# United States Court of Appeals

*for the*

# Seventh Circuit

Case No. 17-1883

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

*Plaintiff-Appellee,*

– v. –

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, in his official capacity, *et al.*,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

## BRIEF FOR *AMICUS CURIAE* CENTER FOR REPRODUCTIVE RIGHTS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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# APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1883

Short Caption: Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana Dep't of Health, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

**[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Center for Reproductive Rights

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The Center for Reproductive Rights

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

---

Attorney's Signature: s/ Julie Rikelman Date: 7/28/17

Attorney's Printed Name: Julie Rikelman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Jenny Ma Date: 7/28/17

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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N/A

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Attorney's Signature: s/ Hillary Schneller Date: 7/28/17

Attorney's Printed Name: Hillary Schneller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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## INTEREST OF AMICUS CURIAE

The Center for Reproductive Rights (the "Center") is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, the Center's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the United States concerning reproductive rights, in both state and federal courts, including most recently serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

As lead counsel in *Whole Woman's Health*, and an organization that regularly litigates in federal and state courts to ensure that access to abortion is not impermissibly burdened, the Center has an interest in ensuring that the undue burden standard set forth by the Supreme Court in *Whole Woman's Health* is accurately and consistently applied.

All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part or contributed money to fund its preparation or submission. No person, other than amicus herein, contributed money to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Last year in *Whole Woman's Health*, the Supreme Court reaffirmed the Constitution's robust protection of the right to abortion. 136 S. Ct. at 2309. The Court reiterated that the undue burden test—the governing standard for over a quarter-century for laws infringing on that right—is a fact-based and context-specific inquiry that requires courts to weigh the benefits of an abortion restriction against its burdens. *Id.* at 2309-10. In making this inquiry, courts must thoroughly examine the evidence regarding both burdens and benefits, as they exist in the real

world. Judicial deference to the legislature is limited, and if the established burdens of a restriction outweigh the benefits it confers, those burdens are undue and the law is unconstitutional. *Id.* These principles apply regardless of the state's purported interests.

The district court correctly concluded that Plaintiff-Appellee Planned Parenthood is likely to prevail on the merits of its undue burden claim. The court applied the legal standard affirmed in *Whole Woman's Health*, which demands a contextual analysis that weighs a law's benefits against the accumulated burdens it imposes, and assesses burdens based on how providers deliver services in the real world, without assuming, for purposes of the undue burden analysis, that they must take costly or impractical steps to lessen the burdens a regulation creates. Contrary to the State's description of these aspects of the undue burden inquiry as "novel" and "remarkabl[e]," Appellants' Br. 15, 45, they are the very core of the undue burden standard. The State, in defiance of an unbroken line of precedent spanning decades, asks this Court to abandon the rule of law and the core holdings of the Supreme Court's abortion jurisprudence. No constitutional development or doctrine disturbs, threatens to diminish, or suggests limited application of this long-standing legal standard.

## ARGUMENT

### I. The District Court Properly Reviewed the Indiana Ultrasound Law Under the Undue Burden Standard Applied in *Whole Woman's Health*.

For over twenty-five years, laws restricting a woman's right to end a pregnancy have been subject to the undue burden test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Under this standard, as subsequently applied in *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007); and *Whole Woman's Health*, 136 S. Ct. at 2292, a law restricting abortion imposes an undue burden and is constitutionally invalid if the "'*purpose or effect*' of the provision '*is to place a substantial*

*obstacle'"* before a woman seeking an abortion. *Whole Woman's Health*, 136 S. Ct. at 2300 (quoting *Casey*, 505 U.S. at 878). Last year, the Supreme Court clarified that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2309. Indiana now contends that the district court abused its discretion by applying the undue burden standard prescribed by *Whole Woman's Health* because the applicable standard varies based on a state's asserted interest for the challenged law. Appellants' Br. 17-18. But no support exists for the contention that there are two different undue burden tests: one for laws that promote patient health and another for laws that promote potential life. Nor is there support for a division of patient health into physical and mental health.[1] To the contrary, such distinctions have no support in any case law and are wholly irreconcilable with Supreme Court precedent.

