No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a State, consistent with the Fourteenth Amendment, require an ultrasound as part of informed consent at least eighteen hours before an abortion?

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PETITION FOR WRIT OF CERTIORARI

The Commissioner of the Indiana State Department of Health, the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, and the Individual Members of the Medical Licensing Board of Indiana respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit panel opinion, App. 1a–55a, is reported at 896 F.3d 809 (7th Cir. 2018). The order of the United States District Court for the Southern District of Indiana granting Planned Parenthood's motion for preliminary injunction, App. 59a–128a, is reported at 273 F. Supp. 3d 1013 (S.D. Ind. 2017). The district court's separate order issuing the preliminary injunction, App. 56a–58a, is not reported.

JURISDICTION

The Seventh Circuit panel entered judgment the same day it issued its opinion, on July 25, 2018. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which the Court of Appeals denied on October 5, 2018. *Id.* at 129a–130a. Petitioners then requested an enlargement of time to file their petition for certiorari until February 4, 2019, and the Court granted that request. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code section 16-34-2-1.1(a)(5), referred to below as the Ultrasound Law, provides:

> At least eighteen (18) hours before an abortion is performed and at the same time that the pregnant woman receives the information required by subdivision (1), the provider shall perform, and the pregnant woman shall view, the fetal ultrasound imaging and hear the auscultation of the fetal heart tone if the fetal heart tone is audible unless the pregnant woman certifies in writing, on a form developed by the state department, before the abortion is performed, that the pregnant woman:
> (A) does not want to view the fetal ultrasound imaging; and

(B) does not want to listen to the auscultation of the fetal heart tone if the fetal heart tone is audible.

INTRODUCTION AND STATEMENT OF THE CASE

Indiana's Ultrasound Law merely combines two pre-existing abortion regulations that are undoubtedly constitutional: an informed-consent waiting period and an ultrasound requirement. The Ultrasound Law informs a woman's abortion choice and affords her the opportunity to reflect on the information conveyed. Indeed, the ultrasound image may be the most critical information imparted, for it gives the mother her first opportunity to see her child and listen to her child's heartbeat. As Judge Manion of the Seventh Circuit recently observed in a separate case, "Planned Parenthood knows that the ultrasound is 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., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted).

Yet, the Seventh Circuit held the capacity of the Ultrasound Law to protect fetal life and dignity and to promote maternal mental health (both compelling state interests) is outweighed by the burdens it imposes on women seeking abortion—*not* as measured by the direct impact of the law (which was challenged within a week of becoming enforceable and remained in effect only a few months before it was preliminarily

enjoined), but as inferred from an apparently infinite variety of indirect indicators, including Planned Parenthood's business practices. The decision below misattributed and exaggerated the burdens imposed, miscalculated the relevant fraction of women affected, and discounted evidence of the law's benefits, relying on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), for its decisional methodology.

Certiorari is warranted to resolve circuit conflicts regarding the "large-fraction" component of the undue burden test and to address more broadly how lower courts are to evaluate abortion informed-consent laws (which until this case had been universally upheld under federal law by lower courts following *Casey*) in the wake of *Hellerstedt*.

I. Indiana's Informed Consent Statute and Ultrasound Requirement

The story of the Indiana Ultrasound Law actually begins with the enactment, over two decades ago, of an abortion informed-consent and waiting period law. As first enacted in 1995, the informed-consent statute mandated that a woman must receive, in person, specified information relevant to abortion and childbirth (not including, at that point, ultrasound information) at least eighteen hours before an abortion. P.L. 187-1995, § 4. This Court had upheld a similar statute in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881–87 (1992), and, after then-district Judge Hamilton at first invalidated it, the Seventh Circuit ultimately upheld the Indiana

statute. *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002).

In 2005, the legislature added a requirement that, during the pre-abortion consultation, appropriate medical personnel must advise a woman seeking an abortion that an ultrasound is available. P.L. 36-2005, § 1. In 2011, it required an ultrasound be performed before an abortion and that the woman *must* be shown the ultrasound unless she refuses in writing. P.L. 193-2011, § 9.

In 2016, it added the provision at issue here, which specifies that the required ultrasound must take place at the informed-consent appointment at least eighteen hours before the abortion procedure. Ind. Code § 16-34-2-1.1(a)(5). In so doing, it effectively added the pre-existing ultrasound requirement to the subjects covered by the pre-existing informed-consent appointment.

