No. 17-1883

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,
PLAINTIFF-APPELLEE,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, ET AL.,
DEFENDANTS-APPELLANTS

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:16-cv-1807-TWP-DML
The Honorable Tanya Walton Pratt, Judge

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARKANSAS, IDAHO, KANSAS, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA; AND MISSISSIPPI AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH THEIR GOVERNORS, AS *AMICI CURIAE* SUPPORTING DEFENDANT-APPELLANT'S PETITION FOR *EN BANC* REVIEW

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are States that regulate abortion in order to express and encourage respect for life. Each of them requires a pre-abortion waiting period and several have pre-abortion ultrasound requirements like the Indiana ultrasound law.[1] *Amici* strongly support Indiana's authority to protect unborn life and human dignity through the ultrasound law and have an interest in ensuring that courts scrutinize such regulations under the appropriate standards.

INTRODUCTION

The Indiana ultrasound law sensibly requires that among other material that abortion providers must give to women 18 hours before an abortion, they must include an opportunity for a woman to view an ultrasound image of her unborn child. Ind. Code Ann. §16-34-2-1.1(a)(5). That follows from long-settled law upholding Indiana's requirement that abortion providers give women information necessary for informed consent the day before the abortion. *See A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 691 (7th Cir. 2002) (upholding Indiana pre-abortion waiting-period law). The mandatory opportunity to view an ultrasound image, too, has been part of Indiana law for years and had never been challenged before. The current ultrasound law simply combines those requirements into one.

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[1] *See* La. Rev. Stat. §§40:1061.17(B), 40:1061.10(D)(2)(a); Ala. Code §26-23A-4; Ark. Code §§20-16-1703(b), 20-16-602; Idaho Code §18-609; Kan. Stat. §65-6709; Ky. Rev. Stat. §§311.725(1), 311.727; Mich. Comp. Laws §333.17015; Miss. Code §§41-41-33(1), 41-41-34; Mo. Rev. Stat. §188.027; Neb. Rev. Stat. §28-327; Ohio Rev. Code §§2317.56, 2317.561; Okla Stat. tit. 63, §1-738.2(B); S.C. Code §44-41-330; S.D. Codified Laws §34-23A-56; Tex. Health & Safety Code §171.012; Utah Code §76-7-305; W. Va. Code §16-2I-2.

The panel's holding — that the ultrasound law nonetheless imposes an undue burden on the abortion decision — is a significant development that creates multiple conflicts with Seventh Circuit and Supreme Court precedents, as well as with other circuits. That should not pass without *en banc* review.

ARGUMENT

I. The Panel Decision Unsettles This Court's Caselaw On The Constitutionality Of Pre-Abortion Informed Consent And Waiting-Period Laws.

To begin with, the panel's holding conflicts with cases establishing Indiana's authority to ensure informed consent. As the Supreme Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a State may require that abortion providers convey "truthful, nonmisleading information," 505 U.S. 833, 882 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.), that is "'relevant to the decision' to undergo an abortion." *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (quoting *Casey*, 505 U.S. at 882) (alteration omitted); *see also Planned Parenthood Minn., N. Dak., S. Dak. v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (*en banc*). If the sight of an unborn child inside the body of the mother preparing to terminate its life is *not* truthful, relevant, nonmisleading information, it is hard to imagine what would be.

The panel decision similarly conflicts with cases permitting Indiana to require that abortion providers give women the necessary information the day before an abortion takes place. *Casey* upheld a law requiring informed-consent disclosures "at least 24 hours before performing an abortion[.]" 505 U.S. at 881 (joint opinion).

Following *Casey*, this Court has *twice* upheld laws that require pre-abortion waiting periods — including Indiana's own law, before the ultrasound requirement was added. *Woman's Choice*, 305 F.3d at 691; *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (upholding Wisconsin's 24-hour law). Other circuits have done the same. *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 535 (8th Cir. 1994); *see also Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding 48-hour waiting period for minors). *Amici* are aware of no post-*Casey* case holding that a waiting period of 24 hours or less is unconstitutional. Because the ultrasound simply adds to information that abortion providers are required to give to women the day before, the ultrasound law should not have been controversial.

The panel's contrary holding rested *entirely* on the finding that the ultrasound law burdens women who have to travel to obtain abortions: "*[a]ll* of the burden in this case originates from the lengthy travel that is required of some women who have to travel far distances for an ultrasound appointment at least eighteen hours prior to an abortion." Slip Op. at 17 (emphasis added). But for two reasons, that only deepens the conflict with prior cases.

First, the panel conflicts with the Supreme Court and at least two other circuits by attributing that supposed burden to the State rather than to PPINK itself. PPINK operates sixteen centers across Indiana, performing abortions at four and providing pre-abortion counseling at the rest. Slip Op. 6; *see also* ECF No. 51 (reporting closure of the Fort Wayne clinic). The ultrasound law effectively requires that centers have

ultrasound equipment to continue providing counseling. The four abortion-providing centers (and two others) already had ultrasound machines necessary for counseling under the ultrasound law, and PPINK *could* obtain similar equipment at other centers — it simply does not intend to do so. Slip Op. at 25–27. In other words, the ultrasound law is potentially burdensome to Indiana women in large part because PPINK *chooses* to not make pre-abortion counseling more accessible. The panel affirmed the district court's choice to "defer" to that "justifiable business decision[]." *Id.* at 26.

Even if PPINK's choice were "justifiable" as a business matter, *id.*, the burdens it created cannot be attributed to Indiana: "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris v. McRae*, 448 U.S. 297, 316 (1980); *see also K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013); *Schafer*, 18 F.3d at 533. Worse, the panel's approach grants abortion providers like PPINK a virtual veto over State regulations by allowing it to manufacture burdens. Under the panel's standard, whenever PPINK considers an abortion regulation economically inconvenient, it can simply decline to comply, limit the services that it offers potential patients, and blame the State. It is hard to imagine a regulation that PPINK could *not* challenge through that strategy. *En banc* review should clarify that the undue burden standard is not so easily manipulated.[2]

[2] The Supreme Court has also held that statutes "bar[ring] certain procedures and substitut[ing] others" are not unduly burdensome simply because a doctor prefers to use the

Second, the panel's undue burden finding conflicts with Supreme Court and Seventh Circuit caselaw authorizing pre-abortion waiting periods. As noted above, waiting periods requiring two visits to a clinic have been upheld for more than a quarter century. *See*, *e.g.*, *Casey*, 505 U.S. at 885 (joint opinion); *A Woman's Choice*, 305 F.3d 684; *Karlin*, 188 F.3d 446.

The panel distinguished those cases because this case is a *post*-enforcement challenge "in light of the reality of the facts in Indiana." Slip Op. at 44. But that reads *Casey* too narrowly, for the controlling opinion there accepted the district court's findings about the burdens that would result. The district court had found, for example, that "the practical effect" of a 24-hour waiting period "will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor," 505 U.S. at 885–86; and that the waiting period would be "'particularly burdensome'" for "those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others[.]" *Id.* at 886. Yet the Court was "not convinced that the 24-hour waiting period constitutes an undue burden" — "*even for the women who are most burdened by it.*" *Id.* at 887 (emphasis added). The burdens *Casey* identified, in other words, are the same as in this case, but the panel reached the opposite result.

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prohibited procedure. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). Given the Court's position on the relevance of the doctor's preferences, it makes no sense to hold that a statute is unduly burdensome because it conflicts with PPINK's *business* decisions.

This Court has held that *Casey* does not absolutely *foreclose* challenges to waiting-period laws. *See Karlin*, 188 F.3d at 485. Nonetheless, a challenger must bring *something* new to distinguish a challenged waiting-period law from the one in *Casey*, and the Plaintiffs did not. The result is confusion about how such laws should be evaluated in this Circuit.

II. The Panel Applied Erroneous Legal Standards.

The holding that Indiana may not require an ultrasound as part of a woman's informed consent the day before an abortion warrants *en banc* review. That holding, moreover, rests on flaws in the panel's legal standards. Those errors create additional conflicts and warrant *en banc* review in their own right.

A. The panel misconstrued the undue burden test.

The panel misconstrued the Supreme Court's test for statutes — like the ultrasound statute — that further respect for unborn human life.[3] The panel acknowledged that this case is controlled by the "undue burden" test. Slip Op. at 12–13. An "undue" burden is one that has "the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." *See Casey*, 505 U.S. at 877 (joint opinion) (emphasis added). The panel treated that test as mandating a crude balancing analysis: it added up the purported burdens of the ultrasound statute and measured them against the State's expected benefits. Slip Op. at 15–16. That approach gives insufficient weight to the State's interest in the ultrasound law.

[3] That interest is unquestionably legitimate. *Gonzales*, 550 U.S. at 128.

Some balancing is appropriate when a State regulates abortion to further its interest in protecting women's health and safety. *See*, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016). Factual evaluation of health regulations for whether they serve their professed purposes, after all, is a classic judicial function. But "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*." *Casey*, 505 U.S. at 886 (joint opinion) (emphasis added). As the Supreme Court held in *Gonzales v. Carhart*, when a legislature does so, the fact that the law "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" 550 U.S. 124, 157–58 (2007) (quoting *Casey*, 505 U.S. at 874) (alteration omitted).

That makes balancing inappropriate for statutes intended to further respect for unborn life. When a State seeks to further that interest, a regulation's moral and expressive ends are incommensurable with the potential tradeoffs. At the very least, judicial standards are lacking. When Congress determined, for example, that partial birth abortion "'confuses the medical, legal, and ethical duties of physicians to preserve and promote life,'" and that continuing to permit it "'will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life,'" *Gonzales*, 550 U.S. at 157 (quoting § 14, 117 Stat. 1202, note following 18 U.S.C. §1531), it would have been pointless for the Court to analyze whether a prohibition "confer[red] … benefits sufficient to justify the burdens upon access[.]" *Hellerstedt*, 136 S. Ct. at 2299.

In such cases, the proper analysis is not a standardless comparison of the value of State expression versus the incidental effects on abortion access. The proper approach is set out by *Gonzales*: "when the regulation is rational and in pursuit of legitimate ends" — *i.e.*, when an abortion regulation is intended to defend respect for unborn life and rationally furthers that goal — "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence[.]" *Gonzales*, 550 U.S. at 166; *see also Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 539 (9th Cir. 2004).

The benefits of the ultrasound law are plain. Although the panel speculated that the effect of seeing the ultrasound could "dissipate[]" before the abortion, Slip Op. at 37, Indiana could reasonably have predicted the opposite. Indeed, the Supreme Court has treated the benefits of pre-abortion waiting periods as self-evident: "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Casey*, 505 U.S. at 885 (joint opinion). The panel should have shown greater deference to the policy judgment of the Indiana legislature.

B. The panel misidentified the relevant population of women.

Finally, the panel conflicted with other authority in its definition of the group affected by the ultrasound law. In this Court, an abortion restriction cannot be held facially unconstitutional unless it imposes an undue burden on a "substantial fraction" of the women "for whom it is an actual rather than an irrelevant restriction."

Casey, 505 U.S. at 895 (joint opinion); *A Woman's Choice*, 305 F.3d at 687.[4] The panel adopted the district court's finding that the relevant population "consisted of low income women who do not live near one of PPINK's six health centers where ultrasounds are available." Slip Op. at 17. That approach conflicts with Supreme Court and Seventh Circuit authority.

That definition of the relevant population *excludes* everyone for whom the ultrasound law is *not* a burden. The ultrasound law is presumably "relevant" to every woman who would need to obtain an ultrasound the day before an abortion — it is simply that many of those women would not find it burdensome to do so. In other words, instead of determining whether a "substantial fraction" of affected women would be unduly burdened, *Casey*, 505 U.S. at 895 (joint opinion), the panel and the district court merely held that *some* women would be unduly burdened, and that the ultrasound law was therefore invalid.

That is not a proper basis for facially invalidating an abortion law. It is improper to evaluate an abortion law with reference to women "for whom [the law] is … an irrelevant restriction." *Hellerstedt*, 136 S. Ct. at 2320. But it is no less improper to facially invalidate a regulation by focusing *solely* on the allegedly burdened population. *See Gonzales*, 550 U.S. at 168 ("We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely

[4] The Fifth Circuit adopts a more stringent test under which facial challenges to abortion laws "will succeed only where the plaintiff shows that there is *no* set of circumstances under which the statute would be constitutional." *See Barnes v. State of Miss.*, 992 F.2d 1335, 1342 (5th Cir. 1993); *Barnes*, 970 F.2d at 14 n.2.

those in which the woman suffers from medical complications."); *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958–59 (8th Cir. 2017), *cert. denied,* 138 S. Ct. 2573 (2018).

If PPINK wished to challenge the ultrasound law based on its effects on low-income women who live far away from particular clinics, the proper vehicle would have been an as-applied challenge, not a facial challenge. As the *Gonzales* Court explained, that is the proper vehicle when plaintiffs wish to prove that abortion regulations impose undue burdens "in discrete and well-defined instances[.]" 550 U.S. at 167. The panel erred by applying the strong remedy of facial invalidation instead.

CONCLUSION

The petition for *en banc* review should be granted and the judgment of the district court should be reversed.

Dated, August 29, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 2,593 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: August 29, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2018, I caused the foregoing Brief to be filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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