### A. The Undue Burden Standard Applies to All Abortion Restrictions and Requires Balancing a Law's Benefits With its Burdens Based on Record Evidence.

In this appeal, Indiana advances an interpretation of the undue burden standard that the Supreme Court has already rejected. *See, e.g.*, Appellants' Br. 21. As the district court noted, "[t]he premise of the State's argument—that different standards are applied in *Casey* and *Whole Woman's Health*—is belied by those decisions." Short App. 11. This Court, as was the district court, is bound by these cases, which apply the same test to all abortion restrictions under review. The mandate from these decisions is plain: the undue burden test requires courts to evaluate whether an abortion restriction actually furthers the state's alleged interests, and then to

[1] At the district court, Indiana argued that the undue burden test should apply differently to laws "designed to protect maternal health" and those "designed to protect fetal life." Defs.' Mem. Opp'n Pl.'s Mot. Prelim. Inj. 7. Before this Court, Indiana now changes its position, arguing that "[t]he *Whole Woman's Health* standard . . . is suitable only for abortion regulations nominally intended to protect *women's physical health*, not to those intended to inform the abortion decision (and thereby *protect fetal life and women's mental health*)." Appellants' Br. 17-18 (emphasis added).

balance any benefits from furthering those state interests—whatever they may be—against the burdens the law would impose. The *Casey* plurality emphasized that respect for women's autonomy requires protection of her right to choose abortion and that the state's asserted interest in potential life must be accommodated. 505 U.S. at 851, 878-79. The Court held that the trimester framework employed in earlier cases was too rigid, and the undue burden formulation ensured the proper balance between the state's interests and the burdens imposed on women. *Id.* at 873-77.

*Whole Woman's Health* resolved that the undue burden test requires not only "a constitutionally acceptable" justification for regulating abortion, but also record evidence demonstrating that the regulation *actually* advances that goal in a permissible way. 136 S. Ct. at 2309-10. Quoting *Gonzales*, a case where the state's asserted interest was potential life, the Court reiterated that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." *Id.* at 2310. Thus, a court may not "[u]ncritical[ly] defer[]" to the legislature in the manner that Indiana urges. *Id. Contra* Appellants' Br. 20. Rather, the undue burden standard requires close judicial scrutiny—no matter the state's interest—because of the important constitutional interests at stake. *Whole Woman's Health*, 136 S. Ct. at 2309 (It "is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue." (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955))).

In determining whether a law furthers a valid state interest, whether it does so through permissible means, and to what extent it does so, a court may take into account the degree to which the law is over- or under-inclusive, and the existence of alternative, less burdensome

means to achieve the state's goal. *Id.* at 2311 (noting that state's prior law was sufficient to serve asserted interest); *id.* at 2314 (observing that record contained no evidence suggesting that new law would be more effective than pre-existing law at achieving state's goal); *id.* at 2315 (discussing under-inclusive scope of provision at issue). After evaluating a law's benefits, a court must weigh them against its burdens to determine if the burdens are justified. *See id.* at 2310. As in other constitutional contexts, the undue burden standard demands a fact-specific balancing. *See, e.g.*, *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1199 (10th Cir. 2010) (noting that substantive due process right to familial association is subject to a balancing test under which "we balance 'the individual's interest in liberty against the State's asserted reasons for restraining individual liberty'"); *Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir. 1996) (assessing whether additional process would "place an undue burden on the government's resources"); *Mid-Atl. Bldg. Sys. Council v. Frankel*, 17 F.3d 50, 52 (2d Cir. 1994) (applying undue burden test to a dormant commerce clause challenge to balance a regulation's "burdens on interstate commerce . . . [against] its legitimate local benefits").

