No. 18-1019

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, AMERICAN COLLEGE OF PEDIATRICIANS, CARE NET, CHRISTIAN MEDICAL ASSOCIATION, HEARTBEAT INTERNATIONAL, INC., AND NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national medical organizations and their combined membership of thousands of pregnancy centers, physicians, nurses, physician assistants, and other healthcare professionals share a profound commitment to protecting maternal health and the sanctity of human life. *Amici* members include: physicians and nurses who serve as medical staff at pregnancy centers that offer ultrasounds; obstetrician/gynecologists who regularly perform ultrasounds on pregnant patients and whose patients see abortion providers and then return to their care; emergency physicians and other staff who use ultrasounds to treat emergent complications caused by abortion; and clinical staff who counsel women regarding abortion and treat its damaging physical and psychological consequences.

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization that consists of over 4,500 obstetrician-gynecologist members and other reproductive health medical professionals. AAPLOG was the largest special interest group within the American College of Obstetricians and Gynecologists until ACOG discontinued the designation of special interest group in 2013. As physician specialists in reproductive

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1 No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice and have consented to the filing of this brief.

health, AAPLOG members are experts in the utilization of ultrasound to guide pregnancy and reproductive health decision-making. AAPLOG's members attest to the essential need for accurate ultrasound dating in early pregnancy, in order to give accurate informed consent to the women who are considering abortion, since abortion risks rise exponentially with increasing gestational age. AAPLOG members also attest to the need for ultrasound to identify contraindications and abnormalities which greatly increase the risk of the abortion procedure, and which, without ultrasound, cannot be accurately identified.

American College of Pediatricians (ACPeds) is a national not-for-profit organization of pediatricians and other healthcare professionals. Formed in 2002 and dedicated to the health and well-being of children, the mission of ACPeds is to enable all children to reach their optimal physical and emotional health and well-being. ACPeds currently has members in 47 states, as well as in several countries outside of the United States. As pediatricians, ACPeds members rely upon ultrasound imaging at various points in the course of caring for children for the purpose of medical diagnosis. Their neonatologist members, in particular, rely on prenatal ultrasound imaging (in cooperation with obstetricians) in planning for the care of fetuses in high risk pregnancies and fetuses with congenital anomalies.

Care Net is a national pregnancy care organization that networks individual pregnancy care

centers across the nation. Care Net-affiliated pregnancy centers assist women and men who are making difficult pregnancy decisions by providing free pregnancy tests, options education, and pregnancy confirmation ultrasound examinations. Over 70% of Care Net affiliates provide medical services, including ultrasound examinations. Care Net believes that women are entitled to receive information about their choices in order to make fully informed decisions. Confirming the presence of a living pregnancy within the womb of a woman's body is critical information to her decision-making process. Ultrasound affords a "window to the womb" which protects human life and dignity. This is evidenced by Care Net's statistics which reveal that abortion minded women are twice as likely to choose life for their baby *after* viewing an ultrasound, compared to those women who do not see an ultrasound of their unborn child.

Christian Medical Association (CMA), founded in 1931, is a non-profit national membership organization for doctors, medical and dental students, and other health professionals. With more than 19,000 members, CMA provides a public voice on bioethics and healthcare policy. CMA provides doctors and medical education in the developing world, offers continuing medical education, and sponsors student chapters at most U.S. medical schools. CMA doctors and medical professionals perform ultrasounds for medical diagnostic purposes, including during pregnancy and for the purpose of informed consent.

Heartbeat International, Inc. (Heartbeat) is the world's largest organization forming an affiliate network of individual pregnancy help centers.

Heartbeat serves approximately 2,400 pro-life centers, maternity homes, and non-profit adoption agencies in over 50 countries. Trained medical professionals at affiliate pregnancy centers conduct limited obstetric ultrasounds for women at no cost. Following the ultrasound, the woman will know whether the baby is in her uterus or if she has an ectopic pregnancy (which requires immediate medical attention), the dating of her pregnancy (which is a crucial factor in the type of abortion procedure she will have), and viability or fetal heart motion.

