IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 21-2480, 21-2573

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, No. 1:18-cv-01904-SEB-MJD
The Honorable Sarah Evans Barker, Judge

REPLY BRIEF OF APPELLANTS

GENE C. SCHAERR
H. CHRISTOPHER BARTOLOMUCCI
JAMES A. HEILPERN
SCOTT D. GOODWIN
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

THEODORE E. ROKITA
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
KIAN HUDSON
Deputy Solicitor General
CHRISTOPHER M. ANDERSON
JULIA C. PAYNE
ROBERT A. ROWLETT
MELINDA R. HOLMES
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
Telephone: (317) 232-6255
Tom.Fisher@atg.in.gov
Counsel for Defendants/Appellants

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SUMMARY OF ARGUMENT

The district court enjoined nine Indiana laws—the physician-only law, the second-trimester hospital/ASC requirement, the in-person counseling requirement, the in-person examination requirement, the telemedicine ban, the surgical-facility requirements, the housekeeping-room requirement, the human-physical-life disclosure, and the fetal-pain disclosure—claiming that they unduly burden women seeking abortion. At least three of these laws have already been upheld by the Supreme Court and by this Court, and this Court stayed the injunctions against two more because their validity "follows directly" from precedent. *Whole Woman's Health Alliance v. Rokita*, 13 F.4th 595, 598 (7th Cir. 2021). Whole Woman's Health asks this panel to reconsider its earlier decision, Appellees' Br. 33 n.3, but offers only the same unsuccessful points as before. The precedents cited in the Court's stay order remain controlling, and this Court has no power to overrule the Supreme Court. *See Rokita*, 13 F.4th at 598. This Court should continue adhering to those precedents and, on that basis, reverse the district court's judgment enjoining the statutes addressed in the stay order.

Beyond that, Whole Woman's Health has failed to show that *any* of these nine laws prevents a single woman, much less a large fraction of women, from having an abortion. And each of these laws is rationally related to the State's legitimate interests in protecting fetal life and promoting women's health, the benefits of which outweigh the (at best) meager burdens proved by Plaintiffs. These reasons alone are

sufficient to foreclose each of Whole Woman's Health's due-process and equal-protection challenges.

Whole Woman's Health's First Amendment claims also fail. It implicitly concedes the biological truth that "human physical life begins when a human sperm fertilizes a human ovum" and merely complains that women seeking abortion should not be reminded of that fact. Its argument against the fetal pain advisory turns not on actual scientific evidence presented in court but on the theory that a scientific disclosure (even one having to do with neuroscience rather than obstetrics) is invalid unless Whole Woman's Health's two favored associations of gynecologists endorse it. That is not what the Constitution requires, particularly since the State may impose regulations that take sides on disputed scientific assertions. *See Gonzales v. Carhart*, 550 U.S. 124, 164 (2007).

For these reasons, this Court should reverse the district court's injunction as to these nine laws and reaffirm that, even in the abortion context, district courts remain bound by this Court's and the Supreme Court's decisions.

ARGUMENT

I. The District Court Misunderstood the Undue-Burden Standard To Permit Invalidation of Abortion Laws that Do Not Prevent Abortions

A law does not impose an undue burden unless "'in a large fraction of the cases in which [the statute] is relevant'" it actually "*prevent[s]* women from obtaining abortions rather than merely making abortions more difficult to obtain." *See Karlin v. Foust*, 188 F.3d 446, 482 (7th Cir. 1999) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)) (emphasis in original). Whole Woman's Health

expressly disavows—both below and now on appeal, Appellees' Br. 36—any claim that the challenged laws have prevented abortions for *any* woman, let alone a large fraction of women. The National Women's Law Center attempts to rehabilitate this failure by suggesting—without any record evidence—that the laws "forc[e]" women to "forego wanted abortions." National Women's Law Center Amicus Br. 10. But that unsupported assertion cannot overcome Whole Woman's Health's express—and repeated—denial that it was attempting to prove, or has proved, any such thing. Whole Woman's Health, for its part, urges this Court simply to ignore *Karlin*, but that precedent, like so many others that preclude its claims, still applies.

In granting Whole Woman's Health relief, the district court failed to apply the large-fraction test, which inherently requires quantification of impact. Whole Woman's Health insists, counterintuitively, that the large-*fraction* test "does not . . . require courts to quantify the number of people burdened by an abortion restriction or perform any mathematical calculations." Appellees' Br. 38. It cites *Whole Woman's Health v. Hellerstedt* for this point, but that case merely said that Texas *misidentified* the denominator. *See* 136 S. Ct. 2292, 2320 (2016). Neither *Hellerstedt* nor any other decision of the Supreme Court (or this Court) suggests that a plaintiff can satisfy the large-fraction test without identifying any numerator and denominator at all.