In support of the bill creating the Ultrasound Law, and again in this litigation, Dr. Christina Francis, a board-certified obstetrician/gynecologist, testified about a patient who would have benefitted from this law. The patient had a medication abortion at a Planned Parenthood clinic. Appellants' App. 47 ¶ 13. She underwent an ultrasound on the day of her abortion but chose not to view the image because she felt it might change her mind. *Id.* She did not want to be persuaded not to abort because she was already at the clinic, had paid for the abortion, and felt pressured to go through with the procedure. *Id.* The patient told Dr. Francis that, had she undergone the ultrasound

the day before her abortion appointment, she likely would have viewed the ultrasound image and would not have returned the next day for the abortion. *Id.* The waiting period between the ultrasound and the abortion would have given her more time to consider her decision based on more complete information, and she would likely have changed her mind. *Id.*

II. Planned Parenthood's Current Ultrasound Capabilities and Policy

Planned Parenthood operates three Indiana clinics that offer both surgical and medication abortions (in Bloomington, Merrillville, and Indianapolis) and one clinic that offers only medication abortions (in Lafayette). Appellants' App. 2 ¶¶ 7–9. Additionally, Planned Parenthood operates twelve other centers in Indiana that do not provide abortion services. *Id.* at 1–2 ¶¶ 4, 7, 9; *see also* App. 8a (explaining that Planned Parenthood's Fort Wayne clinic recently closed).

Prior to the Ultrasound Law's effective date of July 1, 2016, Planned Parenthood offered the state-mandated informed consent appointments at all of its health centers "in order to minimize the travel distances and other inconveniences for women obtaining abortions." Appellants' App. 4 ¶ 22. Women would generally obtain an ultrasound on the day of the abortion. *Id.* at 5 ¶ 27. Six of Planned Parenthood's centers are currently equipped with ultrasound machines: the four that offer abortion services and two more in Mishawaka and Evansville. *Id.* at 8 ¶¶ 41–43.

Six of Planned Parenthood's centers are currently equipped with ultrasound machines: the four that offer abortion services and two more in Mishawaka and Evansville. *Id.* at 8 ¶¶ 41–43. While the ultrasound machines that Planned Parenthood uses "cost at least $25,000" and "must be operated by specially trained technicians," *id.* at 5 ¶ 28, Planned Parenthood's medical director and CEO both testified that they were not aware whether Planned Parenthood investigated any alternative options such as purchasing portable ultrasound machines (some of which can cost as little as $4,250, *see id.* at 48 ¶ 16), purchasing refurbished ultrasound machines, or leasing ultrasound machines, *id.* at 66–67, 73.

III. This Litigation

Less than a week after the Ultrasound Law went into effect, Planned Parenthood filed this lawsuit and asked for a preliminary injunction barring enforcement. The district court granted the injunction, and the Seventh Circuit affirmed.

1. The district court concluded that the Ultrasound Law "creates an undue burden on a woman's right to choose to terminate her pregnancy." App. 60a. The court applied the balancing test articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and it rejected the State's argument that this test applies only to laws designed to protect maternal physical health and not laws, such as this one, designed to protect fetal life (and, relatedly, maternal mental health). App. 74a. The court then "weigh[ed] the burdens against the benefits" of the law. *Id.* at 75a.

The district court determined that the Ultrasound Law will burden abortion access by causing increased travel distances and delays in obtaining abortions because only four of Planned Parenthood's health centers have ultrasound machines. *Id.* Of course, Planned Parenthood could mitigate this burden by simply purchasing additional, less expensive ultrasound machines. But the court rejected this argument, concluding that "the undue burden inquiry does not contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a new abortion regulation." *Id.* at 78a.

The court then concluded that the law will substantially burden a large proportion of relevant women. It reached this conclusion by defining the denominator in a way nearly guaranteed to produce a large fraction: It concluded that "the class of women on whom the Court must focus" was "women for whom an additional lengthy trip to a PPINK health center for their informed-consent appointment acts as an impediment to their ability to have an abortion." *Id.* at 75a–76a. In other words, it defined the denominator on nearly the same terms as the numerator.