The National Institute of Family and Life Advocates (NIFLA) was founded in 1993 and is a national legal network of more than 1,500 pro-life pregnancy centers of which 1,200 operate as medical clinics providing ultrasound confirmation of pregnancy to mothers considering abortion. NIFLA trains and equips pro-life pregnancy centers in the legal and medical "how to's" of providing ultrasound services and since 1997 has trained more than 4,500 RNs and other licensed professional healthcare providers in the provision of limited ultrasound at pregnancy centers.

SUMMARY OF ARGUMENT

Ultrasound imaging shows truthful, nonmisleading essential medical information about a woman's pregnancy, including the biological reality of her unborn child. This information is relevant and necessary to a woman's decision to undergo an abortion procedure. Without this information she cannot be fully informed or truly consent.

States have always regulated the medical profession and the provision of informed consent, and can do so—as Indiana does—to further important state interests in protecting maternal health and fetal life. State-mandated informed consent information is all the more important when the medical procedure is elective and has permanent, life-long (and life-altering) consequences, as is the case with abortion.

Indiana's ultrasound viewing option requirement as part of the informed consent process for abortion procedures satisfies *Casey*'s informed consent "truthful, nonmisleading information" standard, and this Court has already held that a mandatory reflection period of 24 hours—which is more than Indiana's 18-hour requirement—does not impose an undue burden.

This Court should grant certiorari to determine the appropriate undue burden standard for informed consent laws and hold that Indiana's law does not impose an actual undue burden on a woman's decision, and, in fact, actually helps ensure that the woman's decision is fully informed and consensual—whatever her ultimate decision may be. Without intervention by this Court, the Seventh Circuit decision below will continue to cast doubt on the constitutionality of states' ultrasound and informed consent laws and prohibit Indiana women from being able to consider the information conveyed by ultrasound imaging *during* the informed consent process.

ARGUMENT

I. Ultrasound imaging shows truthful, nonmisleading information relevant to the decision to undergo an abortion procedure.

A. Ultrasound imaging is a safe diagnostic medical test that shows truthful, nonmisleading images in real time.

Ultrasound—also called ultrasound imaging, ultrasound scanning, or sonography—is a widely used safe medical test used to diagnose various medical conditions by using high frequency sound waves to produce pictures of the inside of the body.[2]

Ultrasound scanners consist of a console, a video display screen, and a transducer, which is a small hand-held device that resembles a microphone and is connected to the scanner. The transducer sends out high-frequency sound waves into the body through a small amount of gel placed on a patient's skin and listens for the returning echoes from the tissues in the body. Similar to sonar principles used by bats, boats, and submarines, ultrasounds are able to determine how far away the object is, as well as the object's size, shape, and consistency based on the amplitude (loudness), frequency (pitch), and time it takes for the sound waves to return. During the ultrasound, an

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[2] *General Ultrasound*, RadiologyInfo.org (last reviewed Mar. 9, 2018), https://www.radiologyinfo.org/en/info.cfm?pg=genus.

image is immediately visible on the video display screen in real time.[3]

B. Ultrasound imaging has a wide range of uses, including in the contexts of pregnancy, abortion, and informed consent.

In the late 1960s, the diagnostic potential of ultrasounds became widely accepted, but "[d]espite this growing interest, the wider adoption of ultrasound imaging was slow, at least initially."[4] It was not until the late 1970s and onward—after this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)—that ultrasound machines became "standardized products in a high-volume global market," which expanded "exponentially" over the next two decades.[5]

Today, ultrasound has many uses in (and out of[6]) the medical field and impacts every organ system in daily practice. For example, diagnostic ultrasounds are commonly used to examine many of the body's

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[3] *Id.*; *Obstetric Ultrasound*, RadiologyInfo.org (last reviewed Jan. 23, 2019), https://www.radiologyinfo.org/en/info.cfm?pg=obstetricus.

[4] MALCOLM NICHOLSON & JOHN E. E. FLEMING, IMAGING AND IMAGINING THE FETUS: THE DEVELOPMENT OF OBSTETRIC ULTRASOUND 203 (2013).

[5] *Id.* at 232.

[6] *See, e.g.*, Dept. of Health, Educ., & Welfare Pub. Health Serv. Food & Drug Admin., Ultrasound in the Food, Drug and Device Industries, Inspection Technical Guide No. 18 (Mar. 3, 1975), https://www.fda.gov/iceci/inspections/inspectionguides/ucm072531.htm (describing uses of ultrasound in the food, drug, and device industries).

internal organs, including: the heart and blood vessels, liver, gallbladder, spleen, pancreas, kidneys, bladder, uterus, ovaries, eyes, and thyroid glands.[7] Ultrasound is also commonly used in the contexts of pregnancy, abortion, and informed consent.

