UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WHOLE WOMAN'S HEALTH ALLIANCE, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:18-cv-1904-SEB-MJD
CURTIS T. HILL, JR., Attorney General of the State of Indiana, in his official capacity, *et al.*,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case, which challenges twenty-five sections and sub-sections of the Indiana Code and one article of the Indiana Administrative Code, represents an attempt by an abortion provider to exploit the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as a weapon to strike down entire state regulatory regimes, even if those laws have been enforced and upheld for years. Indeed, Whole Woman's Health's approach cuts to the very heart of the Supreme Court's abortion jurisprudence: It assumes no abortion dispute can ever be truly settled, claiming that no matter how many times an abortion regulation is upheld, it can always be challenged again—at trial—on the ground that changed circumstances have made the previously valid law unconstitutional. And it contorts the Supreme Court's undue-burden test, attacking the State's abortion laws on the basis of alleged burdens that amount to speculative counterfactuals with no causal connection to the regulations at issue. If accepted, these arguments would throw abortion jurisprudence into chaos. Yet Whole Woman's Health cannot prevail without them: The State's abortion regulations are carefully designed to further the State's important and legitimate interests in expressing respect for fetal life and promoting women's health while respecting the woman's ultimate decision whether or not to bear a child, as protected by *Roe* and *Casey*. This Court should protect the delicate balance fashioned by the Supreme Court's abortion precedents by granting summary judgment to the State.

ARGUMENT

I. Whole Woman's Health May Not Unilaterally Amend Its Complaint To Challenge Additional Regulations

Whole Woman's Health accuses the State of failing to address its claims against Indiana Code section 16-34-2-1.1 and 410 Indiana Administrative Code 26.5-1-1 to 26.5-20-1. ECF No. 234 at 1. First, the State *does* address Whole Woman's Health's due process *and* First Amendment

claims against section 16-34-2-1.1. *See* ECF No. 214 at 44–48 ("[I]nformed-consent laws violate neither the Due Process Clause nor the First Amendment, provided that 'the information the State requires to be made available to the woman is truthful and not misleading.' . . . The State is therefore entitled to summary judgment." (internal citation omitted)).

Second, Whole Woman's Health does not challenge 410 Indiana Administrative Code 26.5-1-1 to 26.5-20-1 in its complaint. *See generally* ECF No. 1. Indeed, these sections of the Indiana Administrative Code appeared nowhere in the pleadings for this case until Whole Woman's Health filed its statement of claims on October 11, 2019, ECF No. 203 ¶ 3, almost a full year after the deadline to amend the pleadings set by the case management plan, ECF No. 41 at 4, and a week after the close of discovery, *id.* at 7. Whole Woman's Health may not unilaterally amend its complaint by listing additional sections of the Indiana Administrative Code in its statement of claims. Rather, it "may amend its pleading only with the opposing party's written consent or the court's leave." *See* Fed. R. Civ. P. 15(a)(2). Because Whole Woman's Health has not followed that process, claims absent from the complaint are not before the Court.

II. Defendants' Summary Judgment Evidence Is Admissible

Plaintiffs take issue with Defendants' Exhibits 10, 11, 15, 18, 19, and 27, asserting only that "[e]ach document is inadmissible hearsay." ECF No. 234 at 43. But Plaintiffs misunderstand the standard applicable to summary judgment evidence. Federal Rule of Civil Procedure 56(c)(2) does not require evidence to be admissible if used in a motion for summary judgment; instead, evidence must only be *capable* of being admissible. Fed. R. Civ. P. 56(c)(2) (allowing objections to material that "*cannot* be presented in a form that *would* be admissible") (emphasis added). Prior decisions by this Court have followed the plain text of the Rule. *See, e.g.*, *Dunn-Lanier v. Indianapolis Public Schools*, No. 1:17-cv-3687-SEB-MJD, 2019 WL 3532841 at *4 (S.D. Ind. Aug. 2,

2019) (declining to exclude exhibits at the Summary Judgment stage where the only objection was hearsay because "[the Court] cannot say that Ms. Dunn-Lanier will be unable to present the evidence in an admissible form at trial."); *McCarthy v. Fuller*, No. 1:08–cv–994–WTL–DML, 2012 WL 1424414 at *2 n.2 (S.D. Ind. April 24, 2012) ("Pursuant to Rule 56 as amended, materials submitted in response to a motion for summary judgment need only be *capable* of being presented in a form admissible at trial.") (emphasis in original). Exhibits 10, 11, 15, 18, 19, and 27 are clearly *capable* of being admissible.

