsylvania's requiring disclosures 24-hours before an abortion easily satisfied rational basis review: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." 505 U.S. at 885.

Indiana's ultrasound provision provides women with both the opportunity to receive important, truthful, and nonmisleading information and the time to reflect on that information. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012) (concluding that while ultrasounds are "more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*, they

"are the epitome of truthful, non-misleading information" and "are not different in kind"); *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc) (recognizing that a State can adopt reasonable informed consent regulations that "require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."). As *Casey* and *Whalen* demonstrate, though, truthful, nonmisleading disclosures related to abortion are subject to only rational basis scrutiny. *See Casey*, 505 U.S. at 882 (overruling *Akron and Thornburgh* as "inconsistent with *Roe*'s acknowledgment of an important interest in potential life" because they struck down "truthful, nonmisleading information" that was reasonably related to the abortion decision).

Thus, in striking down Indiana's ultrasound law, the Seventh Circuit not only narrowed the States' interest in potential life, but also restricted the States' authority to alter the nature and timing of their regulations, thereby threatening to usurp the legislative function. *See Harris v. McRae*, 448 U.S. 297, 326 (1980) (explaining that "'when an issue involves policy choices as sensitive as those implicated [here], the appropriate forum for their resolution in a democracy is the legislature'") (quoting *Maher v. Roe*, 432 U.S. 464, 479 (1977)); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality opinion) (criticizing *Roe*'s trimester framework because it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the

United States) (internal punctuation omitted). Instead of considering whether the ultrasound requirement imposed a substantial obstacle in and of itself, the Seventh Circuit limited the inquiry to a comparison of the current and prior law. Even though the court assumed that there might be benefits from having an ultrasound at some point prior to the abortion procedure, it prohibited Indiana from relying on those benefits when justifying its regulation under the Seventh Circuit's balancing test. *See PPINK*, 896 F.3d at 826 ("Therefore, the benefits of having an ultrasound at some time prior to an abortion (without regard to the 'eighteen hour prior' requirement) are irrelevant.").

As a result, under *PPINK*, when first considering whether to adopt an ultrasound regulation, Indiana could have required that the ultrasound be performed immediately before the abortion procedure, while another State in the Seventh Circuit could have required an ultrasound 18-hours before the procedure. Both regulations likely would be constitutional because both would be based on the benefits that flow from having an ultrasound at some point prior to the abortion procedure. But having made its initial decision, *PPINK* now precludes Indiana from changing its mind and adopting the same waiting period after the ultrasound that the other State initially adopted. As a result, States in the Seventh Circuit (as well as any other States subject to this type of balancing test) must carefully consider the scope and timing of any regulation that promotes their interest in potential life because once they enact such a regulation, the States can alter that regulation only if they can prove that the specific benefits of the

change (as opposed to the general benefits of the *regulation*) outweigh the burdens created by that change.

Yet *Casey* and *Whalen* recognize that States have greater authority to regulate pursuant to the their interest in potential life, which is why the *Casey* plurality overturned *Akron* and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762 (1986): "[W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. Review is warranted, therefore, because the Seventh Circuit's analysis undermines a State's authority to determine the type of truthful, nonmisleading information that should be given before an abortion as well as the timing of that information even though both decisions advance its interests in "ensuring a decision that is mature and informed" and in "express[ing] a preference for childbirth over abortion." *Casey*, 505 U.S. at 883.

II. Certiorari Should Be Granted Because Lower Courts Have Reached Conflicting Conclusions as to Whether and How *Hellerstedt*'s Balancing Test Applies to Regulations Advancing the States' Interest in Potential Life.

In *Hellerstedt*, this Court applied a balancing test to Texas regulations that sought to promote the

State's "valid" and "legitimate" interest in maternal health. 136 S.Ct. at 2309. Under this test, courts are to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* In *PPINK*, the Seventh Circuit applied *Hellerstedt*'s balancing test to a regulation intended to advance Indiana's interest in potential life. The application of *Hellerstedt* outside the maternal health context, though, raises two important questions regarding whether and how States can further their "substantial" and "profound" interest in promoting and protecting human fetal life through ultrasounds or other informed consent provisions. *Casey*, 505 U.S. at 876, 878.

First, when a State uses "its regulatory authority to show its profound respect for the life within the woman," should courts apply *Hellerstedt*'s balancing test or some other formulation of the undue burden standard? *Gonzales*, 550 U.S. at 157. *Hellerstedt* grounded its use of a balancing test in *Casey*'s analysis of Pennsylvania's parental consent and spousal notification requirements. In *PPINK*, the Seventh Circuit went farther, contending that Pennsylvania had asserted that "spousal notification and parental involvement … were related to its interest in potential life" such that "the same undue burden test [applied] to all of the regulations at issue … without regard to the state's asserted interest." 896 F.3d at 818. Yet, as a closer review of *Casey* demonstrates, the spousal notification and parental consent provisions were predicated on interests other than the promotion of fetal human life. With respect to spousal notification, *Casey* considered only "the *husband*'s interest in the potential life of the child" and did not mention, let alone balance, the

State's interest in potential life. *Casey*, 505 U.S. at 898 (emphasis added). Similarly, *Casey*'s short discussion of Pennsylvania's parental consent requirement invoked only the parents' interest in discussing abortion with their pregnant daughter, not the State's interest in fetal human life. *Id.* at 899.

Moreover, while *Casey* applied its undue burden test "to all of the regulations at issue in that case," *PPINK*, 896 F.3d at 818, it is far from clear that *Casey* adopted a balancing test when analyzing Pennsylvania's spousal notification, parental consent, and recordkeeping requirements. *See*, *e.g.*, *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting) ("The 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."). As Justice Thomas explained in his *Hellerstedt* dissent, the plurality did not balance the alleged benefits and burdens when considering whether any of these provisions imposed a substantial obstacle on a woman's right to choose. *Hellerstedt*, 136 S.Ct. at 2324 (Thomas, J., dissenting). The spousal notification requirement constituted an undue burden because it would "likely … prevent a significant number of women from obtaining an abortion," deterring women "from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Casey*, 505 U.S. at 893-94. In addition, *Casey* upheld the parental notification requirement based on this Court's pre-*Casey* precedents, which applied *Bellotti*'s four criteria for bypass procedures rather than a

balancing test. *See*, *e.g.*, *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502, 511 (1990).

Similarly, the plurality upheld Pennsylvania's "recordkeeping and reporting requirements [because 'they] are reasonably directed to the preservation of maternal health and … properly respect a patient's confidentiality and privacy.'" *Casey*, 505 U.S. at 900 (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 80 (1976)). Information gathering was viewed as "a vital element of medical research" such that "it cannot be said that the requirements serve no purpose other than to make abortions more difficult." *Id*. at 901. Consequently, the plurality concluded that the requirements did not "impose a substantial obstacle on a woman's choice." *Id*.; *see also id*. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

Accordingly, even if *Hellerstedt* properly adopted a balancing test for regulations directed at maternal health, it did not have occasion to consider the nature and scope of the States' "substantial" and "profound" interest in potential life. *Casey*, 505 U.S. at 876, 878. Indiana's ultrasound requirement provides this Court with a clean vehicle to determine whether *Hellerstedt*'s balancing test applies to a measure designed to promote potential life and, if it does, to provide lower courts with guidance as to the weight of that interest and how that interest should be balanced against potential burdens.

Second, how are lower courts supposed to carry out the balancing required under *Hellerstedt*? Lower court decisions reflect confusion about when a regulation's benefits are sufficient to survive such a balancing test. For example, district courts in the Fifth and Eighth Circuits have decided that "[a] regulation will not be upheld unless the benefits it advances outweigh the burdens it imposes." *Hopkins*, 267 F.Supp.3d at 1055-56. *See Hellerstedt II*, No. A-16-CA-1300, 2018 BL 30317, at *6 (W.D. Tex. Jan. 29, 2018) ("[T]he record suggests Chapter 697 imposes an undue burden on abortion access because its burdens exceed its benefits."). This "whichever is greater" approach appears simple but raises two other important questions: (1) how are courts to value the States' interests in promoting fetal life and in "ensur[ing] that a woman apprehend the full consequences of her decision," *Casey*, 505 U.S. at 882, and (2) how much more "burden" is required to outweigh the States' interest in fetal human life given *Casey*'s recognition that a regulation serving that interest is constitutional even when it "has the incidental effect of making it more difficult or more expensive to procure an abortion." *Id*. at 874.

A district court in the Eleventh Circuit, on the other hand, has taken a different approach, interpreting *Hellerstedt* to require a sliding scale under which a State must show a greater purported benefit as the burden increases: "[T]he more severe the obstacle a regulation creates, the more robust the government's justification must be, both in terms of how much benefit the regulation provides towards achieving the State's interests and in terms of how realistic it is the regulation will actually achieve that

benefit." *West Ala. Women's Center v. Miller*, 299 F. Supp.3d 1244, 1262 (M.D. Ala. 2017).

The Seventh and Eight Circuits complicate things even more by employing the balancing test in their own distinct ways. The Seventh Circuit concludes that a regulation is undue "'[i]f a burden significantly exceeds what is necessary to advance the state's interests.'" *PPINK*, 896 F.3d at 827 (quoting *Schimel*, 806 F.3d at 919). And the Eighth Circuit interprets *Hellerstedt* to require a court to find that a regulation's "benefits are substantially outweighed by the burdens it imposes." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). These five distinct interpretations evidence the uncertainty surrounding (as well as the uneven application of) *Hellerstedt*'s balancing test and the need for clarification as to its demands.

CONCLUSION

For the reasons set forth above, this Court should grant Indiana's petition for a writ of certiorari.

Respectfully submitted,

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