

No. 18-1019

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In The  
**Supreme Court of the United States**

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KRISTINA BOX, COMMISSIONER,  
INDIANA DEPARTMENT OF HEALTH, et al.,

*Petitioners,*

v.

PLANNED PARENTHOOD OF  
INDIANA AND KENTUCKY, INC.,

*Respondent.*

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

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**AMICUS CURIAE BRIEF  
OF TRINITY LEGAL CENTER  
IN SUPPORT OF PETITIONERS**

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**CORPORATE DISCLOSURE STATEMENT**

Amicus Trinity Legal Center is a nongovernmental corporate entity, and it has no parent corporations and no publicly held corporations hold 10 percent or more of their stock.

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**STATEMENT OF INTEREST  
OF THE AMICUS CURIAE**

Consent to file this amicus brief was given by both parties. This brief supporting Petitioner was prepared by counsel for amicus.<sup>1</sup>

Trinity Legal Center is a nonprofit foundation that works with women who are considering an abortion to provide accurate information and educational materials. The Center also represents post-abortive women who attest to the physical and psychological harm that abortion causes them.

This case is of great national importance and consequence because it goes to the heart of this Court's abortion jurisprudence and recognizes the State's legitimate governmental interest of requiring full, accurate, and truthful information without creating an undue burden. The approximately one million women per year in the United States who have an abortion are entitled to full, accurate, and truthful information to exercise their constitutional right to decide whether to

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<sup>1</sup> The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored 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. Trinity Legal Center is a nonprofit corporation and is supported through private contributions of donors who have made the preparation and submission of this brief possible. No person other than amicus curiae, its counsel, or donors to Trinity Legal Center made a monetary contribution to its preparation or submission.

abort their unborn child. Due to the physical and psychological consequences for women, this decision has far-reaching and long-lasting implications.

The heart of this case relies on *Planned Parenthood v. Casey* where this Court required that a woman receive truthful and non-misleading information. When a woman sees her doctor, she expects to get full, accurate, and truthful information. Requiring an ultrasound is an objective way for a woman to obtain this information. Failure to give such information prohibits her from making an informed and knowing exercise of her constitutional rights. It also puts her at even greater risk of psychological harm when she later learns the truth about her unborn child.



## SUMMARY OF THE ARGUMENT

### I

This case is certworthy because the Court of Appeals for the Seventh Circuit misinterpreted this Court's abortion jurisprudence which balanced the interests of the woman and the state. The court of appeals erred in creating a triangle of interests between the woman, state, and abortion provider. The abortion provider's business interests were given weight which allowed it to trump the legitimate and important interests of the state in providing for the health and safety of women. In addition, the court of appeals erred in relying on a few unverified anecdotal stories instead of

the well-established scientific evidence of the psychological effects of abortion. Therefore, this Court should grant the Petition for Writ of Certiorari and uphold the state's legitimate and important interests.

## II

The court of appeals misapplied this Court's emphasis on an informed decision. An ultrasound provides objective, accurate, and truthful information about her unborn child upon which the woman can make an informed decision. False or misleading information impacts a woman's decision and also puts her at greater risk of psychological harm when she later learns the truth about her unborn child. In addition, this Court has upheld waiting periods which give a woman the time to weigh all of the facts from the information she received and make an informed decision. Because the absence of truthful information increases the risk of psychological problems, this Court should grant the Petition for Writ of Certiorari and uphold Indiana's law to ensure that pregnant women are given full, accurate, and truthful information before they exercise their constitutional right to decide.



**ARGUMENT****I. THIS CASE IS CERTWORTHY BECAUSE THE COURT OF APPEALS MISINTERPRETED *ROE V. WADE* AND ITS PROGENY AND ONLY THIS COURT CAN CORRECT THE ERROR.****A. The Court of Appeals Erred in Balancing Not Only the State’s and Woman’s Interests, But the Abortion Provider’s Business Interests.**

Because this Court constitutionalized the abortion issue in *Roe v. Wade*<sup>2</sup> and *Doe v. Bolton*,<sup>3</sup> only it can correct the lower court’s errors in interpretation and application. The Court of Appeals for the Seventh Circuit misapplied the undue burden test by considering the abortion provider’s business interests.