With regard to the law's benefits, while the court conceded that the State has a legitimate interest in promoting fetal life and dignity by giving the woman a chance to see her fetus, *id.* at 97a, it concluded that the Ultrasound Law does not further the State's interest because women are not required to view the ultrasound and three-fourths of Planned Parenthood's

patients choose not to view it, *id.* at 100a–103a. The district court recognized that "[u]ndoubtedly the ultrasound image is a piece of information on which women could use the eighteen-hour period to reflect," but it put the burden on the State to provide "specific evidence that *additional time to reflect on the ultrasound image* . . . decreases the likelihood that women will go through with an abortion." *Id.* at 105a (emphasis in original). Accordingly, it preliminarily enjoined enforcement of the Ultrasound Law.

2. The Seventh Circuit affirmed, agreeing with virtually all of the district court's analysis. Ignoring the informational purposes and benefits of these laws, the appellate court agreed with the district court that, under *Hellerstedt*, the burdens of the Ultrasound Law outweigh the "very small" impact of the law on persuading women to choose life. *Id.* at 39a. And with respect to the State's argument that PPINK could reduce any inconvenience created by the Ultrasound Law, it held that "the district court was entitled to defer to PPINK's justifiable business decisions and consider the burdens of the new ultrasound law within the context of the reality that exists for both PPINK in operating its business and for the patients it serves." *Id.* at 28a. The decision said nothing about the ultrasound's utility in helping women to come to a better, more informed abortion decision, regardless of their ultimate choice.

The Seventh Circuit also held that "the district court correctly determined" that the relevant "population" for the purpose of determining whether the law imposed a substantial burden was "women for

whom an additional lengthy trip to a PPINK health center for their informed-consent appointment acts as an impediment to their access to abortion services." *Id.* at 18a. It agreed with the district court that this group "consisted of low income women who do not live near one of PPINK's six health centers where ultrasounds are available." *Id.* And because it concluded that the Ultrasound Law imposed a substantial burden on these women, it upheld the preliminary injunction invalidating the law in all its applications. *Id.* at 53a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens a Circuit Conflict over the Relevant Set of Affected Women for *Casey*'s "Large Fraction" Test, Which Arises in Many Abortion Law Challenges

1. The preliminary injunction issued by the district court and affirmed by the Seventh Circuit entirely forecloses Indiana from enforcing the Ultrasound Law and thus facially invalidates the law. In most contexts, a plaintiff seeking facial invalidation of a statute must establish that "no set of circumstances exists under which [it] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But in the abortion context, the Court apparently has carved out an exception to this rule, permitting facial invalidation of a law if it "will operate as a substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [it] is relevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992); *cf. Whole Woman's Health v. Hellerstedt*,

136 S. Ct. 2292, 2343 n.11 (2016) (Alito, J., dissenting) (noting these two conflicting tests and arguing that "[t]he proper standard for facial challenges is unsettled in the abortion context"). Courts considering facial challenges to abortion laws are therefore required to determine "which group of women is properly considered the numerator and which group of women is properly considered the denominator"—and then determine whether the resulting fraction is "large." *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 377–78 (6th Cir. 2006) (Rogers, J., concurring) (citation and internal quotation marks omitted).

The circuit courts have adopted conflicting approaches to determining which women are "relevant" for the purpose of setting the fraction's denominator. The Seventh Circuit's decision below—which defines the denominator in a way that nearly always ensures a 1:1 ratio (and thus facial invalidation)—further deepens this conflict. Because this issue necessarily arises any time a plaintiff seeks facial invalidation of an abortion law, this conflict affects virtually every abortion case. The Court's guidance is necessary to resolve this important and recurring conflict.

2. In this case, the Seventh Circuit should have ruled that the relevant denominator consisted of those women who would not otherwise choose to have an ultrasound eighteen hours before their abortion as required by the statute. Instead, it defined it to include "low-income women who live a significant distance from one of the six PPINK health centers offering informed-consent appointments." App. 36a. In

other words, the Seventh Circuit's denominator included *only* those women *most likely* to face challenges with compliance, not *all* women for whom the Ultrasound Law would be "relevant." *Casey*, 505 U.S. at 895. Thus, according to the Seventh Circuit's approach, any abortion law is subject to facial invalidation if *some* discrete group of women—no matter how small—is burdened.

This approach undermines the entire purpose of the "large fraction" standard. As noted, most laws can be facially invalidated only if *all* of their applications are unconstitutional. *Casey* may lower the bar for abortion laws, but it does not entirely eliminate the bar: *Casey*'s "large fraction" standard ensures that abortion laws are not facially invalid unless some large proportion of their applications are unconstitutional. Even where a law burdens a handful of women, that is not a sufficient reason to enjoin it in all of its applications.