Whole Woman's Health also suggests that abortion regulations must be shown to be *necessary* to further Indiana's interest. But again, the Supreme Court has said that States need only "a rational basis to act" so long as that action "does not impose an undue burden." *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); *see also June*

Medical Services LLC v. Russo, 140 S. Ct. 2103, 2138 n.2 (2020) (Roberts, C.J., concurring in the judgment) ("[A]bortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being 'reasonably related' to a 'legitimate purpose.'" (quoting *Casey*, 505 U.S. at 878, 882)). Whole Woman's Health suggests that this statement from *Gonzales* stands in tension with *Hellerstedt*, Appellees' Br. 40–41, but only the Supreme Court can overrule *Gonzales*, and it must do so expressly, *Saban v. U.S. Dep't of Lab.*, 509 F.3d 376, 378 (7th Cir. 2007). It is thus wrong to claim, Appellees' Br. 57 n.11, that all abortion laws—even those that do not impose a substantial obstacle—must be medically necessary to survive constitutional scrutiny.

Plaintiffs have failed to show that any of these laws impose a substantial obstacle on a large fraction of women; their undue-burden claims fail as a matter of law.

II. Whole Woman's Health's Undue-Burden Claims Fail Because None of the Laws Imposes a Substantial Obstacle and Each Is Rationally Related to a Legitimate State Interest

A. The physician-only law imposes no substantial obstacle and helps advance the State's interests in (for example) assessment of gestational age and detection of contraindications

The physician-only requirement is squarely controlled by *Mazurek v. Armstrong*, and that case is no less binding because it was decided before medication abortions were available. As the State has explained, *Mazurek* considered—and rejected—the claim that "an objective assessment might suggest" that abortions could safely be performed by others. 520 U.S. 968, 973 (1997). Whole Woman's Health does

not dispute the State's observation that this Court has "thrice recently reaffirmed" *Mazurek*'s validity. *See* Appellants' Br. 24. Regardless of when medication abortions became available, Indiana's ability to limit such abortions to physicians even if an "objective assessment might suggest" that APCs can safely administer them hasn't changed. *Mazurek*, 520 U.S. at 973.

And it is far from clear that any such "objective assessment" yet exists—as the State has pointed out, the experts who testified at trial disagreed on the wisdom of letting APCs dispense abortion-inducing drugs. Appellants' Br. 34–35. ACOG's suggestion that a handful of professional organizations agree with Whole Woman's Health and the district court on the safety of APC-led abortions, ACOG Amicus Br. 20, cannot justify overruling the State's judgment—which, as noted, was supported by the testimony of the State's experts. When reasonable disagreement over issues of science and medical regulation exists, it is the State's prerogative to decide which viewpoint to adopt. *See Gonzales v. Carhart*, 550 U.S. 124, 164 (2007).

In any event, Whole Woman's Health has failed to identify a substantial obstacle imposed by the law because it failed to show that a single woman will be prevented from having an abortion because of the physician-only law. Indeed, neither Whole Woman's Health nor its *Amici* dispute the State's observation that the only burdens shown at trial stemming from this law are an added cost of around $70 and somewhat longer wait times. Appellants' Br. 35. And it is well-established that incidental burdens, including increased costs, "cannot be enough to invalidate" a duly enacted law. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

Moreover, the trial evidence demonstrates that, at minimum, the physician-only law is rationally related to the State's interest in protecting women's health and safety, and indeed that the benefits of the physician-only law outweigh its burdens. In its opening brief, the State explained that the undisputed evidence at trial demonstrated that a physician is better able than non-physicians, including APCs, at determining gestational age, the location of the pregnancy, and any contraindications. Appellants' Br. 34. The conclusion of ACOG and other professional organizations that APC-provided medication abortions are "safe enough" is not dispositive. The relevant question is whether a State may rationally decide to limit medication abortions to physicians because their better training and skills provide some benefit over APCs. The Supreme Court's precedents say yes.

In sum, the Court should uphold the physician-only law because (1) binding Supreme Court precedent has already upheld physician-only laws, (2) Whole Woman's Health has failed to show that the law prevented *anyone* from obtaining an abortion, and (3) the State has rationally decided to limit the distribution of abortion drugs to those who can most safely administer them.

B. The hospital/ASC requirement imposes no substantial obstacle and ensures that more complex surgeries that risk more serious complications occur in facilities best equipped to handle them

The second-trimester hospital/ASC requirement should likewise be upheld. As this Court recognized in its stay opinion, the Supreme Court has already upheld a materially identical requirement. *See Whole Woman's Health Alliance v. Rokita*, 13 F.4th 595, 598 (7th Cir. 2021) (citing *Simopoulos v. Virginia*, 462 U.S. 506 (1983)).

Whole Woman's Health provides no reason why *stare decisis* does not require it to be upheld again. Additionally, the second-trimester hospital/ASC requirement is rationally related to the State's legitimate interest in *maximally* safeguarding women's health and does not impose a substantial obstacle on a large fraction of women.

In any case, Whole Woman's Health has disavowed any attempt to show that women are prevented from having abortions, and the only burdens it has identified as stemming from this law are incidental increases to cost and inconvenience, neither of which can invalidate a law under *Casey*. *See Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999) (holding that "even *severe* inconvenience[s]" do not amount to an undue burden unless they prevent a large fraction of women from obtaining abortions (emphasis added)). Whole Woman's Health has no response other than to urge abandonment that established standard. *See* Appellees' Br. 46–47.

