APPEAL NOS. 21-2480 & 21-2573

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WHOLE WOMAN'S HEALTH ALLIANCE, et al.,

Plaintiffs-Appellees,

v.

TODD ROKITA, Attorney General of Indiana, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Honorable Sarah Evans Barker
Case No. 1:18-cv-01904-SEB-MJD

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS FOR REVERSAL

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Appellate Court No: 21-2480 & 21-2573

Short Caption: Whole Woman's Health Alliance v. Rokita

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Under Fed. R. App. P. 26.1 and 7th Cir. R. 26.1, Amicus Curiae Alliance Defending Freedom states that it is a non-profit organization, has no parent corporation, and does not issue stock. Alliance Defending Freedom is a public-interest law firm and will be the only firm appearing for itself as amicus in this proceeding.

Dated: October 7, 2021

Respectfully submitted

/s/ John J. Bursch
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INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is a nonprofit, public-interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect constitutional freedoms and the right to life. Amicus has a strong interest in the courts applying the correct legal standards when evaluating constitutional challenges to regulations ensuring that pregnant mothers seeking abortions are adequately informed before making the important decision whether to take the life of their own child. Accordingly, Amicus has a direct interest in the outcome of this case on appeal and offers additional medical and scientific information for the Court's consideration as it pertains to the informational components of the Indiana law at issue in this litigation.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. **Counsel for all parties have consented to the filing of this brief.**

INTRODUCTION AND SUMMARY OF ARGUMENT

Informed consent empowers patients by giving them the information necessary to consider all the risks and benefits of an intrusive medical procedure before agreeing to allow a physician to perform it. Such consent is particularly important when a woman makes the difficult decision whether to take her own child's life before it is born. That is why the Supreme Court has held that any asserted "right to abortion" does not prohibit a state "from taking steps to ensure that this choice is thoughtful and informed." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992) (plurality).

Importantly, a state desiring to help women make an informed choice has great leeway in deciding what information must be conveyed for a pregnant mother's consent to be valid in this weighty situation. "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Casey*, 505 U.S. at 872 (plurality).

Given that legal backdrop, Indiana easily passes constitutional muster with respect to its laws requiring abortion providers to inform pregnant mothers when "human physical life begins," Ind. Code § 16-34-2-1.1(a)(1)(E), and that "a fetus can feel pain at or before twenty (20) weeks of postfertilization age," Ind. Code § 16-34-2-1.1(a)(1)(G). These disclosures are well founded in scientific literature. And to the extent the district court concluded that there is conflicting information on these points, it was required to defer to the Indiana Legislature on matters of medical and scientific uncertainty. *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (summarizing Supreme Court's cases on this issue).

Accordingly, Amicus Alliance Defending Freedom urges the Court to reverse the district court and uphold Indiana's common-sense disclosure laws.

ARGUMENT

I. Informed consent ensures that pregnant mothers considering whether to make the difficult decision of taking the life of their child do so while fully considering all the circumstances.

"Informed consent is the legal embodiment of the concept that each individual has the right to make decisions affecting his or her health." Timothy J. Paterick et al., *Medical Informed Consent: General Considerations for Physicians*, 83 Mayo Clinic Proceedings 313, 313 (Mar. 1, 2008) ["*Informed Consent*"], https://mayocl.in/2WU114g. In other words, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable." *Id.* (quoting *Schloendorff v. The Society of the N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) (Benjamin Cardozo, J.)).

As a general matter, "the law protects the patient's right to informed consent by requiring physicians to disclose all pertinent information about risks and benefits of the procedure to the patient." *Informed Consent* at 313. Such information includes "disclosure of the risks of the suggested medical procedure and the risks of the alternatives to enable patients to make knowledgeable decisions." *Id.* "This exchange of information and ideas is the foundation of the patient-physician partnership and promotes informed decision making in the most complex medical situations." *Id.*