In *Roe v. Wade*,<sup>4</sup> this Court analyzed the interests of the woman considering an abortion and the interests of the state. It concluded that “the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”<sup>5</sup>

This ruling was restated in *Planned Parenthood v. Casey*<sup>6</sup> even though it rejected *Roe*’s rigid trimester

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<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> 410 U.S. 179 (1973).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> *Id.* at 154.

<sup>6</sup> 505 U.S. 833 (1992).

framework. This Court emphasized that because the state has an interest in life throughout pregnancy, it may take measures to ensure that a woman's choice is informed and it may enact regulations to further the health or safety of a woman seeking an abortion.<sup>7</sup> In creating the undue burden test, the Court stated that the state could not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion.<sup>8</sup> But it also found that information to help her make the decision and a twenty-four hour waiting period were constitutional.<sup>9</sup> Just because a law "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."<sup>10</sup>

In *Gonzales v. Carhart*,<sup>11</sup> this Court again recognized both the woman's and the state's interests. The Court stated that a central premise in *Casey* was "that the government has a legitimate and substantial interest in preserving and promoting fetal life. . . ."<sup>12</sup>

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<sup>7</sup> *Id.* at 846 (stating ". . . the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus. . . .").

<sup>8</sup> *Id.* at 877.

<sup>9</sup> *Id.* at 885.

<sup>10</sup> *Id.* at 874.

<sup>11</sup> 550 U.S. 124 (2007).

<sup>12</sup> *Id.* at 145.

Again, in *Whole Woman’s Health v. Hellerstedt*,<sup>13</sup> this Court balanced the interests of the woman and the state. Citing *Roe*, it recognized that the state has a legitimate interest in seeing that an abortion is performed under circumstances that ensure maximum safety for the woman.<sup>14</sup>

The court of appeals in this case<sup>15</sup> erred in creating a triangle of interests and not the dual interests of the woman and the state. Although the court stated that the State of Indiana had legitimate interests, it ultimately gave greater weight to Planned Parenthood of Indiana and Kentucky Inc.’s (PPINK) burden as the abortion provider.

In emphasizing the burden to the abortion provider, the court of appeals misinterpreted, and departed from, this Court’s well-established abortion jurisprudence. Although the court stated that “[i]n general, courts do not micromanage an entity’s business decisions,”<sup>16</sup> it improperly allowed the district court 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”<sup>17</sup> for PPINK in operating its business.

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<sup>13</sup> \_\_\_ U.S. \_\_\_, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).

<sup>14</sup> *Id.* at 2309.

<sup>15</sup> *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health*, 896 F.3d 809 (7th Cir. 2018).

<sup>16</sup> *Id.* at 823.

<sup>17</sup> *Id.*

The court of appeals considered the following elements of PPINK's business model:

- The abortion provider's "economic concerns;"<sup>18</sup>
- The abortion provider's "staffing decisions;"<sup>19</sup>
- The abortion provider's choices in using its resources;<sup>20</sup>
- The abortion provider became overwhelmed with appointments and scheduling;<sup>21</sup> and,
- Whether the abortion provider could or would choose to provide each center with the needed equipment and staff.<sup>22</sup>

The court of appeals erred in stating that "[c]ourts must consider the impact of the new ultrasound law based on the reality of the abortion provider and its patients. . . ." <sup>23</sup> It stated that "neither the State nor the courts has the authority to rewrite PPINK's mission and dictate how it must allocate its limited resources."<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 820.

<sup>22</sup> *Id.* at 823.

<sup>23</sup> *Id.* at 824.

<sup>24</sup> *Id.* at 823.

