Nos. 21-2480 & 21-2573

In the United States Court of Appeals for the Seventh Circuit

WHOLE WOMAN'S HEALTH ALLIANCE, ET AL.,
Plaintiffs-Appellees,
v.
TODD ROKITA, in his official capacity as Attorney General of the State of Indiana, ET AL.,
Defendants-Appellants.

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

BRIEF OF AMICI THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA IN SUPPORT OF APPELLANTS

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Interest of Amici Curiae

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.[1]

This suit is one of multiple lawsuits filed in the wake of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), challenging long-standing and, until now, uncontroversial laws regulating abortion. *See* Am. Compl., *Planned Parenthood of the Great Nw. & the Haw. Islands v. Wasden*, No. 1:18-CV-0555-BLW (D. Idaho Dec. 10, 2020); Suppl. Am. Compl., *Jackson Women's Health Org. v. Currier*, No. 3:18-CV-00171-CWR-FKB (S.D. Miss. May 30, 2019); Compl., *Whole Woman's Health All. v. Paxton*, No. 1:18-CV-00500-LY (W.D. Tex. June 14, 2018).[2] Plaintiffs' theory in these cases is that the constitutionality of all abortion regulations must be

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. No consent is necessary for filing this brief. *See* Fed. R. App. P. 29(a)(2).

[2] Similar suits were filed in Louisiana, Arizona, Oklahoma, and Virginia. The parties in Louisiana agreed to dismissal with prejudice shortly after the Fifth Circuit required the plaintiffs to demonstrate standing for each law challenged. *See In re Gee*, 941 F.3d 153 (5th Cir. 2019) (per curiam); Final J., *June Med. Servs., LLC v. Gee*, No. 3:17-CV-00404-BAJ-RLB (M.D. La. Oct. 16, 2020). The parties in Arizona agreed to a dismissal without prejudice. Order, *Planned Parenthood Ariz., Inc. v. Brnovich*, No. 4:19-CV-00207-JGZ (D. Ariz. Nov. 5, 2020). The plaintiffs dismissed their suit in Oklahoma. *South Wind Women's Ctr. v. Hunter*, No. CV-2019-2506 (Okla. Cnty.) (dismissed Feb. 23, 2021). And the plaintiffs in Virginia voluntarily dismissed their appeal in the Fourth Circuit. Order, *Falls Church Med. Ctr., LLC v. Oliver*, No. 19-2382 (4th Cir. July 28, 2020).

reconsidered in light of *Whole Woman's Health*—even if the laws have existed for decades and been upheld by the Supreme Court.

Amici States have an interest in the constitutionality and stability of their abortion laws, which the district court's judgment threatens. Contrary to the district court's ruling, only the Supreme Court may modify its opinions about the scope of the right to abortion—not the American College of Obstetricians and Gynecologists (ACOG). And the Constitution does not establish some sort of schedule upon which Indiana must "update its statute[s] to reflect the evolution of medicine." *Whole Woman's Health All. v. Rokita*, No. 1:18-cv-01904-SEB-MJD, 2021 WL 3508211, at *46 n.56 (S.D. Ind. Aug. 10, 2021).

Amici States also have an interest in ensuring the health and safety of women seeking abortion—like any other medical procedure. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality op.). Unlike the district court's suggestion, States are not constitutionally obligated to water down their abortion regulations to the lowest possible health-and-safety standards in order to maximize the availability of abortion for every woman, no matter her personal circumstances.

Amici States urge the Court to reverse the judgment of the district court.

ARGUMENT

I. Existing Precedent Forecloses Plaintiffs' Claims, Requiring Reversal.

Believing that *Whole Woman's Health* effected a sea change in abortion jurisprudence, plaintiffs have challenged long-standing abortion regulations that have already been upheld by the Supreme Court and this Court. But the majority in *Whole*

Woman's Health never claimed it was modifying or overturning *Casey*'s undue-burden standard or any other decision of the Court. *Whole Woman's Health*, 136 S. Ct. at 2309. And, as the Chief Justice explained in his concurrence in *June Medical Services LLC v. Russo*, courts should take the *Whole Woman's Health* majority at its word. 140 S. Ct. 2103, 2138-39 (2020) (Roberts, C.J., concurring in the judgment). The Court's precedents remain intact.

