No. 18-1019

In The Supreme Court of the United States

KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE 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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Prior to July 1, 2016, Indiana law required that before a woman could have an abortion, she had to obtain an ultrasound and be offered the option of viewing the image and hearing the fetal heart tone. Indiana Code § 16-34-2-1.1(a)(5) altered that requirement by mandating that the ultrasound and offer occur at least eighteen hours prior to the abortion. Because the necessary ultrasound services are available only in a small handful of health centers in the state, the change in law required additional travel, which the courts below found would prevent a significant number of women from accessing abortions at all, as well as substantially burden others. At the same time, the district court found that the State "has not provided any convincing evidence that requiring an ultrasound to occur eighteen hours prior to an abortion rather than on the day of the abortion makes it any more likely that a woman will choose not to have an abortion." Pet. App. 61a. Based on this evidentiary record, the district court issued a preliminary injunction, finding that the burdens imposed by the law "dramatically outweigh the benefits" and that Respondent was thus likely to prevail in showing that these burdens were "undue." *Id*. The court of appeals affirmed, concluding that the district court's findings were supported by the record and not clearly erroneous.

The question presented is whether this Court should review the affirmance of a fact-specific preliminary injunction where the court of appeals faithfully

QUESTION PRESENTED – Continued

applied the undue burden analysis established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality), and *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S. Ct. 2292 (2016), carefully balancing the significant evidence of the burdens imposed by the statute against the "dearth of evidence," Pet. App. 61a, that the law promotes the State's asserted interests.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Planned Parenthood of Indiana and Kentucky, Inc. hereby states that it is a private non-governmental party, and no publicly held corporation owns 10% or more of its stock. Planned Parenthood of Indiana and Kentucky, Inc. further states it is a non-profit member organization, and that its sole member is Planned Parenthood of the Great Northwest and the Hawaiian Islands Inc.

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STATEMENT OF THE CASE

I. Planned Parenthood of Indiana and Kentucky's Services and Existing Informed Consent and Ultrasound Requirements

Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") provides a range of reproductive health services, including family planning services, well-woman exams, screening and/or treatment for cancer and sexually transmitted diseases, and other preventive care. Pet. App. 7a. PPINK provides this care to thousands of individuals each year through a network of seventeen health centers that it has located throughout Indiana in an attempt to maximize ease of access for its patients. Pet. App. 5a.

Approximately 7% of PPINK's patients receive abortion services, the majority of whom are poor or low-income.[1] PPINK is able to offer abortion services at four of its health centers. Pet. App. 63a, 83a. Three of these health centers provide abortions through the first trimester of pregnancy—until fourteen weeks after the first day of a woman's last menstrual period; these health centers and one other offer medication abortions to women through nine weeks of pregnancy. Pet. App. 63a. Prior to the challenged law's passage, only those four health centers had ultrasound machines and health care professionals trained to operate them. Pet. App. 66a. Even at these locations,

[1] At least 56% of PPINK's patients have incomes at or below 200% of the federal poverty level (with 22% of patients' income unknown). Pet. App. 76a.

appointments for abortion are extremely limited. In Indianapolis, abortions are available three days a week; in the other three cities, abortions are offered only one day (or in one location one-and-one-half days) per week. Pet. App. 88a.[2] Many women must travel hundreds of miles to obtain abortion care and already struggle to schedule their appointments. Pet. App. 77a.

Pre-existing Indiana law, not challenged here, requires that certain state-mandated information, including a brochure prepared by the Indiana State Department of Health that includes color pictures of fetuses at various stages of development, be provided to women in person at least eighteen hours before an abortion. Ind. Code § 16-34-2-1.1 (amended eff. July 1, 2016). Prior to the enactment of the challenged law, PPINK provided this information at each of its many health centers located throughout Indiana so each patient could obtain the required information at the health center closest to her. For women who lived far from the closest health center providing abortions, this meant that only one lengthy and disruptive trip (*i.e.*, the trip to actually obtain an abortion) was necessary. Pet. App. 65a-66a. To further make logistics easier for PPINK's many patients with young children and because the information appointments did not involve a medical procedure, patients could bring children to these appointments. Pet. App. 84a.

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[2] The only generally available abortion providers in Indiana other than PPINK are located in Indianapolis, where PPINK also provides abortions, and thus do not increase the geographic options available. Pet. App. 63a.

Under pre-existing Indiana law, women were also required to undergo an ultrasound before obtaining an abortion, but the law permitted the ultrasound to be performed at any time before the abortion. Ind. Code § 16-34-2-1.1(b) (amended eff. July 1, 2016). Consistent with that regime, PPINK's patients generally obtained the required ultrasound the same day as the planned abortion. Pet. App. 66a. The law requires that the woman be offered the opportunity to view the ultrasound images and hear the fetal heart tone (if present) but allows the woman to decline to view the images and/or to listen to the heart tone. Ind. Code § 16-34-2-1.1(b) (amended eff. July 1, 2016). The district court found that 75% of patients opted not to view the ultrasound images and 93% chose not to hear the fetal heart tones. Pet. App. 99a.

II. The Challenged Law

The challenged statute, Indiana Code § 16-34-3-1.1(a)(5), took effect on July 1, 2016. It did not change the substance of the prior ultrasound or informed consent requirements. But it now requires that the ultrasound be performed at least eighteen hours before the abortion, at the same time as the state-mandated disclosures for informed consent. Pet. App. 75a. Patients may still decline to view the ultrasound or listen to the fetal heart tone.