Neither the state nor the appellate court were attempting to redefine the abortion provider's business model. But the serious error in the appellate court's consideration of the abortion provider's business interests opened the door for the abortion provider to thwart the state's legitimate interest. If the court of appeals' opinion is not reversed, abortion providers may trump the state's well-recognized legitimate interest in promoting life and the woman's health and safety. Under any regulation, the abortion provider could say it had neither the resources nor staff to follow the law. This would completely distort this Court's abortion jurisprudence, and therefore, the Petition for Writ of Certiorari should be granted and the appellate court's opinion reversed.

**B. The Court of Appeals Erred in Basing Its Decision on Anecdotal Evidence Instead of Recognizing and Applying the Well-Established Scientific Evidence Concerning the Effects of a Woman's Decision.**

The Court of Appeals for the Seventh Circuit erred in its consideration of one piece of anecdotal experience from the State of Indiana and nine anecdotal and unverified experiences from the abortion provider<sup>25</sup> instead of relying on the well-established scientific evidence. Without any documented or stated support,

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<sup>25</sup> *Id.* at 821-22, 828.

the court of appeals summarily rejected and discredited Dr. Priscilla Coleman who is one of the Nation's leading researchers on the effects of abortion. Dr. Coleman has conducted a meta study reviewing twenty-two of the most reliable, well-documented, and large sample studies on abortion.<sup>26</sup> The court of appeals' reliance on anecdotal stories instead of reliable studies was error.

Reliable scientific studies<sup>27</sup> demonstrate that abortion hurts women psychologically. Abortion is a short-term "solution" with long-term negative consequences.

Dr. David Reardon, one of the leading experts on the effects of abortion on women, further demonstrates

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<sup>26</sup> See, e.g., Priscilla K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published, 1995-2009*, 199 BRITISH J. PSYCHIATRY 180 (2011).

<sup>27</sup> See, e.g., Priscilla K. Coleman, *Induced Abortion and Increased Risk of Substance Abuse: A Review of the Evidence*, CURRENT WOMEN'S HEALTH ISSUES 1:21, 23 (2005); J.R. Cogle, et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, MED. SCI. MONITOR 9(4):CR157 (2003); Z. Bradshaw & P. Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, CLINICAL PSYCHOL. REV. 23:929-58 (2003); David C. Reardon, et al., *Deaths Associated with Delivery and Abortion Among California Medicaid Patients: A Record Linkage Study*, S. MED. J. 95:834 (2002). For an extensive bibliography of peer reviewed studies, see We Care Experts, *Psychological, Relationship, and Behavioral Implication of Abortion: Bibliography of Peer-Reviewed Studies*, available at <http://www.wecareexperts.org/sites/default/files/articles/Bibliography%20of%20Peer%20Reviewed%20Studies%20on%20Psychology%20of%20Abortion.pdf>.

the devastating psychological consequences of abortion. Dr. Reardon states there is a temporary feeling of relief, but that

Women who have undergone post-abortion counseling report over 100 major reactions to abortion. Among the most frequently reported are: depression, loss of self-esteem, self-destructive behavior, sleep disorders, memory loss, sexual dysfunction, chronic problems with relationships, dramatic personality changes, anxiety attacks, guilt and remorse, difficulty grieving, increased tendency toward violence, chronic crying, difficulty concentrating, flashbacks, loss of interest in previously enjoyed activities and people, and difficulty bonding with later children.<sup>28</sup>

It is precisely because of the documented serious physical and psychological effects of abortion that the ultrasound and waiting period are so important in the woman's decision-making process. State legislatures in twenty-eight states have enacted an ultrasound law.<sup>29</sup> Legislatures in twenty-seven states have enacted waiting periods varying from eighteen to

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<sup>28</sup> David C. Reardon, "The After Effects of Abortion," *available at* <https://www.abortionfacts.com/reardon/the-after-effects-of-abortion> (calling abortion a public health issue and listing the physical and psychological effects of abortion).

<sup>29</sup> National Right to Life, *A Window into the Womb: A Guide to State Laws on Ultrasound* (2018), *available at* <https://www.nrlc.org/uploads/stateleg/UltrasoundFactsheet.pdf>.

seventy-two hours.<sup>30</sup> If this Court does not grant the Petition for Writ of Certiorari, potentially the law in the majority of states could be overturned even though the state has a legitimate interest as this Court and the Court of Appeals for the Seventh Circuit recognized.

