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 A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF THE PRO-LIFE ACTION LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## BRIEF OF THE PRO-LIFE ACTION LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

### INTEREST OF THE *AMICUS CURIAE*[1]

Pro-Life Action League, Inc. ("PLAL"), based in Chicago, Illinois, was founded by Joseph Scheidler ("Scheidler") and Ann Scheidler in 1980 with the aim of saving unborn children through non-violent direct action. A picture of a baby aborted late in pregnancy reminded Scheidler of his son Eric's baby picture, and the abortion issue became personal for him. Shortly after the Supreme Court legalized abortion in *Roe v. Wade*, Scheidler became a full-time pro-life activist.

PLAL was sued for antitrust and racketeering (RICO) violations by NOW and the abortion industry in 1986. The case lasted 28 years and led to three U.S. Supreme Court opinions, the last two in its favor by 8-1 and 8-0 margins.

PLAL, now led by Eric Scheidler, conducts a broad spectrum of lawful educational and activist programs

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[1] Petitioners and Respondent consented to the filing of an *amicus* brief on behalf of Petitioners by the Pro-Life Action League ("PLAL"). Pursuant to S. Ct. Rule 37.2, PLAL states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, PLAL further states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than PLAL or its counsel, has made a monetary contribution to this brief's preparation or submission.

including peaceful protest, sidewalk counseling abortion-bound women regarding abortion alternatives, prayer vigils and Truth Tours.

## SUMMARY OF THE ARGUMENT

As this Court has long acknowledged:

> 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. . . . In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 885 (1992).

In this case, the statutory provision found to be facially invalid by the Seventh Circuit added a requirement that an already mandated fetal ultrasound and fetal heart tone auscultation be conducted at least 18 hours prior to an abortion procedure – in effect, so that they correspond in time and become part of an already required (and unchallenged) in-person informed consent consultation. The Seventh Circuit affirmed the District Court's finding that, because of limitations on the locations where Planned Parenthood provides ultrasound services, requiring that the ultrasound be

conducted 18 hours in advance of an abortion, rather than at the time of the abortion, constituted an undue burden upon women's abortion rights. *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Dept. of Health*, 896 F.3d 809, 832 (7th Cir. 2018). The court's analysis, however, encompassed irrelevant considerations such as issues impacting abortion access in Indiana generally, rather than just the impact of the challenged statutory provision.

Further, both the District Court and the Court of Appeals embraced an analysis of the validity of state abortion regulations that inherently skews against upholding state laws. The Seventh Circuit interpreted the *Casey* large fraction test to require comparison not of the women substantially impacted by a regulation against the population of all women impacted by the regulation, but comparison of the number of the women substantially impacted by a regulation against the number of women substantially impacted by the regulation. *Id.* at 826. ("In this case, the district court determined that the relevant group consisted of low-income women who live a significant distance from one of the six [Planned Parenthood] health centers offering informed-consent appointments.")

Such an analysis necessarily entails that all regulations relating to abortion will be deemed to substantially impact a large fraction of women and erects an effectively impossible bar to attempts by states to regulate abortion. This analysis turns on its head the analysis applicable in all other contexts in which the facial validity of a statute is challenged. That analysis

requires that a statute be upheld unless "no set of circumstances exists under which the [statutory provision] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

This is not the intention of the *Casey* large fraction test. In *Casey*, the Court explained that the alleged burdensome effects of a regulation on abortion (in *Casey*, as in this case, a waiting period) requires both a qualitative assessment of whether a particular burden is a "substantial obstacle" and a quantitative assessment of the scope of those impacted by the burden. The Court stated, "[w]e also disagree with the District Court's conclusion that the 'particularly burdensome' effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Casey*, 505 U.S. at 886-887. Later in its decision, in assessing the burden imposed by a spousal notification requirement, the Court concluded the requirement was unconstitutional because, "in a large fraction of the cases in which [the spousal notification requirement] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." *Id.* at 895.

As a practical matter, however, the Courts of Appeals have struggled to apply the large fraction test, resulting in a conflict among the Circuits regarding its application that was further deepened by the Seventh Circuit's decision in this case. This Court should grant

certiorari in order to clarify the application of the large fraction test and to resolve the conflict among the Circuits regarding its application.



## ARGUMENT

### I. In Concluding The Challenged Requirement Imposes An "Undue Burden," The Seventh Circuit Focused On Irrelevant Considerations, Including The Difficulties Facing Women Seeking Abortions In Indiana Generally.

At issue in this case is the validity of an Indiana law specifying the timing of already mandated fetal ultrasound imaging and auscultation of the fetal heart tone, requiring that they take place at least 18 hours prior to the abortion procedure, as part of an already required in-person informed consent consultation. *See* Ind. Code §16-34-2-1.1(a)(1, 2, 4, 5). The challenged law did not change the informed consent requirements but dictated the timing of the required fetal ultrasound imaging and fetal heart tone auscultation to coincide with the already required (and not challenged) in-person informed consent consultation performed at least 18 hours prior to undergoing an abortion. *Compare* Ind. Code §16-34-2-1.1(b) (2011); Ind. Code §16-34-2-1.1(a)(5).[2]

[2] Both versions of the fetal ultrasound imaging and fetal heart tone auscultation requirements allow a woman to decline to view the ultrasound or to hear the fetal heart tone provided she certified in writing on a specified form that she declined. *Id.*