Thus, while the circuits disagree about what exactly the undue-burden standard of *Casey*, as interpreted by *Whole Woman's Health*, requires,[3] the holdings of the Supreme Court and this Court under *Casey* are still binding. Unless and until the Supreme Court decides to overturn them, this Court must follow them. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). And in this case, that precedent requires reversing the district court's decision that various Indiana abortion regulations are unconstitutional. *See June Med.*, 140 S. Ct. at 2141 (Roberts, C.J., concurring in the judgment) ("*Stare decisis* instructs us to treat like cases alike.").[4]

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[3] This Court and the Eleventh Circuit have concluded that the undue-burden test incorporates a balancing analysis. *Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1258-59 & n.6 (11th Cir. 2021) (per curiam); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021). The Sixth and Eighth Circuits, as well as an en banc plurality of the Fifth Circuit, have rejected a balancing analysis and looked only for a legitimate state interest and substantial obstacle. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam); *see also Whole Woman's Health v. Paxton*, 10 F.4th 430, 440-42 (5th Cir. 2021) (en banc) (plurality op.).

[4] Amici States support reversal of the entire judgment below but focus on only a subset of those laws in this brief.

A. *Physician-Only Requirement*—Like most States, Indiana requires abortions, including medication abortions, to be performed by physicians.[5] Ind. Code § 16-34-2-1(a)(1). The constitutionality of physician-only requirements has been established since *Roe v. Wade*, in which the Supreme Court held that "[t]he State may define the term 'physician' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." 410 U.S. 113, 165 (1973). That holding was independent of the trimester in which the abortion took place. *Id.* As the Court later confirmed, "[e]ven during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference." *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam). And again, ten years after *Roe* was decided, the Court stated that it had "left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only

[5] Ala. Code § 26-23E-4(a); Alaska Stat. § 18.16.010(a)(1); Ark. Code §§ 20-16-603, -606; Del. Code tit. 24, § 1790(a); Fla. Stat. § 390.0111(2); Ga. Code § 16-12-141(e)(2); Idaho Code § 18-608; Iowa Code § 707.7(3); Kan. Stat. § 65-4a10(a); Ky. Rev. Stat. § 311.723(1); La. Stat. § 40:1061.10(A)(1); Md. Code Health-Gen. § 20-208; Mich. Comp. Laws § 750.15; Minn. Stat. § 145.412(1)(1); Miss. Code §§ 41-41-107(1), 41-75-1(f); Mo. Rev. Stat. § 188.080; Neb. Rev. Stat. § 28-335(1); Nev. Rev. Stat. § 442.250(1)(a); N.C. Gen. Stat. § 14-45.1(a); N.D. Cent. Code § 14-02.1-04(1); Ohio Rev. Code § 2919.11; Okla. Stat. § 1-731(A); 18 Pa. Cons. Stat. § 3204(a); S.C. Code § 44-41-20; S.D. Codified Laws § 34-23A-3; Tenn. Code § 39-15-213(c)(1); Tex. Health & Safety Code §§ 171.003, .063(a)(1); Utah Code § 76-7-302(2); Wis. Stat. §§ 253.105(2), 940.04(5)(a); Wyo. Stat. § 35-6-111.

physicians perform abortions." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 447 (1983) (*Akron I*).

In *Casey*, the Court considered a requirement that a physician had to provide some of the information necessary for informed consent. 505 U.S. at 884-85 (plurality op.). Reversing a prior decision that found a similar requirement unconstitutional, *Akron I*, 462 U.S. at 448, a plurality determined the requirement did not impose an unconstitutional undue burden, *Casey*, 505 U.S. at 885 (plurality op.). Instead, the Justices noted that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" *Id.* (emphasis added). If a State can have a physician-only requirement for giving out information, *a fortiori*, it can have one for giving out medication.

