No. 18-1019

In the Supreme Court of the United States

KRISTINA BOX, Commissioner, Indiana Department of Health, *et al.*, *Petitioners*,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF LOUISIANA, ALABAMA, ARKANSAS, IDAHO, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, WEST VIRGINIA, KENTUCKY, BY AND THROUGH GOVERNOR BEVIN, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

May a State, consistent with the Fourteenth Amendment, require an ultrasound as part of informed consent at least eighteen hours before an abortion?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

This case illustrates the widespread confusion *Whole Women's Health v. Hellerstedt* has wrought and why this Court should clarify it. The Indiana ultrasound law requires that abortion providers must include an opportunity for a woman to view an ultrasound image of her unborn child eighteen hours before an abortion. Ind. Code Ann. §16-34-2-1.1(a)(5). There should have been little controversy about the ultrasound law's constitutionality. This Court and others have long recognized that because the decision to obtain an abortion is a grave one, State laws requiring informed-consent disclosures and short waiting periods are constitutional. *See*, *e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–87 (1992) (joint opinion). This Court has also emphasized the State's authority to regulate abortion to further respect for unborn life and has established a standard of review appropriate for such laws. *Gonzales v. Carhart*, 550 U.S. 124 (2007). Yet the Seventh Circuit nevertheless held this ultrasound law – a common feature of many states' abortion regulations – facially invalid on the theory that it imposes an undue burden on the abortion decision.

The Seventh Circuit's holding marks a significant departure from established caselaw upholding similar laws. It reflects the Seventh Circuit's apparent view that *Whole Woman's Health v. Hellerstedt*, 136 S. Ct.

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[1] Consistent with Supreme Court Rule 37.2(a), *amici* provided notice to the parties' attorneys more than ten days in advance of filing.

2292 (2016), radically reshaped the law applicable to abortion cases. The court analyzed the ultrasound law under radical new standards derived from *Hellerstedt* without even mentioning *Gonzales*. Its decision is a bellwether – it illustrates a trend that is wreaking havoc with State abortion regulatory schemes and bogging States down in federal litigation over long-settled law. That trend is particularly disturbing when it threatens regulations whose purpose is to ensure informed consent or to show respect for unborn life.

Amici are States that regulate abortion, in part, to express their profound respect for life. *Amici* have an interest in ensuring that courts scrutinize such regulations under the appropriate standards. Many require a pre-abortion waiting period and have ultrasound requirements similar to the Indiana pre-abortion ultrasound law.[2] *Amici* strongly support Indiana's authority to promote informed consent and to protect unborn life and human dignity through the ultrasound law. *Amici* urge the Court to grant review, correct the Seventh Circuit's misapprehensions about *Hellerstedt*, and reverse.

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[2] *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.

STATEMENT

The relevant facts are set out in the Petition. *Amici*, however, wish to emphasize the Seventh Circuit's erroneous analysis of PPINK's failure to obtain additional ultrasound machines.

PPINK operates sixteen centers across Indiana. All of those centers currently provide pre-abortion counseling and four perform abortions. Pet. 6. The ultrasound law effectively requires PPINK's centers to have ultrasound equipment to continue providing counseling. The four abortion-providing centers and two others have ultrasound machines.

PPINK *could* obtain additional, legally compliant ultrasound equipment. However, it claimed in the lower courts that its *preferred* ultrasound machine — a $25,000 model — is too expensive to install more widely without diverting resources from PPINK's other priorities. App. 9a, 26a–27a. PPINK therefore told the lower courts that it will limit its pre-abortion counseling services. Because fewer PPINK clinics would offer pre-abortion counseling under the ultrasound law, women allegedly would have to travel farther to obtain abortions. That was the *sole* burden on abortion identified by the Seventh Circuit. App. 18a ("*All* 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[.]") (emphasis added).