### B. The Undue Burden Test Does Not Vary Based on the State's Asserted Interests.

The Supreme Court has foreclosed Indiana's argument that there is a less-exacting "substantial obstacle" test for some laws and a more stringent "undue burden" test for others, instead stating that the undue burden test is "a standard of *general application*." *Casey*, 505 U.S. at 876 (emphasis added). Under this "controlling standard," the terms "substantial obstacle" and "undue burden" are equivalent. *Id.* at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). Indeed, the Supreme Court applied the same analysis and factually-searching inquiry to all of the restrictions under review in

*Casey*—including the spousal notification and parental involvement requirements, which the state asserted were related to its interest in potential life, *id.* at 887-99, and recordkeeping and reporting requirements, which the state justified as related to patient health, *id.* at 900-01—regardless of the state's asserted interest. At no point did the Supreme Court suggest that multiple standards applied. *See id.* at 877 ("[A] statute which, while furthering the interest in potential life *or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." (emphasis added)).[2]

Nor did *Whole Woman's Health* announce different standards based on the state's asserted interests. Instead, the Supreme Court rejected the Fifth Circuit's articulation of the undue burden standard and relied on its own analysis of the range of regulations challenged in *Casey*. *See* 136 S. Ct. at 2309 (discussing analysis of spousal and parental notification provisions). For example, although *Whole Woman's Health* concerned laws purporting to further the interest in patient health, the Supreme Court discussed whether these laws constituted a substantial obstacle to abortion access—the same test that Indiana argues should apply to non-physical health and potential life interests. *See id.* at 2312 (admitting privileges requirement); *id.* at 2316 (ambulatory surgical center requirement). As the district court found, "[g]iven that the Supreme Court made clear in *Whole Woman's Health* that it was applying *Casey*, it inexorably

[2] *Casey* did not create the "maternal-fetal" conflict the State imagines. *See* Appellants' Br. 18-19. Indeed, *Casey* set out the undue burden standard precisely to "str[i]k[e] a balance" between the state's interest in potential life and women's liberty interests. *Gonzales*, 550 U.S. at 146. Further, to the extent the State means to suggest that a balancing test is unworkable where the State asserts a potential life interest, the Court in *Casey* dismissed that notion. *See* 505 U.S. at 855 ("While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.").

follows that there are not two distinct undue burden tests applied in *Casey* and *Whole Woman's Health*." Short App. 11.

Indiana also incorrectly limits *Whole Woman's Health* to its facts, as if it were cabined to "regulat[ions] in the name of women's physical health." *See* Appellants' Br. 18. To the contrary, *Whole Woman's Health* clarified the application of the undue burden standard generally, given the conflict in the lower courts' application of the test after *Casey*. 136 S. Ct. at 2309. In clarifying the standard, the Court reinforced *Casey*'s balancing framework as a single test requiring courts to weigh evidence of the law's purported benefits against its burdens. *Id.*

Finally, in announcing and applying this test, the Supreme Court in *Casey* did not sanction *all* informed consent and mandated delay measures. *Cf., e.g.*, Appellants' Br. 22 ("*Casey* has *already* done the balancing for informed-consent and waiting period rules."); *see also id.* at 20. The State selectively quotes from *Casey* to support its argument, but the portions of the decision the State excludes are revealing. First, the Court made clear that it reached its holding based on the particular factual record before it, and that the constitutionality of the Pennsylvania mandatory delay law was a close question. 505 U.S. at 885-86. Second, *Casey* emphasizes that all abortion restrictions, including laws allegedly about informed consent, will be constitutional only if "the means chosen by the State to further the interest in potential life [are] calculated to *inform* the woman's free choice, *not hinder* it." *Id*. at 877 (emphasis added).[3]

[3] Thus, contrary to the State's assertion, the potential for pretext is not isolated to laws advanced on patient health grounds, but extends to potential life-justified laws. *See* Appellants' Br. 18, 21 ("*Whole Woman's Health* is about unmasking a *sub rosa* fetal-protection purpose lurking behind a regulation ostensibly enacted to promote women's physical health," while "informed consent and waiting period rules unabashedly and (per *Casey*) permissibly advance government interests in protecting fetal life and maternal mental health, so additional scrutiny designed to expose pretext is not justified."). Under *Casey*'s framework, a measure could be invalid if the state justified it as an informed consent requirement but it did not actually further the interest in informing women or did so in a way that its burdens outweighed any benefits.

Accordingly, *Casey* explicitly contradicts the State's theory that the Supreme Court afforded blanket approval for all informed consent and delay laws. *See, e.g.*, *Karlin v. Foust*, 188 F.3d 446, 485-86 (7th Cir. 1999).