Post-*Casey*, a physician-only requirement was again upheld again in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), in which a physician-assistant sought to perform abortions. The plaintiff in *Mazurek* tried to distinguish *Roe*'s physician-only holding, arguing that "*Roe* did not anticipate that early abortions could be performed with pills; but today first trimester abortions are performed not only surgically but medically." Resp'ts Br. in Opp'n at 20, *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (No. 96-1104), 1997 WL 33484620, at *20. Nevertheless, citing *Roe*, *Menillo*, *Akron I*, and *Casey*, the Court upheld the requirement. *Mazurek*, 520 U.S. at 974-76.

Neither the district court nor plaintiffs here have cited any case in which a physician-only law has been held an unconstitutional undue burden. This Court should

not reject decades of Supreme Court precedent to become the first circuit court to do so.

B. *Second-Trimester Hospital/ASC Requirement*—Indiana also requires that second-trimester abortions be performed in hospitals or ambulatory-surgical centers (ASCs). Ind. Code § 16-34-2-1(a)(2). Abortion providers in Indiana previously and unsuccessfully challenged this requirement. *Gary-Nw. Ind. Women's Servs., Inc. v. Bowen*, 496 F. Supp. 894, 898 (N.D. Ind. 1980), *aff'd sub nom. Gary-Nw. Ind. Women's Servs., Inc. v. Orr*, 451 U.S. 934 (1981). The plaintiffs in *Gary-Northwest* made similar arguments to those the plaintiffs make here: in *Gary-Northwest*, the district court found that only one hospital in Indiana provided non-therapeutic abortions, and some indigent women could not travel to it. *Id.* Because childbirth was more dangerous than abortion, the plaintiffs asserted that the requirement did not reasonably relate to maternal health and was therefore unconstitutional. *Id.* As restated by the district court, the plaintiffs' arguments "seem to apply only to non-therapeutic early second trimester D & E abortions desired by indigent women financially unable to travel to the Gary Methodist Hospital." *Id.* Yet the district court found the requirement constitutional, as it was reasonably related to maternal health in the second trimester, *id.* at 899, and the Supreme Court affirmed, 451 U.S. 934.

Two years later and using *Roe*'s trimester test, the Supreme Court upheld a second-trimester hospital requirement in *Simopoulos v. Virginia*, when Virginia's definition of "hospital" included ASCs. 462 U.S. 506, 516-19 (1983); *see also id.* at 520 (O'Connor, J., concurring in part and in the judgment) (concluding that Virginia's requirement was not an undue burden). That same day, the Supreme Court held

unconstitutional second-trimester hospital requirements when ASCs were not included. *Akron I*, 462 U.S. at 431-39; *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 481-82 (1983). Thus, under *Roe*'s trimester system, second-trimester ASC requirements were found constitutional.

The undue-burden standard introduced in *Casey* rejected *Roe*'s trimester distinctions and gave States more flexibility to regulate the performance of abortions. 505 U.S. at 871-72. The Court held in *Whole Woman's Health* that this flexibility does not extend to requiring that *all* abortions be performed in an ASC, 136 S. Ct. at 2318, but the Court did not overrule *Simopoulos*. Instead, the Court distinguished *Simopoulos* on the grounds that it did not provide clear guidance for Texas's law that regulated all abortions, rather than the few that occurred in the second trimester. *Id.* at 2320. Thus, *Simopoulos* and *Gary-Northwest* remain good law and binding on this Court.

C. *In-Person-Counseling Requirement*—Indiana also requires that information necessary for informed consent be given "in the private . . . presence of the pregnant woman" by the physician performing the abortion, the referring physician, a physician assistant, or a certified nurse midwife. Ind. Code § 16-34-2-1.1(a)(1). As this Court previously noted, Indiana's in-person counseling requirement is "materially identical" to the counseling requirement upheld in *Casey*. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 684 (7th Cir. 2002) (citing *Casey*, 505 U.S. at 881-87). The plaintiffs in *A Woman's Choice* attempted to distinguish Indiana's law from that in *Casey* by pointing to district-court fact findings that Indiana's law required women to make two trips to the clinic, increasing both the financial and

mental costs of obtaining an abortion, possibly delaying some abortions until the second trimester, and potentially reducing by 10-13% the number of abortions performed in Indiana. *Id.* at 685. The district court in that case also found that the in-person counseling requirement had no persuasive effect on a woman's choice to have an abortion. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 132 F. Supp. 2d 1150, 1159-60 (S.D. Ind. 2001). Regardless, this Court followed *Casey* and upheld the law. *A Woman's Choice*, 305 F.3d at 693.