Indiana suggested that PPINK could mitigate that alleged burden by purchasing less expensive ultrasound machines. *Id.* at 26a–27a. That would

satisfy the regulatory requirement and enable PPINK to provide counseling consistent with the ultrasound law at more of its centers. But the Seventh Circuit held that PPINK "set forth a reasonable explanation" for preferring more expensive ones. *Id.* at 28a. The appeal court affirmed the district court's choice to "defer" to PPINK's "justifiable business decision" that its needs would be best served by the more expensive machines. *Id.* at 27a (endorsing the district court's view that "'the undue burden inquiry does not contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a new abortion regulation'") (quoting *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 273 F. Supp. 3d 1013, 1023 (S.D. Ind. 2017)). Because mitigating the effects of the ultrasound law would have been inconsistent with PPINK's preferred business practices, the Seventh Circuit treated the burdens on abortion as results of the law.

The Seventh Circuit also held that "PPINK rationally could determine that it was not the best allocation of its resources" to train staff in using new ultrasound equipment, App. 28a, reasoning that it is not "appropriate … to dictate the best use of resources for a business, provided its choices are within the range of reasonableness." *Id.* 28a–29a. PPINK's preferences thus once again took precedence over Indiana's regulatory mandates:

> [N]either the State nor the courts has the authority to rewrite PPINK's mission and dictate how it must allocate its limited

> resources. PPINK operates in a world where limited health care dollars for mostly poor women must be allocated in an efficient way, and in a way that provides the greatest care for the greatest needs.

App. 29a.

SUMMARY OF ARGUMENT

The root of the Seventh Circuit's error is its misreading of *Hellerstedt*, which led the court to a series of mistakes about the nature of the "undue burden" test. *Casey*, 505 U.S. at 877. The appeal court's three most important legal errors each merit this Court's review.

First, the appeal court's reliance on *Hellerstedt* led it to discount Indiana's unquestionably valid interests in promoting informed consent and respect for unborn life. When a court reviews a regulation intended to promote the health and safety of women seeking abortions — as in *Hellerstedt* — this Court has held that a balancing of the regulation's benefits and burdens is necessary. But that balancing makes no sense when a State's objective is to ensure informed consent and promote respect for unborn life. In emphasizing *Hellerstedt*, the Seventh Circuit entirely overlooked *Gonzales*, which establishes the appropriate standard in cases like this one.

Second, the Seventh Circuit showed unprecedented solicitude for PPINK's business preferences. It went so far as to say that PPINK could not be expected to adjust its business decisions or reallocate resources in response to the ultrasound law. It then attributed the

purported burdens of the law *to the State*, rather than to PPINK's inflexibility. But PPINK, like any other business, must change its practices when the law changes — even if its preferred use of resources is "reasonable". If PPINK chooses not to do so, Indiana is not to blame. Considerable authority established that, contrary to the court's conclusion, PPINK should not be able to obtain invalidation of State laws without making good-faith efforts to comply.

Third, the Seventh Circuit applied a skewed analysis that was sure to lead to facial invalidation of the law. Instead of determining whether the women burdened by the ultrasound law comprise a "substantial fraction" of the women for whom the law is "relevant," *Casey*, 505 U.S. at 895, it focused *exclusively* on the women it considered to be burdened. That misapplies this Court's precedents, splits from the decisions of other circuits, and virtually ensures any law will fail this test.

Not only do those errors justify this Court's review, but they serve as exemplars of broader confusion in lower courts about how to apply *Hellerstedt*. Abortion providers have taken *Hellerstedt* as an opportunity to attack long-established principles of abortion law and to initiate wholesale attacks on long-settled regulatory schemes. Cases like this one show that *Hellerstedt* is susceptible to serious misinterpretations and manipulation. This Court should take the opportunity to clarify the meaning of that case, for the benefit of all involved.

ARGUMENT

I. THE LOWER COURT MISAPPLIED THE UNDUE BURDEN TEST AND SPLIT WITH MULTIPLE LOWER COURTS.

A. The Seventh Circuit misapplied *Hellerstedt* to a statute intended to promote respect for unborn life.

The appeal court acknowledged this case is controlled by the undue burden test. App. 13a. 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 (emphasis added); App. 13a. But the Seventh Circuit instead treated the undue burden test as mandating a crude balancing analysis: It added up the benefits and purported burdens of the ultrasound statute, App. 17a, 32a, and tried to weigh them against each other, *id.* at 35a–49a. The relevant standard, it held, was whether the burdens were "disproportionate" to the benefits. *Id.* at 37a. That approach conflicts with *Casey* and *Gonzales* because it gives insufficient weight to the State's interests in the ultrasound law.