Evidence adduced at the preliminary injunction hearing established that, since not all Planned Parenthood clinics offered ultrasounds, the change meant pregnant women had a choice of six Planned Parenthood clinics[3] offering ultrasounds for their informed consent consultation, whereas before they could choose among seventeen Planned Parenthood clinics for their informed consent consultation. *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Dept. of Health*, 896 F.3d 809, 814 (7th Cir. 2018). Accordingly, the burdens imposed by the new law, which Planned Parenthood was required to establish constituted an "undue burden," are those associated with the decreased number of clinic choices at which pregnant women could obtain an informed consent abortion consultation. In this case, however, much of the burden evidence considered by the District Court and the Seventh Circuit related to difficulties generally facing women seeking abortions in Indiana (including long wait times because only four clinics in Indiana perform abortions and those limit the times when abortions are performed). *Id.* at 820. The District Court and the Seventh Circuit also considered, as evidence of the impact arising from the challenged statute, the necessity of increased travel by women from Fort Wayne (Indiana's second most populous city), who

[3] At the time the law was changed four Indiana Planned Parenthood clinics offered ultrasounds. After the law was enacted, Planned Parenthood began offering ultrasounds at two additional clinics. *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Dept. of Health*, 896 F.3d 809, 815 (7th Cir. 2018).

before the enactment of the new statute, could go to a Planned Parenthood clinic in Fort Wayne for their informed consent consultation. The courts considered this evidence even though the Fort Wayne Planned Parenthood clinic had closed and so the burden arising from the unavailability of an ultrasound at that location (before it closed) was irrelevant. *Id.* at 814, 819, 821-823.[4]

There was, however, no evidence establishing the number of women who do not live a distance deemed sufficiently near to one of the six Planned Parenthood clinics offering ultrasounds, let alone the number of low-income women deemed not to live sufficiently close to one of those clinics. Accordingly, there was no evidence from which the courts below could properly assess the significance in scope of the alleged burden imposed by the statute requiring a fetal ultrasound and fetal heart tone auscultation at least 18 hours prior to an abortion.

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[4] The Court apparently concluded this evidence was appropriately considered because Planned Parenthood represented it planned to open another clinic in Fort Wayne at some unknown point in time. *Id*. at 814, fn. 3.

## II. This Court Should Accept This Case To Resolve A Deepening Split Among The Circuits As To The Appropriate Analysis Used To Determine Whether An Informed Consent Requirement Imposes An "Undue Burden" Upon Women Seeking An Abortion.

In *Casey*, this Court recognized that waiting periods that allow for "more informed and more deliberate" decisions following a period of reflection and are "a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 885 (1992). The Court affirmed a 24-hour waiting period despite the fact that it increased delay, travel, expense and other difficulties, especially for women with "the fewest financial resources" who would find the regulation "particularly burdensome." *Id.* at 885-886.

In doing so, the Court rejected the District Court's "conclusion that the 'particularly burdensome' effects of the waiting period on some women require its invalidation." The Court explained, "A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Casey*, 505 U.S. at 886-887. The Court went on to apply a large fraction test to determine whether a different statutory requirement (a spousal notification requirement), constituted an unconstitutional "undue burden." The Court concluded it was because, "in a large fraction of the cases in which

[the spousal notification requirement] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." *Id.* at 895. *See also Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2313 (2016).

Courts seeking to apply the large fraction test, however, have struggled to properly define the denominator of the fraction, *i.e.*, the population of women against whom the significance of the number of women for whom a statute imposes a substantial obstacle should be assessed in determining whether a burden is "undue." In this case, the District Court and the Seventh Circuit defined the relevant population considered in assessing the significance of the impact of the regulation as low-income women who live far away from one of the six clinics equipped to provide the ultrasounds required as part of informed consent consultations. *Id.* at 826. However, there was no evidence establishing the number of women (or even low-income women) who do not live in proximity to one of the six Planned Parenthood clinics offering ultrasounds. The District Court acknowledged as much when it noted that it was expressly excluding, as irrelevant, (the similarly unknown number of) women who live within proximity to the Planned Parenthood locations offering ultrasounds. *See Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Dept. of Health*, 273 F.Supp.3d 1013, 1023 fn. 1 (S.D. Ind. 2018).

Despite the absence of any evidence of the size of the population impacted by the statutory provision,

the Seventh Circuit held the changed ultrasound requirement invalid. The Seventh Circuit reached that conclusion because it found the *Casey* large fraction test did not require comparison of the women substantially and unduly impacted by the statute at issue against the population of all women impacted by the statute. Instead, it compared the number of women substantially and unduly impacted by the statute against the number of women substantially and unduly impacted by the statute. In doing so, the Seventh Circuit erroneously applied the *Casey* large fraction test so that it is in effect the opposite of the *Salerno* "no set of circumstances" test. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). The Seventh Circuit defined the universe of women affected by the restriction (the denominator in the fraction) so narrowly that the fraction will always be large such that all state laws affecting abortion will be found to unduly burden the abortion decision. In other words, if the women to whom the statute at issue is deemed relevant is defined to include only women for whom the regulation acts as a substantial burden, then it is a truism that group will represent a large fraction (indeed, 100%) of the women for whom the regulation acts as a substantial burden.

The Ninth Circuit has followed an approach to defining the denominator of the *Casey* fraction similar to that adopted by the Seventh Circuit. *See Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014). By contrast, the Fifth Circuit (*Planned Parenthood of Greater Tex. Surgical Health Servs. v.*

*Abbott*, 748 F.3d 583, 598 (5th Cir. 2014); *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 802 (5th Cir. 2018)), the Sixth Circuit (*Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490, 515-516 (6th Cir. 2012)), and the Eighth Circuit (*Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958-959 (8th Cir. 2017)), have not limited evaluation of the burden imposed by a restriction to only those it significantly impacts. As previously discussed, this approach accords the *Casey* large fraction test a meaningful application in the context of assessing the scope of the impact of a restriction in determining whether it constitutes an undue burden. In view of the widening split of authority among the circuits, and the manifest need for guidance as to the appropriate application of the *Casey* large fraction test, this Court should grant certiorari.

## CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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