As a result of requiring the ultrasound to occur earlier, many women must make two long trips, totaling hundreds of miles, first to obtain the ultrasound

and then to return for the abortion, whereas previously they were able to obtain the state-mandated materials at the closest PPINK health center and make the trip to a more distant health center only once, on the day of their abortion. Pet. App. 77a.

As the district court found, in an attempt to reduce the burdens on patients, PPINK purchased ultrasound equipment and trained its staff to provide ultrasound services at two additional health centers. Pet. App. 66a. However, the machines are expensive—approximately $25,000 each—and must be operated by trained technicians. Pet. App. 81a-82a. As the district court found, PPINK is not financially able to purchase ultrasound machines and hire or pay to train technicians for all of its health centers. Pet. App. 63a, 82a. Thus, PPINK offers ultrasounds at only six health centers, requiring women who do not live near those centers to make two long trips to obtain first the ultrasound and then their abortion.

III. The Proceedings Below

PPINK filed suit challenging the new law on July 7, 2016. The district court held a preliminary injunction hearing on November 9, 2016 and issued a preliminary injunction on March 31, 2016, nine months after the law had taken effect.

A. District Court Decision

In concluding that PPINK was likely to succeed on the merits of its claim, the district court applied the undue burden test this Court set forth in *Casey* and *Whole Woman's Health*, weighing the evidence of the burdens caused by the law against the evidence that the challenged provision's change in the timing of the required ultrasound served the State's interests.

i. Findings of Burden

The district court first examined the burdens imposed by the law. It found that those burdens, particularly on the poor and low-income patients who constitute the majority of PPINK's patients who seek abortions, were substantial, in large part due to the additional travel required. The court explained that whereas under the old law women were able to go to the nearest health center to obtain the information required for their first visit, the new law required many women to travel long distances (often hundreds of additional miles round trip) to one of PPINK's six health centers with ultrasound capability in order to comply with the new requirement as to the timing of the ultrasound, and then to travel a second time, a minimum of 18 hours later, to one of the four facilities that offers abortion services or to be away from home overnight, necessitating finding lodging far from home. Pet. App. 65a-66a, 77a.

The court found that this additional required travel imposed myriad problems. First, it meant that

women had to take an additional day off from work, which posed particular difficulties for low-income women (the majority of PPINK's patients). Pet. App. 76a, 84a. These women do not typically have paid time off, and therefore lose critical wages, and may also jeopardize their employment by taking two days off from work in close succession. Pet. App. 84a.

Second, the district court found that the need to reach a more distant health center twice instead of once imposed significant transportation burdens, including "additional expenses of lengthy travel," and that "such travel is especially difficult for low-income women who do not have access to a car." Pet. App. 90a, 77a.

Third, the court found that the law imposed additional hardships for the more than one-third of PPINK patients with children in the home. Pet. App. 10a-11a. Prior to the change in law, women could bring their children to the first appointment. However, because the first visit now included an ultrasound, a medical procedure in which a "transducer is inserted into [the woman's] vagina," Pet. App. 31a, women cannot bring their children to ultrasound appointments, Pet. App. 84a. This, coupled with the fact that women now had to travel significantly further (and, as explained below, be present at the health center longer), meant women had to arrange and pay for additional childcare, causing both added expense and delay. *Id*.

Relying on "extensive evidence" provided by PPINK's expert, Dr. Jane Collins, the court found that

for some low-income Indiana women who do not live near one of the six ultrasound facilities, "the additional costs of transportation, lost wages due to missed work, and child care created by the new ultrasound law" amount to "approximately a quarter of their entire monthly budget for all of life's necessities." Pet. App. 89a-90a. These costs can "dramatically impact low-income women's ability to obtain an abortion." Pet. App. 89a. The court found "credible and persuasive" Dr. Collins' "ultimate conclusion that 'as a result of the [new ultrasound law] a significant number of poor and low-income women [in Indiana] will no longer be able to obtain the abortions they seek or will be delayed in doing so.'" Pet. App. 92a (additions by district court).

Fourth, the court found that for the significant percentage of abortion patients who face abuse at the hands of a partner (13.8% in one national study), having to arrange a second day of lengthy travel jeopardizes the confidentiality of their treatment and thus their safety. Pet. App. 85a-86a.

Fifth, the district court found that requiring every initial appointment to occur at one of the six health centers with ultrasound capabilities (rather than any of the health centers throughout the state) forced PPINK to double-book appointments, which substantially increased the time that a woman had to remain at the health center and "exacerbated the problems caused by the lengthy travel time—lost wages, child-care expenses, and confidentiality concerns." Pet. App. 86a. Additionally, the court found that because of increased demand at these health centers, there was no

guarantee that a woman could be seen in a timely fashion at the health center closest to her; accordingly, she may be forced to travel to an even more distant health center for one or both appointments. Pet. App. 86a-87a.