In addition to the scientific studies, this Court and lower federal courts have recognized the adverse effects of abortion. This Court stated in *Gonzales v. Carhart*<sup>31</sup> that

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.<sup>32</sup>

The abortion decision is “fraught with emotional consequence.”<sup>33</sup> Likewise in *Bell*,<sup>34</sup> the Court of Appeals for the Fifth Circuit cited testimony that abortion as

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<sup>30</sup> Guttmacher Institute, *Counseling and Waiting Periods for Abortion* (2019), available at <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.

<sup>31</sup> 550 U.S. 124 (2007).

<sup>32</sup> *Id.* at 159.

<sup>33</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

<sup>34</sup> *Women’s Medical Center v. Bell*, 248 F.3d 411 (5th Cir. 2001).

practiced is “almost always a negative experience for the patient. . . .”<sup>35</sup>

Prior to *Roe v. Wade*<sup>36</sup> and *Doe v. Bolton*,<sup>37</sup> health issues like abortion were decided by the states where hearings could be held to determine whether the medical and scientific knowledge are more advanced to warrant a different legal conclusion. In the forty-six years since *Roe* and *Doe*, legislatures have determined that there are physical and psychological health risks to women from abortion.<sup>38</sup>

In the largest government study since *Roe*, the South Dakota Task Force to Study Abortion<sup>39</sup> scheduled four full days of hearings. “The Task Force heard live testimony of approximately fifty-five witnesses, including thirty-two experts, and considered the written reports and testimony from another fifteen experts” and the live testimony “was divided almost equally

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<sup>35</sup> *Id.* at 418.

<sup>36</sup> 410 U.S. 113 (1973).

<sup>37</sup> 410 U.S. 179 (1973).

<sup>38</sup> Since *Casey*, twenty-eight states including Indiana have enacted “A Woman’s Right to Know” law and information brochure. See National Right to Life, *A Woman’s Right to Know: Casey-style Informed Consent Laws* (2018), available at <https://www.nrlc.org/uploads/stateleg/WRTKFactSheet.pdf>. The purpose of these laws was for women to know the physical and psychological risks associated with abortion, alternatives to abortion, and scientifically accurate medical facts about the development of the woman’s unborn child before she makes the decision.

<sup>39</sup> Report of the South Dakota Task Force to Study Abortion (December 2005), available at <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>.

between witnesses who support the position that abortion is harmful to women and should be illegal and those who think it should be legal.”<sup>40</sup> In addition, the Task Force received approximately 3,500 pages of written materials, studies, reports, and testimony.<sup>41</sup> The Task Force noted that of particular significance were the affidavits of almost 2,000 post-abortive women who provided statements about their real life experiences.<sup>42</sup> The Task Force stated that “[o]f these post-abortive women, *over 99% of them* testified that abortion is destructive of the rights, interests, and health of women and that abortion should not be legal.”<sup>43</sup>

After hearing all of the evidence from experts and post-abortive women, the Task Force stated:

Further, the Task Force finds that the pre-abortion counseling provided often does not prepare women who have abortions for the psychological outcomes they may experience after their abortions. In addition, women who receive little or no information about possible emotional health risks of this procedure may significantly compromise their mental health and the quality of their lives for years to come. *Due to the very limited information disclosed by abortion providers, women are not fully aware that abortion carries with it the*

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<sup>40</sup> *Id.* at 6-7.

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (emphasis added).

*potential to damage their physical, emotional, interpersonal, and spiritual well-being.*<sup>44</sup>

The Task Force also addressed the issue of the psychological consequences of terminating the life of the child. The Task Force stated:

Perhaps worse, the pregnant mother is not told prior to her abortion that the procedure will terminate the life of a human being. The psychological consequences can be devastating when that woman learns, subsequent to the abortion, that this information was withheld – information that would have resulted in her declining to submit to an abortion. Her anger at being deceived and being prevented from making an informed decision for herself is exacerbated by her realization that she was implicated in the killing of her own child in utero. Aside from the injustice of her being deprived of making her own informed decision (see Section II-D), the psychological harm of knowing she killed her child is often devastating.<sup>45</sup>

In addition, the Task Force found that:

... it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of

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<sup>44</sup> *Id.* at 47 (emphasis added).