The district court's findings here are even less persuasive, similarly relying on delay and costs, but finding no decrease in the abortion rate. *Whole Woman's Health All.*, 2021 WL 3508211, at *22. And the district court did not "quarrel with the fact that in-person interactions yield some benefits in building a trusting relationship between patient and provider." *Id.* at *57. Under the Supreme Court's holding in *Casey* and this Court's holding in *A Woman's Choice*, Indiana's in-person-counseling requirement is constitutional.

D. *Telemedicine Ban and In-Person-Examination Requirement*—Finally, Indiana requires the physician who is to perform or induce the abortion to physically examine the woman, precluding abortion by telemedicine. Ind. Code §§ 16-34-2-1(a)(1); 16-34-2-1.1(a)(1), (a)(4), (b)(1); 25-1-9.5-8(a)(4). While the Supreme Court has not yet ruled on a telemedicine ban or in-person-examination requirement, its order staying the preliminary injunction in *Food and Drug Administration v. American College of Obstetricians and Gynecologists* is instructive. 141 S. Ct. 578 (2021). Relying primarily on the COVID-19 pandemic, ACOG challenged the FDA's requirement that mifepristone (one of the drugs used in medication abortions) be dispensed in person at a

healthcare facility. *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, 472 F. Supp. 3d 183, 189-92 (D. Md. 2020). The district court found that, in addition to the usual cost, delay, and burdens of travel, the requirement imposed a substantial obstacle to abortion in the light of the potential health risks of exposure to COVID-19 from in-person visits and the lower capacity of clinics to perform abortions during a pandemic. *Id.* at 211-17. The court also found no significant benefit to the FDA's in-person-dispensing requirement, reasoning that telemedicine was effective to provide all the counseling necessary. *Id.* at 217-22. Concluding the regulation was an undue burden, the court preliminarily enjoined the law. *Id.* at 222-24, 233; *see also Am. Coll. of Obstetricians & Gynecologists v. U. S. Food & Drug Admin.*, 506 F. Supp. 3d 328 (D. Md. 2020) (reaffirming decision six months later).

The Fourth Circuit denied the FDA's motion to stay the injunction pending appeal, but the Supreme Court granted it. *ACOG*, 141 S. Ct. 578. Though the majority did not provide a written opinion, Supreme Court precedent permits a stay only when "the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 426 (2009). Thus, it appears that a majority of the Court did not believe that the burden of in-person interactions during the COVID-19 pandemic rendered the in-person-dispensing requirement an unconstitutional undue burden. It is unlikely that the Supreme Court would conclude that Indiana's telemedicine ban and in-person-examination requirement are unconstitutional *without* the additional burden of a pandemic.

Upholding a telemedicine ban when in-person options are available is also consistent with the Supreme Court's prior statements that "[t]he law need not give

abortion doctors unfettered choice in the course of their medical practice," and that "[p]hysicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Abortions have been performed in person in Indiana for nearly fifty years and that option remains available. Even ACOG has not yet given abortion-by-telemedicine its strongest recommendation, as there is "limited or inconsistent scientific evidence" on the topic. *Whole Woman's Health All.*, 2021 WL 3508211, at *16 & n.22. Indiana's law is constitutional.

* * *

As the stay panel already recognized, Indiana is likely to prevail in its appeal based on existing precedent upholding similar, if not identical, laws. *Whole Woman's Health All. v. Rokita*, Nos. 21-2480 & 21-2573, 2021 WL 4077549, at *2 (7th Cir. Sept. 8, 2021). This panel should follow suit, as it is up to the Supreme Court to decide whether to revisit its decisions based on any "new" facts—not the district court or this Court. Holding otherwise would upend the hierarchical structure of the federal judiciary. Indiana's laws are constitutional under binding precedent, and the district court's holding to the contrary should be reversed.

II. The District Court's Findings Do Not Establish an Undue Burden on a Large Fraction of Women.

Even if the Court were free to reconsider existing precedent in light of new facts, plaintiffs' facts aren't new. They are the same types of facts that the Supreme Court has previously rejected as establishing an undue burden—namely, facts showing inconvenience in obtaining an abortion, rather than denial of access to abortion.