More fundamentally, the exhibits do not meet the definition of hearsay in the first place, or (as Plaintiffs appear to admit) fall within hearsay exceptions. ECF No. 234 at 43. Federal Rule of Evidence 801 defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." None of the exhibits objected to by Plaintiffs has been offered for the truth of the matter asserted and, thus, none falls within the definition of hearsay. *See* Fed. R. Evid. 801(c). *See, e.g.*, *Pugh v. City of Attica, Indiana*, 259 F.3d 619, 627 n.7 (7th Cir. 2001) (citing *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998)) (holding that the City's investigative report was not hearsay because "it is not offered to prove the truth of the matter asserted—that Mr. Pugh actually misappropriated funds. The report is offered to demonstrate why the City honestly believed Mr. Pugh had misappropriated funds.") (internal citations omitted).

Exhibit 10—a set of safety principles for office-based surgery published by the American College of Surgeons—is not offered to prove what the proper safety principles for office-based surgery are but only to show that Dr. Stroud's medical opinions are consistent with those of the American College of Surgeons and others. *See* ECF No. 214 at 9; ECF No. 217-8.

Exhibit 11—a report recommending best practices for office-based surgery published by the Federation of State Medical Boards—was also not offered to prove what the best practices for office-based surgery are but to demonstrate that Dr. Stroud's medical opinions are consistent with those of the Federation of State Medical Boards. *See* ECF No. 214 at 9; ECF No. 218-1.

Exhibit 15, a different report concerning patient safety in office-based settings published by the American College of Obstetricians and Gynecologists ("ACOG"), is offered not to prove what the best safety principles for office-based surgery are or to prove ACOG's current views, but to show independent grounding for the General Assembly's abortion licensing and inspections requirements. *See* ECF No. 214 at 13, 64; ECF No. 218-5.

Exhibits 18 and 19 are newspaper articles concerning the discovery of fetal remains in the home and vehicle of Dr. Ulrich Klopfer. ECF No. 218-8; ECF No. 218-9. Defendants offer them not to prove any facts about Dr. Klopfer but to illustrate public reporting of events the Indiana legislature may legitimately consider as it regulates abortion via licensure and inspection requirements with an aim to "protect the public by affording ISDH the ability to take preemptive steps and get 'an advance look at possible problems.'" *See* ECF No. 214 at 14; ECF No. 218-7 at 103:4–12. In any event, Whole Woman's Health does not seriously dispute the truth of these reports, and if necessary Defendants will at trial be able to prove the accounts through the testimony of State investigators. *See* Declaration of Vanessa Voigt Gould; Declaration of Matthew Broadwell.

Exhibit 27, a report by ACOG about the best methods for estimating due dates, ECF No. 218-17, is not offered to prove whether a particular method of estimating due dates is the best method, but to demonstrate that the Indiana Code is consistent with ACOG's recommendations on gestational dating. *See* ECF No. 214 at 21–22.

Plaintiffs also attack Exhibits 10 (safety principles), 11 (best practices), 15 (patient safety), and 27 (gestational dating) on the basis of age, ECF No. 234 at 43, but publication date has no bearing on whether these exhibits fall within the definition of hearsay. In any event, Exhibit 27 was published in 2017 and reaffirmed in 2019. *See* ECF No. 218-17 at 1. Plaintiffs claim that Exhibits 11 and 15 are outdated and have since been superseded by more recent guidelines, but do not provide the supposed more recent documents and point to no substantive departures from the versions relied on by Dr. Calhoun. ECF No. 218-3 at 116:8-14. They imply that Dr. Calhoun agreed that the "updated" safety principles published by the American College Surgeons in 2019 differ from the version published in 2003 (Exhibit 10). But in context (on deposition pages Plaintiffs by rule should have supplied but did not, and that Defendants attach herewith), Dr. Calhoun states "[t]hat's not actually what [the 2019 version] says. It says have a place to transfer a patient. So it still has to have a transfer agreement of some sort. That's wordsmithing. That's what it means. You have to have a transfer agreement with somebody there." Excerpts from Deposition of Dr. Byron Calhoun 113:13–17. Continuing, "the spirit of what [the 2019 version] is trying to say is, is that you need to have a place where you're going to send your patients and you're going to have it arranged ahead of time so that the patients get the best care. That's what this is really about. That's what a transfer agreement is about." ECF No. 218-3 at 115:17–22.

Defendants' evidence is clearly capable of being admissible at trial, so Plaintiff's generic challenges to these exhibits at the Summary Judgment stage should be rejected. *See Dunn-Lanier*, 2019 WL 3532841 at *4; *McCarthy*, 2012 WL 1424414 at *2 n.2.