### C. Since *Whole Woman's Health*, Every Federal Court that Has Evaluated an Abortion Restriction Has Applied the Balancing Test Set Out in that Decision.

Since *Whole Woman's Health*, every federal court that has considered an argument like the one the State advances here has rejected it, holding that a single undue burden standard applies regardless of the state's litigation position regarding the purpose of the abortion restriction. *See, e.g.*, *Hopkins v. Jegley*, No. 4:17-cv-00404-KGB, 2017 WL 3220445, at *21 (E.D. Ark. July 28, 2017) (rejecting state's argument that "the Supreme Court has created two distinct undue burden tests," and instead applying test that requires "weighing the extent of the burden against the strength of the state's justification" regardless of state interest); *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, 2017 WL 462400, at *7 (W.D. Tex. Jan. 27, 2017) ("[The State's] argument a different test applies when the State expresses respect for the life of the unborn is a work of fiction, completely unsupported by reading the sections of Supreme Court opinions [the State] cites in context."), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 6, 2017); *W. Ala. Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1337 (M.D. Ala. 2016) ("[t]he *Casey* undue-burden standard . . . governs" the "fetal-demise law"), *appeal docketed*, No. 16-17296 (11th Cir. Nov. 29, 2016); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 194 F. Supp. 3d 818, 828 (S.D. Ind. 2016) ("[T]he State simply ignores that the Supreme Court in *Casey* 'struck a balance' between this interest [in potential life] and a woman's liberty interest in obtaining an abortion."). This is unsurprising given the actual language of the Supreme Court's decisions and because a contrary result would allow a law to evade meaningful constitutional

review simply because the state manufactures an interest other than women's health. And the State's argument would make it impossible for a court to know which test to apply where a state defends a law with a dual purpose or invokes different interests at different times. Accepting Indiana's argument would allow the government to render *Casey* and *Whole Woman's Health* meaningless by asserting a pretextual justification for an abortion restriction, which is exactly what the undue burden standard was designed to prevent.

## II. The Undue Burden Test Requires Evaluating an Abortion Regulation in its Full Context.

The State also contends that Planned Parenthood advances a "novel" theory that the ultrasound law must be evaluated in context—including how it operates in conjunction with "extant regulations, lack of abortion physicians, and patients' personal circumstances." Appellants' Br. 15-16. Far from novel, this articulation and application of the undue burden standard is precisely what precedent demands. *Whole Woman's Health*, 136 S. Ct. at 2313. This Circuit's precedents require that "when one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014); *see also Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 918 (7th Cir. 2015) (considering, among other things, point in pregnancy at which clinics offer abortions; increased travel; and delay resulting from when women become aware they are pregnant), *cert. denied*, 136 S. Ct. 2545 (2016).

### A. *Casey* Requires a Contextual Analysis of the Accumulated Burdens Imposed by a Challenged Restriction.

*Casey*'s analysis of the spousal notification requirement is a paradigmatic example of the Supreme Court evaluating an abortion restriction within the context of women's actual lives. The

Supreme Court expressed concern that married women who experienced domestic violence were "likely to be deterred from procuring an abortion" by fear of violence triggered by the notification. *Casey*, 505 U.S. at 893-94; *see also id.* at 895 (noting that the law's "real target is . . . married women seeking abortions who do not wish to notify their husbands"). Had *Casey* set out a standard that required courts to consider the severity of burdens imposed by abortion restrictions without reference to how the restrictions interacted with women's lived experience, these facts would have been irrelevant.

*Casey* likewise made women's personal circumstances and logistical challenges part of the contextualized analysis of the mandatory twenty-four hour delay law. *Id.* at 885-87. The Court described the district court's findings of increased delays, travel distances, risk of disclosure, and exposure to anti-abortion harassment. *Id.* at 885-86. While "troubling," they were not sufficient, "on th[is] record" to demonstrate an undue burden. *Id.* at 886-87. Likewise, the Court concluded that the district court's finding that these effects would be "particularly burdensome" "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others" did not amount to an undue burden as to those women because "[a] particular burden is not of necessity a substantial obstacle." *Id.* at 886-87. Rather than ignoring these burdens as irrelevant—as Indiana would have it—the *Casey* Court factored them into the record-dependent analysis on which the Court concluded the burden was not undue.