Citing the district court, Whole Woman's Health then suggests that the hospital/ASC requirement prevents abortions by causing Indiana women to leave the State. *Id.* at 46. But Whole Woman's Health has expressly *disavowed* proof that any of these laws have reduced Indiana's abortion rate.

Even if it were the case that some women leave Indiana to obtain second-trimester abortions, that would not be due to the hospital/ASC requirement itself: It would be because no ASC and very few hospitals have chosen to provide abortions. Whole Woman's Health is incorrect to suggest that the business decisions of others are irrelevant to the undue-burden calculus. *Id.* at 47. Even though burdens do "not

exist in a vacuum," they still must be caused by the State to be grounds for invalidating duly enacted laws. *Id.* (quoting *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 986 (7th Cir. 2019)). *Adams*, the one case Whole Woman's Health cites, addresses the "[c]umulative effects" of different provisions of a statute, not the effects of third-party actions. *See Adams*, 937 F.3d at 986. Here, the burdens are caused by the independent business decisions of (1) Whole Woman's Health itself, who has not attempted to open an ASC, and (2) others who have decided that they will not lease facilities to abortion providers or will not provide abortions themselves. Nothing in the record suggests that Indiana's existing hospitals or ASCs decline to perform abortions because of Indiana law—indeed, testimony suggested hospitals make such decisions solely as a matter of policy, Second Trial Tr., Vol. I, 40:12–41:5; 52:11–16; 115:22–25—so the law does not cause the harms Whole Woman's Health alleges.

Moreover, the second-trimester hospital/ASC requirement is rationally related to the State's interest in protecting women's health and safety, and its benefits outweigh its burdens. Whole Woman's Health has no answer to the State's demonstration that facilities with better equipment are correspondingly better equipped to handle the increased risk inherent in abortions at later gestational ages. Appellants' Br. 37–38. After all, even Dr. Grossman admitted that sometimes hospitals and ASCs would be "better equipped to handle some kinds of complications" even if they would not "necessarily" be better equipped to handle *all* of them. Second Trial Tr., Vol. I, 192:25–193:5. Whole Woman's Health entirely disregards this

concession from their own expert. In so doing, they join the district court in ignoring testimony showing that, at least sometimes, the difference between an abortion clinic and a hospital/ASC could be the difference between life and death for a woman who has a complication during a second-trimester abortion.

What is more, in its opening brief, the State pointed out that Dr. Calhoun's testimony that deep sedation is indicated for second trimester abortions went *unrefuted* at trial. Appellants' Br. 38. And indeed, the district court recognized that "[h]ospitals in Indiana . . . administer deep sedation to women receiving second-trimester abortions." Short App. 20. Still, the district court accorded Dr. Calhoun's testimony little weight. Short App. 68, 114. Whole Woman's Health now offers no better defense for the district court's unsupported assessment than a conclusory statement deeming it "a reasonable exercise of its discretion as fact finder." Appellees' Br. 45. It was not. The law requires hospitals and ASCs rather than clinics for second-trimester abortions precisely because they offer safeguards such as deep sedation that clinics do not provide. The weight accorded that interest is a matter of law reviewed de novo, not a matter of discretion for which the district court is entitled to deference. *See Simopoulos*, 462 U.S. at 516–17, 519. And the sufficiency of the State's interest turns not on whether abortion clinics are safe, but on whether hospitals and ASCs are *most* safe. Accordingly, ACOG's discussion of abortion-clinic safety is irrelevant. ACOG Amicus Br. 24–32.

For these reasons, the Court should reverse the district court's decision to invalidate the second-trimester hospital/ASC requirement. This requirement was

upheld four decades ago and still furthers the State's interest in maximizing the safety of abortions without imposing a substantial obstacle to them.

C. The in-person counseling requirement imposes no substantial obstacle and is rationally related to a legitimate state interest

As for the in-person counseling requirement, once again, it is undisputed that this Court already upheld this very requirement in *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), and that *Casey* held that States may require women to meet with their physicians in person. *See* 505 U.S. at 885–86. Once more, Whole Woman's Health fails to undermine the long series of decisions upholding the in-person counseling requirements of Indiana and other States.

Furthermore, Whole Woman's Health failed to show an undue burden stemming from this law because no evidence shows that in-person counseling prevents a large fraction of women from having an abortion.

To begin, the in-person counseling requirement creates no marginal burdens because it requires only the *same* trip to a facility *already* necessary for the pre-abortion ultrasound, which also must occur at least 18 hours before the abortion. The in-person counseling occurs at the same time and place as the ultrasound, so it adds no burden. Yet Whole Woman's Health did not challenge the 18-hour ultrasound waiting period—and indeed explicitly disclaimed such a challenge early in the case. *See* ECF No. 366 at 12:13–17. Apparently recognizing this flaw in its case after judgment, Whole Woman's Health moved the district court to alter or amend the judgment on the grounds that the 18-hour waiting period rendered the ultrasound

law unconstitutional. ECF No. 444. The district court rightly rejected that motion to add a new claim to the case. ECF No. 452. So, the in-person counseling law adds no burdens beyond what Indiana law will otherwise require.