Pregnancy. During pregnancy, ultrasounds—usually called obstetric ultrasounds—provide pictures of the mother's uterus and ovaries, as well as of the "baby (embryo or fetus)" within the mother's uterus.[8] Most often, physicians use abdominal ultrasounds, where the transducer is placed above the pelvic bone and below the navel.[9] Sometimes a transvaginal ultrasound (where the transducer is inserted into the woman's vagina) is required, such as early in pregnancy, when a larger patient has too much tissue blocking the sound waves, and when diagnosing a suspected ectopic pregnancy.[10]

Ultrasounds are considered "medically necessary" for both the mother and fetus. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012). For a "wanted" pregnancy, women often receive several ultrasounds, including at a booking scan at around 10 to 12 weeks, at a fetal anomaly scan at around 20 weeks, and when a specific situation arises that requires further investigation,

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[7] *General Ultrasound*, *supra* note 2.
[8] *Obstetric Ultrasound*, *supra* note 3.
[9] *See id.*
[10] *See General Ultrasound*, *supra* note 2; Comm. on Practice Bulletins—Gynecology, Tubal Ectopic Pregnancy, Practice Bulletin No. 193 (Mar. 2018) [hereinafter Tubal Ectopic Pregnancy].

such as when there is abdominal pain.[11] Ultrasounds are performed early and often in the fertility clinic setting, especially with reproductive technology and procedures like in vitro fertilization.

Ultrasounds are used to confirm "the presence, size, location, and number of gestational sacs"[12]; evaluate the placenta, amniotic fluid, and cervix[13]; and assess fetal growth and well-being.[14] Real-time ultrasounds are able to show the movement of the embryo or fetus, as well as the heartbeat. Fetal cardiac activity begins at twenty-one days of gestation and can be detected and measured by ultrasound early in the first trimester at around five and a half to six weeks.

Ultrasound is the best way to establish or confirm gestational age, since measuring the crown-rump length (CRL) in the first trimester (or up to 14 weeks gestation) is the most accurate method.[15] The earlier in the first trimester the ultrasound is performed, the greater the accuracy in determining gestational age.[16]

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[11] *See* NICOLSON & FLEMING, *supra* note 4, at 260.

[12] Am. Inst. of Ultrasound in Med., AIUM-ACR-ACOG-SMFM-SRU Practice Parameter for the Performance of Standard Diagnostic Obstetric Ultrasound Examinations 2 (2018), https://www.aium.org/resources/guidelines/obstetric.pdf.

[13] *Obstetric Ultrasound*, *supra* note 3.

[14] *Id.*

[15] Comm. on Obstetric Practice Am. Inst. of Ultrasound in Med. Soc'y for Maternal-Fetal Medicine, Methods for Estimating the Due Date, Committee Op. No. 700, at 1–2 (May 2017).

[16] *See id.* at 2. A gestational age assessment by ultrasound in the second trimester is less accurate than in the first trimester because it "introduces greater variability and complexity." *Id.* at

Often the last menstrual period (LMP) is used to estimate gestational age, but LMP *alone* is not the best obstetric estimate because it assumes a "regular" menstrual cycle, and studies report that approximately one half of women do not accurately recall their LMP.[17] Gestational age determinations made without an ultrasound examination before 22 weeks gestation are considered "suboptimally dated."[18]

Ultrasound is also used to assess for fetal anomalies[19] and has enabled physicians to successfully correct various fetal abnormalities.[20] The advent of fetal anomaly testing has also led to an increase of abortions as a way to avoid giving birth to children with mental or physical impairments.

Abortion. Ultrasounds are used for both chemical and surgical abortions. For chemical abortions, ultrasounds are used to confirm intrauterine

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3. Gestational age assessment by ultrasound in the third trimester is the least reliable method. *Id.*

[17] *Id.* at 2.

[18] *Id.*

[19] Am. Coll. of Radiology, ACR-ACOG-AIUM Practice Guideline for the Performance of Obstetrical Ultrasound 2, 5 (2007), https://www.pedrad.org/Portals/5/Subspecialties/OB%20Ultrasound%20practice%20guidelines.pdf.