Sixth, as the district court found, the obstacles imposed by the law are exacerbated by the limited availability of abortion services in Indiana. With very minor exceptions, abortions are available in Indiana only until 13.6 weeks from the first day of a woman's last menstrual period due to an Indiana law mandating that abortions after the first trimester be performed in a hospital or ambulatory surgical facility. Pet. App. 63a; *see* Indiana Code § 16-34-2-1(a)(2). Outside of Indianapolis, abortions are available only one or one-and-one-half days a week. Pet. App. 88a. The court found that because of delays in recognizing that they are pregnant and/or difficulties in making the necessary fiscal and logistical arrangements for care even under the pre-existing law, many women were not able to seek abortion care until near the end of this abbreviated time period.[3] Pet. App. 87a-88a. Thus, the district court concluded, "it is evident that even short delays . . . could significantly delay the abortion appointment such that women will be unable to obtain an abortion within the

[3] The court of appeals noted that "[m]ost women cannot know they are pregnant until at least 4 weeks following their last menstrual period, thus reducing the time they have to discover the pregnancy, explore their options and discuss them with a partner, family or doctor, arrange for missed work and child care, and secure two appointments." Pet. App. 21a.

thirteen week, six day time frame," that is, be unable to obtain an abortion in Indiana at all.[4] Pet. App. 88a.

Finally, the district court detailed how specific patients' experiences with the challenged law while it was in effect confirmed these significant burdens. PPINK presented evidence, which the district court credited, of "concrete examples" of women the new law had prevented from obtaining an abortion. Pet. App. 93a-95a. These included one woman who lived near a city with a PPINK health center where, but for the new law, she could have gone for the initial appointment; because of the new law, she would have to take another day off work to travel to the initial appointment—something she could not afford to do within the two weeks she had before she would be beyond PPINK's gestational limit. Pet. App. 93a. Another woman had recently started a new job after years of unemployment and was unable to schedule an appointment because work, transportation, childcare expenses, and confidentiality concerns prevented her from making the additional three-hour round trip required by the new law. Pet. App. 93a-94a. And a third woman, living in a homeless shelter with her two young children, was unable to navigate the transportation and childcare

[4] The district court further found that prior to the enactment of the challenged law, if a woman contacted PPINK near the end of the time when abortions are available in Indiana, she could be immediately scheduled to receive the state-mandated information in a local health center and be scheduled as early as the next day for an ultrasound and abortion, but that under the new law, the delays and congestion caused by the challenged law made it impossible for some women to obtain an abortion. Pet. App. 88a.

difficulties needed to meet the new law's requirements. Pet. App. 93a.

The State's primary response to this evidence of significant burdens was to argue that the burdens could be avoided if PPINK purchased cheaper ultrasound machines and put one in each of its health centers. The district court rejected this argument, finding that PPINK was unable as a matter of both equipment and staffing to provide ultrasound services at all of its health centers. Pet. App. 82a. The State also contended that PPINK could mitigate the burdens on women by allowing young children to be in the room with the woman as the doctor performed a transvaginal ultrasound. The district court characterized this argument as "perplexing," given the evidence that the presence of young children during the ultrasound is distracting to both the doctor and the woman and would interfere with the State's asserted interest in giving women an opportunity to view and reflect on the ultrasound images. Pet. App. 85a.

ii. Findings on Benefits

Having established the burdens imposed by the new law, the district court next examined its purported benefits. The State argued that by requiring that women be offered the opportunity to view an ultrasound at least eighteen hours before an abortion, the law promotes its interests in both fetal life (by making women less likely to choose abortion) and women's psychological health. Pet. App. 97a-98a. The court

recognized these as legitimate interests but found that "nearly all of the State's evidence addresse[d] the wrong question." Pet. App. 98a. The State's evidence addressed the benefits of requiring that a woman be offered the opportunity to view the ultrasound, not the benefits of requiring that this occur *eighteen hours before the abortion*. *Id.*[5] The court found that Indiana presented only a single piece of evidence that even addressed whether the changed timing of the ultrasound would affect women's decisions. It consisted of a lone physician's statement that she had had one patient who had opted not to view the ultrasound when offered on the day she sought an abortion, but who now felt that if she had been offered the ultrasound eighteen hours before the abortion she likely would have viewed the image, and if she had viewed it, she likely would have then decided not to have the abortion. Pet. App. 106a-107a. As the court found, this contains "multiple layers of speculation" about what one patient "in hindsight" "thinks" she "may" have done in counterfactual circumstances. *Id*. The court found this "far from compelling" and concluded that it "must be given diminished weight in the balancing process." Pet. App. 107a. The district court also found that the State proffered "no

[5] The district court found that "[e]ven accepting that there is evidence that viewing the ultrasound images," which the majority of PPINK patients choose not to do, "has a very small impact on a woman's decision"—evidence which the court characterized as "paltry"—there simply was no reliable evidence that viewing the ultrasound "*at least eighteen hours before the abortion*, rather than on the day of the abortion, has any additional persuasive impact." Pet. App. 100a, 103a, 114a (emphasis added); *see also* Pet. App. 101a-103a.

evidence that the new ultrasound law furthers the State's interest in safeguarding women's psychological health." Pet. App. 110a.

iii. Balancing the Evidence of Burdens Against the Evidence of Benefits

Applying the balancing required by *Casey* and *Whole Woman's Health*, the court concluded that, "[g]iven the foregoing evidence, the Court is left to weigh concrete and compelling evidence that the new ultrasound law imposes significant burdens against a near absence of evidence that the law promotes either of the benefits asserted by the State." Pet. App. 116a. Accordingly, based on its factual findings, the district court concluded that "[t]he burdens imposed by the new ultrasound law are thus undue in the sense that they are excessive in relation to the benefits conferred, making it likely unconstitutional." Pet. App. 118a. Finding that the other preliminary injunction factors were also met, the court issued a preliminary injunction against the requirement that an ultrasound occur at least eighteen hours prior to an abortion. Pet. App. 127a.