III. The State Is Entitled to Summary Judgment on the Undue Burden Claims

A. *Hellerstedt* did not overturn Supreme Court abortion precedents, and the State is entitled to judgment as a matter of law on statutes previously upheld

Whole Woman's Health argues that because "[t]he undue burden standard is fact dependent," abortion statutes and regulations can never be upheld as a matter of law against facial challenges, even if courts have already upheld these specific laws, or the Supreme Court has already upheld materially identical laws, in prior facial challenges. ECF No. 234 at 50. This argument directly contradicts the Seventh Circuit's holding in this very case that "the district court's broad condemnation of Indiana's licensing scheme runs contrary to Supreme Court precedent." *Whole Woman's Health Alliance v. Hill*, 937 F.3d 864, 868 (7th Cir. 2019). Whole Woman's Health does not even bother to address this holding, much less to refute why the same logic would not apply to *all* Indiana's abortion statutes previously upheld. Instead, it proposes a standard that would allow district courts variously to hold a law facially constitutional in one state but an identical law facially unconstitutional in another, or to hold a statute facially unconstitutional after previously holding the same law facially constitutional (and presumably vice-versa, though it is notably silent on that) on the theory that "the burdens and benefits of an abortion law can change over time." ECF No. 234 at 50.

Such a rule would be chaos. States legislatures would have no way of knowing which laws they may constitutionally pass. The enforcement authority of state prosecutors and regulators would likewise be impossible to ascertain: A single statute could be facially constitutional one year, facially unconstitutional the next, and facially constitutional again thereafter. As the Seventh Circuit has already said in this case, when a law has been upheld as facially constitutional by controlling precedent, this Court must adhere to that precedent.

1. The Seventh Circuit has already held that Indiana's clinic licensure requirement is facially valid, and this Court is bound by that decision

In its decision in this case, the Seventh Circuit held that this Court erred "when it decided that Indiana's *entire* licensing scheme was unconstitutional" because "most of Indiana's licensing statutes appear inoffensive." *Whole Woman's Health Alliance*, 937 F.3d at 875 (emphasis in original). Whole Woman's Health does not even mention this holding, much less attempt to refute it. Consistent with the Seventh Circuit, this Court should grant summary judgment to the State on the clinic licensure requirements: Ind. Code §§ 16-18-2-1.5(a), 16-21-1-7, 16-21-2-2(4), 16-21-2-2.5(a), 16-21-2-10, 16-21-2-11, 16-21-2-14; 410 Ind. Admin. Code art. 26.

2. *Mazurek* controls, so this Court must uphold the physician-only requirement

In *Mazurek v. Armstrong*, the Court held 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*." 520 U.S. 968, 973 (1997) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992)) (emphasis in original). Since then, courts have almost universally understood *Mazurek* to approve ubiquitous physician-only statutes. *See Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 195 (Ariz. Ct. App. 2011) (quoting *Mazurek*, 520 U.S. at 974–75); *Gonzales v. Carhart*, 550 U.S. 124, 163–64 (2007) (citing *Mazurek* as an example of a case where legislative judgment was upheld "despite the respondents' contention 'all health evidence contradicts the claim that there is any health basis for the law'" *Mazurek*, 520 U.S. at 973); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 412 (5th Cir. 2013) (describing *Mazurek* as "the longstanding recognition by the Supreme Court that a State may constitutionally require that only a physician may perform an abortion"); *A Woman's*

Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 688 (7th Cir. 2002) (stating that *Mazurek* "held it constitutional to prevent non-physicians from performing abortions without factual inquiries into whether other medical professionals could do the job as safely, and how much prices may be elevated by a physician-only rule" (internal citation omitted)).

Thirty-nine States, including Indiana, have enforceable physician-only requirements. *See* ECF No. 214 at 40–41 (listing statutes). Whole Woman's Health cites only a single case striking down such a requirement, and that case did so on state constitutional grounds. *See Armstrong v. State*, 989 P.2d 364, 384 (Mont. 1999). As the Eastern District of Virginia recognized not long ago, "from a facial perspective, the physician-only requirement rests on firm precedential terrain." *Falls Church Med. Ctr., LLC v. Oliver*, 346 F. Supp. 3d 816, 829 (E.D. Va. 2018). And while the District of Idaho held that "*Mazurek* does not control," it did so only because of "the Ninth Circuit's guidance that undue burden analysis is a context-specific exercise," *Planned Parenthood of the Great Nw. & the Hawaiian Islands v. Wasden*, 406 F. Supp. 3d 922, 929 (D. Idaho 2019), which departs from the Seventh Circuit's holding. Therefore, this Court should grant summary judgment to the State as to Ind. Code § 16-34-2-1(a)(1)(A) and 410 Ind. Admin. Code 26-13-2(b).