Indeed, the district court failed to identify any woman who was unable to obtain a desired abortion, much less a large fraction or significant number of women. Thus, even if the Court were to set aside or distinguish the precedent just discussed, the facts found by the district court do not permit the Court to conclude that Indiana's laws are unconstitutional. *See June Med.*, 140 S. Ct. at 2141-42 (Roberts, C.J., concurring in the judgment) (concluding the outcome in *June Medical* was controlled by *Whole Woman's Health* because the district-court fact findings were alike).

A. The Supreme Court looks for the denial of access to abortion, not difficulty in access.

The district court's lengthy opinion is notable for what it did not say—that Indiana's laws have prevented some number of women from obtaining previability abortions. Instead, the district court focused on burdens of travel, delay, and costs that, according to the court, fall more heavily on some unknown percentage of mostly low-income women in Indiana. But the Supreme Court has required more.

A law creates an undue burden, and is therefore unconstitutional, when its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (plurality op.). As Justice Scalia explained the undue-burden standard in his partial dissent in *Casey*, "it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence." *Id.* at 992 (Scalia, J., concurring in the judgment in part and dissenting in part). The Supreme Court's decisions have demonstrated the truth of Justice Scalia's observation, reserving the judgment of undue burden for those laws

that prevent a significant number of abortions. Because there are no findings that Indiana's laws prohibit women from obtaining abortions, the laws are constitutional.

1. The district court focused on the wrong type of burden.

An examination of Supreme Court cases, and the district-court findings underlying them, shows what is and is not an undue burden. At a minimum, the district-court findings must reflect that the challenged law will deny a large fraction or significant number of women the ability to obtain an abortion.

The district courts in *Casey* and *Gonzales* made extensive fact findings in support of their decisions that the challenged laws were unconstitutional. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 814-1002 (D. Neb. 2004) (district-court findings in *Gonzales*); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 971-73 (N.D. Cal. 2004) (district-court findings in *Gonzales*); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1329-72 (E.D. Pa. 1990). And yet, other than Pennsylvania's spousal-notification provision, the Supreme Court found those facts insufficient to demonstrate an undue burden on the right to abortion. *Gonzales*, 550 U.S. at 168; *Casey*, 505 U.S. at 885-87 (24-hour waiting period), 899-900 (parental consent).

Thus, under the Supreme Court's decisions in *Casey* and *Gonzales*, the following are not unconstitutional undue burdens:

- Failure to follow ACOG recommendations;
- Requiring two trips or staying overnight;
- Delay up to two weeks;
- Traveling over three hours to reach the nearest clinic;
- Increased costs for childcare, travel, and lost wages;

- Increased cost of abortion;
- Increased potential for complications;
- The possibility that some minors will be unable to obtain abortions; and
- Greater impact on low-income women, younger women, and those in abusive relationships.

Compare Gonzales, 550 U.S. at 168, *and Casey*, 505 U.S. at 885-87, 899-900, *with Carhart*, 331 F. Supp. 2d at 814-1002, *Planned Parenthood Fed'n of Am*, 320 F. Supp. 2d at 971-73, *and Casey*, 744 F. Supp. at 1351-52, 1383.

In stark contrast, when the Supreme Court has held that a law creates an undue burden, the district-court findings demonstrate that the law would actually deny abortion to a large fraction or significant number of women. Under *Casey*, *Whole Woman's Health*, and *June Medical*, the following are unconstitutional undue burdens:

- Shutting down so many clinics that women cannot obtain abortions;
- Preventing so many doctors from performing abortions that women cannot obtain abortions; and
- Requiring spousal-notice such that women may be precluded from obtaining abortions by their husbands.

See June Med., 140 S. Ct. at 2129 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2313, 2316-18; *Casey*, 505 U.S. at 887-898. Although the Court mentioned travel and clinic crowding in *Whole Woman's Health* and *June Medical*, it did so in the context of explaining additional burdens created by the loss of providers and clinics. *June Med.*, 140 S. Ct. at 2129-30 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2318. At no point did the Court hold that travel and crowding alone, apart from the denial

of access through closure of most clinics in a given State, could warrant a finding of undue burden.