In *Casey*, the Court first applied its large-fraction test to Pennsylvania's spousal-notification law, and that application continues to apply an appropriate model for other contexts. There, Pennsylvania argued that since most women would notify their spouses of their intent to have an abortion anyway, the notification law would likely burden a very small percentage of women seeking an abortion. The Court, however, ruled that the proper denominator was not all married women seeking an abortion, but only those who would not, but for the spousal-notice law, notify their husbands of the abortion. That smaller group, the

court said, was the group for whom the law was relevant, because it was only the members of that group whose actions respecting the abortion would be affected by the law, *i.e.*, for whom the law compelled action that would not otherwise occur. *Casey*, 505 U.S. at 894–95.

Critically, *Casey* did *not* say that the relevant denominator was the (even) smaller set of women for whom the spousal-notice requirement would be a barrier to abortion. Rather, *that* group constituted the numerator, and only because it constituted such a significant proportion of women who would not otherwise notify their husbands was the law unconstitutional under the "large fraction" test. In other words, under *Casey* the numerator is the group who face a substantial burden, but the denominator is the group for whom the law has some regulatory effect. Characterizing the substantially burdened group as *both* the numerator and denominator would by definition facially invalidate every abortion restriction and would render the "large fraction" test a nullity.

Here, there is no evidence showing how large the burdened group is—even if defined broadly to include "low income women who do not live near one of PPINK's six health centers where ultrasounds are available"—or how it stacks up against the larger class of women who, but for the Ultrasound Law, would not have an ultrasound eighteen hours before the abortion. Consequently, there is legally insufficient evidence to facially invalidate the statute.

3. The Seventh Circuit's determination that the proper denominator was "low income women who do not live near one of PPINK's six health centers where ultrasounds are available" is not only inconsistent with *Casey*, but also deepens an existing conflict among the circuit courts. The Fifth, Sixth, and Eighth Circuits have defined the relevant denominator much more narrowly, whereas the Ninth Circuit has defined it broadly similar to the Seventh Circuit's decision here.

The decision below conflicts, for example, with the approach taken by the Eighth Circuit in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, which upheld an Arkansas statute "requiring medication-abortion providers to contract with a physician who has hospital admitting privileges," 864 F.3d 953, 955 (8th Cir. 2017), because the law was not "an undue burden for a large fraction of women seeking medication abortions in Arkansas," *id.* at 959. The court held that because the challenged law applied only "to medication-abortion providers, the 'relevant denominator' . . . [was] women seeking medication abortions in Arkansas," as opposed to only those women seeking medication abortions from providers that did not have hospital admitting privileges. *Id.* In other words, the Eighth Circuit considered the relevant group to be *all* women to whom the statute was relevant, not simply those who might find it a barrier.

Similarly, the Sixth and Ninth Circuits reached different conclusions regarding the constitutionality of state limitations on medication abortions in part because the two courts used different approaches to

determine the relevant denominator. In *Planned Parenthood Southwest Ohio Region v. DeWine*, the Sixth Circuit examined a ban on certain medication abortions, and because the ban by its terms applied to all women seeking an abortion, the court held that the relevant denominator was all Ohio women attempting to obtain an abortion. 696 F.3d 490, 515–16 (6th Cir. 2012). It upheld the ban because, while the evidence gave "rise to the inference that some women prefer a medical abortion over a surgical abortion," it did "not support the conclusion that the unavailability of a medical abortion would create a substantial obstacle for a *large fraction of women* in deciding whether to have an abortion." *Id.* (emphasis added).

The Ninth Circuit considered a similar Arizona law two years later in *Planned Parenthood Arizona, Inc. v. Humble*, and it explicitly disagreed with the Sixth Circuit. 753 F.3d 905, 914 (9th Cir. 2014). The court defined the denominator much more narrowly, as "*women who, in the absence of the Arizona law, would receive medication abortions* under the evidence-based regimen." *Id.* (emphasis added). Because this group of women, however small, could face delays or increased costs, the Ninth Circuit struck down the law as facially invalid. *Id.* at 917. In other words, the Ninth Circuit, like the Seventh Circuit in this case, but in contrast with the Sixth and Eighth Circuits, defined the denominator in a way that ensured a near 1:1 ratio, and, hence, facial invalidation.