3. Indiana's requirement that second-trimester abortions be performed in a hospital or ambulatory surgical center has already been upheld

The Supreme Court has already upheld Indiana's requirement that second-trimester abortions must be performed in a hospital or ambulatory outpatient surgical center. *Gary-Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F. Supp. 894, 899 (N.D. Ind. 1980), *aff'd*, *Gary-Northwest Indiana Women's Services, Inc. v. Orr*, 451 U.S. 934 (1981). Whole Woman's Health argues that this decision is no longer good law due to the Supreme Court's subsequent decisions in *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983), *overruled*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Planned Parenthood Association of*

Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983), each of which invalidated a second-trimester hospitalization requirement. But *City of Akron* and *Ashcroft* were decided in conjunction with *Simopoulos v. Virginia*, 462 U.S. 506 (1983), which upheld a similar statute against a facial challenge. The critical difference between the facially constitutional statute upheld in *Simopoulos* and the statutes struck down in *City of Akron* and *Ashcroft* is that the Virginia statute allowed second-trimester abortions to be performed in an outpatient surgical center. *See Simopoulos*, 462 U.S. at 516 ("Under Virginia's hospitalization requirement, outpatient surgical hospitals may qualify for licensing as 'hospitals' in which second-trimester abortions lawfully may be performed. Thus, our decisions in *City of Akron* and *Ashcroft* are not controlling here."). Because Indiana's requirement also allows for second-trimester abortions to be performed in an outpatient surgical center, *see* Ind. Code § 16-34-2-1(a)(2)(B), *Simopoulos* controls here. Therefore, this Court should grant summary judgment to the State on the requirement that second-trimester abortions be performed in a hospital or ambulatory surgical center.

4. Indiana's reporting requirement is not materially different from the reporting requirements upheld by the Supreme Court in *Casey*, *Ashcroft*, and *Danforth*

Despite the Supreme Court's repeated holdings that reporting requirements are facially constitutional, *see Casey*, 505 U.S. at 900–01 (1992); *Ashcroft*, 462 U.S. at 489–90 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), Whole Woman's Health argues that Indiana's reporting requirement is nonetheless unconstitutional because it "require[s] abortion providers to report thirty-nine pieces of information for each patient," whereas *Casey* only required twelve. ECF No. 234 at 59. But the test does not depend on how many pieces of information the statute requires, but on whether or not that information is "reasonably directed to the preservation of maternal health." *Casey*, 505 U.S. at 900 (quoting *Danforth*, 428 U.S. at 80).

Whole Woman's Health's only theory why any of the reportable thirty-nine pieces of information is not reasonably directed to the preservation of maternal health is that "[t]his information goes far beyond the information that the CDC solicits in connection with its abortion surveillance system, and it is not used by the Health Department to develop programs." ECF No. 234 at 59. But *Casey* mentions no requirement that the data collected be consistent with CDC practices nor that the State "develop programs." Instead, the State compiles the information in "a public report," Ind. Code § 16-34-2-5(e), so that the information may be used as "a vital element of medical research," *Casey*, 505 U.S. at 901. This Court should grant summary judgment to the State on the reporting requirements, Ind. Code §§ 16-34-2-5(a), 16-34-2-5.1, 16-34-2-5(b).

5. The Seventh Circuit upheld Indiana's in-person informed consent waiting period in *A Woman's Choice*, and that decision controls here

The Seventh Circuit already upheld Indiana's in-person informed consent waiting period against a facial challenge in *A Woman's Choice*, 305 F.3d at 693, and this Court is bound by that decision. In *A Woman's Choice*, the court held that evidence of a declining abortion rate in other States after similar laws were passed was not sufficient to show that Indiana "would experience the same effect and the reason *why* the effect occurs." 305 F.3d at 692 (emphasis in original). Nor has Whole Woman's Health presented such evidence here. On the contrary, the State has shown without contradiction that there is *no* evidence the abortion rate in Indiana declined due to the in-person informed consent waiting period law. *See* ECF No. 240-1 ¶ 18 & Figure 2. Indeed, Dr. Grossman has conceded that several studies cited in his report found that waiting periods longer than the one required by Indiana have not been shown to affect abortion rates or prevent women from obtaining abortions. ECF No. 217-6 at 167:8–15 (24-hour waiting period), 253:21–255:2 (72-hour waiting period). The isolated anecdotes Plaintiffs mention do not evidence a "substantial obstacle" on a "large fraction" of women, let alone *causation* of any such burden—nor does Whole

Woman's Health bother arguing that they do. And Whole Woman's Health's practice of requiring patients to wait two weeks between informed consent and the procedure is not a burden imposed by statute, which requires only an 18-hour delay.

