No. 21-2480

In the United States Court of Appeals for the Seventh Circuit

WHOLE WOMAN'S HEALTH ALLIANCE, ET AL.,
Plaintiffs-Appellees,

v.

TODD ROKITA, ET AL.,
Defendants-Appellants.

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

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

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Interest of Amici Curiae

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.[1] Exercising their sovereign prerogative to regulate the practice of medicine, Amici States have regulated abortion for decades. Courts typically uphold such regulations not because state sovereignty is "an end in itself," but because it "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). In this case and many like it, abortion providers ask the courts to jettison longstanding laws under the theory that any marginal inconvenience constitutes an unconstitutional burden. *See, e.g.*, Compl., *Whole Woman's Health All. v. Paxton*, No. 1:18-CV-00500 (W.D. Tex. June 14, 2018); Am. Compl., *Jackson Women's Health Org. v. Currier*, No. 3:18-CV-00171-CWR-FKB (S.D. Miss. Apr. 9, 2018). The district court agreed even though nearly every regulation challenged here has been upheld by this Court, the Supreme Court, or both. Amici States have an interest in the consistent and correct application of the Supreme Court's undue-burden precedent as they enact, enforce, and defend abortion regulations that further States' legitimate interests in respecting unborn life and protecting women's health and safety.

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

ARGUMENT

The district court's ruling contravenes binding Supreme Court precedent regarding what facts demonstrate an undue burden and what laws are constitutional. Because Indiana is very likely to succeed on the merits, it is entitled to a stay on appeal. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

I. The Supreme Court's Holdings Demonstrate What Burden Is Undue.

Plaintiffs' "global assault" on Indiana's abortion laws (Op. at 1 (ECF No. 425)) resulted in a district-court ruling that certain health-and-safety regulations have, at most, the "incidental effect of making it more difficult or more expensive to procure an abortion," which is insufficient to render those laws unconstitutional. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality op.). The Supreme Court has squarely held that inconvenience, delay, or increased cost do not an unconstitutional burden make. *Id.* at 885-87. Instead, under existing Supreme Court precedent, a law imposes an undue burden only when the district-court findings demonstrate the law denies access to previability abortions to a significant number or large fraction of women. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2115-16 (2020) (plurality op.); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2302-03 (2016).

The district court made no such findings here. Its ruling focused entirely on convenience factors that do not satisfy the Supreme Court's undue-burden test. By ignoring binding precedent and reweighing the merits of Indiana's laws, the district court improperly acted as Indiana's "*ex officio* medical board," approving and disapproving various practices and standards. *See Gonzales v. Carhart*, 550 U.S. 124, 163-

64 (2007) (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality op.)). Its judgment is contrary to Supreme Court precedent and should be stayed.

A. To show an undue burden, Plaintiffs must prove that women have been denied access to previability abortion.

In *Casey*, the Supreme Court introduced the undue-burden test, requiring courts to determine whether a law "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877 (plurality op.). The Circuits are currently debating whether the undue-burden test imposes a balancing test or substantial-obstacle standard. *See, e.g.*, *Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1258-59 & n.6 (11th Cir. 2021) (per curiam); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020). But they are not debating (at present) that the results reached in *Casey*, *Whole Woman's Health*, and *June Medical* all remain good law. Those holdings require a district court to find that a law denies women access to abortion before it can be declared unconstitutional.

1. The district court's findings here regarding the challenged health-and-safety laws are indistinguishable from the district court's findings in *Casey* regarding Pennsylvania's 24-hour waiting period. The *Casey* court's findings included (1) the American College of Obstetricians and Gynecologists (ACOG) opposed the waiting period; (2) women would have to make two trips or stay overnight; (3) women would be subjected to twice the harassment and hostility from protestors; (4) because clinics did not perform abortions on a daily basis, women might face a delay ranging from

two days to two weeks; (5) 42% of women would have to travel over an hour, and some over three hours, to reach the nearest clinic; (6) there would be increased costs for child care and lost wages; (7) delay could increase the cost of the abortion; (8) the impact would be felt by the poor, the young, the abused, and those without sick leave; (9) delay might push the abortion into the second trimester, which entails more risks; and (10) the 24-hour waiting period served no medical purpose. *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1351-52 (E.D. Pa. 1990). The *Casey* plurality credited these findings, even describing them as troubling in certain respects. 505 U.S. at 885-86.