Alternatively, Whole Woman's Health relies on the district court's theory that the in-person counseling requirement imposes different burdens than the ultrasound requirement because, without the in-person counseling requirement, "a patient could present to a nearby health center to satisfy the [u]ltrasound [r]equirement." Appellees' Br. 54. But Planned Parenthood, the only abortion provider in the State with multiple remote health centers in addition to abortion clinics, *already* uses that service model, *see* First Trial Tr. Vol. I, 30:20–31:2, which proves the in-person counseling requirement is no barrier to it. And Whole Woman's Health has presented no evidence that it similarly plans to open additional facilities. Indeed, this entire burden theory was concocted by the district court, Short App. 133, and was never suggested by Whole Woman's Health.

Furthermore, the in-person counseling requirement advances the State's legitimate interest in ensuring that the abortion decision is made with a complete understanding of the consequences, and its benefits outweigh its (once again, meager) burdens. The State presented largely unrebutted evidence, credited by the district court, showing that in-person interactions "yield some benefits in building a trusting relationship" and in catching coercion. Short App. 129–30. Yet it nevertheless held that "the benefits imposed by this requirement" are "at best slight," *id.* at 130—an erroneous legal conclusion reviewed de novo.

The district court also accepted that the in-person counseling requirement ensures women will have a chance to meet with clinic personnel outside of an abuser's presence. Short App. 129. Telemedicine counseling would deprive the State of the opportunity to guarantee that safeguard for all women. Even assuming, as the district court found, that videoconferencing is "typically . . . just as meaningful," the benefits of in-person meetings that would flow to vulnerable women, whom Indiana cannot identify beforehand, justify this requirement. Short App. 129–30. Whole Woman's Health complains that the State does not impose the in-person counseling requirement on patients seeking other medical procedures, Appellees' Br. 52–53, but the Supreme Court has recognized for more than 40 years that abortion is inherently different because it takes fetal life, *see Harris v. McRae*, 448 U.S. 297, 325 (1980). That realization underscores the needs both to ensure proper informed consent and to safeguard against coercion.

Because this Court has already upheld this requirement, and because it is rationally related to the State's interest in ensuring a robust informed-consent process and does not unduly burden Indiana women, the district court's invalidation of this requirement should be reversed.

D. The in-person examination requirement and telemedicine ban impose no substantial obstacle and are rationally related to a legitimate state interest

This Court already held in its stay order that the constitutionality of the in-person examination requirement and telemedicine ban "follow[] directly" from *Casey* and *A Woman's Choice. Whole Woman's Health All. v. Rokita*, 13 F.4th 595, 598 (7th

Cir. 2021). Whole Woman's Health does not rebut this conclusion in its brief, so the Court has no reason to depart from it, and no further analysis is necessary to uphold this law.

Yet even apart from the answers provided by *Casey* and *A Woman's Choice*, the in-person examination requirement and telemedicine ban are constitutional because there is no evidence that either rule has prevented a large fraction of women from having an abortion. Whole Woman's Health simply has no answer to the State's showing that most of the burdens the district court found these provisions impose fall upon *physicians*, not women. *See* Appellants' Br. 11. Whole Woman's Health instead focuses on the theory that telemedicine would yield more appointment slots, such that women might have their medication abortions earlier. Appellees' Br. 20–21. But again, an inconvenience is undue only if it prevents abortions (a factual theory Whole Woman's Health has disclaimed); delay, even if severely inconvenient, is not enough. *Karlin*,188 F.3d at 481.

Moreover, the in-person examination requirement and telemedicine ban are both rationally related to the State's legitimate interest in ensuring the maximum safety of the abortion procedure—a benefit that outweighs any slight burdens the requirements might impose. The district court recognized that some symptoms requiring a physical exam "do occur," Short. App. 43; it follows that requiring such an exam before an abortion furthers Indiana's interest in maximizing patient safety.

Whole Woman's Health responds by suggesting that the State is asking this Court to deviate from the clear-error standard in observing that the district court

ignored unrebutted evidence. Appellees' Br. 48. Not so. Though the district court need not cite evidence refuting every point, *id.*, its decision to ignore nearly every point made by the State is something this Court should consider when deciding whether it has a "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In any case, Whole Woman's Health's theory on this score—that the State has a constitutional obligation constantly to update its laws, Appellees' Br. 50—finds no support in the law. The very point of a written Constitution is to provide stability in the law, and its meaning does not change with "ever-advancing technology." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). Accordingly, even if telemedicine is becoming a more common way of conducting business, that would not place an affirmative, constitutional obligation on Indiana to embrace it for abortion, which (again) can be treated differently. *Harris*, 448 U.S. at 325. This Court should reject the suggestion that the federal judiciary may strike down abortion laws that have not been updated to reflect the newest technological conveniences.