<sup>45</sup> *Id.*

a woman whose natural instincts are to protect and nurture her child.<sup>46</sup>

The Task Force heard testimony from Dr. Vincent Rue, Ph.D., who is a psychotherapist, professor, and was special consultant to then-U.S. Surgeon General Dr. C. Everett Koop on abortion morbidity. The Task Force stated: “In 1981, Dr. Rue provided the first clinical evidence of post-abortion trauma, identifying this psychological condition as ‘Post-Abortion Syndrome’ in testimony before the U.S. Congress.”<sup>47</sup> The Task Force heard evidence that individuals with Post-Abortion Syndrome “experience symptoms of avoidance (efforts to escape from reminders of the event), intrusion (unwanted thoughts, nightmares, and flashbacks related to the event), and arousal (exaggerated startle reflex, sleep disturbance, irritability) for a month or more following exposure to a traumatic event.”<sup>48</sup> Although for some women, the initial response is one of relief, many women later avoid the problem through repression and denial, usually for years – “5 years is common, 10 or 20 is not unusual.”<sup>49</sup>

The Task Force found the following mental health outcomes:

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<sup>46</sup> *Id.* at 47-48.

<sup>47</sup> *Id.* at 53.

<sup>48</sup> *Id.* at 44.

<sup>49</sup> JOHN C. WILLKE & BARBARA H. WILLKE, ABORTION 50 (Hayes Pub. Co. 2003).

1. Based on methodological improvements characterizing these studies, prior works indicating that abortion is an emotionally benign medical procedure for most women are invalid and little reliance can be placed upon them;
2. In all the analyses conducted, women with a history of abortion were never found to be at a lower risk for mental health problems than their peers with no abortion experience;
3. Women with a history of induced abortion are at a significantly higher risk for the following problems: a) inpatient and outpatient psychiatric claims, particularly adjustment disorders, bipolar disorder, depressive psychosis, neurotic depression, and schizophrenia; b) substance use generally, and specifically during a subsequent pregnancy; and c) clinically significant levels of depression, anxiety, and parenting difficulties;
4. When compared to unintended pregnancies carried to term and other forms of perinatal loss, abortion poses more significant mental health risks; and
5. Cross-cultural data call into question the often-voiced view that psychological problems associated with abortion are socially constructed, as women living in a culture where abortion is normative and a much less volatile social issue, have been found

to also suffer psychological effects of abortion.<sup>50</sup>

Although the Court of Appeals for the Seventh Circuit recognized the state's important and legitimate interests, it failed to give proper weight to these interests and improperly considered the abortion provider's business interest. Due to serious physical and psychological effects of abortion, this Court should grant the Petition for Writ of Certiorari and uphold Indiana's ultrasound and waiting period law.

## **II. THIS CASE IS CERTWORTHY BECAUSE THE COURT OF APPEALS MISAPPLIED CASEY'S EMPHASIS ON AN INFORMED DECISION AND WAITING PERIODS.**

### **A. Ultrasounds Prior to Abortion Provide Women with Accurate, Factual Information That Is Needed to Make an Informed Decision, and Therefore, the Court of Appeals for the Seventh Circuit Misapplied *Casey*.**

The question posed in this case is whether the state interfered with a woman's constitutional right to decide whether to abort her child by requiring an ultrasound which provides objective, accurate and truthful information on the gestational age of the child, the

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<sup>50</sup> Report of the South Dakota Task Force to Study Abortion 42-43 (December 2005), *available at* <http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>.

amniotic sac, placenta, ovaries, and any major anatomical abnormalities or birth defects.<sup>51</sup>

A woman's right to make this decision based on accurate and truthful information is critical because, as this Court has recognized, an abortion

... is an act fraught with consequences for others; for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted.<sup>52</sup>

The assumption in *Roe v. Wade*<sup>53</sup> and its progeny<sup>54</sup> is that a woman's choice to abort her child would be made after consulting with her physician.<sup>55</sup> That also assumes that the advice and counsel of the physician will be based on sound medical advice concerning the gestational age of the unborn child, the health risks associated with an abortion, and the nature of the medical procedure.<sup>56</sup> This Court expected that the

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<sup>51</sup> WebMD, *Prenatal Ultrasound* (2018), available at <https://www.webmd.com/baby/ultrasound#1>.