[20] *See, e.g.*, MICHAEL R. HARRISON, MITCHELL S. GOLBUS, & ROY A. FILLY, THE UNBORN PATIENT, PRENATAL DIAGNOSIS AND TREATMENT (1984).

pregnancy, to establish gestational age, and for follow up post-abortion.[21]

Confirmation of intrauterine pregnancy before a chemical abortion is necessary because mifepristone—the standard drug given to induce a chemical abortion—is contraindicated in the case of a "confirmed or suspected ectopic pregnancy."[22] "An ectopic pregnancy occurs when a fertilized egg grows outside of the uterus," almost always in a fallopian tube.[23] The growing embryo can cause the tube to burst or rupture, which can lead to life-threatening internal bleeding.[24] Mifepristone is not effective for terminating an ectopic pregnancy and the symptoms of a rupturing ectopic pregnancy are identical to the symptoms experienced by a woman in a chemical abortion, so failure to diagnose a rupturing ectopic

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[21] *See* Comm. on Practice Bulletins—Gynecology & the Soc'y of Family Planning, Medical Management of First-Trimester Abortion, Practice Bulletin No. 143, at 8–9 (reaffirmed 2016) [hereinafter Medical Management]; *id.* at 8 (To obtain a chemical abortion, a woman should "meet the gestational age criteria for the regimen and have no contraindications.").

[22] U.S. Food & Drug Admin., Mifeprex Highlights of Prescribing Information and Full Prescribing Information (Mar. 2016), [hereinafter Mifeprex Prescribing Information], https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf.

[23] *FAQ: Ectopic Pregnancy*, Am. Coll. of Obstetricians & Gynecologists (Feb. 2018), https://www.acog.org/Patients/FAQs/Ectopic-Pregnancy?IsMobileSet=false. Approximately one half of all women who have an ectopic pregnancy do not have any known risk factors and the ectopic pregnancy may initially feel like a typical pregnancy. *Id.*

[24] *Id*.

pregnancy can lead to the woman's death by internal hemorrhaging. The "minimum diagnostic evaluation" necessary to determine where the embryo is developing and whether there is an ectopic pregnancy is an ultrasound examination, along with confirmation of pregnancy (such as by measuring hCG levels).[25] The diagnosis of an ectopic pregnancy can usually be eliminated by confirming an intrauterine pregnancy.[26]

Women are candidates for chemical abortion "if they meet the gestational age criteria . . . and have no contraindications."[27] Mifepristone is only indicated for use through 70 days or 10 weeks gestation.[28] So an ultrasound is used to establish gestational age since CRL measurements are the most accurate method of dating.[29]

Ultrasound is also commonly used for follow-up examinations after chemical abortions because it provides a "definitive assessment" of whether the embryo or fetus has been "expelled."[30]

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[25] Tubal Ectopic Pregnancy, *supra* note 10. While measuring hCG levels is often used to confirm that the woman is pregnant, it *alone* is insufficient to diagnose a live pregnancy (in the case of fetal demise) or an ectopic pregnancy. *Id.*

[26] *Id.* In rare cases, a woman will have a heterotopic pregnancy, where one embryo is located in the uterus and another is located outside. *Id.*

[27] Medical Management, *supra* note 21, at 6.

[28] Mifeprex Prescribing Information, *supra* note 22, at 9.

[29] *See* Medical Management, *supra* note 27, at 8 (Before a chemical abortion, "gestational age should be confirmed by clinical evaluation or ultrasound examination.").

[30] *See id*. at 9.

For surgical abortions, ultrasound imaging is used to show information necessary for the procedure that cannot be seen otherwise. For example, ultrasound imaging shows the presence, location, and number of gestational sacs, as well as abnormalities of the uterus itself, such as retroversion of the uterus—which predispose to perforation if the abortion provider is unaware of it—and large fibroids—which can make identification of the uterine cavity difficult and predispose to surgical injuries and retained tissue. Since many states have gestational age limits on abortion procedures and the CRL measurement provides the most accurate gestational dating method prior to 22 weeks (by which point the vast majority of abortions occur), ultrasound is the best method to establish gestational age.[31] As one Christian Medical Association physician explained, "assessing gestational status without ultrasound would be akin to listening to lungs without a stethoscope."[32]

Informed consent. Ultrasounds are often used in the context of informed consent. For example, during pregnancy, an ultrasound is almost always used to document and explain for purposes of informed consent why a cesarean section is recommended or necessary. For an abortion procedure, an ultrasound is necessary to obtain a true estimate of a woman's

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[31] *See Abortion Surveillance System FAQs*, Centers for Disease Control & Prevention (last reviewed Nov. 19, 2018), https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm (In 2015, "91.1% of abortions were performed at ≤ 13 weeks' gestation," which is during the first trimester.).