1. Mere balancing of benefits and burdens is inappropriate for statutes intended to promote informed consent and to further respect for unborn life. While it may be relevant to health regulations, such balancing cannot fully capture the importance these State interests.

Pre-abortion informed consent disclosures and waiting periods are classic — and traditionally constitutional — means by which States further

respect for life. *Casey*, 505 U.S. at 881–87. And "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." *Id.* at 886. As the Supreme Court explained in *Gonzales v. Carhart* — which the appeal court did not even cite — authority to pass such laws flows from a State's "legitimate interest … in protecting the life of the fetus that may become a child." 550 U.S. at 146. The State may pursue that interest by "'express[ing] profound respect for the life of the unborn'" and encouraging women to do the same. *Id.* (quoting *Casey*, 505 U.S. at 887). When a State does so, the fact that an abortion regulation "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" *Id. at* 157–58 (quoting *Casey*, 505 U.S. at 874) (alteration omitted). So long as the effects of such laws do not amount to a "substantial burden" on their own, they survive the undue burden analysis.

When a State seeks to further that interest, it is impossible to directly compare the regulation's moral and expressive ends with potential medical tradeoffs. Consider a different law enacted for a similar purpose: When Congress determined 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.

The relevant values are incommensurable. Applying a balancing test to statutes like the ultrasound law inevitably exceeds the proper limits of judicial competence and authority. When a State regulates abortion to protect women's health, as in *Hellerstedt*, this Court has held that some balancing of burdens and benefits is necessary. *See*, *e.g.*, 136 S. Ct. at 2309–10. But when a State's abortion regulations promote informed consent and further respect for unborn life, judicial standards are lacking. There is no way to perform such a balancing analysis without making a *policy* judgment about the *value* of changing even a single woman's mind about terminating her pregnancy and the *value* of expressing respect for unborn life in particular ways. In the long run, there is no principled way to apply the Seventh Circuit's inquiry to evaluate whether alleged burdens are "disproportionate" to the benefits of expressing respect for unborn life. App. 37a. The Seventh Circuit's analysis renders abortion caselaw even more unpredictable.

The correct course is the one this Court followed in *Gonzales*. Rather than standardless judicial second-guessing, the Court should recognize that "when the regulation is rational and in pursuit of legitimate ends" — *i.e.*, when an abortion regulation is intended to promote informed consent or 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). Unless such laws impose a "substantial obstacle" on the decision to obtain an abortion, "incidental effect[s]" on the logistics or expense of an abortion "cannot be enough to invalidate" a duly enacted State law. 550 U.S. 124, 157–58 (2007) (quoting *Casey*, 505 U.S. at 874) (alteration and quotes omitted).

The benefits of the ultrasound law are plain. If the sight of an unborn child inside the body of the mother preparing to terminate its life is *not* "truthful, relevant, nonmisleading information" that could be valuable to a woman considering an abortion, *see Casey*, 505 U.S. at 882, it is hard to imagine what would be. The Seventh Circuit, however, *speculated* that the effect of seeing the ultrasound might "dissipate[]" over the eighteen hours before the abortion, App. 40a. Indiana reasonably predicted the opposite. Indeed, the Supreme Court has treated the benefits of pre-abortion waiting periods as self-evident: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Casey*, 505 U.S. at 885. And although the Seventh Circuit *further* speculated that few women would actually change their minds as a result of an early ultrasound, App. 32a–33a, 38a–40a, that only proves the difficulty and impropriety of comparing the value of an unborn human life with the other considerations a court may subjectively deem more compelling. The Seventh Circuit's improper balancing analysis thus gave inadequate deference to

the policy judgment of the Indiana legislature – and improperly substituted its own.