With regard to the specific disclosures required by the informed consent statute, Whole Woman's Health does not contest that the "truthful and non-misleading test" from *Casey* applies. Whole Woman's Health points out several requirements in Indiana's statute that differ from the statute upheld in *Casey*, ECF No. 234 at 62–63 (identifying information regarding lethal fetal anomalies, pictures of the fetus, and copies of the informed consent brochure in different languages as distinguishable from *Casey*), but does not bother explaining how many of these differences are material to the truthful/non-misleading test. It challenges only four disclosures: (1) "the requirement that abortion providers inform patients about 'the potential danger to a subsequent pregnancy' and 'the potential danger of infertility;'" (2) "the requirement that abortion providers inform their patients that 'human physical life begins when an human ovum is fertilized by a human sperm;'" (3) "the requirement that abortion providers inform their patients that 'objective scientific information shows that a fetus can feel pain at or before twenty (20) weeks of postfertilization age;'" and (4) "[t]he requirement that abortion providers inform their patients about certain options for tissue disposition." ECF No. 234 at 63–64. But each has uncontested support.

First, Whole Woman's Health itself concedes that abortion carries a risk of infertility and risks to subsequent pregnancies. *Id.* at 62 (describing these disclosures as "*de minimis* risks of abortion" (emphasis in original)). Second, one of Whole Woman's Health's own experts conceded that human life begins at fertilization. ECF No. 218-14 at 95:9–12.

Third, the State has presented objective scientific information that the necessary development for the conscious experience of pain happens between 12 and 18 weeks, ECF No. 218-15 ¶¶

10, 23, 32–42, while Whole Woman's Health's assertion that "a human fetus does not have the capacity to experience pain until at least 24 weeks" is unsupported by the sources it relies on. *See* ECF No. 234 at 34. "[T]he debate over fetal pain is not *whether* a fetus detects pain in some manner during the first trimester of life (all parties agree on this point), but rather *how* pain is experienced, i.e., whether a fetus is capable of "*suffering*." ECF No. 218-15 ¶ 25. A debate over *how* a fetus experiences pain is not a dispute of material fact. And while Whole Woman's Health relies on the testimony of Dr. Grossman, it does not claim he has any expertise on fetal pain. ECF No. 234 at 74. Dr. Grossman merely relies on the opinions of RCOG and ACOG, which is an insufficient basis to qualify him to give opinion testimony under Rule 702. *See Jones v. U.S.*, No. 2:16-cv-435-JRS-DLP, 2019 WL 367622, *5 (S.D. Ind. Jan. 30, 2019) (holding that a literature review does not equate to expertise). The State's expert testimony on fetal pain stands unrebutted.

Finally, the options for fetal disposition are equally available to women undergoing medication abortion, as the woman may choose to return the fetus to the clinic for proper disposition. The statute permits doctors also to inform women having medication abortions that the law does not *require* them to return the fetal remains to the clinic for disposition.

Whole Woman's Health also contends that "[s]tatements in the Informed Consent Brochure and Perinatal Hospice Brochure are also false and misleading." ECF No. 234 at 64. Whole Woman's Health states that the "brochure erroneously suggests that continuing the pregnancy is safer than having an abortion" and that "abortion is associated with worse mental health outcomes than carrying a pregnancy to term." ECF 234 at 34. The brochure makes no such suggestion. *See* ECF No. 234-1 at 826–27. The brochure does state that the risk of death from the abortion procedure increases if performed after 21 weeks, but this fact was established by the expert opinion of Dr. Coleman, who found that "the relative risk of abortion-related mortality per 100,000 was . . .

76.6 at or after 21 weeks. This compares to a 12.1 rate for childbirth." ECF No. 217-4 ¶ 161. Plaintiffs have not proffered any evidence to dispute this testimony.

Plaintiffs also argue that "[r]esearch demonstrates that women who have an abortion due to fetal anomaly do not have worse mental health outcomes than women who experience a miscarriage, still birth or neonatal death." ECF No. 234 at 34–35. It cites the testimony of Dr. Grossman, who claims that "there is no evidence to show that women who have an abortion due to fetal anomaly fare worse in terms of their mental health than women who experience miscarriage, still birth or neonatal death." ECF 234-1 at 184–85. Once again, the state's brochure expressly cites studies supporting its assertions, and Whole Woman's Health does not argue that those cited studies do not exist. ECF 234-1 at 830. Moreover, Whole Woman's Health acknowledges that Dr. Grossman has no expertise on mental health, but merely relies on a review of the relevant literature. Again, that is not enough to qualify Dr. Grossman to provide an expert opinion on this subject under Rule 702. ECF No. 234 at 74; *see also Jones v. U.S.*, 2019 WL 367622at *5 (holding that a literature review does not equate to expertise).

Accordingly, the State is entitled to summary judgment on the in-person informed consent waiting period. Ind. Code §§ 16-34-2-1.1, 16-34-2-1.5.