The plurality did not rely on any specific evidence regarding the legitimacy of the state interest furthered by the waiting period; rather, it determined that it was not "unreasonable" to think that a period of reflection would result in more informed decisions and that "[i]n theory," the waiting period was a reasonable measure that did not amount to an undue burden. *Id.* at 885. Given that legitimate interest, the district court's findings regarding the inconveniences posed by the challenged regulations—which closely track those present here—did not amount to an undue burden on the right to abortion. *Id.* at 885-87.

2. By contrast, the findings here bear no resemblance to those in *Whole Woman's Health* and *June Medical* that led the Court to hold there was an undue burden. In *Whole Woman's Health*, the Supreme Court accepted the district court's findings that half of Texas's forty abortion clinics closed when the admitting-privileges requirement became effective and that only seven or eight would remain if clinics were required to meet the standards for ambulatory-surgical centers (ASCs). 136

S. Ct. at 2301, 2312, 2316. The district court found the remaining facilities could not meet the demand for abortion in Texas. *Id.* at 2316. Similarly, in *June Medical*, the Supreme Court accepted the district court's finding that Louisiana's adoption of an admitting-privileges law might leave only one qualified provider in the entire State. 140 S. Ct. at 2115-16 (plurality op.); *id.* at 2140 (Roberts, C.J., concurring in the judgment).

It was the imminent denial of abortion access to a significant number of women that caused the Court to require more than reasonable inferences to support the State's legitimate interest. *June Med.*, 140 S. Ct. at 2130-32 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2311-12, 2315. Finding nothing sufficient, the Court held the laws imposed an undue burden. *June Med.*, 140 S. Ct. at 2132 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2313, 2318.[2]

B. Indiana's abortion laws do not create an undue burden.

The district court's findings in support of its undue-burden ruling here closely track those held insufficient in *Casey*. The court repeatedly cited delay (Op. at 29, 39, 50, 66, 105, 131, 138); travel (Op. at 39, 50-51, 74, 105, 131, 138); costs of the procedure, lodging, and childcare (Op. at 39, 51, 66, 74-75, 105, 131, 138); time off work (Op. at 105, 131, 138); and the impact on low-income women and women in

[2] Other precedent from the Court follows this pattern. *Compare Gonzales*, 550 U.S. at 164 (no undue burden when alternative procedures were available), *with Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000) (undue burden when law banned most second-trimester abortions), *and Casey*, 505 U.S. at 898 (undue burden when spousal-notification law might prevent large fraction of women from accessing abortion).

abusive relationships (Op. at 75, 105, 131). Given how long Indiana's laws have been in effect, one would expect evidence of their impact on abortion access to be readily available. Yet the court did not cite any evidence that Indiana's laws prevented any woman from obtaining an abortion—much less a large fraction of women, as found in *Whole Woman's Health* and *June Medical*. Under binding Supreme Court precedent, the court should have upheld Indiana's laws.

II. The District Court's Judgment Is Contrary to Supreme Court Precedent.

Instead, believing longstanding Supreme Court precedent needed to be updated, the district court effectively required Indiana to continually rewrite its abortions laws in response to the changing opinions of ACOG and various abortion providers. The district court's refusal to follow precedent should result in an immediate stay of its ruling.

A. *Physician-Only Law*—The Supreme Court has repeatedly upheld laws that restrict the performance of abortions to physicians: For over forty years, binding precedent has "left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 447 (1983); *see also, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam) ("[P]rosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference."). Indeed, that a State may "proscribe any abortion by a person who is not a physician" was first suggested in *Roe v. Wade*, 410 U.S. 113, 165 (1973).

Yet the district court found that Indiana's law was constitutionally infirm because, in its view, medication abortion does not require the expertise of a physician. Op. at 100-01. This flies directly in the face of *Casey*: Considering Pennsylvania's informed-consent law that required a physician to provide certain information to a woman, the plurality noted that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" *Casey*, 505 U.S. at 885 (plurality op.) (emphasis added); *see also Mazurek*, 520 U.S. at 973 (same). If the States can require information be provided by a physician, they can require medication be provided by a physician.