This case is not the first in which the courts have been asked to consider state statutes enacted to increase the information available to pregnant mothers considering whether to take the life of their child. *Casey* itself, while generally upholding *Roe v. Wade*, 410 U.S. 113 (1973), sustained Pennsylvania's informed-consent requirements. Except in a medical emergency, the Pennsylvania statute required "that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of

childbirth, and the 'probable gestational age of the unborn child.'" *Casey*, 505 U.S. at 881 (plurality). In addition, the "physician or a qualified nonphysician" was required to "inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion." *Id.* The abortionist could not move forward and perform the procedure "unless the woman certifie[d] in writing that she ha[d] been informed of the availability of these printed materials and ha[d] been provided them if she cho[se] to view them." *Id.*

The Supreme Court viewed this statute as "unexceptional." *Casey*, 505 U.S. at 881 (plurality). Indeed, *Casey* overruled the Court's previous decisions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), to the extent those cases invalidated state laws requiring "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." *Casey*, 505 U.S. at 882 (plurality). And the Court expressly held that it could not "be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." *Id.* As a result, "[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.* "If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." *Id.*

In sum, "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Casey*, 505 U.S. at 884 (plurality). And such information is not strictly limited to the pregnant mother's scientific considerations. "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are *philosophic and social arguments of great weight* that can be brought to bear in favor of continuing the pregnancy to full term." *Id.* at 872 (emphasis added).

II. A state's informed-consent laws regarding the taking of innocent human life are valid if they require the provision of "truthful and not misleading" information, with doubt being resolved in favor of the Legislature.

As the *Casey* plurality made clear, informed-consent requirements are constitutional if they require abortionists to provide pregnant mothers with "truthful and not misleading" information. *Casey*, 505 U.S. at 882 (plurality). But sometimes, as here, there may be conflicts between those in favor of and opposed to the taking of innocent human life as to what is "truthful and not misleading." When that happens, the federal courts should defer to the wisdom of legislative bodies.

Chief Justice Roberts' concurrence in *June Medical* described the Court's precedents on this point at length. "We have explained," he said, "that the 'traditional rule' that 'state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty' is 'consistent with *Casey*.'" 140 S. Ct. at 2136 (Robert, C.J., concurring) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). So in *Casey*, the Court did not second-guess legislative medical and scientific determinations but rather "focuse[d] on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts." *Id.* (numerous citations omitted).

Chief Justice Roberts highlighted several portions of *Casey* to make this point. The Court, for example, did not second-guess Pennsylvania's determination that a 24-hour waiting period further the state's interest in maternal health (despite the district court concluding that the law did "not further the state interest in maternal health"); it merely considered whether the waiting period imposed a substantial obstacle. *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring). The *Casey* opinion "similarly looked to whether there was a substantial burden, not whether benefits outweighed burdens"—i.e., did not reassess the benefits the legislature imputed—"in analyzing Pennsylvania's requirement that physicians provide certain 'truthful, nonmisleading information' about the nature of the abortion procedure." *Id.* at 2137. In other words, as the Court has clarified in other cases, when medical justifications for a pro-life law are debatable, that "provides a sufficient basis to conclude in [a] facial attack that the [law] does not impose an undue burden." *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007).

Given these lenient standards for legislative informed-consent laws, Indiana's laws easily pass constitutional muster when requiring disclosure about the human physical life as well as when an unborn baby may start to experience pain while still in the womb.

III. Indiana's human-physical-life and fetal-pain disclosure requirements are truthful and nonmisleading. Therefore, they are constitutional.

A. Indiana's mandatory disclosure related to human physical life is constitutional.

Indiana Code § 16-34-2-1.1(a)(1)(E) requires abortionists to disclose to pregnant mothers considering whether to take their unborn baby's life that "human physical life begins when a human ovum is fertilized by a human sperm." There can be no real dispute about that proposition.

To begin, Americans recognize "biologists" (as opposed to philosophers, religious leaders, Supreme Court Justices, or voters) as the group most qualified to determine when a human life begins. Steven A. Jacobs, *Balancing Abortion Rights and Fetal Rights: A Mixed Methods Mediation of the U.S. Abortion Debate* 208 (June 2019) (Ph.D. dissertation, University of Chicago), https://perma.cc/GZT2-8JDN. And the overwhelming percentage of biologists surveyed on the question believe that human life begins at fertilization. *Id.* at 252.

