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

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BRIEF OF AMICUS CURIAE PROLIFE CENTER AT THE UNIVERSITY OF ST. THOMAS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The Prolife Center at the University of St. Thomas seeks to promote effective legal protection for human life from the moment of fertilization to natural death through scholarly research, curriculum development, and legal initiatives. Faculty associated with the Center have provided significant *pro bono* representation to government officials, organizations and individuals supporting regulation and the eventual elimination of the practice of induced abortion.

As an academic center located in Minnesota, faculty associated with the Prolife Center have studied and defended ultrasound laws similar to the one at issue in this case, as well as the state interests advanced by such statutes. The Prolife Center submits this brief to provide this Court with insight into how the standards of review have varied among courts evaluating such statutes.

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[1] As required by Rule 37.2(a), counsel of record for each party received timely notice and has consented to the filing of this amicus brief. Pursuant to 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.

SUMMARY OF THE ARGUMENT

The lower courts in this case have failed to correctly apply the large-fraction test articulated by Justices O'Connor, Kennedy and Souter in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879–89 (1992), and completely disregarded the test for review of facial challenges established in *United States v. Salerno*, 481 U.S. 739, 745 (1987). These failures are examples of the confusion among lower courts regarding the proper test to be applied in abortion cases, and the proper method of calculating the large fraction when employing the large-fraction test. Certiorari should be granted in this case to provide clarity to all lower courts.

ARGUMENT

I. Certiorari should be granted in this case to provide guidance to the lower courts on the proper standard to apply when adjudicating facial challenges to informed consent laws related to abortion.

The Seventh Circuit erred in its determination that Indiana Code section 16-34-2-1.1(a)(5) ("Ultrasound Law") imposed an undue burden on a woman's right to choose an abortion. The Ultrasound Law requires women to obtain

ultrasounds at least 18 hours before obtaining an abortion. The District Court determined, and the Seventh Circuit agreed, the law imposes an undue burden because it would "prevent a significant number of low income women from obtaining an abortion." *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r, Ind. State Department of Health*, 273 F. Supp. 3d 1013, 1038 (S.D. Ind. 2017). In arriving at this conclusion, the lower courts examined the effect of the law only on low-income women who do not live near one of the six health centers operated by Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") where ultrasounds are available. Yet the Ultrasound Law does not exclusively affect low-income women, nor does it only require ultrasounds 18 hours prior to abortion for low-income women living a significant distance from one of those six health centers. It affects all women electing to abort their pregnancies in Indiana. By narrowing the inquiry from all women seeking abortions to only low income women who do not live near one of PPINK's six health centers where ultrasounds are available the lower courts misapplied this Court's test to determine the facial constitutionality of laws assuring informed consent is obtained . The reasoning of the majority is undercut both by its substitution of "person" for the state's use of "human being" in its defense of the statute, and more importantly by the actual language of the Indiana statute.

The proper standard of review for facial challenges to abortion laws has been a contested issue for decades. "The proper standard for facial challenges is unsettled in the abortion context." *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S.Ct. 2292, 2343 (2016) (Alito, J. dissenting). In 1987, this Court summarized the standard for assessing a pre-implementation facial challenge to a validly enacted statute as, "the challenge must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This standard was employed by the Court in reviewing abortion statutes in *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990), *Webster v. Reproductive Health Services*, 490 U.S. 490, 523 (1989), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Five years after *Salerno*, and only one year after *Rust*, Justices O'Connor, Kennedy and Souter did not refer to the *Salerno* standard in their review of the Pennsylvania abortion statute. Although the justices applied the *Salerno* test to the parental consent and informed consent regulations presented in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879–89 (1992), the plurality opinion applied a new test to the spousal notice provision: plaintiffs challenging abortion statutes must show the provisions create undue burdens on the woman's

right to terminate a pregnancy in a "large fraction" of the cases involving the statute's applications. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992).

The fact that Salerno has never been overruled, and in fact has been regularly applied by this Court in other context, *see e.g. City of Los Angeles, Calif. v. Patel*, ___ U.S. ___,135 S.Ct. 2443, 2449 (2015) (facial challenge of criminal statute under Fourth Amendment) leaves lower court in a quandary.

> The Justices have insisted that courts lower in the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions. When the Justices themselves disregard rather than overrule a decision--as the majority did in *Stenberg,* and the plurality did in *Casey*--they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.

A Woman's Choice – E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003) (citations omitted).

Lower courts have largely embraced the "large fraction" test, but applied it in wildly divergent ways. They diverge primarily in determining "which group of women is properly considered the numerator and which group of women is properly considered the denominator". *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).

In the case at bar, the lower courts disregarded the fact that the Ultrasound Law applies to all women seeking abortions in Indiana. Instead, both the District Court and the Court of Appeals chose to focus only on the women PPNK claims are burdened by the legal requirement. In other words, the lower courts essentially asked the question: Of all women purportedly unduly burdened by this statute, is there an undue burden on a large fraction of those women. This nonsensical formulation of the test ensures all facial challenges under the large-fraction test will succeed.

"The purpose of the large-fraction analysis, presumably, is to compare the number of women actually burdened with the number potentially

burdened. Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always "1," which is pretty large as fractions go." *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S.Ct. 2292, 2343 (2016) (Alito, J. dissenting).

Had PPNK's facial challenge been reviewed under either the *Salerno* standard or a proper formulation of *Casey's* "large-fraction" test, the Ultrasound Law would have been upheld. The Court should grant certiorari to provide guidance to lower courts on the proper standard to be employed when reviewing informed consent statutes.