B. *Second-Trimester Hospital/ASC Requirement*—The Supreme Court has similarly upheld a second-trimester hospitalization requirement under the more stringent trimester test from *Roe* when "hospital" included ASCs, as Indiana's law does. *Simopoulos v. Virginia*, 462 U.S. 506, 516-19 (1983); Ind. Code § 16-34-2-1(a)(2)(B). Though decided before *Casey*, Justice O'Connor noted that the requirement also did not impose an undue burden on abortion. *Simopoulos*, 462 U.S. at 520 (O'Connor, J., concurring part and in the judgment). And the Supreme Court did not reverse *Simopoulos* when it had the opportunity to do so. *See Whole Woman's Health*, 136 S. Ct. at 2320. Thus, *Simopoulos* remains binding unless the Supreme Court decides to revisit it. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Price v. City of Chicago*, 915 F.3d 1107, 1119 (7th Cir. 2019).

C. *In-Person Counseling Requirement*—As this Court has already noted, Indiana's in-person counseling requirement is "materially identical" to the law upheld

in *Casey*. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002). And as described above, the burdens identified by the district court here—delay, travel, costs, time off, childcare, and lodging (Op. at 131)—were insufficient to show an undue burden in *Casey*. 505 U.S. at 885-87. Moreover, the district court did not "quarrel with the fact that in-person interactions yield some benefits in building a trusting relationship between patient and provider." Op. at 130. Nothing the district court found permits it to deviate from the Supreme Court's holding in *Casey* or this Court's holding in *A Woman's Choice*.

D. *Telemedicine Ban and In-Person Examination Requirement*—Finally, though the Supreme Court has not yet opined specifically on abortion-by-telemedicine, it has held that "[p]hysicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures." *Gonzales*, 550 U.S. at 163. As the past fifty years demonstrate, alternatives to telemedicine exist. That dooms Plaintiffs' challenge to Indiana's telemedicine ban and in-person-examination requirement. The district court did not find that this law denied abortion access to a large fraction of women, but instead focused on reducing delays, anxiety, and cost. Op. at 138. Such burdens are insufficient to render a law unconstitutional. *Supra* Part I.A. A longstanding regulatory regime that does not unduly burden abortion does not suddenly become unconstitutional because of the advent of videoconferencing.

III. The Court Need Not Defer to the District Court's Findings.

Because the district court was looking for the wrong burden and ignoring binding case law, its findings are due little or no deference. As the Fifth Circuit just explained, a court's legal errors can undermine the deference usually given to its

findings. *Whole Woman's Health v. Paxton*, No. 17-51060, 2021 WL 3661318, at *9 (5th Cir. Aug. 18, 2021) (en banc) (plurality op.) (citing *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). And if a court makes sufficient legal errors, appellate courts can set the findings aside. *Id.* at *10 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)). The district court made such errors here.

Rather than follow Supreme Court precedent, the district court attempted to modernize it, concluding that Indiana must facilitate access to abortion by constantly updating its laws to conform to the latest advances in medicine. Op. at 33-38 (touting the benefits of telemedicine), 99 (noting "the nature of abortion care has evolved"), 108 n.56 (condemning Indiana for "refus[ing] . . . to update its statute to reflect the evolution of medicine"). But the Supreme Court has never required constant updating of abortion laws every time ACOG comes out with a new recommendation. *Cf. Hall v. Florida*, 572 U.S. 701, 731 (2014) (Alito, J., dissenting) ("[T]he views of professional associations often change."). Instead, the Court has held that "[t]he Constitution does not compel a state to fine-tune its statutes so as to . . . facilitate abortions." *H. L. v. Matheson*, 450 U.S. 398, 413 (1981).

The district court's reasoning also results in the perverse consequence of giving Supreme Court precedent less respect the longer it has lasted. The district court believed it could deviate from the holdings in *Simopoulos* and *Mazurek* precisely because they were forty and twenty-five years old. Op. at 98, 112. In other words, the court treated the fact that the Court's abortion precedent is longstanding as a reason to reject it. That is not how *stare decisis* or the hierarchical structure of the federal

judiciary works. *E.g.*, *Agostini*, 521 U.S. at 237. The Court should reject this rule as leaving States without any stable basis on which to enact and defend their laws.

The district court's legal errors permit the Court to set aside its factual findings (which are insufficient anyways, *supra* Part I.B). *Paxton*, 2021 WL 3661318, at *9-10. There is no evidence that Indiana's longstanding abortion regulations have suddenly become unduly burdensome. The district court's judgment is erroneous, likely to be reversed, and should be stayed.

Conclusion

The Court should grant Appellants' motion to stay the trial court's injunction pending appeal.

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