This is not a recent development. Early discoveries about fertilization took place in the mid- to late 1800s and established "that fertilization involved the union of egg and sperm nuclei and represented therefore the cytological mechanism underlying biparental inheritance." C.R. Austin, *The mammalian egg* 4 (Oxford Blackwell Scientific Publications 1961). Today, scientists and researchers' acceptance of fertilization as the beginning of human life is such a well-accepted biological view that there is really no viable alternative in the scientific literature. (For a non-comprehensive list of journal articles, legislative testimonies, and medical textbooks on the subject, *see 2021 Report: Scientific, Legal, Pro-Life, & Pro-Choice Sources on When a Human's Life Begins*, https://whendoeslifebegin.org.)

Thus, it is unsurprising that Dr. Maureen Condic's review of scientific journals in the field of biological and life sciences demonstrated that peer-reviewed articles definitively adopt the fertilization view. Maureen L. Condic, *The Origin of Human Life at Fertilization: Quotes Compiled* (Nov. 2017), https://perma.cc/H9ED-9LCC; accord Samuel B. Condic & Maureen L. Condic, *Human Embryos, Human Beings: A Scientific and Philosophical Approach* (2018). Even pro-abortion ethicist Peter Singer recognizes this fact: "There is no doubt that from the first moments of its existence an embryo conceived from human sperm and eggs is a human being." Peter Singer, *Practical Ethics* 85–86 (2d ed. 1993).

Given all this, the district court here could not—and did not—say that Indiana's disclosure requirement regarding human physical life was false or misleading. Indeed, the court credited Dr. Curlin's assessment that "the disclosure, carefully crafted to reference only 'physical' life, is not scientifically controversial." *Whole Woman's Health All. v. Rokita*, __ F. Supp. 3d __, 2021 WL 3508211, at *65 (S.D. Ind. Aug. 10, 2021). "In other words, a living human organism is created when a human ovum is fertilized by a human sperm, and thus Indiana's mandated disclosure advances nothing more than this uncontroversial biological statement." *Id.*

Yet the district court held the disclosure unconstitutionally "superficial," *Rokita*, 2021 WL 3508211, at *65, whatever that means, because the real question is when "life" begins, "a question ripe for debate among 'those trained in the respective disciplines of medicine, philosophy, and theology,' about which neither the State nor the judiciary may 'speculate as to the answer.'" *Id.* (quoting *Roe*, 410 U.S. at 159. In addition, the district court discredited the State's expert because his "opinions on this topic . . . are informed by his overall belief that abortion is the killing of an innocent human being," *id.*, even though that has nothing to do with the scientific and medical question. And the district court engaged in the exact opposite of deference, faulting the State for not presenting "evidence that this mandatory disclosure has actually ever served to inform or enhance the decision-making of a single woman." *Id.*

As explained at length above, the standard is whether the required disclosure is truthful and not misleading, with any scientific or medical questions implicated by that inquiry resulting in deference to the legislative body. Indiana's disclosure relating to fetal life easily satisfies that low bar. Accordingly, this Court should reverse and reinstate Ind. Code § 16-34-2-1.1(a)(1)(E).

B. Indiana's mandatory disclosure related to fetal pain is also constitutional.

Indiana Code § 16-34-2-1.1(a)(1)(G) also requires abortionists to disclose that "[o]bjective scientific information shows that a fetus can feel pain at or before twenty (20) weeks of postfertilization age." The district court invalidated this provision based on the court's view that the assertion "has been rejected by all the major medical organizations." *Rokita*, 2021 WL 3508211, at *63. Again, that was improper judicial second-guessing of a legislative determination—and wrong.[2]

"[N]eonatal and medical science . . . now graphically portrays, as science was unable to do [at the time *Roe* was decided] how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring). A human being perceives pain after receptors in the body transmit a message to the spinal cord, which then carries the pain message into the thalamus and cortex in the brain for processing. And these structures develop well before 20 weeks. At 12 weeks, sensory fibers have already grown into the spinal cord and successfully connected with the thalamus, the "essential organ of the affective side of our sensation, especially pain," and thus has "pivotal importance" for "fetal pain." Carlo V. Bellieni, *Analgesia for fetal pain during prenatal surgery: 10 years of progress*, 89 PEDIATRIC RSCH. 1612-18 (2021), abstract at https://www.nature.com/articles/s41390-020-01170-2. Likewise, by 12 weeks, the first projections from the brain's thalamus connect to the cortical subplate. Stuart Derbyshire & John Bockmann, *Reconsidering fetal pain*, 46 J. MED. ETHICS 4 (2020), https://jme.bmj.com/content/46/1/3. The cortical subplate is a temporary structure that forms beneath the permanent cortical plate. *Id.* Neurons initially migrate into the subplate, then move to the cortex. *Id.*

[2] The following science is cited and explained at greater length in the Amicus Brief for Monique Chireau Wubbenhorst, M.D., M.P.H. et al., in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, https://bit.ly/3agAT6y.