Because the constitutionality of the in-person exam and telemedicine ban follow from *Casey* and *A Woman's Choice*, because Indiana has a powerful interest in catching abortion contraindications best detected by in-person examination, and because the district court did not (and could not) find that the exam requirement and telemedicine ban prevent abortions, this Court should reverse the district court's decision invalidating these laws.

E. The challenge to surgical-facility requirements fails on the merits and suffers from standing problems

1. The surgical-facility requirements impose no substantial obstacle and are rationally related to a legitimate state interest

The district court should have upheld the surgical-facility requirements because, again, Whole Woman's Health disclaimed any argument that these requirements depress the abortion rate—and therefore cannot show that these requirements prevent a large fraction of women from obtaining an abortion. Instead, Whole Woman's Health simply cites *Hellerstedt*, which "struck down a requirement that abortion clinics satisfy facility requirements designed for surgical centers." Appellees' Br. 58. But it ignores the reason the facility requirements in *Hellerstedt* were struck down: Because they would deprive Texas women of sufficient clinics to meet abortion demand and thereby *prevent* women from obtaining wanted abortions. *Hellerstedt*, 136 S. Ct. at 2316. Whole Woman's Health has come nowhere close to making this showing here, which defeats their challenge.

The surgical-facility requirements further the State's interest in protecting women's health and safety, and the benefits of the requirements outweigh their burdens. The relevant inquiry is not whether a law is necessary to furthering the State's interest, but whether the law serves some medical benefit. *Hellerstedt*, 136 S. Ct. at 2309. Each of the surgical-facility requirements passes that test. A sterile procedure room will be better at preventing the occasional infection than a non-sterile one, and the district court's rejection of that interest was wrong. Whole Woman's Health's only response to this point is to argue that the sinks are unnecessary here

because they are not required of other facilities. Appellees' Br. 57. But again, under *Gonzales* and other precedents, that answer addresses the wrong question. *See* 550 U.S. at 158.

Whole Woman's Health continues to address that same wrong question with respect to the other facility requirements. Once again, Indiana showed that, in an emergency, wider corridors will help medical professionals "get a gurney through that hallway quickly" to "save a woman's life." Second Trial Tr., Vol. III, 23:14–23. Likewise, it showed that a larger procedure room will better allow abortion providers in an emergency to "get emergency equipment or other personnel" into the procedure room. Second Trial Tr., Vol. II, 103:17–19. These points were undisputed, and they are sufficient to uphold these requirements. Indeed, if any other standard applied, garden-variety regulatory decisions about room size and corridor width would become constitutional questions. *Simopoulos*, 462 U.S. at 516–17, 519. This Court should reject Whole Woman's Health's effort to enlist federal courts as stand-ins for state health regulators.

Whole Woman's Health also fails to address adequately the State's argument that the district court wrongly discounted the opinions of the State's experts. Instead, it simply states that "[t]he portion of the opinion from which the State quotes . . . concerns the regulation pertaining to medication abortion facilities." Appellees' Br. 56. But, of course, the same error applies to both sets of regulations: If the standard for expert witnesses in abortion cases requires that an expert has performed abortions, then the State's witnesses fall short (and always will). And because

abortion providers have an institutional and financial interest in challenging regulations of their practice, such a standard would necessarily prevent States defending abortion regulations from recruiting any qualified experts. Rather than grappling with the problems that standard would create, Whole Woman's Health embraces it. Appellees' Br. 56 n.9. That standard is unworkable and unnecessary: A doctor may develop an informed and helpful expert opinion on abortion safety without performing abortions.

Once more, Whole Woman's Health and the district court are wrong that Indiana lacks a legitimate interest in ensuring maximum safety for women seeking abortions: The facility requirements are rationally related to this interest, impose no substantial obstacle, and provide benefits that outweigh whatever modest burdens they impose. This Court should reverse.

2. Whole Woman's Health cannot obtain an injunction against both the corridor-width and procedure-room requirements

Whole Woman's Health acknowledges that "the South Bend Clinic currently complies with the corridor width requirement," but says it has standing to challenge that requirement because "the clinic faces a trade-off between maintaining compliance with that requirement and achieving compliance with the procedure room square footage requirement." Appellees' Br. 57 n.10. Analytically, that means the Court may address the corridor-width challenge *only* if it first upholds the procedure-room requirement (which, of course it should do). The district court, in contrast, enjoined the corridor-width requirement even though it *also* invalidated the procedure-room requirement. If the procedure-room requirement is invalid, however,

Whole Woman's Health has no need to expand its procedure rooms, and thus no need to shrink the widths of its currently compliant hallways. In that circumstance, Whole Woman's Health would suffer no injury justifying its corridor-width challenge.

Nor do Dr. Glazer and All Options provide alternative avenues for challenging the corridor-width requirement. Both clinics where Dr. Glazer provides abortions (Whole Woman's Health and Women's Med Center), already comply with the requirement, and Dr. Glazer does not allege any intention to begin performing surgical abortions at a location that does not comply with the requirement. All Options does not provide abortions at all, and it makes no argument that the corridor-width requirement causes it to divert resources away from its mission. Nor would such an argument be plausible, considering that at least six of the seven abortion clinics in the State already comply with this requirement.