<sup>52</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

<sup>53</sup> 410 U.S. 113, 163 (1973).

<sup>54</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>55</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973).

<sup>56</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

physician would give “truthful, non-misleading information.”<sup>57</sup>

Ultrasounds prior to abortion provide women with accurate and truthful information which is necessary to make an informed decision. But that kind of truthful information has not always been given. For example, Rosa Acuna, a woman considering an abortion, asked the abortionist if it was a baby.<sup>58</sup> He replied “don’t be stupid, it’s only blood.”<sup>59</sup> This was false information about the characteristics and development of her eight-week-old unborn child. Furthermore, if it were just “blood,” she would not expect the risk of being rushed to the emergency room due to an “incomplete abortion” with “parts of the baby left in” her.<sup>60</sup> If Rosa had seen the ultrasound, she would have known that it was a baby and not just blood.

*Roe v. Wade* recognized that at a minimum a pregnancy evidences potential life<sup>61</sup> – something more than simply a collection of cells, blood, or body fluids. Now forty-six years after *Roe*, through the advancement of medical technology, it is well-recognized that life begins

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<sup>57</sup> *Id.*

<sup>58</sup> *Acuna v. Turkish*, 192 N.J. 399, 930 A.2d 416 (2007) (although recognizing the facts, the New Jersey Supreme Court ultimately found no common law duty requiring a physician to instruct the woman that the embryo is an “existing human being”). *Id.* at 418.

<sup>59</sup> *Id.* at 419.

<sup>60</sup> *Id.*

<sup>61</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973).

at conception.<sup>62</sup> This “is not debatable, not questioned. It is a universally accepted scientific fact.”<sup>63</sup>

*Roe v. Wade* and its progeny also recognized the state’s interest in promoting life.<sup>64</sup> The state has an obligation to avoid placing an undue burden on a woman’s decision; but it has an equally compelling obligation to ensure that the information given to the woman comports with sound medical judgment, advice and current medical knowledge to ensure the woman’s choice is informed.<sup>65</sup>

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<sup>62</sup> See, e.g., U.S. Health and Human Services, Strategic Plan FY 2018 – 2022, Introduction, Organizational Structure (stating “HHS accomplishes its mission through programs and initiatives that cover a wide spectrum of activities, serving and protecting Americans at every stage of life, from conception”), available at <https://www.hhs.gov/about/strategic-plan/introduction/index.html>; Maureen L. Condit, Ph.D., *When Does Life Begin? A Scientific Perspective*, Westchester Institute White Paper (October 2008), available at [https://bdfund.org/wp-content/uploads/2016/05/wi\\_whitepaper\\_life\\_print.pdf](https://bdfund.org/wp-content/uploads/2016/05/wi_whitepaper_life_print.pdf) (stating “life of a new human being commences at a scientifically well-defined moment of conception”); JOHN C. WILLKE & BARBARA H. WILLKE, ABORTION 63 (Hayes Pub. Co. 2003) (stating “. . . the beginning of any one human individual’s life, biologically speaking, begins at the completion of the union of his father’s sperm and his mother’s ovum, a process called ‘conception,’ ‘fertilization’ or ‘fecundation’ . . .”).

<sup>63</sup> JOHN C. WILLKE & BARBARA H. WILLKE, ABORTION 63 (Hayes Pub. Co. 2003).

<sup>64</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>65</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (stating “to promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed . . .”).