Following *Casey*, courts routinely consider the challenged regulation within its factual context. In evaluating Wisconsin's admitting privileges law, for example, this Court considered each of the burdens that Indiana argues it is foreclosed from factoring in here. It looked at the increased distances some women would have to travel if the clinic near them closed, observing

that what might become a 200 mile trip to a clinic "is really 400 miles . . . . [f]or Wisconsin law requires two trips to the abortion clinic (the first for counseling and an ultrasound) with at least twenty-four hours between them." *Van Hollen*, 738 F.3d at 796; *see also id*. at 795-96 (noting law would close two and a half of state's four abortion clinics, resulting in "sudden shortage of eligible doctors," and requiring additional travel to remaining clinics). Because the state-mandated delay and additional trip law "compound the effects" of the challenged law, this Court held "the aggregate effects on abortion rights must be considered." *Id*. at 796. Moreover, it found such travel is a "nontrivial burden on the financially strapped and others who have difficulty traveling long distances to obtain an abortion, such as those who already have children." *Id*. This Court continued its contextual analysis in *Schimel*, noting that clinic closures would lead to increased delays that, for some women, would stretch beyond the point in pregnancy that remaining clinics offered services. 806 F.3d at 918. In addition, some women, like those "seeking lawful abortions [] late in their pregnancy, either because of [a] waiting list or because they hadn't realized their need for an abortion sooner, would be unable to obtain abortions in Wisconsin." *Id*. Again, this Court accounted for all of what the State now asks this Court to ignore: women's personal circumstances, the lack of abortion providers, and existing regulations.

Courts outside this Circuit similarly apply the contextual analysis *Casey* demands. *See, e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) ("In reaching [the undue burden] determination, we look to the entire record and factual context in which the law operates."), *cert. denied*, 136 S. Ct. 2536 (2016);[4] *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (stating undue burden inquiry requires "consider[ing] the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors,

[4] *But see Whole Woman's Health v. Cole*, 790 F.3d 563, 589 (5th Cir. 2015) (per curiam) (rejecting contextual analysis), *rev'd*, *Whole Woman's Health*, 136 S. Ct. at 2292.

and other abortion regulations"); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d. 1330, 1356-60 (M.D. Ala. 2014) (considering, among other things, socioeconomic factors, travel, logistical challenges of arranging child care, transportation, and work).

### B. *Whole Woman's Health* Affirms the Undue Burden Standard's Context-Specific Inquiry.

*Whole Woman's Health* foreclosed the State's argument that a court should be willfully blind to the real-world impacts of a challenged abortion restriction. There, the Supreme Court considered not only the impacts on women denied abortions because of clinic closures, but also that the "closures meant fewer doctors, longer waiting times, and increased crowding" at the remaining clinics, along with "increased driving distances" as "one additional burden . . . when taken together with others that the closings brought about." 136 S. Ct. at 2313. Thus, contrary to the State's misleading paraphrase of the Supreme Court's analysis, *see* Appellants' Br. 17, the Supreme Court did not pluck the challenged restrictions from their context. Instead, it looked at what adding the challenged provisions to Texas's pre-existing scheme of abortion regulation would mean for women's actual lives. *See Whole Woman's Health*, 136 S. Ct. at 2318.[5]

Every federal court applying the undue burden standard since *Whole Woman's Health* has engaged in the context-specific inquiry that decision demands, as the district court did here. One Louisiana federal district court decision provides a particularly valuable window into this aspect of the undue burden inquiry, as clarified in *Whole Woman's Health.* Prior to the Supreme Court's decision, the Louisiana court preliminarily enjoined the state's admitting privileges law, but did

[5] Indeed, *Whole Woman's Health* made plain that context is key to *both* sides of the undue burden calculus. Thus, the Court not only accounted for the burdens accumulated by adding the challenged restrictions to Texas's abortion regulation scheme but also evaluated whether, "compared to prior law . . . the new law advanced [the state]'s legitimate interest," or whether, looking at the context in which abortion was practiced, there was any "significant health-related problem that the new law helped to cure." 136 S. Ct. at 2311.