Thus, post-*Casey*, the Court has not found an undue burden in any circumstance except one in which abortion would be denied to a large fraction or significant number of women. That evidence is lacking here. The district court made no findings that any woman was unable to obtain a wanted abortion, much less a large fraction or significant number of women. Indeed, plaintiffs did not seek to provide that information, arguing instead that evidence of the abortion rate in Indiana for the last forty years was irrelevant to the undue-burden analysis. Suppl. Memo of Law in Supp. of Pls' Mot. to Exclude Expert Test. at 2-5, *Whole Woman's Health All.*, No. 1:18-cv-01904-SEB-MJD (S.D. Ind. Jan. 15, 2021) (concerning Indiana's evidence that the abortion rate had not varied with new laws).

Due to plaintiffs' litigation choices, the district court relied entirely on delay, travel, and costs that affect each woman differently but, apparently, do not prevent anyone from obtaining an abortion. *Whole Woman's Health All.*, 2021 WL 3508211, at *15-19 (telemedicine ban and in-person examination: delay, travel, increased costs), *22 (in-person counseling: delay, travel, and increased costs), *28 (physician-only: delay, increased costs), *31-32 (second-trimester ASC: travel, increased costs). But the Supreme Court rejected the "burdens" of delay, travel, and costs as sufficient to prove a law is unconstitutional in *Casey*. Those burdens should likewise be insufficient here to hold unconstitutional decades-old laws.

2. The district court erroneously attributed additional burdens to Indiana.

The district court further erred by attributing to Indiana burdens that are not the fault of Indiana, namely, the personal circumstances of some women in Indiana and the decisions of abortion providers.

a. The district court repeatedly focused on the low-income status of many women seeking abortion in Indiana. *See, e.g.*, *Whole Woman's Health All.*, 2021 WL 3508211, at *10-13, *22, *57. But that is not a burden attributable to Indiana. Discussing whether the government could choose not to fund elective abortion, the Supreme Court has stated that

> [A]lthough 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. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

Harris v. McRae, 448 U.S. 297, 316 (1980); *see also Maher v. Roe*, 432 U.S. 464, 474 (1977) (reasoning that "[t]he indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by" the State's regulation). The district court in *Gary-Northwest* correctly echoed those sentiments, explaining that, as long as the second-trimester hospital requirement related to maternal health, it was constitutional "without regard to the regulation's practical impact on the availability of abortions to indigent women." *Gary-Nw.*, 496 F. Supp. at 901.

Every State has a certain percentage of low-income women within it. Plaintiffs' theory, and the district court's ruling, would require States to lower their health-and-safety standards to the absolute minimum in order to enable women to obtain abortions at the lowest possible cost. But, as recognized by the Supreme Court, low-income status is not a burden caused by the State. It is, therefore, not a burden the State is required to alleviate by eliminating long-standing, common-sense abortion regulations.

b. The district court also found that the lack of abortion providers in Indiana (which contributes to delays in scheduling procedures) was due in large part to difficulty in physician recruitment. *Whole Woman's Health All.*, 2021 WL 3508211, at *9. But the district court did not find that *Indiana* caused that difficulty through the challenged laws. *See also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 599 (5th Cir. 2014) (finding that testimony about difficulty of physician recruitment was unconnected to the challenged law). The district court cited testimony that physicians may be reluctant to work at abortion clinics because of the presence of protestors—that is, individuals exercising their First Amendment rights. *Whole Woman's Health All.*, 2021 WL 3508211, at *9; *see also McCullen v. Coakley*, 573 U.S. 464 (2014) (describing First Amendment right to protest outside abortion clinics). But protestors are not state actors, nor are their actions caused by the challenged Indiana laws.[6]

[6] To the extent the district court found that one or more physicians had been physically threatened, *Whole Woman's Health All.*, 2021 WL 3508211, at *9, it should

If physicians in Indiana do not wish to perform abortions, or do not wish to do so full-time, that is their choice. And any resulting lack of physicians is not an unconstitutional burden placed on women by Indiana.