False or misleading information impacts a woman's decision on how to exercise her constitutional right to decide. If the state explicitly or implicitly minimizes the dangers and thereby impacts the woman's decision, it is significantly interfering with the woman's decision regarding the life within her. This is certainly true where Rosa Acuna specifically asked if the life within her was a baby because the question was the ultimate factor in her decision-making process. This Court recognized that the impact on the fetus would be "relevant, if not dispositive" for most women.<sup>66</sup>

Furthermore, Rosa Acuna's experience is not an isolated event. Abortionists are not giving women full, accurate, and truthful information as anticipated by *Roe* and *Casey*. For example, the South Dakota Task Force concluded that "virtually all of the credible objective evidence" compelled the conclusion that abortions in South Dakota were not informed.<sup>67</sup> The Report stated that the record reflects the following concerning informed consent: (a) The abortion providers fail to disclose the essential nature of the procedure – that it terminates the life of the woman's existing child; (b) When they do discuss the procedure, they provide misleading information in misleading terms; (c) The abortion providers give misleading information about the psychological and physical risks to the mother, and do not

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<sup>66</sup> *Id.* at 882.

<sup>67</sup> Report of the South Dakota Task Force to Study Abortion at 37 (December 2005), available at <http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>.

disclose the direct injury to the child that leads to its death; (d) The abortion providers assume the women have made their decisions before they reach the facility; and, (e) The abortion providers place the burden upon the mothers to discover material facts on their own.<sup>68</sup>

Ultrasounds and the fetal heartbeat are “routine measures in pregnancy medicine today.”<sup>69</sup> The Court of Appeals for the Fifth Circuit stated:

They are viewed as “medically necessary” for the mother and fetus. Only if one assumes the conclusion of Appellees’ argument, that pregnancy is a condition to be terminated, can one assume that such information about the fetus is medically irrelevant. The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information. In any event, the Appellees’ argument ignores that *Casey* and *Gonzales*, as noted above, emphasize that the gravity of the decision may be the subject of informed consent through factual, medical detail, that the condition of the fetus is relevant, and that

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<sup>68</sup> *Id.*

<sup>69</sup> *Texas Medical Providers v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012).

discouraging abortion is an acceptable effect of mandated disclosures.<sup>70</sup>

An ultrasound provides the full and accurate information for a woman to make an informed decision. At a minimum, this Court should require that full, accurate, and truthful information be given to a woman as it expected in *Casey*. Otherwise, a woman's constitutionally protected right to decide to abort her child is meaningless.

**B. This Court Has Held That Waiting Periods Are Constitutional, and Therefore, the Court of Appeals Erred.**

Waiting periods before a woman decides to have an abortion are critical to ensuring that she can weigh all of the facts from the accurate and truthful information that she receives. Twenty-nine states have established waiting periods that vary from eighteen to seventy-two hours.<sup>71</sup>

This Court in *Casey* determined that a requirement for important decisions must be informed, and therefore, a decision made after a period of reflection

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<sup>70</sup> *Id.* (footnotes omitted).

<sup>71</sup> National Right to Life, *Waiting Periods* (2018), available at <https://www.nrlc.org/uploads/stateleg/WaitingperiodsMAP.pdf>; see also Guttmacher Institute, *Counseling and Waiting Periods for Abortion* (2019), available at <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (recognizing a majority of states but stating twenty-seven states enacted waiting periods).

and thought was not unreasonable.<sup>72</sup> Thus, a waiting period was not an undue burden on a woman.<sup>73</sup> Facial challenges to a waiting period requirement that are substantially similar to the one upheld in *Casey* are constitutional.<sup>74</sup>

In upholding the waiting period, this Court in *Casey* considered various factors of the twenty-four hour waiting period.<sup>75</sup> These factors included whether:

- It created “any appreciable health risk;”<sup>76</sup>
- It caused women to travel distances to the abortion provider;<sup>77</sup>

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<sup>72</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 885 (1992).

<sup>73</sup> *Id.* See generally Linda L. Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present and Future*, 40 OHIO N. U. L. REV. 105 (2013).