[32] Personal correspondence on file with Americans United for Life.

risk. For example, her risks for surgical injury increase if the uterus is malformed or has fibroids and her risk of death related to abortion increases by 38% for each week of pregnancy after 8 weeks.[33] Furthermore, ultrasounds are critically important in early pregnancy to establish whether or not the baby is alive, as nearly one out of five very early pregnancies end in miscarriage, and the psychological toll from miscarriage is substantially less than the toll from elective abortion. Full informed consent requires an accurate diagnosis of the gestational age of the pregnancy, the status of the fetus, and the risks involved—all of which can only be accurately obtained with an obstetrical ultrasound.

C. Ultrasound imaging shows truthful, nonmisleading information about a woman's pregnancy and reveals the biological reality of her unborn child.

Before ultrasound, unborn children were "hidden, enveloped within the female abdomen, away from the medical gaze."[34] The advent of the ultrasound in the Twentieth Century, especially real-time ultrasound imaging, "had a momentous social impact because it c[ould] visualize the fetus," even in the first trimester.[35] Ultrasounds "rendered the once opaque womb transparent . . . [by] letting the light of scientific observation fall on . . . the unwary fetus, [a]

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[33] Linda A. Bartlett, et al., *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103 Obstetrics & Gynecology 729, 731 (2004).
[34] NICOLSON & FLEMING, *supra* note 4, at 1.
[35] *Id.*

surprisingly active live creature, and not at all the passive parasite . . . imagined."[36] Ian Donald, the physician who pioneered medical diagnostic ultrasounds, "believed that the ultrasound image demonstrated, unequivocally, the individuality and humanity of the fetus."[37] Even "Planned Parenthood knows that the ultrasound is an invaluable tool in revealing the personhood of unborn children."[38]

Ultrasound imaging can show information in a way that a mere description or generic picture of a fetus cannot convey. Our society "accords special epistemological status to the visual sense. The visual is the real—and the moving image conveys reality to us in a particularly convincing manner."[39] As such, ultrasound imaging "compellingly combines" what society holds to be "the two most potent sources of authoritative knowledge in Western culture: the visual and the scientific."[40] Thus ultrasounds possess the status as "the primary source of 'objective' knowledge about the fetus."[41] Real-time ultrasounds are particularly useful as a powerful persuasive resource since real-time imaging "convey[s] the life of

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[36] *Id.* at 257–58.
[37] *Id.* at 239.
[38] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 313 n.3 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted).
[39] NICOLSON & FLEMING, *supra* note 4, at 264.
[40] *Id.* at 263.
[41] *Id.* at 262.

the fetus more vividly than a static image could."[42] Ultrasound imaging is personal—it gives the woman an opportunity to view *her* fetus.

D. The majority of states have recognized the importance of ultrasound imaging prior to an abortion procedure.

Twenty-six states have some type of ultrasound regulation in the context of abortion.[43] Fourteen states require an ultrasound prior to an abortion.[44] Of those 14, 9 require that the woman is offered the option to view the image, while 3 require that the ultrasound image is displayed and described.[45] Five states require

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[42] *Id.* at 242; *see also id.* at 265 ("The power of the ultrasound scanner to condition an emotional response to the fetus is . . . clearly evident.").