2. The Seventh Circuit's refusal to accommodate Indiana's policy judgments rested in large part on a misreading of *Hellerstedt*. Instead of analyzing the ultrasound law as *Gonzales* requires, the court held that under *Hellerstedt* there is *no* difference in the analyses applicable to different types of abortion regulations — a balancing test governs them all. App. 16a–17a. The court relied on the fact that this Court in *Hellerstedt*, in describing the applicable analysis, "cited specifically to the balancing the *Casey* court did for [regulations] not justified by a concern for women's health — those related to spousal notification and parental consent." *Id*. That misconstruction of *Hellerstedt* merits review.

Hellerstedt is consistent with a more deferential analysis of State expressions of respect for unborn life. In the passage upon which the appeal court relied, the *Hellerstedt* majority simply cited portions of *Casey* that illustrate how to identify a "substantial obstacle" to abortion. 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887–98, 899–901). The cited language in *Casey* shows how to identify burdens and determine their severity; *Hellerstedt* accordingly held that under *Casey* a court cannot determine whether a substantial obstacle exists without "consider[ing] the burdens a law imposes." *Id.*

Although *Hellerstedt* characterized that as a form of "balancing," what *Hellerstedt* actually stands for is the proposition that in identifying a substantial obstacle to abortion courts should conduct their own analysis of facts in the record. *Id.* at 2310. The Seventh Circuit's

conclusion — that *Hellerstedt* required it to determine whether purported burdens are "disproportionate" to Indiana's respect for unborn life — does not follow.

Hellerstedt reaffirms the traditional obligation of lower courts to find facts. *Hellerstedt*, 136 S. Ct. at 2309–10. A court should consider the total evidence in any case. *See Gonzales*, 550 U.S. at 165. But in a case like this one, where the State has elected to regulate medicine in order to encourage informed consent and respect for unborn life, how is a court to consider those facts in light of the State's avowed purposes? The answer is not in *Hellerstedt*, which reviewed State health regulations, but in *Gonzales*: In that circumstance, where judicial competence is at a low ebb, the "the balance of risks[] [is] within the *legislative competence*[.]" *Gonzales*, 550 U.S. at 166 (emphasis added).

A legislature's reasonable resolution of medical questions in comparison with moral and ethical purposes deserves more deference in a case like this one than in a case like *Hellerstedt* — and more than the Seventh Circuit gave here. The fact that the Seventh Circuit applied *Hellerstedt* in the way that it did, however, justifies review to clarify the proper standard.

B. The Seventh Circuit misapplied *Hellerstedt* and split from other circuits in failing to hold Plaintiffs to their burden to prove good-faith efforts to comply.

The Seventh Circuit also conflicts with this Court and splits from other circuits by attributing PPINK's predicted reduction of pre-abortion counseling to the State, as a burden of the ultrasound law, rather than to PPINK. If the undue burden standard is to make any sense at all, abortion providers must be expected to undertake good-faith efforts to comply with State laws, or at least show why compliance is impossible. Otherwise, abortion providers can manufacture burdens on abortion simply by refusing to comply with reasonable regulations, or refusing to comply in acceptable more economical ways. Such manipulation would be an intolerable threat to the undue burden analysis, and indeed, to the integrity of judicial review. But that is exactly what happened here.

1. The Seventh Circuit held that because PPINK made "reasonable" business decisions not to purchase affordable ultrasound equipment or to train additional workers in how to perform ultrasounds, the burdens on abortion resulting from lack of ultrasound availability must be attributed to the State. App. 26a–31a. That holding rested on the assumption not only that "the district court was entitled to defer to PPINK's justifiable business decisions," *id.* at 28a, but that "neither the State nor the courts has the authority to … dictate how [PPINK] must allocate its limited resources." *Id.* at 29a.

The notion that a business's preferences override acceptable means of compliance and override a State's authority to encourage respect for human life by ensuring a woman is fully informed before she makes an irrevocable decision to terminate the life of her baby has no precedent. The Seventh Circuit cited only a *Title VII* case explaining that federal anti-discrimination law distinguishes between "unlawful hiring practices" and ordinary "business judgments" — a proposition with little apparent relevance. *Riley v. Elkhart Cmty. Sch.*, 829 F.3d 886, 895 (7th Cir. 2016) (quotes omitted); App. 28a. At any rate, *all* business regulation directs how organizations "allocate [their] limited resources." App. 29a. Not even *Lochner* put business decisions outside the realm of regulation altogether, let alone said the government categorically lacks police power authority to make laws that may lead businesses to reallocate their resources.