B. Court of Appeals Decision

The court of appeals affirmed the preliminary injunction, with Judge Kanne concurring. The panel agreed that this Court's decisions in *Casey* and *Whole Woman's Health* set out the standard for evaluating abortion regulations, including ones that seek to

protect fetal life. Pet. App. 14a-17a. The court explained that the district court properly "made findings and evaluated the persuasiveness of the evidence regarding the burdens and benefits created by the new ultrasound law" in reaching its preliminary injunction decision. Pet. App. 17a.

The court of appeals then examined the district court's extensive factual findings concerning the burdens that the challenged law imposed on women seeking abortions. Like the district court, the court of appeals focused its attention on the burdens imposed on women required by the change in law to make an additional lengthy trip to obtain an ultrasound at least 18 hours before the abortion who, but for the challenged provision, could have completed their first visit closer to home. Pet. App. 18a-19a.

The court of appeals found that the record supported the district court's conclusions that the burdens imposed by the law, including "additional travel expenses, childcare costs, loss of entire day's wages, risk of losing jobs, and potential danger from an abusive partner," were significant obstacles to obtaining an abortion. Pet. App. 18a-25a, 37a. The court of appeals likewise upheld the district court's findings that these burdens would "prevent a significant number of low-income women from obtaining an abortion." Pet. App. 45a-46a.

The State again attempted to evade this showing of significant burden by arguing that it was PPINK's responsibility to mitigate these harms by buying new

ultrasound machines or making other changes in business practices. The court of appeals concluded that the district court had properly rejected this argument, as the record supported the finding that PPINK could not afford to outfit each of its health care centers with an ultrasound machine and the attendant staffing. Pet. App. 28a (recognizing PPINK's need to "make decisions about its medical equipment needs based not only on economic concerns, but also on its ability to provide the best medical care for its patients, to attract certain medical professionals, for the safety of its technicians, to prevent malpractice claims, or for any number of other legitimate reasons"). The court of appeals also rejected the State's argument that PPINK should allow children to be present at the appointment at which the ultrasound is performed (usually transvaginally). Pet. App. 31a (noting that the policy was adopted for "good reason" given concerns about safety, "serious risk of distraction," and dignity).

The court of appeals then reviewed the district court's assessment of the benefits of the law and concluded, as had the district court, that the only evidence that the State presented on that question was the single, "exceedingly speculative" anecdote described above. Pet. App. 41a-42a. The court of appeals also noted that, even as to the small percentage of women who actually chose to view the ultrasound or hear the fetal heart tone, the State's evidence showed that this experience had "little to no impact" on their decisions. Pet. App. 39a-40a. And, because Indiana law already required that women be offered the opportunity to

view the ultrasound, the court of appeals agreed with the district court that the relevant inquiry was whether the new requirement that the offer be made *at least eighteen hours* before the abortion had specific benefits beyond the pre-existing, unchallenged requirement. Pet. App. 36a. The court therefore determined that the district court did not err in concluding that changing the timing of the offer imposed significant burdens and that there was a near absence of evidence that the law promoted the benefits asserted by the State. Pet. App. 46a.

The court rejected the State's suggestion that waiting periods, and everything attendant to them, had been given a "blanket stamp of approval," for "one of the primary lessons of *Whole Woman's Health* is that burden and benefit weighing is context-specific." Pet. App. 47a. And the court of appeals concluded that the district court "thoroughly addressed each of the burdens and benefits asserted by the parties and engaged in a painstakingly thorough weighing. Its factual findings were not clearly erroneous and are entitled to our deference." Pet. App. 49a. The court of appeals agreed that the eighteen-hour ultrasound requirement "places a large barrier to access without any evidence that it serves the intended goal of persuading women to carry a pregnancy to term. Instead, it appears that its only effect is to place barriers." Pet. App. 52a. Having found that the district court was correct in concluding that PPINK had met the remaining preliminary injunction considerations, the court of appeals

affirmed the preliminary injunction. Pet. App. 49a-51a, 53a.

Judge Kanne concurred, identifying two "evidentiary factors" that led him to conclude that the eighteen-hour requirement likely imposed an undue burden: (1) "the additional travel necessitated by the availability of only six ultrasound imaging sites" in Indiana; and (2) the fact "that the state offered little evidence" to support its argument that an eighteen-hour "wait following an ultrasound would persuade those seeking an abortion to preserve fetal life." Pet. App. 54a.

The State sought rehearing en banc, which was denied without dissent.