[43] *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. Ann. § 36-2156; Ark. Code Ann. § 20-16-602; Fla. Stat. § 390.0111; Ga. Code Ann. § 31-9A-3; Idaho Code Ann. § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. Ann. § 65-6709; La. Rev. Stat. Ann. § 40:1061.10; Mich. Comp. Laws § 333.17015; Miss. Code Ann. § 41-41-34; Mo. Rev. Stat. § 188.027; Neb. Rev. Stat. § 28-327; N.C. Gen. Stat. §14-45.1; N.D. Cent. Code § 14-02.1-04; Ohio Rev. Code Ann. § 2317.561; Okla. Stat. tit. 63 § 1-738.3d; S.C. Code Ann. § 44-41-330; S.D. Codified Laws § 34-23A-52; Tex. Health & Safety Code Ann. § 171.012; Utah Code Ann. § 76-7-305; Va. Code Ann. § 18.2-76; W. Va. Code § 16-2I-2; Wis. Stat. § 253.10; Wyo. Stat. Ann. § 35-6-119.

[44] Alabama, Arizona, Florida, Indiana, Iowa, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Texas, Virginia, and Wisconsin.

[45] Three additional states—Kentucky, North Carolina, and Oklahoma—also had requirements to display and describe the ultrasound image, but each was permanently enjoined by court order. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 2017 U.S. App. LEXIS 24931 (6th Cir. 2017) (holding Kentucky's

that a woman be given the option to have an ultrasound performed before an abortion procedure.[46] Nine states require that *if* an ultrasound is conducted, the woman must be offered an opportunity to view the image.[47] Fourteen states require that verbal information or written materials on accessing ultrasound services be included in the information provided to a woman during the informed consent process prior to an abortion procedure.[48] Eight states, including Petitioner Indiana, have mandatory reflection periods, ranging from 30 minutes to 24 hours after an ultrasound is performed or displayed, before an abortion can be performed.[49]

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requirement unconstitutionally compelled speech); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (holding North Carolina's requirement unconstitutionally compelled speech); *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012) (per curium) (summarily holding Oklahoma's requirement violated the U.S. Constitution under *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

[46] Missouri, North Dakota, South Dakota, Utah, and Wyoming.

[47] Arkansas, Georgia, Idaho, Michigan, Nebraska, Ohio, South Carolina, Utah, and West Virginia.

[48] Georgia, Idaho, Indiana, Kansas, Michigan, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wisconsin.

[49] *See* Ariz. Rev. Stat. Ann. § 36-2156 (24 hours); Fla. Stat. § 390.0111 (24 hours); Ind. Code § 16-34-2-1.1 (18 hours); Kan. Stat. Ann. § 65-6709 (30 minutes); La. Rev. Stat. Ann. § 40:1061.10 (24 hours (2016 72-hour reflection period amendment temporarily enjoined)); Okla. Stat. tit. 63 § 1-738.3d (1 hour); Tex. Health & Safety Code Ann. § 171.012 (24 hours); Va. Code Ann. § 18.2-76 (24 hours); Wis. Stat. § 253.10 (24 hours).

II. This Court should grant certiorari to determine whether Indiana's law—which requires that pregnant women receive an ultrasound viewing option *during* the informed consent process for an abortion procedure—imposes an undue burden.

A. Before undergoing an abortion procedure, a pregnant woman must give informed consent.

In practice, medical providers are "responsible for securing the patient's informed consent" for a specific medical procedure, including abortion procedures.[50] "Informed consent" is defined in the American College of Obstetricians and Gynecologists *Guidelines for Women's Health Care* as "the willing and uncoerced acceptance of a medical intervention by a patient after appropriate disclosure by the clinician of the nature of the intervention and its risks and benefits as well as the risks and benefits of alternatives."[51] Under the American Medical Association Code of Medical Ethics, "[p]atients have the right to receive information and ask questions about recommended treatments so that they can make well-considered decisions about care" and a medical practitioner seeking informed consent should (among other requirements) "[p]resent relevant information accurately and sensitively" about "[t]he nature and purpose of recommended interventions."[52] The information should be presented

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[50] AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, GUIDELINES FOR WOMEN'S HEALTH CARE 125 (3d ed. 2007).
[51] *Id* at 80.
[52] AMA Code of Medical Ethics Op. 2.1.1 (Informed Consent).

with language that the patient can easily understand and the patient should be able to accurately articulate the information back to the clinician. Informed consent is especially important for elective medical procedures—procedures that do not involve a medical emergency—since there is time to discuss the nature of the procedure, risks, benefits, and alternatives, and ensure that the decision is not made under pressure or duress.[53] The vast majority of abortion procedures are elective.