6. Whether Indiana's parental consent and judicial bypass requirements satisfy *Bellotti* is not a factual issue

Whole Woman's Health concedes that *Bellotti* applies to parental consent statutes, but argues that whether a statute satisfies *Bellotti* depends on material issues of fact. This argument misunderstands the *Bellotti* test, which depends only on the terms of the statute. Under *Bellotti*, a parental consent statute must provide a judicial bypass procedure that (1) allows the minor to have an abortion without parental consent if she is sufficiently mature to make the decision on her own; (2) allows the minor to have an abortion without parental consent if it is in her best interests; (3)

ensures the anonymity of the minor throughout the judicial proceeding; and (4) may be conducted expeditiously. *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979). On its face, Indiana's statute satisfies this test. *See* Ind. Code §§ 16-34-2-1(a)(1)(C), 16-34-2-4(a). If Indiana judges take too long to rule on a minor's petition, that minor may bring an as-applied challenge in state court. The remaining evidence presented by Whole Woman's Health—that there is no established network of attorneys for pregnant adolescents and that Indiana has a high proportion of adolescents who are abused—is irrelevant to the statutes facial constitutionality under the *Bellotti* test (or any other plausible test). The State is entitled to summary judgment on the parental consent requirement.

7. Indiana's criminal penalties are not subject to a separate constitutional analysis from the substantive laws that they enforce

Whole Woman's Health argues that "[s]hould the Court decline to strike down any of the challenged laws, enjoining application of the attendant criminal penalties would mitigate some of the laws' burdens." ECF No. 234 at 67. But if the Court holds that the substantive laws which the criminal penalties enforce are constitutional, then it would have no legal basis on which to strike down the criminal penalties. Whole Woman's Health does not cite a single case that suggests otherwise. Moreover, Whole Woman's Health's suggestion that lifting the criminal penalties would "mitigate some of the laws' burdens" is a tacit admission that Whole Woman's Health would be willing to violate the State's abortion regulations if only doing so was a civil, rather than criminal, infraction. Such a theory merely bolsters the State's need to enforce its criminal penalties. If underlying regulations are constitutional, so must be criminal penalties that enforce them.

B. Whole Woman's Health concedes that it has failed to show the challenged laws have prevented Indiana women from accessing abortion

With its motion for summary judgment, the State presented the expert testimony of Dr. James Studnicki, who testified that "[t]he plaintiffs' experts do not present any empirical evidence

that suggests even an association of [Whole Woman's Health's] claimed injuries with the challenged laws." ECF No. 240-1 ¶ 7. Dr. Studnicki's expert report responds to the testimony of Plaintiffs' expert Dr. Heidi Moseson, who opined that "Indiana's abortion restrictions create substantial obstacles to abortion access in the State." ECF No. 219-4 ¶ 48. Dr. Moseson admitted in her deposition that she had "not done a formal causal analysis of the laws' effect" on Indiana's abortion rates. ECF No. 219-3 at 69:25–70:2; *see also id.* at 66:20–67:1–2; 67:10–14; 69:20–21. Whole Woman's Health now concedes that the State is correct and withdraws Dr. Moseson's opinion about causation. ECF No. 234 at 74. Plaintiffs present no other evidence to contradict Dr. Studnicki, leaving *no* evidence showing that any alleged burdens—let alone substantial obstacles to the abortion decisions of a large fraction of Indiana women—result from the challenged laws.

This point is critical to Whole Woman's Health's case. State abortion laws are unconstitutional "[o]nly where *state regulation imposes* an undue burden on a woman's ability to make th[e abortion] decision." *Casey*, 505 U.S. at 874 (emphasis added). For this reason, courts must examine "the burdens *a law imposes* on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S. Ct. at 2309 (emphasis added). Consequently, if the alleged burdens are not empirically proven—or if burdens result not from the challenged laws, but instead from some other circumstance—Whole Woman's Health cannot prevail on its undue burden challenge. Whole Woman's Health has presented no evidence that any of the challenged laws have caused a large fraction of women to forgo an abortion. Therefore, this Court should grant summary judgment to the State on all of Whole Woman's Health's undue burden claims.

C. Whole Woman's Health's anecdotal evidence does not establish that a large fraction of Indiana women will be unduly burdened by the challenged laws

The undue burden standard is *not* a form of heightened scrutiny. *See* ECF No. 234 at 47. On the contrary, the Court in *Casey* specifically declined to apply heightened scrutiny to abortion,

explaining that doing so would discount the State's "important and legitimate interest in potential life." *Casey*, 505 U.S. at 871. Consequently, the burden is not on the State to "demonstrate that the law actually advances the asserted interest." ECF No. 234 at 48. The *Casey* challengers lost their challenges to the informed-consent and recordkeeping requirements because they failed to meet their burden of showing that the provisions would amount to substantial obstacles. *See Casey*, 505 U.S. at 884 ("[T]here is no evidence on this record that requiring a doctor to give the information as provided by the [informed-consent] statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion."); *id.* at 901 ("While at some point increased cost [from the recordkeeping and reporting requirements] could become a substantial obstacle, there is no such showing on the record before us."). And in *Gonzales v. Carhart*, the Court upheld the federal partial-birth abortion ban because the challengers had "not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases." 550 U.S. 124, 167–68 (2007).