REASONS FOR DENYING THE WRIT

I. Certiorari Is Not Warranted to Review the Court of Appeals' Application of the Well-Established Undue Burden Standard to the Unique Facts and Circumstances of this Interlocutory Appeal

The decision below affirms a preliminary injunction, and is a straightforward application of the established undue burden standard to a uniquely narrow fact-bound legal challenge. It addresses only a change in the *timing* of an ultrasound requirement, and leaves in place both the underlying ultrasound requirement and a requirement that women be provided other state-mandated information in person at least

eighteen hours before an abortion. The State points to no other case applying the undue burden standard in this narrow posture, much less to any decision that conflicts with the result below. Instead, it seeks to manufacture an issue for this Court's review by noting that no federal appellate court has upheld an injunction against an informed consent law. But this Court's precedents establish that the validity of abortion restrictions depends on a context-specific assessment of burdens and benefits, not a *per se* rule. At bottom, the State disagrees with the court of appeals' application of the undue burden standard to the particular restriction and facts at issue in this case. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

A. This Case's Interlocutory Posture Strongly Weighs Against Certiorari

The State seeks review at an interlocutory stage, before full discovery and final judgment. The court below affirmed a preliminary injunction. The State remains free to seek summary judgment or a trial on the merits. But rather than exhaust its remedies below, it has sought immediate intervention from this Court. There is no reason not to await final judgment, especially where, as here, the State has identified no circuit conflict and the decision below is limited, by its very terms, to the particular facts and circumstances presented by a unique legal reform in a single state.

The Court has stated repeatedly that it will grant certiorari to review interlocutory judgments only in rare or extraordinary circumstances. *See*, *e.g.*, *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (holding that "no special circumstances" existed to justify the exercise of the Court's discretionary certiorari jurisdiction); Stephen M. Shapiro, et al., Supreme Court Practice 285 (10th ed. 2013) ("[I]n the absence of some unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari."). This is so even in cases, unlike this one, that present questions of undoubted importance. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting the denial of certiorari). No such rare or extraordinary circumstances are present here. The interlocutory posture of this case alone warrants denying certiorari.

B. The State Has Identified No Conflict with this Court's Jurisprudence or Circuit Split Regarding Application of the Undue Burden Test

In the absence of any conflicting decisions upholding a change in law akin to Indiana's, the State seeks to manufacture a conflict by noting that no other court of appeals has upheld an injunction against a law involving informed consent for abortion. Pet. 18. But this argument is unavailing for two reasons.

First, the State cites no case remotely akin to this one, much less reaching a conflicting result. None of

the cases the State cites posed a challenge to a change in *the timing* of a requirement that a woman be required to have an ultrasound and be told she may view the resulting images. Moreover, while other courts have considered different waiting period laws in different states, only this case, arising after *Whole Woman's Health*, involves the weighing of the burdens imposed by a waiting period against any asserted benefit of the change in timing. And the district court's preliminary injunction expressly rests on its conclusion that Indiana failed to show that the new law had any benefits, while imposing substantial burdens.

Second, it is simply not the case, as the State claims, that all waiting periods are *prima facie* constitutional. Pet. 20. The Court in *Casey* noted that "*in theory* at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn." *Casey*, 505 U.S. at 886 (emphasis added). The Court did not rest on "theory," however, but carefully examined the district court's findings of fact to determine whether the challenged waiting period was "nonetheless invalid because *in practice* it is a substantial obstacle." *Id.* (emphasis added).

The waiting period cases Indiana cites all underscore that the undue burden test requires a careful examination of state-specific evidence. Thus, in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999), the court upheld a waiting period, but recognized that a different factual record could produce a different result. "While a twenty-four hour waiting period that requires two trips to an abortion provider has been found not to

impose an undue burden on Pennsylvania women based on the circumstances of that state at the time the Court decided *Casey*, a similar provision in another state's abortion statute could well be found to impose an undue burden on women in that state depending on the interplay of [numerous] factors." *Id.* at 485. Similarly, in *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994), the court upheld a 24-hour waiting period statute only after it construed the law to require only one personal visit to the abortion facility, and expressly cautioned that if the statute were interpreted "as requiring more than one in-person visit to the medical facility before a woman may obtain an abortion, the facial validity analysis will be entirely different." *Id.* at 532.

The courts below appropriately considered the evidence of burdens and benefits associated with the challenged law, and properly concluded that given the circumstances in Indiana, changing the timing of the ultrasound requirement likely imposed an undue burden. That fact-based conclusion does not conflict with any other decision and does not warrant this Court's review.[6]

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[6] The State's suggestions that review is warranted because this was a pre-enforcement challenge and that such a challenge is invalid, Pet. 18-20, are both fundamentally flawed. First, this law was challenged after it had gone into effect. The preliminary injunction briefing followed a period of discovery, and the court had before it evidence of specific women denied abortions because of the requirement. In any event, the State's argument that pre-enforcement challenges are improper has no basis in law and

C. In the Absence of a Conflict, Certiorari Is Not Appropriate to Review the Lower Court's Fact-Bound Application of the Undue Burden Standard to the Facts in this Case

The undue burden test is by definition context-specific. Whether a particular law imposes an undue burden requires careful consideration of the burdens it imposes in light of the facts on the ground in a particular state, coupled with an equally fact-bound determination of any benefits that the law might serve. Thus, as the court of appeals noted, "one of the primary lessons of *Whole Woman's Health* is that the burden and benefit weighing is context-specific." Pet. App. 47a. Where, as here, a court affirms a preliminary injunction after weighing the burdens and benefits on a particular, not-yet-final record in a manner that hews closely to this Court's precedent, it does not present a question worthy of certiorari.