so under the Fifth Circuit's articulation of the standard—a standard that foreclosed a contextual inquiry. *See June Med. Servs. LLC v. Kliebert*, 158 F. Supp. 3d 473, 525 (M.D. La. 2016) ("Under the Fifth Circuit approach [in *Cole*, 790 F.3d at 589], poverty related issues, e.g. increased challenges for poor women to get an abortion far from their home caused by lack of availability of child care, unreliability of transportation, unavailability of time off from work, etc., cannot be considered in the undue burden analysis because these issues were not caused by or related to the admitting privileges requirement."). After *Whole Woman's Health* declared the Fifth Circuit's "articulation of the relevant legal standard . . . incorrect," 136 S. Ct. at 2309, the Louisiana court made additional factual findings. The court explained that "certain facts that [the state of Louisiana] argued were not legally relevant are now indisputably relevant and, indeed, critical to the constitutional analysis," including "evidence regarding the *actual* burdens the restriction places on women seeking abortions." *June Med. Servs. LLC v. Kliebert*, No. 14-CV-00525-JWD-RLB, 2017 WL 1505596, at *2 (M.D. La. Apr. 26, 2017) (emphasis added), *appeal docketed sub nom. June Med. Servs. LLC v. Caldwell*, No. 17-30397 (5th Cir. May 16, 2017). Accordingly, the court looked at the burdens imposed by the challenged admitting privileges law together with the state's hostility to abortion; other state regulations; and socioeconomic factors, such as the disproportionate burdens imposed on poor women. *Id.* at *49-52. In addition, the court considered the burdens imposed by the closure of two clinics during the time the law was preliminarily blocked, "*regardless of the reason*" for the closures, because the "closure[s] reinforce[] the Court's findings regarding access." *Id.* at *49 (emphasis added).

Likewise, an Alabama district court applying the test affirmed in *Whole Woman's Health* rejected the same argument Indiana advances here as a "misapprehen[sion of] the undue-burden case law." *W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1328, 1348 (preliminarily enjoining

enforcement of laws banning one of the most common and safest methods of second-trimester abortion and prohibiting abortion facility within 2,000 feet of a public school). "[T]he undue burden analysis requires an examination of the 'real-world context' of the challenged statute and its actual effects—and not just those circumstances that were directly attributable to the statute." *Id*. at 1328 (quoting *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1285-86 (M.D. Ala. 2014)). Thus, in evaluating one of the challenged Alabama restrictions, the court considered the impact of clinic closures, including "the increased travel times, and the reduced capacity and increased wait times at Alabama's three remaining clinics." *Id.* at 1331; *see also id*. at 1328 (accounting for impact of "the stigma" and "climate of extreme hostility" surrounding abortion). In evaluating another restriction, which could require some women to make an additional trip to the clinic, the court likewise considered the range of "external factors that affect women's ability to access abortion care," including Alabama's pre-existing forty-eight hour delay and two-trip law; the "difficulties that [] patients face with arranging child care, traveling far distances to the clinic, and affording shelter during the trip," as well as missed work; and that "[t]he burden of having to make multiple trips for the procedure is especially pronounced for low-income women." *Id*. at 1344-45, 1344 n.32-33, 1345 n.34.

The State's assertion that a court should evaluate an abortion restriction in a vacuum, and disregard the cumulative burdens it imposes, is thus foreclosed by Supreme Court and Circuit precedent.

## III. The Undue Burden Standard Requires Courts to Assess the Burdens a Regulation Creates for Women Based on How Providers Deliver Services in the Real World, Without Assuming They Must Undertake Costly or Impractical Actions to Lessen Burdens that a Regulation Imposes.

Consistent with *Whole Woman's Health*, and as part of the undue burden standard's context-specific inquiry, the district court held that "the undue burden inquiry does not

contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a new abortion regulation." Short App. 17. Instead, courts must assess burdens "given the reality of how [a provider] provides its abortion services." *Id.* Seeking to alter the legal standard, the State claims "that conclusion has no basis in the law," Appellants' Br. 45, arguing instead that courts must require abortion providers to modify their pre-existing practices *before* there can be any assessment of the magnitude of the burdens that a law imposes, no matter how impractical such modifications would be. According to Indiana, any such "choice" by a provider not to change practices to lessen burdens means that the provider—not the regulation—has caused the burdens, and courts must disregard them in the undue burden analysis. *Id.* at 16.