c. The district court also made multiple references to the fact that the only doctors willing to perform abortions were not located in geographically convenient locations for an unknown number of Indiana women. *Whole Woman's Health All.*, 2021 WL 3508211, at *10 (explaining that there were no clinics east of Indianapolis or south of Bloomington), *22, *49. But the geographic location of abortion providers and their patients, again, was not shown to be the result of any of the challenged laws in this case. Perhaps abortion providers have not opened clinics in those areas because the market would not support that endeavor, especially given the proximity of clinics in Louisville and Cincinnati. Perhaps physicians in those areas are simply unwilling to perform abortions. There are many reasons why the clinics in Indiana may be geographically distributed as they are, but the district court did not tie any of those reasons to the challenged laws. Thus, the burdens of travel are not attributable to Indiana.

The Supreme Court has never required that a State tailor its abortion regulations to the socio-economic characteristics of a certain segment of its population or the specific desires of medical personnel. All abortions in Indiana must comply with the challenged laws. If a certain group of women experience an undue burden, the

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go without saying that such conduct is unacceptable—but also that it is not the result of Indiana's laws.

appropriate avenue is as-applied relief, *Gonzales*, 550 U.S. at 168, not a facial injunction of a law with which everyone has complied for years.

B. When access is not at issue, the Supreme Court has not required evidentiary proof of a benefit.

The district court also erred in its analysis of the benefits of Indiana's laws. When an abortion regulation does not prohibit women from obtaining an abortion, the Supreme Court has found the law constitutional as long as it reasonably furthers the State's interests. It is only when the law prohibits women from obtaining abortions that the Court has looked for more concrete evidence.

For example, when considering *Casey*'s 24-hour waiting period—which caused delays, increased costs, additional travel, and possible increased complications—the plurality said only that it was not "unreasonable" to think that a period of reflection would result in more informed decisions and that, "[i]n theory," the waiting period was a reasonable measure that did not amount to an undue burden. *Casey*, 505 U.S. at 885. Considering the partial-birth-abortion ban in *Gonzales*, the Court said that "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." 550 U.S. at 159. The Court then concluded that "[i]t is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions." *Id.* at 160. Thus, regardless of whether the Court was (1) balancing those theoretical interests against the practical burdens imposed, or (2) looking for a substantial obstacle and reasonable relation to

the State's interests, the Court upheld the laws without specific, quantifiable evidence of their benefits. *See also Mazurek*, 520 U.S. at 973 (upholding physician-only law despite the argument that "all health evidence contradicts the claim that there is any health basis for the law").

On the other end of the spectrum are cases like *June Medical* and *Whole Woman's Health*, in which the Court looked for additional evidence of benefit, given the potential closure of over half the clinics in Louisiana and Texas and denial of abortion to a significant number of women. *June Med.*, 140 S. Ct. at 2130-32; *Whole Woman's Health*, 136 S. Ct. at 2311-12, 2315-16. Finding insufficient evidence of benefit, the Court concluded the laws were not medically necessary and posed a substantial obstacle to abortion. *June Med.*, 140 S. Ct. at 2132; *Whole Woman's Health*, 136 S. Ct. at 2313, 2318.

Contrary to *June Medical* and *Whole Woman's Health*, plaintiffs here are not challenging new laws that would shutter most existing clinics. Rather, they challenge the status quo—the laws with which everyone is already complying. In this case, the rule from *Gonzales* should apply: "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them." 550 U.S. at 166. Holding otherwise makes any district court in which one of these lawsuits is filed an "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards"—a role the Supreme Court has rejected. *See id.* at 163-64 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality op.)).

Indiana provided evidence of the benefits of each of the challenged laws. Because none of Indiana's laws closed most existing clinics or deprived a significant number of women of abortion access, the Indiana Legislature's choice should be respected.

C. The district court failed to find facts demonstrating how many women are unconstitutionally burdened.

The district court further erred by enjoining Indiana's laws without first identifying a large fraction or significant number of women who would be unconstitutionally burdened by them. Instead, the court recognized that there are women in Indiana who are low-income, who are in abusive relationships, or who do not live near the cities where abortion providers have chosen to open clinics. *Whole Woman's Health All.*, 2021 WL 3508211, at *10-13. From there, the court generally opined that any law that even marginally increased travel, delay, or cost would be a burden on these women. *See, e.g.*, *id.* at *15-19, *22, *28, *31-32. But the district court made no attempt to quantify the number of women affected, either as a percentage or specific number, or to link these women to specific laws and burdens.