The decision below rests on extensive findings of the district court regarding the effects that altering the timing of Indiana's required ultrasound had on women who do not live near one of the state's six health centers that provide ultrasounds. As detailed above, these findings include:

- that the additional travel required forces low-income women (who constitute the majority of PPINK's patients) to incur

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would undermine the very purpose of preliminary injunctions, namely, to protect against impending irreparable harm.

travel and childcare expenses and lost wages that can constitute a quarter of their monthly income;

- that the new requirement forces women to make logistical arrangements that can jeopardize the confidentiality of their pregnancy and abortion decision, including from abusive partners;
- that the four health centers that provide abortions do so only on very limited days of the week, further exacerbating the burdens of travel;
- that PPINK does not have the resources to provide ultrasound services at more health centers;
- that the new law required those facilities that have ultrasound equipment to double-book appointments because the demand so exceeded the need, thus causing further delays and congestion at these health centers;
- that as a result of these burdens, a significant number of women will be unable to obtain an abortion at all and others will be delayed in doing so; and
- that plaintiffs identified multiple patients who, in the short time the law was in effect, were prevented from obtaining an abortion because of the change in law.

As the court of appeals noted, Pet. App. 37a-38a, these are exactly the types of effects this Court has

examined in assessing whether a law imposes an undue burden. *See*, *e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2302 (recognizing that travel burdens "erect a particularly high barrier for poor, rural, or disadvantaged women"); *id.* at 2313, 2318 (limiting health centers where services are available harms women because it means "longer waiting times, and increased crowding" and deprives patients of "individualized attention . . . at less taxed facilities"); *id*. at 2313 (forcing women to travel long distances to access services is "one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any . . . benefit," led the Court to invalidate the Texas restrictions); *Casey*, 505 U.S. at 886 (considering burdens on women who have the fewest financial resources); *id.* at 894 (considering risks to patient confidentiality, particularly in the context of domestic abuse).

Similarly, the court's conclusion that the law advances few, if any, benefits rests on well-supported findings including that the State advanced virtually no evidence that moving the timing of the ultrasound eighteen hours before the abortion would change anyone's behavior or provide any benefit to patients; and that the only evidence the State did advance on that score was a doctor stating that a single patient had speculated that had she had an ultrasound eighteen hours before her abortion, rather than on the same day as her abortion, she might not have proceeded with the abortion.

The State contends that if PPINK equipped all of its facilities with ultrasound capability, and hired individuals trained in providing ultrasounds at all health centers, it could eliminate the travel-related burdens that the law creates. Pet. 23. But the district court found that the burdens on abortion access were not caused by PPINK's business decisions, a finding the State does not challenge. Pet. App. 81a-83a.

In any event, it is well established that the burden occasioned by an abortion regulation must be evaluated with respect to existing conditions. In *Whole Woman's Health*, for example, this Court accepted that the admitting privileges requirement resulted in the closure of clinics given existing resources in Texas, and did not speculate about some hypothetical state of affairs or rearrangement of the clinics' business models. 136 S. Ct. at 2312-13. It noted that those closures resulted in "fewer doctors, longer waiting times, and increased crowding," without speculating about alternative staffing or scheduling arrangements. *Id.* at 2313. And it invalidated the requirement that abortion clinics meet surgical facility standards without questioning whether, in an alternative universe, clinic facilities could meet those standards. *Id.* at 2316-18. Following this Court's lead, the court of appeals concluded that "[a]nalyzing the regulation in light of the reality of the facts in Indiana is precisely what the district court did in this case. A court cannot assess the law in a world where PPINK has unlimited resources to open dozens of clinics, each with the ability to

provide ultrasound and abortions along with unlimited access to other health care needs." Pet. App. 48a.[7]

The State also erroneously argues that the Seventh Circuit's analysis of the law's effects in light of PPINK's resources "stands in sharp contrast" to this Court's approach in *Gonzales v. Carhart*, 550 U.S. 124 (2007). Pet. 24. *Gonzales* nowhere suggests that courts should examine abortion regulations based on speculation about alternative business models. The *Gonzales* Court upheld a ban on one particular abortion procedure, dilation and extraction (D&X), because, given the ready availability of an alternative method, dilation and evacuation (D&E), it found no evidence that the law would in fact burden any woman's choice to have an abortion. 550 U.S. at 158. Here, by contrast, the district court made extensive findings of substantial burden and no offsetting benefit.

At bottom, the State asks this Court to substitute itself for the district court and court of appeals, and to reject both courts' well-reasoned and factually supported application of the undue burden test. That is not the function of Supreme Court review. Sup. Ct. Rule 10.

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[7] *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), did not hold that abortion regulations should be assessed without regard to the actual conditions in the state, as Petitioners suggest. Pet. 26. Rather, that court held that, based on the record before it, the increased travel distance caused by the closure of a single health center did not impose an undue burden. *See id.* at 165.

II. No Circuit Conflict Exists with Respect to the Proper Denominator in *Casey*'s "Large Fraction" Test, but Even If It Did, this Case Is Not a Proper Vehicle for Addressing It

The State argues that the decision below deepens a pre-existing circuit conflict regarding the application of *Casey*'s "large fraction" test for assessing when an abortion regulation is invalid on its face. No such split exists.

Indiana agrees that an abortion regulation is facially invalid if it "operate[s] 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." *Casey*, 505 U.S. at 895. It also agrees that courts must examine a regulation's effect on "those women for whom the provision is an actual rather than an irrelevant restriction." *Whole Woman's Health*, 136 S. Ct. at 2309. Contrary to Indiana's contention, no circuit conflict exists with respect to the determination of what constitutes the appropriate denominator in the application of that test. But, even if it did, this case would be an exceedingly poor vehicle for resolving such a conflict.