Similarly, in *Karlin v. Foust*, the court "consider[ed] whether *plaintiffs ha[d] proved* that the factual circumstances in Wisconsin are such that the waiting period operates to impose an undue burden on women seeking abortions in Wisconsin." 188 F.3d 446, 485 (7th Cir. 1999) (emphasis added). It concluded, "*plaintiffs cannot demonstrate* with any certainty that the restriction will have a significantly more burdensome effect on women in that state than the comparable restriction had on women in Pennsylvania." *Id.* at 485–86 (emphasis added).

Only where the challengers have already demonstrated a burden imposed by the law must the State demonstrate that the benefits outweigh that burden. Whole Woman's Health concedes this point: "In *Gonzales*, the Supreme Court simply held that medical uncertainty over the extent to which the challenged law would *burden* patients by subjecting them to health risks—*which was the plaintiffs burden to prove*—precluded a finding of unconstitutionality." ECF No. 234 at 49

(second emphasis added). The mere existence of some alleged burden is not sufficient. *See Casey*, 505 U.S. at 876 ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue."). Instead, "[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." *Hellerstedt*, 136 S. Ct. at 2309 (emphasis added). The law is unconstitutional only if the burdens proved by plaintiffs substantially outweigh those benefits. *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017) ("The question . . . is whether the [challenged] requirement's benefits are substantially outweighed by the burdens it imposes on a large fraction of women seeking . . . abortion.").

Finally, a challenged law imposes an undue burden only if it will "operate as a substantial obstacle" in "*a large fraction* of cases in which [the law] is relevant." *Casey*, 505 U.S. at 895 (emphasis added). Thus, in the context of a facial challenge, a "substantial obstacle" is not "synonymous" with an undue burden unless the "large fraction" test is met. *See* ECF No. 234 at 48. Whole Woman's Health does not even bother to apply this test, and consequently, it has not met its burden of proof with respect to any of the challenged laws.

1. The licensing and inspection requirements do not impose an undue burden

The only burden Whole Woman's Health alleges that the licensing requirement imposes stems from Whole Woman's Health's own inability to provide abortions absent permanent injunctive relief. ECF No. 234 at 55. But—especially in the absence of any testimony on causation—Whole Woman's Health presents no evidence or even explanation how its inability to provide abortions will impose an undue burden on a large fraction of women. Nor does it attempt to provide evidence that the State handled its license application in a discriminatory manner, as the Seventh Circuit set out. *See Whole Woman's Health Alliance v. Hill*, 937 F.3d 864, 879–80 (7th Cir. 2019).

It also claims that but for the licensing law, Planned Parenthood would open additional clinics. But Planned Parenthood's area services director attributes its failure to open additional clinics to the physical plant requirements, not the licensing law. ECF No. 234-1 at 502.

With respect to the inspection requirement, Whole Woman's Health argues that inspections "disrupt abortion clinic operations, divert resources away from patient care, and drive up costs." ECF No. 234 at 25. But once again, Whole Woman's Health does not bother to explain how these inconveniences translate into an undue burden on a large fraction of women. *Casey*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."). Whole Woman's Health also argues that "anti-abortion advocates are able to co-opt the Inspection Requirement as a means of harassing abortion clinics and patients." ECF No. 234 at 25–26. But this argument is just another way of saying that Whole Woman's Health is burdened by complying with the law—if Whole Woman's Health cannot prove that this burden is a substantial obstacle to its patients, it is not undue. It provides as an example "three baseless complaints against the South Bend clinic." *Id.* at 26. But, excepting the testimony of its own president and CEO, Whole Woman's Health provides no evidence that these complaints are baseless or were filed for the purpose of harassment. ECF No. 234-1 at 298.

No material issue of fact prevents this Court from granting summary judgment to the State on the licensing and inspection requirements. Ind. Code §§ 16-18-2-1.5(a), 16-21-1-7, 16-21-2-2(4), 16-21-2-2.5(a), 16-21-2-10, 16-21-2-11, 16-21-2-14; Ind. Admin. Code art. 26.