Considering a statute that required doctors who provide medication abortions to contract with a doctor with admitting privileges, the Eighth Circuit reversed a preliminary injunction because the district court's findings did not demonstrate a burden on a large fraction of women. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959-60 (8th Cir. 2017). The district court in that case failed to determine or even estimate (1) how many women would face increased travel distances due to the law, (2) how many would forgo abortions, (3) how many would postpone their abortions, and (4) how many would face an increased risk of complications. *Id.* The

Eighth Circuit reversed because it was left with "no concrete district court findings estimating the number of women who would be unduly burdened by the contract-physician requirement—either because they would forgo the procedure or postpone it—and whether they constitute a 'large fraction' of women seeking medication abortions in Arkansas . . . ." *Id.* at 960; *see also Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) (noting that several circuits have found a large fraction only when "practically all of the affected women would face a substantial obstacle in obtaining an abortion").

The district court's findings here contain similar evidentiary gaps. The court's statement that "[t]he majority of women impacted most severely . . . are low-income individuals" is devoid of any objective reference point of what constitutes a "severe" impact. *Whole Woman's Health All.*, 2021 WL 3508211, at *10. Although opining that low-income women find travel difficult, the district court made no determination of how far women have to travel, what percentage of low-income women have to travel, and what combination of those factors constitutes an "undue" burden. The same holds for any delays in obtaining an abortion. The district court noted that some women face delays in their procedures but did not identify which category of women do so, the impact of those delays, and when a delay becomes an "undue" burden.

Every State contains some number of women with low incomes who do not live near an abortion provider. That, standing alone, cannot be enough to declare, for example, a physician-only law unconstitutional. There must be a large fraction or significant number of women for whom the law creates an unconstitutional undue burden. The district court, however, failed to identify them.

III. The Court Should Reject Plaintiffs' Attempt To Rewrite Indiana Abortion Law.

This case reflects a new trend by abortion providers across the country who seek to remake regulatory regimes by judicial fiat. The district court acknowledged that plaintiffs are "waging a global assault" on Indiana's abortion regulations, challenging twenty-five separate laws. *Whole Woman's Health All.*, 2021 WL 3508211, at *1. In Texas, abortion providers have similarly challenged nearly every abortion regulation that was not already the subject of a separate lawsuit, in part because "[a]s improved access to contraceptives causes the abortion rate to decline, it becomes less economically feasible" to operate their clinics. Compl. ¶ 189, *Whole Woman's Health All.*, No. 1:18-cv-00500-LY (W.D. Tex. June 14, 2018). The Fifth Circuit correctly concluded that another, now-abandoned challenge to "virtually all of Louisiana's legal framework for regulating abortion" was "extraordinary" and a "threat to federalism," given the plaintiffs' request for a "structural injunction and continuing federal supervision." *In re Gee*, 941 F.3d at 156, 167. This Court should do the same.

The undue-burden test should not be used to empower federal courts to micromanage state abortion regulations. As stated in *Roe* and confirmed in *Whole Woman's Health*, States have "a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Roe*, 410 U.S. at 150). Plaintiffs and the district court fail to recognize that abortion is not just a medical procedure on par with any other. It is "inherently different from other medical procedures, because no other procedure involves the purposeful

termination of a potential life." *Harris*, 448 U.S. at 325. It is a "unique act" that is "fraught with consequences for others." *Casey*, 505 U.S. at 852 (recognizing that many view abortion as "nothing short of an act of violence against innocent human life"). To save their own bottom lines, abortion providers may be willing to trade safety for convenience. But the existence of a more convenient option does not make the current law a substantial obstacle or unconstitutionally burdensome. States should be permitted to regulate abortion in line with Supreme Court precedent and without federal oversight.

Conclusion

The Court should reverse the judgment of the district court.

Respectfully submitted.

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Certificate of Word Count

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I hereby certify that on October 7, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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