An analogous dispute regarding the proper denominator also divided the Fifth Circuit in the original challenge to a Texas admitting-privileges law.

The Fifth Circuit refused to invalidate the law entirely because the evidence "showed that more than ninety percent of the women seeking an abortion in Texas would be able to obtain the procedure within 100 miles of their respective residences even if [the challenged regulation] went into effect." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014). It concluded that this did "not constitute an undue burden in a large fraction of the relevant cases." *Id.* (citation and internal quotation marks omitted); *see also June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 802 (5th Cir. 2018) (defining the relevant denominator as "all women seeking abortions in Louisiana").

But Judge Dennis, dissenting from the denial of rehearing *en banc*, argued that "the 'denominator' for purposes of the large-fraction analysis" was not all women seeking an abortion in Texas, but only those women "who as a result of the admitting-privileges regulation, are absolutely precluded from obtaining an abortion, as well as those who are forced to travel vast distances and incur prohibitive traveling costs to access abortion services from a provider with the requisite admitting privileges." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 769 F.3d 330, 361 (5th Cir. 2014) (Dennis, J., dissenting from denial of rehearing en banc). Judge Dennis sided with the Seventh Circuit's approach defining the numerator and denominator in substantially the same terms.

Finally, a similar disagreement split the Sixth Circuit panel in *Women's Medical Professional Corp. v.*

Voinovich, a challenge to an Ohio law banning—regardless of the gestational age of the fetus—the "dilation and extraction" abortion procedure. 130 F.3d 187, 190 (6th Cir. 1997). The majority of the panel defined the relevant denominator as women seeking abortions in the second trimester. *Id.* at 201. These women would be substantially burdened, the majority reasoned, because the banned procedure was "the most common method of abortion in the second trimester." *Id.* Judge Boggs dissented, observing that the law had relevant application to all women who would seek an abortion, not merely those in the second trimester. *Id.* at 218 (Boggs, J., dissenting). Judge Boggs concluded that the Ohio law did not affect "95 percent of abortion seekers" because "95 percent of abortions in the United States are performed in the first 15 weeks of pregnancy, a period in which the [banned] procedure is not used," which meant that the law could not be facially invalidated. *Id.*

If the Seventh Circuit is correct that the relevant denominator includes only those women most likely to be burdened by the law, then nearly every abortion regulation will fail the undue burden test. *Casey*, which specifically recognized the State's interest in regulating post-viability abortions, cannot require such a result. The Court should grant certiorari in order to resolve the conflict over how the "large fraction" test should be applied.

II. The Decision Below Is the Only Federal Appellate Case To Uphold an Injunction Against an Abortion Informed-Consent Law—and It Did So in a Pre-Enforcement Challenge

This case is, in essence, a pre-enforcement challenge, for Planned Parenthood filed this action a mere week after the Ultrasound Law went into effect. As evidence of the law's impact, Planned Parenthood of course could supply no data showing any aggregate impact on access to abortion, so it came forward instead with only a few (unreliable) anecdotes of women who were supposedly finding it marginally more difficult to have an abortion. Appellants' App. 16–17. Yet regardless of the lack of a meaningful period of enforcement that might have generated useful data regarding the law's impact, both the district court and the Seventh Circuit invalidated the statute on its face. Since *Casey*, no other circuit has ever upheld an undue-burden challenge to an abortion informed-consent law, let alone one that was pursued prior to any significant period of enforcement. The decision below, therefore, warrants review as an unprecedented expansion of abortion rights defined by the Court.

A. The decision below conflicts with the Court's informed-consent precedents and the informed-consent decisions of other federal appellate courts

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court recognized that, when it comes to abortion, both the pregnant woman

and the State have vital interests at stake: the woman's "right to choose to terminate or continue her pregnancy before viability" and "the State's 'important and legitimate interest in protecting the potentiality of human life.'" 505 U.S. 833, 871–72 (1992) (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)). Yet at times those interests coincide and "[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*," unless the regulation imposes an undue burden on the woman's right to terminate her pregnancy. *Id.* at 873–74.