The State's approach is contrary to the Supreme Court's analysis in *Whole Woman's Health* for good reason: it would render the undue burden test meaningless by requiring courts to assume that providers will be able to change their practices in ways that lessen the burdens a restriction places on women, even where restrictions will be found unconstitutional because they offer no actual benefits.

### A. *Whole Woman's Health* Does Not Permit Courts to Explore Hypothetical Ways a Provider Could Lessen the Burdens Imposed by an Abortion Regulation Prior to Assessing Whether it is Constitutional.

Under the undue burden standard, courts must assess the burden that regulations place on women based on how medical providers operate in the real world and weigh those burdens against the benefits the law advances. *See Whole Woman's Health*, 136 S. Ct. at 2309-10. For purposes of the balancing test, courts cannot assume that medical providers will reallocate resources or increase expenditures to make impractical changes that lessen burdens, thereby tipping the scale toward constitutionality.

For example, the restrictions at issue in *Whole Woman's Health* would have required, among other things, abortion clinics to undertake renovations that transformed them into ambulatory surgical centers ("ASCs"), complete with surgical suites and architectural arrangements that bore no relationship to the offered clinical procedures. *Id.* at 2314. In applying the undue burden test, the Supreme Court assessed the burdens the regulations would place on women based on how abortion clinics currently provided services, as non-ASCs (facing closure) and ASCs that saw a given number of patients, with staffing levels and hours of operation put in place before the restrictions were passed. *Id.* at 2316-18. It rejected Texas's argument that providers could simply open more ASCs, or serve more patients at existing ASCs by changing their current practices, thereby lessening the burden on women. *Id.* at 2317-18.

Instead, the Supreme Court analyzed burdens as providers offered their services in the real world, and determined whether the law was constitutional on that basis. For example, in finding that more ASCs "will not" open in Texas to meet demand, the Court treated opening an ASC as a change that was impossible for some providers, and impracticable but potentially feasible for others. *See id.* To that end, it noted that Planned Parenthood had opened a new ASC in Houston, constructed at a cost of $26 million and serving 9,000 women annually. *See id*. Although it made note of the Houston ASC, the Court did not hold that providers were obligated to construct ASCs that would lessen access burdens if their resources allowed, and then reduce their measure of burdens on women accordingly. Instead, the Court observed that, "*[m]ore fundamentally*, in the face of no threat to women's health," Texas sought through the ASC requirement to impose burdens with no countervailing benefit. *Id*. at 2318 (emphasis added). Irrespective of whether a provider could hypothetically redirect and increase resource investment

to become an ASC, the Supreme Court analyzed burdens on women as they existed under the clinics' real world practices.

The Supreme Court rejected the State's formulation of the undue burden test for good reason: it would require courts to assume that providers must change their practices to lessen the burdens of unconstitutional laws, no matter how costly, impractical, or inconvenient. As discussed above, the undue burden test requires courts to assess the extent to which a law confers benefits (if any), and burdens a law imposes on abortion access, and then weigh the benefits against the burdens to determine whether a regulation is constitutional. *See supra* Section I. Indiana's approach would require courts to explore the hypothetical ways a state believes providers could change their existing practices to lessen burdens *before* determining whether a regulation was in fact constitutional, regardless of the tradeoffs for patient care entailed in such changes. In some instances, like the one now before this Court, the evidence will reveal that a regulation does little or nothing to advance a valid state interest. Nonetheless, under the State's theory, a court's obligation to factor in ways the state believes a provider could change its practices to lessen the burdens imposed by such a law could help tip the scales toward constitutionality.

Accordingly, the district court correctly found that "the undue burden inquiry does not contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a new abortion regulation," Short App. 17, and that such a method would "constitute[] either an improper inquiry generally or [be] otherwise unpersuasive." *Id.* at 21. It is the State that incorrectly impugns the district court's approach by arguing for a rule that would disregard the *Whole Woman's Health* analysis.

### B. This Court, Among Others, Has Assessed Burdens a Regulation Creates for Women Based on How Providers Deliver Services in the Real World, Without Assuming They Must Increase or Reallocate Resources to Lessen Burdens.