<sup>74</sup> See, e.g., *Karlin v. Foust*, 188 F.3d 446, 490 (7th Cir. 1999) (upholding Wisconsin’s twenty-four hour waiting period); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1463-67 (8th Cir. 1995) (upholding South Dakota’s twenty-four hour waiting period that would require one visit to an abortion provider); *Fargo Women’s Health Organization v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994) (upholding similar requirement contained in the North Dakota statute); *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir. 1992) (upholding Mississippi’s twenty-four hour waiting period that required two trips to an abortion provider); *Utah Women’s Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1494 (D. Utah 1994) (upholding Utah’s twenty-four hour waiting period that required two trips to an abortion facility), *rev’d on other grounds*, 75 F.3d 564 (10th Cir. 1995).

<sup>75</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 885-87 (1992).

<sup>76</sup> *Id.* at 885.

<sup>77</sup> *Id.*

- It caused a “delay of much more than a day;”<sup>78</sup>
- It would require the woman to “make at least two visits” to the abortionist;<sup>79</sup>
- It might expose women to “harassment and hostility of anti-abortion protesters;”<sup>80</sup>
- It would affect “women who have the fewest financial resources;”<sup>81</sup> and,
- Some women may have “difficulty explaining their whereabouts to husbands, employers, or others.”<sup>82</sup>

After considering and analyzing all of these factors, this Court in *Casey* determined that these factors “do not demonstrate that the waiting period constitutes an undue burden.”<sup>83</sup> The Court said that “. . . under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does not limit a physician’s discretion, that is not, standing alone, a reason to invalidate it.”<sup>84</sup>

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<sup>78</sup> *Id.* at 886.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Furthermore, even if the burden falls on a particular group of women, that is “a distinct inquiry from whether it is a substantial obstacle” to that group of women.<sup>85</sup> The Court noted that the district court “did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it.”<sup>86</sup> Therefore, the Court concluded that the twenty-four hour waiting period did not constitute an undue burden.<sup>87</sup>

In an earlier opinion, the Court of Appeals for the Seventh Circuit held that the Wisconsin informed consent law advising of an image and fetal heart tone and providing a twenty-four hour waiting period was constitutional.<sup>88</sup> The court did an extensive review of the *Casey* decision and concluded that the arguments by the plaintiffs were substantially the same as those raised in *Casey* and which the Supreme Court subsequently rejected.<sup>89</sup> These included the argument that the twenty-four hour waiting period created a substantial obstacle because there were “increased costs for travel, lodging, and child care, loss of confidentiality for women who are closely monitored and controlled by abusive partners, and delays that are in actuality longer than twenty-four hours because of the limited

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<sup>85</sup> *Id.* at 887.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Karlin v. Foust*, 188 F.3d 446, 491 (7th Cir. 1999).

<sup>89</sup> *Id.* at 483.

number of physicians performing abortions in Wisconsin.”<sup>90</sup> The court found that “the hardships of which the plaintiffs complained were generally no different than those the Court in *Casey* held did not amount to an undue burden,”<sup>91</sup> and, therefore, constitutional.

In the present case, the Court of Appeals for the Seventh Circuit reviewed all of the *Casey* factors, but erred in finding that they caused an undue burden. This case is similar to both *Karlin* and *Casey*, and therefore, the court of appeals erred. If this Court does not reverse the opinion, it will in essence contradict and undermine *Casey*. Such a ruling would disturb this Court’s long-standing abortion jurisprudence and give the abortion provider the ability to assert its own business interests which have never been a factor. As discussed above, it would allow the abortion provider’s business interests to trump the legitimate interests of the state in virtually any case. Furthermore, if under the court of appeals’ rationale that each state could assess various factors and conditions within the state to determine that there was an undue burden, then there would be a lack of stability and consistency of the law. This would also be inappropriate and very detrimental to this Court’s abortion jurisprudence and its application by lower courts.



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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 486.

**CONCLUSION**

Therefore, the amicus urges this Court to grant the Petition for Writ of Certiorari and uphold the State of Indiana's legitimate interests.

Respectfully submitted,

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