The Court in *Casey* specifically applied the undue burden standard to uphold an informed-consent and waiting-period statute akin to the one at issue here. The Pennsylvania statute at issue in *Casey* required doctors to "inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child," all at least twenty-four hours before the abortion procedure. *Id.* at 881 (internal quotation marks and citation omitted). The Court first determined the statute was a reasonable means of furthering the State's important interest in protecting human life, *id.* at 882–83, and then asked whether the law "would amount in practical terms to a substantial obstacle to a woman seeking an abortion," *id.* at 884. Even taking into account the likelihood that the statute would require women to make two trips to the abortion clinic—and the increased travel times and costs such a requirement would impose—the Court found no undue burden. *Id.* at 884–85.

Thus, under *Casey*, informed consent laws are *prima facie* valid because "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.* at 884. The only way to invalidate such a law is to show actual evidence "that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Id.* at 884–85.

Following *Casey*, no circuit court, except the Seventh Circuit in this case, has understood that a "substantial obstacle" in an informed-consent case could be proved with evidence other than data showing the actual impact of the law on the number of women obtaining abortions. It is therefore unsurprising that, until this case, undue-burden challenges to informed-consent laws—all of which have been pre-enforcement—have been universally rejected. *See Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006) (rejecting pre-enforcement challenge to Ohio law requiring an in-person meeting with a physician 24 hours prior to abortion); *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (rejecting pre-enforcement challenge to law requiring consultation 18 hours prior to abortion); *Karlin v. Foust*, 188 F.3d 446, 497 (7th Cir. 1999) (rejecting pre-enforcement challenge to Wisconsin 24-hour law); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (rejecting pre-enforcement challenge to South

Dakota's 24-hour waiting period); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 532 (8th Cir. 1994) (rejecting pre-enforcement challenge to North Dakota 24-hour law); *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992) (rejecting pre-enforcement challenge to Mississippi 24-hour law); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1099 (D. Ariz. 2009) (rejecting pre-enforcement challenge to Arizona 24-hour law); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 456 (W.D. Ky. 2000) (rejecting pre-enforcement challenge to Kentucky's 24-hour waiting period); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1487–88 (D. Utah 1994), *rev'd on other grounds*, 75 F.3d 564 (10th Cir. 1995) (rejecting pre-enforcement challenge to Utah's 24-hour waiting period).

None of these courts expressed the view that an informed-consent law could be shown to impose an undue burden with evidence other than the law's actual as-measured effect on women seeking abortion. For instance, in *A Woman's Choice*, the Seventh Circuit held that "it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate." 305 F.3d at 693. And in *Cincinnati Women's Services*, the Sixth Circuit affirmed the district court's holding that because "the evidence did not establish what proportion of the abused women would be blocked from obtaining abortions[,] . . . it could not strike down the [informed consent statute] under *Casey*'s 'large fraction' test." 468 F.3d at 366.

Pre-enforcement challenges in other contexts illustrate the problem of predicting how abortion service providers will react to new abortion regulations. In *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (4th Cir. 2000), the court held that without "evidence of the impact that [the admitting privileges requirement] would have on other South Carolina abortion clinics," it could not "speculate about the impact on all relevant women to determine . . . whether a large fraction would encounter a substantial obstacle to their choice to seek an abortion."

Courts, therefore, have good reason to disfavor pre-enforcement challenges to informed-consent laws. Because it is only the *effect* of these laws that can possibly render them unconstitutional, and because their effects can be known only after experience shows how women and providers dynamically respond, there is no basis for enjoining them before a significant period of enforcement. *Cf. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 597 (5th Cir. 2014) (pre-enforcement challenge unsuccessful); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016) (post-enforcement challenge successful).

Here, the Seventh Circuit enjoined Indiana's Ultrasound Law without waiting to see whether it would actually prevent women from having abortions—or if, instead, Planned Parenthood would adapt to the new regulations as it has in the past. The Court should grant certiorari to address whether a pre-enforcement facial challenge can succeed based solely on speculation about a law's impact on access to abortion.

B. The Seventh Circuit erred in allowing Planned Parenthood's business model to override Indiana's well-established interests in abortion informed-consent

This case shows that the practical effect of a successful pre-enforcement challenge to an abortion informed-consent law is to transform a *woman's* personal right to privacy in making the abortion decision into an *abortion provider's* right to protected business practices.

Because Planned Parenthood could present no significant data on the law's actual aggregate impact on access to abortion, it relied instead, as a kind of shorthand, on evidence that it could not afford to supply its preferred ultrasound machines or train additional staff at each of its informed-consent health centers. As a consequence, it argued, more women would have to drive farther for their informed-consent appointments, which would drive up the cost of abortion and drive down abortion access. In this way, the sanctity of Planned Parenthood's entire business model became a proxy for the right to abortion: to burden how Planned Parenthood does business is to burden the right to abortion.

The Seventh Circuit deferred to Planned Parenthood's business preferences not to purchase more ultrasound machines or train additional staff. *See* App. 28a. It opined that the "undue burden inquiry does not contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a

new abortion regulation." *Id.* at 27a. The Seventh Circuit found an undue burden, in short, because the law would interfere with Planned Parenthood's "reasonable" business decisions, as determined by the district court. *Id.* at 28a.

Such a rule, in effect, constitutionalizes the static business models of current abortion providers and negates any need to take account of how both women *and* the market will react to a new informed-consent law. For even if Planned Parenthood cannot afford to supply more of its preferred ultrasound machines or train more workers in more locations, perhaps other abortion providers will come along to fill that need (perhaps using cheaper machines than Planned Parenthood requires).

The Seventh Circuit's approach stands in sharp contrast with that of this Court in *Gonzales v. Carhart*, where the Court refused to "interpret[] *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer." 550 U.S. 124, 158 (2007). The Court explained that while "some doctors may prefer not to disclose precise details of the means that will be used," it is "precisely this lack of information . . . that is of legitimate concern to the State." *Id.* at 159. Similarly, while Planned Parenthood might prefer not to purchase additional ultrasound machines so that its patients can see their children eighteen hours before the abortion, these business decisions should not dictate the informed consent process that the State may require.

Indeed, in the wake of Indiana's implementation of its original abortion informed-consent law, Planned Parenthood changed its business practices and made pre-abortion in-person counseling available to women in more locations. Appellant's App. 78–79. Now, more than fifteen years later, Planned Parenthood is no more entitled than before to a static abortion regulatory scheme that safeguards it from having either to adapt or possibly compete with new market entrants. Whether, in the wake of the Ultrasound Law, Indiana's abortion-provider market will fulfill any unmet need for sufficiently accessible pre-abortion ultrasounds cannot be known in advance, and Planned Parenthood should not be immune, in the name of the right to abortion, from the market pressures that such new regulation brings.

Protecting an abortion provider's business practices not only finds zero support in the Court's doctrines, but also stands in tension with how other circuits address abortion regulations generally. The Fifth Circuit, for example, requires that a clinic challenging an abortion law to "put forth affirmative evidence" that the law, not the clinic's own business decisions, imposes an undue burden. *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 807 (5th Cir. 2018). Were courts "not to require such causation, the independent choice of a single physician could determine the constitutionality of a law." *Id.* When it is the *abortion provider's* decision that causes the hindrance, the chain of causation between the law and the burden on abortion access is "severed by an intervening cause." *Id.* at 811. The Fifth Circuit held that "the doctors' failure to apply for privileges in a reasonable manner," meant

that there was "an insufficient basis in the record to conclude that [Louisiana's admitting privileges law] . . . prevented most of the doctors from gaining admitting privileges." *Id.*

Similarly, in *Greenville Women's Clinic*, the Fourth Circuit rejected a pre-enforcement challenge to a licensing regulation imposing medical, safety, and administrative requirements on South Carolina abortion providers even though one provider "testified that he would have to make so many changes to his . . . facility that compliance would require him to cease providing abortions at that facility." 222 F.3d at 170. The Fourth Circuit explained that the abortion provider's inability or refusal to comply with the challenged law did not demonstrate a constitutional violation because, even if the provider's clinic closed, "no evidence suggests that [women in the area] could not go to the clinic in Charleston, some 70 miles away," and the court was not "provided with evidence of the impact that [the challenged regulation] would have on other South Carolina abortion clinics." *Id.* at 165, 170. The Fourth Circuit, unlike the Seventh, understood the need to let both women and the market react to a new regulation before surmising that access to abortion would decline.

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This case illustrates the critical point that when lower courts go beyond the four-corners of the abortion cases this Court has actually decided they inevitably expand the abortion right. The Court has approved abortion informed-consent laws, subject to invalidation upon proof that such laws have the actual

effect of denying women access to abortion. In attempting to apply that standard via pre-enforcement challenge (which this Court has never done), the court below searched for some proxy for actual denial of access, and in so doing created incidental constitutional protection for Planned Parenthood's business practices and market share. The Court should take this case to examine whether that is the proper methodological approach to review abortion informed-consent laws.