It is hard to exaggerate how disruptive the Seventh Circuit's rule would be if applied more broadly. An abortion provider could challenge virtually any abortion regulation with hardly any judicial check.

Even if limited to the abortion context — as a special rule against second-guessing how abortion clinics choose to comply with abortion regulations — the rule is wrong. Whatever the advantages and disadvantages of particular pieces of ultrasound equipment might be, App. 27a, there is no dispute that PPINK could provide more pre-abortion counseling under the ultrasound law if it invested in equipment and training. The Seventh Circuit made no finding that purchasing additional ultrasound machines and

training staff in their use would be impossible, only that PPINK's decision not to do so was a "reasonable" one in light of PPINK's other business priorities. In other words, the appeal court treated the ultrasound law as burdening abortion simply because it would contradict PPINK's preferred use of resources, even crediting PPINK's choices over less costly *compliant* alternatives. That does not just *privilege* business decisions by Planned Parenthood and other abortion providers, it *constitutionalizes* them. No authority supports such unquestioning deference to a private organization or countenances such subjectivity. Planned Parenthood must accommodate its business practices to the law, not the other way around.

The Seventh Circuit's rule creates the worst possible incentives for abortion providers. Given a range of possible responses to a regulation, an abortion provider would have little incentive to use its resources to comply and no incentive to search for the least costly means. Rather, its incentive is to seek to facially invalidate the law in federal court by claiming it subjectively favors *more* expensive, *less* convenient forms of compliance, knowing that it will never be held to its word. The provider can threaten to reduce services, blame the State, and potentially obtain invalidation of the law — never having even attempted in good-faith to comply. If the abortion provider happened to *lose* in court, it would still remain free to adopt economical means of compliance and suffer no consequences from exaggerating its expected burdens.

This Court should clarify that *Hellerstedt* does not justify such a radical departure from this Court's

precedent regarding the application of the undue burden standard. And if the undue burden standard can be so easily manipulated, then that too bears further examination.

2. Supreme Court and other authority rejects the Seventh Circuit's approach. The circuit court relied, once again, on *Hellerstedt*. Under the Seventh Circuit's reading:

> [t]he [*Hellerstedt*] Court looked at the cost a facility would have to incur to meet the [challenged] requirements — $1–$3 million — and assumed that the facilities would close rather than be able to meet the requirements, despite the fact that each facility could, in an alternate universe where resources were unlimited, simply make the changes.

App. 30a. That is wrong on multiple levels. To begin with, the *Hellerstedt* majority did not "assume[] that facilities would close" as a result of the challenged law; it found that most of Texas's clinics *had* closed, *see* 136 S. Ct. at 2312, and that a court could infer based upon the record evidence that the challenged law was at fault, *id.* at 2313. And while the *Hellerstedt* Court plainly did not adopt the assumption that abortion clinics' resources are "unlimited," App. 30a, it does not follow that a court should altogether *excuse* an abortion provider from mitigating the costs of compliance using the resources it does have.

At least three lines of authority contradict the Seventh Circuit's reasoning. *First*, this Court has held that "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). At least two circuits — the Fifth and Eighth — have applied that rule in rejecting challenges to abortion regulations. *See K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994). Any burdens resulting from PPINK's business preference not to obtain ultrasound machines at other locations are "not of [Indiana's] own creation" and so, under those cases, have no constitutional significance. The Seventh Circuit's emphasis on such burdens thus creates a split in authority.

Second, the Supreme Court also held in *Gonzales* that statutes "bar[ring] certain [medical] procedures and substitut[ing] others" are not unduly burdensome simply because a doctor prefers to use the prohibited procedure. 550 U.S. at 158. If an abortion provider's preferences on *medical* practices must give way, it makes no sense to hold that a statute is unduly burdensome because it conflicts with PPINK's *business* decisions.

Third, the Seventh Circuit's approach creates another split with the Fifth Circuit by excusing abortion providers from their obligation to prove good-faith efforts at compliance. In *June Medical Services L.L.C. v. Gee*, several abortion providers challenged Louisiana's admitting privileges requirement for abortion providers, a health and safety regulation similar to the law challenges in *Hellerstedt*. 905 F.3d 787 (5th Cir. 2018), *mandate stayed*, 139 S. Ct. 663

(Feb. 9, 2019). The Fifth Circuit reasoned that the question whether abortion providers had made "good-faith effort[s]" to comply with that requirement was an essential link in the "chain of causation" connecting the admitting privileges requirement to alleged burdens on abortion. *Id.* at 808. But upon finding — based on a close review of the record — that several abortion providers had *not* made good-faith efforts to comply, the Seventh Circuit held that the providers had not carried their burden to prove that the admitting privileges requirement creates a substantial obstacle to the abortion decision.

The Fifth Circuit's reasoning is irreconcilable with the Seventh Circuit's in this case. The Fifth Circuit did not inquire whether a decision not to seek admitting privileges was "reasonable". On the contrary, it looked for good-faith efforts from each Louisiana abortion doctor. And if the Seventh Circuit had evaluated whether PPINK had made good-faith efforts to outfit more of its centers for pre-abortion counseling, it almost certainly would have found PPINK's record wanting. Indeed, on the record here, there is not even adequate proof of a substantial obstacle if the six centers with ultrasound equipment were the only PPINK compliant facilities. Surely more is demanded by a plaintiff seeking to facially invalidate a law that advances indisputably important State interests.

Under the Seventh Circuit's standard, however, whenever an abortion provider considers an abortion regulation economically inconvenient, it can simply decline to comply, limit the services it offers potential patients, and blame the State. That rationale no doubt

will be employed in an attempt to invalidate a wide swath of State laws and entire regulatory regimes. It is hard to imagine a regulation that an abortion provider could *not* challenge through that strategy. This Court should grant review to course correct this undoubtedly disruptive and destructive understanding and application of its precedent.

C. The Seventh Circuit misapplied *Hellerstedt* and split from other circuits in its "large fraction" analysis.

Even assuming that the remainder of the Seventh Circuit's reasoning was correct, the circuit also split from other authority in granting facial relief. Specifically, the Seventh Circuit erred in its definition of the group affected by the ultrasound law.

An abortion restriction cannot be held facially unconstitutional unless it imposes an undue burden on at least 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).[3] The Seventh Circuit 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." App. 18a; *id.* at 36a (holding that "a court must look specifically at 'those women for whom the provision is an actual

[3] The standard for facial invalidation of an abortion regulation is still unsettled. *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting). *Amici* assume for purposes of this brief that the "substantial fraction" test applies.

rather than an irrelevant restriction'") (quoting *Hellerstedt*, 136 S. Ct. at 2309).

That definition of the relevant population is flawed because it 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. But the Seventh Circuit ignored those women in determining whether a "substantial fraction" of affected women would be unduly burdened. *Casey*, 505 U.S. at 895.

At most, the Seventh Circuit merely identified *some* women who would be burdened, and held on that basis that the ultrasound law is 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 those in which the woman suffers from medical complications."). That error, as Indiana's Petition explains, conflicts with the decisions of other lower courts. *See* Pet. 14–17.

If PPINK wished to challenge the ultrasound law based on its effects on low-income women who live farther away from particular clinics, the proper vehicle would have been an as-applied challenge, not a facial

challenge. "[A]s-applied challenges," after all, "are the basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168 (quotes omitted). In such a challenge, Plaintiffs would have the burden to prove that the ultrasound law imposes an undue burden "in discrete and well-defined instances[.]" 550 U.S. at 167. But if lower courts define the relevant groups of women as the Seventh Circuit did, facial invalidation is a virtual certainty. Indeed, under the Seventh Circuit's rule, a court could justify facial invalidation in *any* case merely by identifying some subset of women who would face an obstacle to obtaining an abortion. Such an approach flips the presumption of constitutionality and long-settled preference for as-applied challenges on their head. This Court's precedents do not permit that.