B. States can regulate medical informed consent, including for an abortion procedure.

Informed consent laws "are part of the state's reasonable regulation of medical practice." *Lakey*, 667 F.3d at 576; *see id.* at 579 ("The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances."). Just last term in *National Institute of Family and Life Advocates v. Becerra*, this Court affirmed the right of states to regulate medical informed consent and reiterated that that right also extends to abortion procedures. *See* 138 S. Ct. 2361, 2373 (2018). An informed consent requirement for abortion is "no different from a requirement that a doctor give certain specific information about any

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[53] *See, e.g.*, Owen A. Anderson & I. Mike J. Wearne, *Informed Consent for Elective Surgery—What is the Best Practice?*, 100 J. ROYAL SOC'Y OF MED. 97 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1791005/ (discussing informed consent for elective surgery).

medical procedure." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

For example, in *Casey*, this Court upheld a Pennsylvania informed consent law which required that "a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifie[d] that she be provided with certain information at least 24 hours before the abortion is performed." 505 U.S. at 844. Physicians were required to inform their patients of "the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child,'" as well as of the availability of printed materials from the State, which provided information about the child and various forms of assistance. *Id*. at 881. This Court held that Pennsylvania's law, which required disclosing information about a woman's unborn child, "facilitate[d] the wise exercise" of the right to choose an abortion "free of undue interference by the State." *Id.* at 887.

C. Informed consent regulations for an abortion procedure are constitutional if they require "truthful, nonmisleading information" and do not impose an undue burden.

According to this Court, State regulations ensuring that the choice to undergo an abortion procedure is "thoughtful and informed" are

constitutional, so long as they do not impose an undue burden on a woman's abortion choice.[54] *Id.* at 872, 881.

> "[W]hen the government requires [as part of the informed consent process] . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth," and other information *broadly relevant* to the decision to have an abortion, it does not impose an undue burden on abortion rights, even if the disclosure "might cause the woman to choose childbirth over abortion."

Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (quoting *Casey*, 505 U.S. at 882–83) (alterations in original) (emphasis added).

This Court's decisions have made clear that "relevant" informed consent includes both "the physical and psychological risks to the expectant mother facing this 'difficult moral decision'" and "the state's legitimate interests in 'protecting the potential life within her.'" *Lakey*, 667 F.3d at 576 (quoting *Casey*, 505 U.S. at 871). Regarding protecting maternal health through informed consent regulations, "the State furthers [its] legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not

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[54] Whether the undue burden standard is as articulated in *Casey* or as modified by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), is something that this Court should grant certiorari to clarify. *See* Pet. Cert. Sec. III (arguing that *Hellerstedt* does not apply to informed consent laws).

fully informed." *Casey*, 505 U.S. at 882; *see also Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). Regarding protecting fetal life through informed consent regulations, this Court has recognized that there is a "substantial state interest" in fetal life "throughout pregnancy" and that it is not an undue burden for a state to enact persuasive measures favoring childbirth over abortion, "even if those measures do not further a health interest." *Casey*, 505 U.S. at 876, 886. "Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." *Id.* at 882.

This Court has held that a 24-hour reflection period for informed consent is "a reasonable measure to implement the State's interest in protecting the life of the unborn, [and] a measure that does not amount to an undue burden," even though the reflection period caused delays of more than a day, required at least two visits, and *some* women would find the law "particularly burdensome"—such as those who had fewer financial resources, would have to travel long distances, and would have difficulty explaining their absence to husbands, employers, or others. *Id.* at 885–86; *see also id.* at 887 (There is no constitutional right to "abortion on demand."); *id.* ("A particular burden is not of necessity a substantial obstacle."). The incidental effect of a regulation "making it more difficult or more expensive to procure an abortion [is not] enough to invalidate it." *Id.* at 874.

D. Indiana's law recognizes the importance of an ultrasound viewing option *during* the informed consent process for an abortion procedure.