1. Indiana argues that the Seventh Circuit erred in defining the denominator for purposes of the "large fraction" test as "low-income women who live a significant distance from one of the six PPINK health centers offering informed-consent appointments." Pet. App. 36a. Instead, Indiana insists, the court should have defined the denominator as "those women who would not otherwise choose to have an ultrasound eighteen hours

before their abortion." Pet. 11. But Indiana misses the point of *Casey*'s "large fraction" test. As *Whole Woman's Health* reaffirmed, the law must be examined as to its effect on "those women for whom the provision is an actual rather than an irrelevant restriction." Here, the new law is a relevant restriction for women who do not live near one of the six health centers that have an ultrasound machine, and who lack the resources to adjust their behavior without substantial sacrifice. These women must now make multiple lengthy trips, with consequent disruption to their ability to access abortion, as the courts below found.[8]

2. While Indiana seeks support in *Casey* for its supposed conflict, that case only confirms the propriety of the Seventh Circuit's approach. In assessing Pennsylvania's spousal-notification requirement, the Court in *Casey* defined the relevant denominator as "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." 505 U.S. at 895. It did not make the denominator all women, or all married women, but only those for whom the law posed a relevant restriction.

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[8] To the extent that Indiana disagrees with the Seventh Circuit's focus on low-income women, nothing turns on the disagreement. As the courts below found, the majority of PPINK's patients are low-income women, and in fact, the courts considered burdens for other women as well. Pet. App. 10a & n.5; *see also* Pet. App. 18a (noting that the court's reference to "low income women" was somewhat under-inclusive, for "concerns about confidentiality in employment situations and abusive spouses . . . can create impediments that span income levels").

Because the Court found that a large fraction of them would be unduly burdened by having to notify their spouses, this Court invalidated the requirement on its face. The Seventh Circuit did exactly what the *Casey* Court did: (1) it identified as the denominator those women for whom the law would pose a relevant restriction; and (2) it assessed whether a "large fraction" of them would face an undue burden.

The same is true of the only post-*Whole Woman's Health* decision extensively cited by Indiana, *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 2573 (2018). In *Jegley*, which concerned a requirement that health centers have a back-up doctor with local admitting privileges in order to provide medication abortions, the Eighth Circuit concluded that the relevant denominator was "women seeking medication abortions in Arkansas." *Id.* at 958. Indiana underscores that the court did not define the denominator more narrowly as "women seeking medication abortions from providers that did not have hospital admitting privileges." Pet. 14. But the district court in *Jegley* "found that medication abortion would no longer exist in Arkansas" were the challenged requirement to stand. 864 F.3d at 956-57. In other words, the class of "women seeking medication abortions" and "women seeking medication abortions from providers that did not have hospital admitting privileges" were one and

the same—and perfectly in line with this Court's instructions in *Casey*.[9]

Indiana points to the Ninth Circuit's disagreement with the Fifth and Sixth Circuits in *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014). Pet. 15. But the conflict between those decisions has nothing to do with how to determine the relevant denominator in the large fraction test, and does not survive *Whole Woman's Health*. Rather, it concerned whether the undue burden test considers only the *burden* imposed by an abortion regulation, or whether it also should consider evidence of whether the law actually advances the state's asserted benefits. *Compare id. and Planned Parenthood of Wisc., Inc. v.*

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[9] In passing, Indiana also cites the Fifth Circuit's decision in *June Medical Services LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *decision stayed*, ___ S. Ct. ___, 2019 WL 488298 (Feb. 7, 2019), Pet. 16, which defined the relevant denominator in a challenge to an admitting-privileges requirement as "all women seeking abortions in Louisiana." *Id.* at 802. That approach, however, is inconsistent with this Court's requirement that the proper denominator is "those women for whom the provision is an actual rather than an irrelevant restriction." *Whole Woman's Health*, 136 S. Ct. at 2320 (internal alterations omitted). The Court in *Whole Woman's Health* examined the burden imposed by an admitting-privileges requirement on women who would be served by those clinics that would be forced to close as a result of the requirement, and not on those who would be served by the clinics that would remain open, except to the extent that those clinics would have "fewer doctors, longer waiting times, and increased crowding." *Id.* at 2312-14. In any event, which women are relevant to a facial challenge to an admitting-privileges requirement is different from which women are relevant to a facial challenge to Indiana's law. Even Indiana does not insist that under this law, the proper denominator should have been "all women seeking abortions in Indiana."

Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013), *with Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 593-95 (5th Cir. 2014), *and Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 513-18 (6th Cir. 2012). The Sixth Circuit in *DeWine*, for instance, did not even address the relevant denominator for purposes of *Casey*'s "large fraction" test; it simply held that, because a law restricting medication abortions did not affect a woman's ability to obtain a surgical abortion, the statute did not represent "a substantial obstacle to the ultimate abortion decision." 696 F.3d at 515-16. When the Ninth Circuit addressed a materially identical statute in *Humble*, it reached a different result, not because it offered a different definition of the relevant denominator, but because it examined both the benefits and burdens, as this Court in *Whole Woman's Health* has since made clear is required. *See* 753 F.3d at 914-17. Neither *Abbott* nor *DeWine* survives *Whole Woman's Health*, and the circuit conflict described by Indiana has already been resolved.