F. The challenge to the housekeeping-room requirement lacks a plaintiff with standing and fails on the merits as well

1. No plaintiff has standing to challenge the housekeeping-room requirement

The challenge to the housekeeping-room requirement confronts serious standing problems as well. Because Whole Woman's Health already has a housekeeping room, the plaintiffs do not contend that Whole Woman's Health itself has standing to challenge the housekeeping-room requirement. Instead, they argue that Dr. Glazer and All Options have standing to challenge the requirement.

Both theories of standing, however, derive from an abortion provider that is not even a party to this case—Planned Parenthood. Planned Parenthood maintains

a health center in Evansville that is not an abortion clinic and that lacks a housekeeping room. The plaintiffs' theory is that, were the housekeeping-room requirement enjoined, Planned Parenthood would have a compliant facility for offering medication abortions and could seek a state license to do so. Planned Parenthood has not seen fit to make such an argument in support of its own challenge to the housekeeping-room requirement, however, so it is hard to see how anyone else can invoke that supposed injury. Furthermore, any relief Planned Parenthood could obtain against this requirement—whether by asking the Department of Health for a waiver or by filing an as-applied challenge—would necessarily be limited to Planned Parenthood itself. Plaintiffs here cannot leverage a non-party's injury to obtain standing to request facial invalidation of the housekeeping-room requirement.

The plaintiffs respond to this point merely by citing the district court's rejection of the State's motion to dismiss on standing grounds, but there the court merely said that Dr. Glazer could challenge Indiana abortion regulations on account of his patients at Women's Med Center in Indianapolis. ECF No. 81 at 13–14. Critically, the district court did not hold that Dr. Glazer has standing to challenge the housekeeping-room requirement specifically. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (holding that standing "is not dispensed in gross" and that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief' that is sought" (cleaned up)). Nor could it have, as the complaint nowhere mentions the housekeeping-room requirement, so no one knew at the motion-to-dismiss stage that it was among the challenged laws.

Moreover, Dr. Glazer alleges no intention to begin providing abortions at a hypothetical Planned Parenthood clinic in Evansville—or even at the actual (and housekeeping-room-compliant) abortion clinic nearby in Bloomington. He instead claims standing "on behalf of his abortion patients who would be able to obtain abortion care in Evansville but for" the housekeeping-room requirement. Appellees' Br. 58. But the plaintiffs identify no instance where a woman from Evansville (or nearby) drove to Women's Med in Indianapolis or Whole Woman's Health in South Bend (where Dr. Glazer provides abortions) to obtain an abortion. Nor is that surprising, given the existence of the Bloomington Planned Parenthood abortion clinic, which is much closer to Evansville. Put differently, there is no plausible scenario where the lack of a housekeeping room at Planned Parenthood in Evansville imposes a substantial obstacle on patients at either Women's Med or at Whole Woman's Health in South Bend. Dr. Glazer thus lacks standing to challenge this requirement.

All Options, not being an abortion provider, cites *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), and argues for standing on the theory that the housekeeping law somehow requires it "to divert resources from other programming to assist people in Evansville with travel to other parts of Indiana—or other states—to obtain abortion care." Appellees' Br. 58–59. The district court's standing decision did not address this argument, ECF No. 81 at 11–14, and All Options has not shown that the housekeeping-room requirement specifically causes it to divert resources away from its mission. Again, the complaint does not mention this requirement at

all. All Options cannot obtain standing merely by claiming that its organizational mission is to defeat laws it does not like; like any other association, it must identify a concrete injury to itself or to its members. *See Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972).

Because no plaintiff has standing to challenge the housekeeping-room requirement, this Court should reverse the judgment against it.

2. The housekeeping-room requirement imposes no substantial obstacle and is rationally related to a legitimate state interest

The housekeeping-room requirement also must be upheld because the district court did not find that the requirement prevented any women from having an abortion. In fact, Planned Parenthood has not even *attempted* to get a license for its Evansville facility, where it might ask for a waiver from the housekeeping-room requirement. Planned Parenthood's business decisions in that regard are not attributable to Indiana. Whole Woman's Health and the district court are thus wrong to conclude that this provision necessarily prevents an abortion clinic from operating in Evansville. Appellees' Br. 28 (citing Short App. 76–77).

Moreover, the housekeeping-room requirement advances the State's interest in cleanliness and safety, and the benefits of the housekeeping room outweigh its burdens. It is important to have a space for separating "sterile, clean and dirty instruments" or chemicals. Second Trial Tr., Vol. II, 102:17–23 (Calhoun testimony). Whole Woman's Health asks this Court to resolve a debate over whether the Evansville facility really needs such a room, Appellees' Br. 27, but that is at most a question for an as-applied challenge and can hardly pose a question of facial

constitutional significance. The Constitution generally permits the State to impose a housekeeping-room requirement to guarantee maximum cleanliness and safety, *see Simopoulos*, 462 U.S. at 516–17, 519, which requires reversal of the district court's judgment of facial invalidity.