*Schimel* is consistent with *Whole Woman's Health*. *Schimel* held that the challenged requirement would "push [some women] past the . . . deadline for the Planned Parenthood clinics' willingness to perform abortions." 806 F.3d at 918. The district court was thus correct in recognizing that, in *Schimel*, this Court "did not suggest that Planned Parenthood could provide later term abortions like another abortion clinic in Wisconsin offered; it instead counted this fact as a burden imposed by the challenged law, not as one caused by Planned Parenthood's policy." Short App. 17. This Court further found in *Schimel* that some Planned Parenthood clinics would "have to expand staff and facilities to accommodate such an influx [of patients due to clinic closures] . . . , and this would be costly and could even be impossible." 806 F.3d at 918. Like the Supreme Court, this Court rejected the idea that providers must make "costly" changes to their existing practices to lessen burdens on women prior to a judicial determination that a regulation is constitutional.

An Alabama district court similarly declined to make assumptions that physicians could change existing practices to lessen the effects of an admitting privileges requirement. The court observed that one of the plaintiff doctors "is not willing to move to Mobile from her current residence in Georgia because she would have to sacrifice access to the variety of medical opportunities that are available in the Atlanta area." *Strange*, 33 F. Supp. 3d at 1346. Relatedly, a doctor who provided both abortions and obstetric services "would realize that there was a good chance that an affiliation with abortion would lead to harassment of her non-abortion patients, potentially preventing her from continuing to deliver babies. Given the intensive training for obstetrics, the loss of that part of a doctor's practice would be significant." *Id.* at 1351. Neither

the physician's decision not to relocate nor another's desire to keep her ob-gyn practice were failures to lessen burdens for which the physicians or clinics were responsible, given that burdens must be measured as they exist under current practices and real world conditions. *See id*. at 1346, 1351. These are the types of "difficult" decisions that Indiana argues providers are obligated to make. The case law holds otherwise.

Another district court rejected the state's argument that providers had "caused" the burdens on women stemming from a medication abortion restriction "by choosing not to provide surgical abortions [in other cities]," and therefore that the court should discount such burdens from its undue burden analysis. *Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-cv-00784-KGB, 2016 WL 6211310, at *31 (E.D. Ark. Mar. 14, 2016), *vacated and remanded on other grounds by* No. 16-2234, 2017 WL 3197613 (8th Cir. July 28, 2017). The court relied on record evidence that "[the provider] PPH would need to relocate its current health centers and renovate the new location to meet its needs, as well as the state regulatory requirements for surgical abortion providers," which the provider represented would exceed its budget. *Id.* at *9. The court also credited evidence that anti-abortion stigma would "make[] it extremely difficult for PPH to locate and secure real estate, as landlords and sellers are unwilling to work with PPH," and that even if it secured the space, "it does not currently have physicians who are trained and available to provide surgical abortions in Arkansas." *Id.* at *32. The court did not dwell on whether the provider was absolutely unable to change its practices. It instead analyzed burdens as they existed under the provider's current practices, and counted the costs of potential compliance as factors relevant to the burdens that the regulation would place on women.

Decisions from the Supreme Court, this Court, and other federal courts are consistent with the district court's holding below: courts must assess a regulation's burdens as they affect

women under providers' real-world practices, not based on counterfactual or hypothetical assumptions about how providers could change their practices. The State's argument guts the undue burden standard by premising a regulation's constitutionality on the extent to which providers are willing and able to reallocate resources to lessen the burden it imposes on women, at their own expense and with potential detriment to patient care. That cannot be the rule when constitutional rights are at stake.

## CONCLUSION

For the foregoing reasons and for those set forth in the Brief of Plaintiff-Appellee Planned Parenthood, the district court's preliminary injunction should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 29(a)(4)(g), the undersigned counsel for Amicus Curiae certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7)(B)(i), and 7th Cir. R. 29 because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 6,394 words; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by 7th Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, size 12 font for the body of the brief and size 11 font for the footnotes.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of August 2017, the foregoing Brief of Amicus Curiae Center for Reproductive Rights in Support of Plaintiff-Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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