3. Even if Indiana had identified a current circuit conflict regarding the large-fraction denominator, this case is an inappropriate vehicle for resolving any such conflict for at least three reasons. First, Indiana advanced absolutely no argument in the courts below that the district court used an inappropriate denominator. Indeed, neither the word "fraction" nor the word "denominator" appears in more than seventy pages of appellate briefing. This Court is a "court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7

(2005), and certiorari is not warranted to consider the appropriate denominator in *Casey*'s "large fraction" test in the first instance. Even if any courts of appeals had differed in the determination of the denominator—and they have not—this Court would surely benefit from reviewing a considered decision where the issue had actually been litigated below.

Second, as noted above, the interlocutory posture of these proceedings weighs against granting certiorari. Indiana complains that "there is no evidence showing how large the burdened group is . . . or how it stacks up against the larger class of women who . . . would not have an ultrasound eighteen hours before the abortion." Pet. 13. But the preliminary injunction record showed that the majority of PPINK's patients were low-income, and fully supported the district court's findings that for those women who did not live near a facility with ultrasound equipment, the law would indeed impose substantial burdens without any evidence of countervailing benefits. Nothing precludes Indiana from seeking to counter those conclusions with evidence at the summary judgment or trial stage—but it hasn't even tried to do so.

Third, even if a circuit conflict existed regarding the determination of the appropriate denominator, the precise definition of the denominator is not outcome determinative here. *Whole Woman's Health* requires "that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. Thus, the weaker a state's justification is, the more likely any burden imposed by

the regulation will be undue. As Indiana offered virtually no evidence to support any benefit from its eighteen-hour ultrasound requirement, burdens that might otherwise be acceptable where they advance substantial benefits are undue here. The district court's findings, not challenged on appeal, establish unequivocally both the substantial burdens occasioned by the challenged statute and the absence of any demonstrated benefit.

III. *Casey* and *Whole Woman's Health* Do Not Establish Different Tests Depending on the Asserted Interest Served by the Challenged Abortion Regulation

Indiana finally maintains that the lower courts erred because this Court has established two different tests for determining whether a statute regulating abortion imposes an unconstitutional undue burden: one announced in *Casey*, which applies only when the state asserts an interest in women's mental health or the protection of fetal life; and a different test, established by *Whole Woman's Health*, which applies only when a statute aims to protect women's physical health. Pet. 27-30.[10] Indiana argues that the court of appeals erred by applying the test set forth in *Whole Woman's Health* and asks this Court to grant certiorari

[10] Indiana does not explain the logical let alone legal basis for arguing for a different test if a state's interest is to protect a woman's mental as opposed to physical health.

to "set forth the proper constitutional standard for abortion informed-consent requirements." Pet. 30.

As the court of appeals correctly recognized, Indiana's argument is foreclosed by this Court's precedent. The Court has consistently applied a single legal standard to abortion regulations and has never suggested that the constitutional standard should vary based on the interest asserted by the state, and no court of appeals has held to the contrary. In establishing the undue burden standard, *Casey* "set forth a standard of general application." 505 U.S. at 876. Regardless of its justification, "a statute which, while furthering the interest in *potential life or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* at 877 (emphasis added).

In *Casey* itself, the Court applied the undue burden test to all of the restrictions at issue, even though some were said to further potential life and others were said to further women's health. It applied the same standard to recordkeeping and reporting regulations justified as protecting women's physical health, and to spousal notification and parental consent regulations, assertedly protecting potential life. *Id.* at 881-901.

In *Whole Woman's Health*, the Court again applied the same undue burden standard. 136 S. Ct. at 2309 ("We begin with the standard, as described in *Casey*."). The Court specifically cited portions of *Casey* in which the Court applied this test to laws designed to protect

potential life and a woman's mental health. *Id.* (citing portion of *Casey* in which the Court was "performing this balancing [of benefits and burdens] with respect to a spousal notification provision" and citing portion of *Casey* in which the Court performed the "same balancing with respect to a parental notification provision").

Not surprisingly, no court of appeals (or any other court) following *Whole Woman's Health* has concluded that separate legal standards apply depending on the state's asserted interest. *See*, *e.g.*, *Gee*, 905 F.3d at 803 ("Hewing to [*Whole Woman's Health*] and *Casey*, we recognize and apply a balancing test."); *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 755-56 (8th Cir. 2018) (identifying a single "constitutional test" as the "undue burden standard," requiring that "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer"); *West Alabama Women's Center v. Williamson*, 900 F.3d 1310, 1326 (11th Cir. 2018) ("The State cites no support for the proposition that a different version of the undue burden test applies to a law regulating abortion facilities. The question in all abortion cases is whether 'the purpose or effect of the law [at issue] is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (quoting *Whole Woman's Health*, 900 F.3d at 1326) (additions by the *Williamson* court)), *pet. for cert. pending*, No. 18-837 (2019); *Jegley*, 864 F.3d at 958 (citing *Casey* as explaining that "[a] finding of an undue burden is a shorthand for the conclusion that a

state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," 505 U.S. at 877, and *Whole Woman's Health* as clarifying "that this undue burden analysis requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," 136 S. Ct. at 2309).

There is no lack of clarity regarding the test to be applied, and certiorari is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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