II. *AMICI* STATES NEED CLARITY ON THE MEANING OF *HELLERSTEDT*.

The Seventh Circuit's decision reflects a deeper problem in abortion jurisprudence. Abortion providers — and some lower courts — have interpreted *Hellerstedt* as a watershed decision that radically unsettles State abortion regulation. They have relied on *Hellerstedt* to challenge or invalidate laws that have been uncontroversial ever since *Casey*, and even to liberate plaintiffs from the burden of raising well-pleaded, justiciable challenges in the first place. Only this Court can provide the corrective for that trend, and it should do so soon.

1. To begin with, some litigants and lower courts have relied on *Hellerstedt* to invalidate long standing laws that should be unquestionably constitutional. This case may present the best example: A simple

requirement that relevant information be disclosed to patients in advance of an abortion procedure for the purpose of ensuring informed consent.

As this Court held in *Casey*, a State may require that abortion providers convey "truthful, nonmisleading information" that is "relevant to the decision" to obtain an abortion. 505 U.S. at 882. Lower courts have interpreted *Casey* in that way. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012); *Planned Parenthood Minn., N. Dak., S. Dak. v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (en banc). An ultrasound of an unborn child surely meets those criteria.

Casey likewise upheld a law requiring informed-consent disclosures "at least 24 hours before performing an abortion[.]" 505 U.S. at 881. Following *Casey*, the Seventh Circuit twice upheld laws that require pre-abortion informed consent 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). And several other circuits did 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 informed consent period for minors). Indeed, *amici* are aware of *no* post-*Casey* case holding that an informed consent period of 24 hours or less is unconstitutional. Given those pre-*Hellerstedt* precedents, it should have been obvious that a law

adding an ultrasound requirement to informed consent disclosures is constitutional. The fact that the Seventh Circuit departed from that long line of cases — relying heavily on *Hellerstedt* — demonstrates how *Hellerstedt* threatens long-settled laws.

This will not be the last such case. Other such challenges to long-upheld State laws are rapidly developing. *Compare Planned Parenthood of the Great Northwest v. Wasden*, No. 1:18-cv-00555 (D. Idaho) (challenging law requiring that abortions be performed by physicians), *with Mazurek v. Armstrong*, 520 U.S. 968 (1997) (upholding similar law). The result is inconsistency and confusion that only this Court can rectify.

2. That is not even the most radical implication of *Hellerstedt*. Some abortion providers have relied on *Hellerstedt* to challenge the cumulative effects of individually permissible regulations or to bring wholesale challenges against entire abortion clinic licensing systems. *See June Med. Servs. L.L.C. v. Gee*, No. 3:17-cv-404 (M.D. La.); *Jackson Women's Health Org. v. Currier*, No. 3:18-cv-00171 (S.D. Miss.); *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-00500 (W.D. Tex.); *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-00428 (E.D. Va.).

The premise of such challenges has been that if the cumulative effect of abortion licensing regulations outweighs their total health benefit, they are invalid *in toto*. Although plaintiffs in some of those cumulative-effects challenges have since amended their litigation positions, abortion providers plainly believe that *Hellerstedt* created a new framework that supports

broad-based burden challenges to whole legislative and regulatory schemes. If such challenges succeed, they would negate the decisions of several States to require abortion clinic licensing in the first place. Their immediate effect, moreover, would be to invalidate *every* clinic licensing regulation a State might have enacted — right down to the requirement that a clinic use sterile instruments when performing surgical abortions. *See* Jul. 26, 2018, Mem. in Supp. Mot. to Dismiss at 6-7, *June Med. Servs. L.L.C. v. Gee*, No. 3:17-cv-404 (M.D. La.).

Hellerstedt, in short, has opened a Pandora's box of legal theories and litigation that would be absurd in any other context. Only this Court can clarify that *Hellerstedt* was not the watershed decision abortion providers claim it was and reaffirm the right of States to enact reasonable abortion regulations.

CONCLUSION

The Court should grant certiorari and reverse the decision of the Seventh Circuit.

Respectfully submitted,

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