Because Indiana can rationally require clinics to be cleaner than minimum standards, and because its housekeeping-room requirement does not prevent women from obtaining abortions in Indiana, this Court should uphold this requirement.

III. The Equal Protection Clause Does Not Provide an Independent Ground for Upholding the District Court's Judgment

Tacked onto the end of its brief, Whole Woman's Health suggests that the Equal Protection Clause provides an independent ground for affirming the district court's judgment. Appellees' Br. 67–68. No authorities support that position, however, and Whole Woman's Health accordingly fails to include even a single citation showing that the Equal Protection Clause has *anything* to say about abortion restrictions. Indeed, even while arguing that the Equal Protection Clause provides an independent ground for affirming, Whole Woman's Health applies the same standard it uses in its Due Process Clause argument. Accordingly, because the challenged statutes survive the due-process analysis, they necessarily survive any equal-protection analysis.

IV. Indiana's Informed-Consent Disclosures Do Not Violate the First or Fourteenth Amendments

The State's human-physical-life disclosure and its fetal-pain disclosure are truthful and non-misleading. These provisions are therefore constitutional, and

Whole Woman's Health fails to respond meaningfully to the State's arguments on this score. The district court's decision to invalidate these provisions should be reversed.

A. Plaintiffs admit the truth of the human-physical-life disclosure

Whole Woman's Health acknowledges that, as a matter of basic biology, "a fertilized egg is alive in the same way that an amoeba or bacterium is alive." Appellees' Br. 61. And it nowhere disputes that the egg is human. Indeed, by recognizing that the disclosure is—at the very least—"biological trivia," it gives the game away. *Id.* at 61. The question of what to do with that information, and whether "a fertilized egg constitutes meaningful human life that is morally or ethically distinguishable from an amoeba or bacterium" is a question left to each Indiana woman to answer. *Id.* Indiana can reasonably require abortion providers to convey the scientific reality of abortion to Indiana women seeking abortion.

Whole Woman's Health responds by asserting that Indiana women are unable to comprehend the difference between "an ideologically neutral refresher on middle school biology"—yet another concession to the scientific accuracy of the statement—and a "message about the personhood status of a fertilized egg." *Id.* at 61–62. The required statement is merely a factual declaration about "human physical life," not a statement about "personhood," so this argument misses the mark in all events. But even if the disclosure conveyed the message Whole Woman's Health suggests, the Constitution would still allow it. Indiana, like any other State, can "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State

expresses a *preference* for childbirth over abortion." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (emphasis added); *see Gonzales v. Carhart*, 550 U.S. 124, 157, 159 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman" by "ensuring so grave a choice is well informed.").

Accordingly, even accepting the district court's conclusion that this disclosure could cause some women to be confused or angry because it conflicts with their assumptions, that fact does not render the statement untruthful or misleading. Instead, it reflects the undisputed biological accuracy of the statement, which may carry moral implications precisely because of its truth. *See Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.").

B. The fetal pain disclosure is truthful and non-misleading

The fetal-pain disclosure is also constitutional. Whole Woman's Health cannot dispute that none of its witnesses testified that the disclosure was false or misleading, or otherwise showed that the disclosure had misled even one woman. And Whole Woman's Health has made no attempt to rebut the significant body of evidence the State has recounted showing that the disclosure was "scientifically well supported." Second Trial Tr., Vol. II, 207:5–23. Nor can Whole Woman's Health muster a single word of defense after the State pointedly demonstrated that its own position turned on wholly unsupported assumptions. Appellants' Br. 65–66.

Whole Woman's Health instead urges this Court to adopt a distorted standard under which self-interested professional organizations—opining outside their own expertise—can rely on their own unsupported claims to trump a mountain of scientific evidence. The district court erroneously concluded that the State's position had been "rejected by *all* the major medical organizations" when the plaintiffs' evidence showed, at best, that two OB-GYN licensing organizations—outside the disciplines of neuroscience and embryology—had addressed the subject. Short App. 144 (emphasis added). Further, the district court conflated the views of the 2005 Lee article's authors with the journal that published it, attributing the article's "findings" to *The Journal of the American Medical Association* itself. *Id.*; *see also* Second Trial Tr., Vol. II, 242:15–243:3 (noting that the American Medical Association had not taken an official position on abortion).

The Supreme Court, however, has already rejected Whole Woman's Health's proposed approach, holding that it would be "too exacting a standard" to strike down abortion regulations because ACOG opposes them—and the Court said that where ACOG was speaking *within* its area of practice. *Gonzales*, 550 U.S. at 166. Here, Whole Woman's Health asks this Court to impose a still more exacting standard—one that would give advocacy organizations (including one based in the United Kingdom) constitutional veto power in matters *beyond* their scientific purview. OB-GYNs are not neuroscientists, and disclosure language well-grounded in neuroscience should not be subject to their *ipse dixits*.