The Indiana legislature's understanding of informed consent and ultrasounds in the context of abortion has evolved over the years. Since 1995, Indiana law has had a "voluntary and informed consent" regulation for abortion procedures, which requires disclosure of numerous facts and information related to abortion at least 18 hours before the procedure. P.L. 187-1995, § 4. In 2005, the Indiana legislature added a requirement that a woman seeking an abortion must be told about the availability of an ultrasound, but did not require that the woman be shown the ultrasound image unless she specifically requested to see it. P.L. 36-2005, § 1. In 2011, the legislature updated this requirement so that pregnant woman seeking an abortion must be shown the ultrasound image unless she refuses in writing. P.L. 193-2011, § 9. Finally, in 2016, the Indiana legislature recognized the importance of having the ability to view ultrasound images *during* the abortion informed consent process and passed the law at issue here, requiring that the ultrasound viewing option be part of the informed consent process, which has an existing mandatory 18-hour reflection period. Ind. Code § 16-34-2-1.1

Specifically, Indiana's current voluntary and informed consent law for abortion procedures requires that: "An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed."

Id. "Except in the case of a medical emergency," consent is considered "voluntary and informed" only if certain conditions are met "at least eighteen (18) hours before the abortion." *Id.* These conditions include receiving the following information orally and in writing from the physician performing the abortion (or other statutorily authorized medical personal):

- The physician's name;
- The emergency 24-hour telephone number;
- "The nature of the proposed procedure or information concerning the abortion inducing drug";
- "Objective scientific information of the risks of and alternatives to the procedure or the use of an abortion inducing drug, including: (i) the risk of infection and hemorrhage; (ii) the potential danger to a subsequent pregnancy; and (iii) the potential danger of infertility";
- "That human physical life begins when a human ovum is fertilized by a human sperm";
- "The probable gestational age of the fetus at the time the abortion is to be performed, including: (i) a picture of a fetus; (ii) the dimensions of a fetus; and (iii) relevant information on the potential survival of an unborn fetus; at this stage of development";
- "That objective scientific information shows that a fetus can feel pain at or before twenty (20) weeks of postfertilization age";
- "The medical risks associated with carrying the fetus to term"; and
- "The availability of fetal ultrasound imaging and auscultation of fetal heart tone services to

> enable the pregnant woman to view the image and hear the heartbeat of the fetus and how to obtain access to these services."

Id. § 16-34-2-1.1(a)(1).

When a pregnant woman receives the above information, the physician (or other statutorily authorized medical personnel) is also required to perform an ultrasound and the woman is required to "view the fetal ultrasound imaging and hear the auscultation of the fetal heart tone if the fetal heart tone is audible" unless she certifies in writing on a state form prior to the abortion that she "(A) does not want to view the fetal ultrasound imaging[,] and (B) does not want to listen to the auscultation of the fetal heart tone if the fetal heart tone is audible." *Id.* § 16-34-2-1.1(a)(5). It is this provision that Planned Parenthood claims, and that the Seventh Circuit panel found, imposes an undue burden. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018).

E. Indiana's ultrasound viewing option provides "truthful, nonmisleading information" that is relevant and necessary to informed consent for an abortion procedure.

Ultrasound imaging is medically accurate, inherently truthful, and non-misleading. It is hard to imagine what is more truthful and nonmisleading than ultrasound imaging of the *actual* fetus inside the *specific* woman deciding whether or not to undergo an abortion procedure. Displaying ultrasound imaging is

perhaps the most scientific, factual, and objective method of ensuring that a woman considering abortion can understand the full consequences of her decision—whatever her ultimate decision may be. As Indiana's Petition explains, "the ultrasound image may be the most critical information imparted, for it gives the mother her first opportunity to see her child and listen to her child's heartbeat." Pet. Cert. 3. It is not only her first opportunity, but it is her *only* opportunity to see her child in utero and listen to her unborn child's heartbeat.

If *Casey* held that informed consent included information related to the nature of the procedure and "the impact on the fetus," as well as printed materials giving information about the child, then ultrasound imaging of the *actual* child about to be aborted certainly falls under the purview of informed consent. 505 U.S. at 881–82. Ultrasound imaging provides information that is not only relevant, but also necessary to truly consent to an abortion procedure. Moreover, if a 24-hour reflection period is constitutional, then absent an actual undue burden—which the hypothetical facts and unsupported assumptions in this case do not support, *see* Pet. Cert. Sec. II—Indiana's 18-hour reflection period must also be constitutional.

Without intervention by this Court, states will be left in doubt about the constitutionality of their informed consent and ultrasound regulations, and Indiana will be unable to ensure that women considering an abortion procedure can reflect on the information conveyed by ultrasound imaging *during* the informed consent process.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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