III. The Seventh Circuit Erroneously Applied *Hellerstedt*'s Test for Laws Principally Protecting Maternal Physical Health to an Informed-Consent Law, Which Mainly Protects Fetal Life and Maternal Mental Health

While both *Hellerstedt* and *Casey* provide iterations of the undue burden standard, the Court applied the standard differently in the two cases because the justifications for the statutes are different. The statute in *Whole Woman's Health v. Hellerstedt*, which required that abortion clinics meet the standards for ambulatory surgical centers and that doctors performing abortions have hospital admitting privileges, were justified on grounds of protecting women's physical health. 136 S. Ct. 2292, 2310 (2016). In contrast, statutes like the one here that help women make informed abortion decisions are justified on grounds of protecting fetal life and dignity, and, relatedly, the mental health of women who have abortions (and may later come to regret the decision). Courts have long recognized a fundamental difference between the two when applying the undue burden standard. In *Tucson*

Woman's Clinic v. Eden, for example, the court observed that, "because *Casey* largely dealt with a law aimed at promoting fetal life and dignity, its application of the 'undue burden' standard is often not extendable in obvious ways to the context of a law purporting to promote maternal health." 379 F.3d 531, 539 (9th Cir. 2004).

The Ninth Circuit's observation was borne out by *Hellerstedt*, which invalidated Texas's admitting privileges and ambulatory surgical center requirements. 136 S. Ct. at 2310. In contrast with laws aimed at protecting fetal life and dignity, such statutes are ostensibly designed to protect maternal physical health, yet may actually function as "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* at 2309. Accordingly, judicial review of the relative burdens and benefits of such laws is justified, and significant weight must be afforded to the judicial record. *Id.*

That decision, however, does not upset the balance already struck by *Casey* with regard to informed-consent and waiting period statutes. The extra weight accorded the judicial record for health regulations (which while critical, are directed at problems collateral to the abortion decision) are off-point for regulations protecting fetal life and dignity (and maternal mental health), which are unabashedly—and permissibly—about the abortion decision itself. Consequently, there is no additional balancing to be done.

The Seventh Circuit's decision in this case illustrates why the balancing test of *Hellerstedt* does not make sense in the context of statutes designed to protect fetal life. The court held that the Ultrasound Law violates the Constitution because the significant burdens imposed on women's access to abortion, amounting to an additional cost of $219 to $247, App. 20a, outweigh the "very small" impact of the law on persuading women to choose life, *id.* at 38a. According to the majority opinion, the ultrasound image and fetal heart tone may be persuasive "only for the pool of women consisting of the 7% of abortion seekers with low or medium decision certainty and only on whatever percentage of that 7% who actually choose to also view the ultrasound, but likely only 25% of that 7% or 1.75%." *Id.* at 39a.

Even assuming this data accurately predicts the impact of the ultrasound law on Indiana women, the panel's conclusion necessarily raises the question: what number of fetal lives must be saved before the benefit of the statute outweighs its burdens? Surely fifty percent would be sufficient, but what about twenty-five percent or even ten? Or what if, despite all Indiana's efforts, only one woman is persuaded by the ultrasound to carry her pregnancy to term? What dollar amount in burdens is her unborn child's life worth? Surely the Constitution does not require this type of utilitarian calculus.

The difference between *Casey* and *Hellerstedt* is also implied by the views of Justice Kennedy who, while voting in support of the balancing test in *Hellerstedt*, voted in support of the federal partial-birth

abortion ban in *Gonzales v. Carhart* because "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." 550 U.S. 124, 158 (2007). Justice Kennedy provided the deciding vote in both cases, and the two positions cannot be reconciled except by reference to the distinction between laws aimed at protecting fetal life and dignity and laws aimed at protecting maternal physical health.

Unlike in *Hellerstedt*, the questions in *Casey* and *Gonzales* (and here) were not whether the stated objective was pretextual or whether any legitimate objective sustained the statute. Instead, the issue was which of two important, unquantifiable interests (the woman's right to abortion and the State's right to protect fetal life and dignity) must prevail. These interests, in contrast with measures ostensibly designed to protect maternal health, do not change with local circumstances. And with informed consent and waiting period laws—even those that require two trips to an abortion clinic—the Court has already said that the State's interest prevails (subject to post-enforcement proof that the law is an insurmountable barrier). The Court should grant certiorari to set forth the proper constitutional standard for abortion informed-consent requirements.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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