The fact that a baby in utero may not have a fully functional cortex before 24 weeks' gestation has led some to wrongly believe that the baby cannot feel pain before then, even though that ignores evidence demonstrating that the baby responds to noxious stimuli much earlier. *E.g.*, Vivette Glover & Nicholas Fisk, *Fetal pain: implications for research and practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881, 882 (1999), https://www.nrlc.org/uploads/fetalpain/BJOGfetalpain1999.pdf. For example, in 2010, the Royal College of Obstetricians and Gynaecologists (RCOG) issued a report stating that very conclusion. Royal Coll. of Obstetricians & Gynaecologists, *Fetal Awareness Review of Research and Recommendations for Practice: Report of a Working Party* (Mar. 2010), https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf. And the American College of Obstetricians and Gynecologists (ACOG)—the same organizations on which the district court relied—recently used the RCOG report to make the same point. ACOG, *Facts are Important: Fetal Pain*, https://www.acog.org/advocacy/facts-are-important/fetal-pain (undated but, for a temporal reference, the article mentions the Trump Administration).

But researchers now call such conclusions unfounded: "We could rewrite this [report] as 'in theory they can't feel pain, therefore they don't.'" Bellieni, *Analgesia*, at 5. More recent research "call[s] into question the necessity of the cortex for pain and demonstrat[es] functional thalamic connectivity into the subplate." *Id.* at 3. In fact, "even if the cortex is deemed necessary for pain experience, there is now good evidence that thalamic projections into the subplate, which emerge around 12 weeks' gestation, are functional and equivalent to thalamortical projections that emerge around 24 weeks' gestation." *Id.* at 4. So, researchers now understand that "current neuroscientific evidence undermine the necessity of the cortex for pain experience. Thus, current neuroscientific evidence supports the possibility of fetal pain before the 'consensus' cut-off of 24 weeks." *Id.* at 4.

"Review of the last decade's research shows that science has also disproved other theories arguing that fetal pain is impossible before 24 weeks. Amicus Br. for Monique Chireau Wubbenhorst, M.D., M.P.H. et al. at 25, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. July 29, 2021), https://bit.ly/3agAT6y (citing Bellieni, *Analgesia* at 1–7). Indeed, "one of the most prominent researchers" in the fetal-pain field "has changed his conclusions, due to the new evidence." Bellieni, *Analgesia* at 1. "Overall," he now concludes, "the evidence, and a balanced reading of that evidence, points towards an immediate and unreflective pain experience mediated by the developing function of the nervous system from as early as 12 weeks." Derbyshire, *Reconsidering fetal pain* at 6. To reiterate, that's at 12 weeks, well before the 20 weeks referenced in Indiana's informed-consent law.

So where does that leave this reviewing court? It does not need to sort through the reams of scientific evidence, even though the best and most current research "suggests that the unborn child, like infants, may even experience pain *more severely* than mature people." Dr. Wubbenhorst Amicus Br. 25–26 (emphasis added). (That is why "[f]etal anesthesia is the standard of care for any fetal procedure." *Id.* at 26 (citing Bellieni, *Analgesia* at 1).) Instead, like the Supreme Court, this Court should defer to the Indiana Legislature on this point of science and medicine. Because Indiana's required disclosure is truthful and not misleading, the district court should be reversed and Indiana Code § 16-34-2-1.1(a)(1)(G) should be upheld.

CONCLUSION

Given the abundant medical and scientific evidence supporting both of Indiana's informed-consent provisions, this Court should reverse and hold that these provisions are constitutional.

Respectfully submitted,

Dated: October 7, 2021

By: */s/ John J. Bursch*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29 because this brief contains 3,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: October 7, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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