II. The "large-fraction" test is incapable of being applied consistently as evidenced by varied applications to abortion statutes by the Seventh Circuit.

Despite citing *Hellerstedt* extensively, the Seventh Circuit failed to articulate the large-fraction test in its formulation of the legal standard for an undue burden. *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r, Ind. State Department of Health*, 896 F.3d 809, 816-18 (7th Cir. 2018). This is par for the course in the Seventh Circuit.

The Seventh Circuit Court of Appeals has only fully articulated the "large-fraction" test once in a majority opinion. *Zbaraz v. Madigan*, 572 F.3d 370, 381 (7th Cir. 2009) (challenging parental notification requirement for minors). Despite the fact that the parental notification requirement applied to all minors seeking an abortion, the court classified the denominator group as "minors who prefer not to notify their parents of their decision to have an abortion." *Id.* To its credit, the court resisted pressure from plaintiffs to further restrict the denominator group to "a subset of minors… who are immature and for whom an abortion without parental notice would be in their best interest." *Id.*

In cases where the Seventh Circuit fails to articulate the "large-fraction" test, it often quietly embraces the smallest denominator possible, or fails to define the group at all. *See Planned Parenthood v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013); *A Woman's Choice v. Newman*, 305 F.3d 684 (7th Cir. 2002); *Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1998). In each case, the majority opinion only weighed the medical justifications for the law against the burden it imposed in cases adversely affected by the law, not the total population for whom the law was relevant. *Schimel*, 806 F.3d at 910-922; *Van Hollen*, 738 F.3d at 798; *A*

Woman's Choice, 305 F.3d at 688; *Doyle*, 162 F.3d 463 at 467.

Proper application of the "large-fraction" test in these cases leads to a more favorable result for the state. *Schimel*, 806 F.3d at 930 (Manion, J. dissenting) (articulating "significant number" test to find in favor of the state); *Van Hollen*, 738 F.3d at 804-806 (Manion, J. concurring in part) (classifying denominator group as all Wisconsin women seeking an abortion and, since a "significant number" of women would not be blocked from obtaining an abortion, determining no undue burden existed); *A Woman's Choice*, 305 F.3d at 698-700 (Coffrey, J. concurring) (articulating "large-fraction" test to explicitly conclude reduction in abortions from 13% to 10% did not constitute an "impermissibly large fraction"); *Doyle*, 162 F.3d at 474 (Manion, J. dissenting) (articulating the "large-fraction" test and finding for the state);

Not only does the Seventh Circuit apply the "large-fraction" test inconsistently, but when it fails to articulate it at all, it narrowly restricts the denominator group to consist of only cases in which the law adversely affects a woman's right to choose instead of cases in which the law is relevant.

III. The Fifth, Sixth, and Ninth Circuits diverge from the Seventh and Eighth Circuits' construction of the denominator group when applying the "large-fraction" test.

Courts disagree on which cases are "relevant" for the purposes of constructing the denominator group in challenges to waiting-period abortion laws. The Eighth Circuit joins the Seventh Circuit in selectively analyzing the law's impact on adversely affected populations instead of the cases in which the law is relevant. The Fifth, Sixth, and Ninth Circuits disagree.

In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard,* the court struck down a 72-hour waiting period by restricting the denominator group to women who are "unable to afford the second trip… and women who live farther away" from the abortion center. 799 F. Supp. 2d 1048, 1064-1065 (D.S.D. 2011). The court rejected the idea that the requirement is "relevant to every woman who chooses to undergo an abortion," because it was apparently "irrelevant" for women who could afford to comply. *Id.* The Sixth and Ninth Circuits reject this circular construction of the "large-fraction" test.

In *Cincinnati Women's Services, Inc. v. Taft*, the Sixth Circuit upheld a law requiring an in-person meeting with a physician 24 hours before obtaining an abortion. 468 F.3d 361 (6th Cir. 2006). Abortion providers previously, by their own policies, required an in-person consultation with exceptions for women who lived too far away or had some other hardship. *Id.* at 372. The court rejected plaintiff's denominator classification of "all women who are *presently* excused by the clinic[s]." *Id.* at 373 (emphasis added). Instead, the court classified the denominator more broadly, as "all women who *seek* an exception to the clinic's in-person informed consent requirement," as they were the only ones for whom the state would be imposing a new restriction. *Id.* (emphasis added).

The Ninth Circuit goes even further. In *Tucson Women's Center v. Arizona Medical Bd.*, the court accepted defendant's classification of the denominator group to uphold a 24-hour waiting period restriction. 666 F. Supp. 2d 1091, 1097 (D. Ariz. 2009). The court rejected plaintiff's contention that the denominator group consisted of women for whom the restriction "will have *some negative effect* on their right to an abortion." *Id.* (emphasis added). Instead, the court agreed with defendant's classification of "women on whom it will have *any* effect." *Id.* (emphasis added).

Lastly, the Fifth Circuit has rejected the "large-fraction" test on occasion, requiring the traditional standard be satisfied for facial challenges to abortion laws. *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992) (holding that a plaintiff must "establish that no set of circumstances exists under which the Act… would be valid" (*quoting Salerno*, 481 U.S. at 745)).

Collectively, these cases reflect the weakness of the Seventh Circuit's position in classifying the "large-fraction" test's denominator group. More importantly, they indicate a need for guidance in interpreting this Court's precedent in *Casey* and *Hellerstedt*.

CONCLUSION

For the above-stated reasons, *amicus* respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

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