The panel that produced the 2010 RCOG review did include one well-recognized fetal pain expert, neuroscientist Dr. Stuart Derbyshire. *See* Royal College of Obstetricians and Gynecologists, *Fetal Awareness: Review of Research and Recommendations for Practice* ix (Mar. 2010). But in the intervening decade of scientific advancements, even Derbyshire has reversed his position on fetal pain, now concluding that fetal apprehension of pain is possible as early as 12 weeks. *See* Alliance Defending Freedom Br. 11 (citing Stuart Derbyshire & John Bockmann, *Reconsidering Fetal Pain*, 46 J. Med. Ethics 6 (2020)). And notably, ACOG, which submitted an amicus brief here, opted not to defend its position on fetal pain—even though the State's opening brief expressly pointed out why it is incorrect. *See* Appellants' Br. 65–66. ACOG's failure to respond amounts to tacit acknowledgement of its own lack of expertise, and the indefensibility of its position under current science.

Because the State presented ample evidence grounding the fetal-pain disclosure in scientific proof, and because Whole Woman's Health presented no experts or scientific evidence able to refute that proof, the challenge to the fetal-pain disclosure fails: Whole Woman's Health has failed to meet its burden of showing that the disclosure is unconstitutionally false or misleading, both here and at trial.

C. The *O'Brien* test does not apply to informed-consent laws

This Court need not consider Whole Woman's Health's argument that Indiana's informed-consent provisions should be analyzed under *United States v. O'Brien*, 391 U.S. 367, 377 (1968), because Whole Woman's Health's forfeited this

argument below. Notably, the district court did not allow the State to file a supplemental brief after Whole Woman's Health raised the *O'Brien* argument for the first time in its pre-trial brief, explaining that it had already decided at summary judgment that *Casey* provided the appropriate test. *See* Phase 2 Pretrial Conference Tr. 7:4–9 (June 8, 2021). Whole Woman's Health thus waived the issue by not raising it earlier in the proceedings, and it would be inappropriate and prejudicial to the State for this Court to consider an issue that was not fully briefed in (or addressed by) the district court. *See Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 600 (7th Cir. 2014) ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment.")

Regardless, *O'Brien* is not the correct test for informed-consent laws. In *Casey*, the Court held that there is no "constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information" as part of the informed consent process for abortion. 505 U.S. at 882. It then explained that "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." *Id.* at 884. While "the physician's First Amendment rights not to speak are implicated" by informed-consent requirements, the Court stated that it saw "no constitutional infirmity in the requirement that the physician provide the information mandated by the State here" without further explanation. *Id.* It did not even mention, much less apply, the *O'Brien* test. And the Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), does not disturb that holding: There

the Court nowhere cited *O'Brien*—but cited *Casey* when observing that informed-consent laws "regulate[] speech only 'as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" *Id.* at 2373 (quoting *Casey*, 505 U.S. at 884).

Whole Woman's Health does not cite a single case applying *O'Brien* to an abortion informed-consent requirement. Courts across the country, including this Court, routinely apply the *Casey* "truthful and not misleading" standard to First Amendment challenges to abortion informed-consent laws. *See, e.g.*, *EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012); *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012); *Karlin v. Foust*, 188 F.3d 446, 491 (7th Cir. 1999). None of these cases mentions *O'Brien*.

In all events, both the human-physical-life and fetal-pain disclosures pass the *O'Brien* test. The Supreme Court rejected the argument Whole Woman's Health makes here—that "the State does not have an important or substantial governmental interest in elevating one set of beliefs about when human life begins over others," Appellees' Br. 65—when it held that a State may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883; *see also Gonzales*, 550 U.S. at 157, 159 ("The government may use its voice and its regulatory authority to show its

profound respect for the life within the woman" by "ensuring so grave a choice is well informed.").

Whole Woman's Health is also wrong to claim that the human-physical-life disclosure is "greater than necessary to further" Indiana's asserted interest. Appellees' Br. 66. Requiring the disclosure to be included in both the oral informed-consent information and the written informed-consent brochure ensures that women receive the disclosure in a format conducive to processing and understanding the information.

With respect to fetal-pain, Whole Woman's Health at most suggests that the disclosure is untruthful or misleading. But as explained above, Dr. Condic, whose testimony Whole Woman's Health entirely ignored, proved the contrary.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the district court's judgment and vacate the permanent injunction.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General

Gene C. Schaerr
H. Christopher Bartolomucci
James A. Heilpern
Scott D. Goodwin
Joshua J. Prince
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
Fax: (202) 776-0136
gschaerr@schaerr-jaffe.com

By: *s/Thomas M. Fisher*
Thomas M. Fisher
Solicitor General
Kian J. Hudson
Deputy Solicitor General
Christopher M. Anderson
Julia C. Payne
Robert A. Rowlett
Melinda R. Holmes
Deputy Attorneys General
Office of the Indiana Attorney General
IGC-South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov

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By: *s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 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.

s/ Thomas M. Fisher
THOMAS M. FISHER
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov