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**

## REPLY BRIEF OF PETITIONERS


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## REPLY BRIEF OF PETITIONER

As an "invaluable tool in revealing the personhood of unborn children," *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 313 n.3 (7th Cir. 2018) (Manion, J., dissenting), ultrasounds may be the most critical information conveyed during abortion informed-consent counseling. Unsurprisingly, coupling ultrasounds with existing informed consent waiting periods—to ensure the woman has time to reflect on what she sees and hears—makes common sense to several state legislatures. *See* Ky. Rev. Stat. §§ 311.725(1), 311.727; La. Rev. Stat. § 40:1061.10(D)(2)(a); Mo. Rev. Stat. § 188.027.1(4); Tex. Health & Safety Code § 171.012(a)(4); s*ee also EMW Women's Surgical Ctr., P.S.C. v. Beshear*, Nos. 17-6151/6183, 2019 WL 1487309 (6th Cir. April 4, 2019); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012). It is therefore deeply counterintuitive—really, confounding—that the courts below would strike down such a law at all.

Yet the true significance of this case carries beyond ultrasounds, for the decision below broadly implies new vulnerability, in the wake of *Hellerstedt*, for all types of abortion regulations previously upheld following *Casey*. As the only post-*Casey* appellate judgment to strike down an informed consent waiting period, the decision below veered off course by (1) demanding proof of efficacy never before required for an informed consent waiting period; (2) hypothesizing unproven obstacles for women seeking abortion; and (3) defining the denominator of the *Casey* "large-fraction" test to be equal to the numerator, *i.e.*, to include

only those women who are burdened by the law (conflicting with several decisions from other circuits). In the process, it also safeguarded Planned Parenthood's business decision not to purchase additional ultrasound machines that might ease any burdens encountered by women seeking abortions.

The Court should grant certiorari not only to confirm the validity of combining ultrasounds with existing abortion informed consent waiting periods, but also to clarify whether, in the wake of *Hellerstedt*, every type of abortion regulation previously upheld is now fair game for free-form judicial balancing.

## ARGUMENT

### I. As the Only Appellate Case Since *Casey* To Invalidate an Informed Consent Waiting Period, the Decision Below Signals a Fundamental Misapprehension of Abortion Rights that Must Be Corrected

The informed consent waiting period common to many States' abortion regimens assumes that seeing and hearing relevant information ahead of the procedure will make a difference, either because it will persuade the woman not to have the abortion or because it will merely make her decision better informed. As the State's expert testified, waiting periods are standard care for most major medical procedures, particularly when they give patients time to absorb and understand medical imaging like x-rays, MRIs, and ultrasounds. *See* Appellant's App., CA7 ECF No. 14 at 46 ¶ 11, 50–51 ¶ 9.

No one has ever thought that a State must prove the "efficacy" of such laws in the abortion context, which have *always*, until this case, been upheld. And there is no reason to hold the ultrasound waiting period to a higher standard of proof. The law serves the purpose of affording more time for reflection on relevant information, regardless of the woman's ultimate decision. That is either a legitimate concern of medical ethics or not, but its legitimacy is not susceptible to any particular proof or disproof.

The decision below fastened on the supposed need for direct proof of efficacy based on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), where the Court balanced the government's proven interest in a new law that supposedly safeguarded maternal health against the degree of burden on the abortion right. But unless the Court meant for *Hellerstedt* to overrule *Casey,* that cannot be the correct standard for informed consent laws. The only way to reconcile *Hellerstedt* with *Casey* is to infer that *Hellerstedt* announced a rule only for putative attempts to safeguard maternal physical health—and *not* to informed consent waiting period laws, which are good in themselves (like all informed consent requirements) *and* which are designed to protect fetal life and maternal *mental* health.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court considered record-keeping and reporting laws along with informed consent, waiting periods, and spousal notice. It upheld all of these laws (except spousal notice) because each self-evidently served "a valid purpose" and could be unconstitutional only by imposing "an undue burden on a

woman's ability to make this [abortion] decision." 505 U.S. 833, 874 (1992). But in *Hellerstedt*, the Court replaced acceptance of a self-evident "valid purpose" with consideration of "the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. Critically, the Court took a skeptical view of the Texas admitting privileges law's supposed objective of promoting maternal health in order to root out "*[u]nnecessary health regulations* that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* (emphasis added). By its terms, therefore, the *Hellerstedt* balancing test applies only to clinic regulations ostensibly (but perhaps pretextually) designed to protect maternal physical health. It leaves intact the self-evident legitimacy of informed consent waiting period laws.

Furthermore, the *Hellerstedt* balancing test cannot meaningfully apply to laws designed to protect fetal life. Laws promoting maternal health arise from a *utilitarian* assessment that can be objectively measured. Laws safeguarding fetal life, in contrast, arise from a *moral* judgment that cannot be so measured. Applying *Hellerstedt*'s utilitarian test gives rise to an unanswerable question: How many fetal lives must be saved to justify a given burden on a woman's choice to have an abortion?

Imposing the *Hellerstedt* balancing test here also ignores the State's broader interest in ensuring that the woman's decision is fully informed even if she ultimately has the abortion. Again, the judgment regarding the need for information and a period of reflection is not susceptible to objective measurement.

The nature of the procedure, and medical decision-making generally, justifies imparting the information with time for reflection. The abortion decision is "so fraught with emotional consequence" that "some doctors might prefer not to disclose the precise details" by showing the woman the ultrasound of her child and allowing her to listen to the heartbeat, but "[i]t is . . . precisely this lack of information that is of legitimate concern to the State." *Gonzales v. Carhart*, 550 U.S. 124, 129 (2007). Again, there is no way to measure the "efficacy" of this requirement.

Yet despite *Hellerstedt*'s obviously poor fit, Planned Parenthood (and the courts below) proceed as if it *changed* the rules for informed consent waiting period laws. The very timing of this suit implies that Planned Parenthood believes *Hellerstedt* represents something other than systematic application of *Casey*. The Indiana legislature passed HEA 1337, the bill that included the Ultrasound Law, on March 24, 2016. Planned Parenthood brought suit against two other provisions of HEA 1337 (but not the Ultrasound Law) on April 7, 2016, and asked for an injunction before the July 1, 2016, effective date. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-483 (U.S.). The Court issued *Hellerstedt* on June 27, 2016. Only *then*, on July 7, 2016, did Planned Parenthood challenge the Ultrasound Law, and its effort to distinguish prior informed consent waiting period cases reveals why: "only this case, arising after *Whole Woman's Health*, involves the weighing of the burdens imposed by a waiting period against any asserted benefit of the change in timing." Br. in Opp. 19.

What is more, this is not the only lawsuit brought in the wake of *Hellerstedt* that seeks to turn that decision into an all-purpose bludgeon against state abortion regulations. Five States now face "cumulative burdens" challenges to their entire abortion codes on the theory that even laws already upheld by courts can be challenged if their aggregate effect imposes too great a burden in light of their benefits. *See Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-1904 (S.D. Ind.); *June Med. Servs. L.L.C. v. Gee*, No. 3:17-cv-404 (M.D. La.); *Jackson Women's Health Org. v. Currier*, No. 3:18-cv-00171 (S.D. Miss.); *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-00500 (W.D. Tex.); *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-00428 (E.D. Va.).

Planned Parenthood itself recognizes that using *Hellerstedt* this way would create a doctrine where abortion restrictions might be valid in one State but not another, depending on an infinite variety of business, demographic, transportation, and other factors in each State. Br. in Opp. 20. Indeed, under this theory, abortion laws might be valid one day, but invalid another, when market conditions for abortion access change. That is not a legal standard, and States need more conclusive guidance as to which abortion regulations are constitutional and which are not.

Ultrasounds convey important and powerful information relevant to the abortion decision, and a waiting period ensures time to reflect on that information. That regulatory model has long been permissible under *Casey*, but lower courts believe it is newly vulnerable to challenge under a new standard. The Court should grant certiorari to address whether and how to

apply *Hellerstedt* to an informed consent waiting period law that plainly would have been upheld under *Casey*.

## II. The Court Should Resolve the Circuit Conflict Regarding Application of the Large-Fraction Test

1. An abortion regulation imposes an undue burden only if "in a large fraction of cases in which [the regulation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992). Here, the Seventh Circuit defined the relevant denominator of that "fraction" to include only "low income women who do not live near one of PPINK's six health centers where ultrasounds are available." Pet. App. 18a. This is a conveniently precise definition tailored to the exact description of women supposedly burdened by the Ultrasound Law. Br. in Opp. 27. As a result, it followed that the fractional burden found by the district court was not a fraction at all, but effectively a whole number. This is a suspect result to say the least, and it stands in conflict with decisions from other circuits.

Despite insisting no circuit conflict exists on this subject, Planned Parenthood complains that the Fifth Circuit went a different route in *June Medical Services L.L.C v. Gee*, 905 F.3d 787, 802 (5th Cir. 2018), and defined the denominator to be "all women seeking abortions," which is supposedly "inconsistent with" *Casey*. Br. in Opp. 29 n.9. In addition to the Fifth, the Sixth and Eighth Circuits have also defined the rele-

vant denominator for abortion regulations broadly, effectively to include all women seeking abortions. *Planned Parenthood of Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514 (6th Cir. 2012) ("women to whom [medication abortion] is available"); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997) ("women seeking pre-viability abortions"); *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) ("women seeking medication abortions in Arkansas"). Meanwhile, in a case addressing state laws requiring adherence to FDA protocols for medication abortions, the Ninth Circuit defined the denominator not to include all women who would have medication abortions, but more narrowly to include only women who "would receive medication abortions under the evidence-based regimen" that plaintiffs preferred. *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014).

Plainly there is irreconcilable conflict among the circuits over how to define the "large-fraction" denominator. And the Seventh Circuit's definition cannot be correct. The Ultrasound Law is *relevant* to any woman seeking an abortion who would *not otherwise* choose to have an ultrasound eighteen hours before her abortion. It may be a *substantial obstacle* for a subset (hence the term "fraction"), but it has meaning for *all* who would not otherwise schedule such an ultrasound on their own. *Cf. Casey*, 505 U.S. at 895 (observing that the spousal notice provision was *relevant* for all women seeking abortion who would not otherwise inform their spouses of the abortion).

Defining the denominator to include only those women who would actually find the law to be a substantial obstacle is pointless and inconsistent with *Casey*.

2. Apparently realizing that a circuit conflict does in fact exist, Planned Parenthood next argues this case is not a proper vehicle for resolving it because: (1) "Indiana advanced absolutely no argument in the courts below that the district court used an inappropriate denominator," (2) "the interlocutory posture of these proceedings weights against granting certiorari," and (3) "the precise definition of the denominator is not outcome determinative here." Br. in Opp. 30–31. None is a legitimate reason to deny the petition.

First, the State did in fact advance its argument concerning the relevant denominator below. At the district court, in the State's brief in opposition to preliminary injunction, it set out the large-fraction test and explained that the particular burden to low-income women was insufficient to meet this test. S.D. Ind. ECF No. 35 at 12–14. Then, in its appellate briefing, after the district court defined the denominator as "low income women who do not live near one of PPINK's six health centers at which ultrasounds are available," Pet. App. 76a, the State explained the relevant burden in terms of how the law affected "women in Indiana," CA7 ECF No. 13 at 26, and "women seeking an abortion," CA7 ECF No. 37 at 14. Finally, after the Seventh Circuit panel agreed with the district court's definition of the relevant group, Pet. App. 18a, the State in its petition for rehearing *en banc* argued

that "the panel applied the test incorrectly by miscalculating the relevant fraction of women." CA7 ECF No. 58 at 10–11.

Second, because it is unlikely the record will change on remand, the Court should not be concerned that this case arrives on appeal from a preliminary injunction rather than a final judgment. The Ultrasound Law was enjoined before it was in effect for a meaningful period, so there is no chance the State will be able to generate additional evidence of its effectiveness. Planned Parenthood brought this lawsuit only six days after the Ultrasound Law went into effect, so it is misleading (if technically correct) to say that "this law was challenged after it had gone into effect." Br. in Opp. 20 n.6. In all ways that matter, this is a pre-enforcement challenge, as the State had no serious opportunity to enforce the law and measure its impact. Accordingly, waiting until final judgment would provide no benefit for Supreme Court review. Regardless, the Court frequently decides cases that arrive in the preliminary injunction posture, including three in the past year alone. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

Finally, Planned Parenthood argues that the large-fraction test is irrelevant because "Indiana offered virtually no evidence to support any benefit from its eighteen-hour ultrasound requirement." Br. in Opp. 32. However, Indiana was never given an opportunity to gather evidence showing how the law worked in practice, and now, with an injunction in place, it will be impossible to do so. Regardless, such

evidence should not be necessary under *Casey*. *See supra* Part I. Indeed, the implicit threat that the decision below carries for other informed consent waiting periods—which until now all had thought to be perfectly constitutional—is a big reason to take this case. The lack of any direct proof regarding the "efficacy" of placing the ultrasound 18 hours before the abortion (rather than the day of) is an added feature of certworthiness, not a defect.

## III. The Court Should Clarify Whether the Abortion Right Extends to Abortion Providers' Business Decisions

Planned Parenthood urges the Court to deny the petition in part because, in its view, the decision below represents merely a fact-bound application of the undue burden standard to particular circumstances. That can only be true, however, if the right to abortion ultimately safeguards the business decisions of abortion providers—something this Court has never embraced.

In particular, Planned Parenthood argues that it cannot afford to expand ultrasound services to meet 18-hour demand because its preferred ultrasound machines are too expensive. Cheaper machines are available, but it refuses to use them. Are such business decisions really entitled to deference in the name of protecting the right to abortion? The Seventh Circuit thinks so, but the Fifth and Eighth Circuits do not. *See June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 811 (5th Cir. 2018) (criticizing doctors who "failed to seek admitting privileges in good faith"); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir.

1994) (attributing any lack of abortion access to plaintiff clinics, which scheduled abortions only on Thursdays and Fridays).

The Seventh Circuit's deference to Planned Parenthood's business decisions effectively affords constitutional protections to its business model and insulates it from competition. Such deference is relevant not only to increasingly common ultrasound laws, but also to other abortion rights claims, including the cumulative burdens challenges filed against five States. *See supra* Part I. Yet deferring to abortion clinic business decisions is inconsistent with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which held that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." 505 U.S. 833, 873 (1992). The Court can, in taking this case, clarify how, if at all, business conditions inform application of the undue burden standard.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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