2. The physician-only requirement does not impose an undue burden

Whole Woman's Health's argument against the physician-only requirement appears to rest on the allegation that there is a "shortage of abortion providers" in Indiana and that allowing advanced practice clinicians would relieve this shortage. ECF No. 234 at 18. Even assuming these allegations are true, they do not present a constitutional issue. There is no constitutional minimum of abortion providers that a State must have, and indeed, Indiana currently has seven abortion clinics (including Whole Woman's Health)—more than North Dakota, South Dakota, Missouri, Kentucky, Mississippi, and West Virginia combined. *See* Holly Yan, *These 6 states have only 1 abortion clinic left. Missouri could become the first with zero*, CNN Health (June 21, 2019), https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html.

To prove an undue burden, Whole Woman's Health must show that the physician-only law *caused* a supposed shortage of abortion providers and that any such shortage has caused a large fraction of women to be unable to obtain an abortion. Whole Woman's Health has not even attempted to make such a showing. *See supra* Part III.B. Therefore, no material issue of fact exists that prevents this Court from granting summary judgement to the State on the physician-only law. Ind. Code § 16-34-2-1(a)(1)(A); 410 Ind. Admin. Code 26-13-2(b).

3. The ASC/hospital requirement does not impose an undue burden

In order to prove that the requirement that second trimester abortions be performed in a hospital or ambulatory surgical center imposes an undue burden, Whole Woman's Health must show that it prevents a large fraction of women seeking second trimester abortions from successfully obtaining those abortions. Whole Woman's Health has not met that burden here.

The State's expert Dr. Studnicki testified that there was no change in the percentage of women seeking second trimester abortions after the legislature passed the ASC/hospital requirement. ECF No. 240-1 ¶ 45. Instead, the data suggests that "the reason there are so few second trimester abortions is that they have already been performed in the first." *Id.* Whole Woman's Health has presented no evidence to contradict Dr. Studnicki, nor can it, since it has disclaimed any argument that the challenged laws actually cause the burdens it alleges. *See* ECF No. 234 at 74 (disavowing Dr. Moseson's statement that "Indiana's abortion restrictions *create* substantial obstacles to abortion access").

Because there is no contested issue of material fact on whether the ASC/hospital requirement, Indiana Code section 16-34-2-1(a)(2)(B), imposes any substantial obstacle on women seeking second trimester abortions, the Court should grant summary judgment to the State.

4. The reporting requirement does not impose an undue burden

Whole Woman's Health argues that the reporting requirement imposes an undue burden because it requires abortion providers to report three times the amount of information in the reporting requirement upheld in *Casey*, making it "three times as time-consuming for patients and medical staff to complete." ECF No. 234 at 59. According to Whole Woman's Health, "[t]he additional staff time required to comply with the Reporting Requirements increases the cost of providing care." *Id.* at 60. But Whole Woman's Health provides no evidence regarding the amount of increased cost, whether that cost is passed on to patients or, critically, whether that increased cost amounts to an undue burden on a large fraction of women. *See Casey*, 505 U.S. at 901 ("While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us."). That leaves them with no evidence of a substantial obstacle to the abortion decision of a large fraction of women.

Nor does Whole Woman's Health provide any evidence that the additional information required by Indiana actually does triple the reporting time. Patients presumably already fill out forms with their basic medical information and doctors already make records of compliance with state law. It simply does not follow that adding additional information to a form that the doctor must already file with the State triples the time needed for compliance any more than tripling a recipe for Christmas cookies triples the amount of time needed to prepare them. Accordingly, Whole Woman's Health has not shown a material issue of fact with regard to the reporting requirement, Indiana Code sections 16-34-2-5, 16-34-2-5.1.

5. In-person informed consent plus waiting period is not an undue burden

Indiana's informed consent requirements, through both in-person counseling and the brochure, provide women with more information to make their decisions. Whole Woman's Health concedes that the *Casey* "truthful and nonmisleading" standard applies to Indiana's informed consent requirement, and that standard is met here. *See supra* Part III.A.5. And Whole Woman's Health has failed to provide any evidence that the requirement that informed consent must take place in-person with the physician or an advanced practice clinician at least eighteen hours before the abortion imposes any substantial obstacle on a woman's abortion decision. *See id.* Summary judgment should be granted in favor of the State's informed consent provisions.

6. The ultrasound requirement does not impose an undue burden

Indiana's ultrasound requirement does not impose an undue burden but instead helps women reach a fully informed decision concerning whether or not to abort. Whole Woman's Health concedes that ultrasounds are the best method for certain types of gestational aging. ECF No. 234 at 37. Whole Woman's Health also does not dispute that ultrasounds help providers determine which procedures are contraindicated for a patient. ECF No. 217-1 ¶ 144; ECF No. 216

¶¶ 63, 72; ECF No. 218-2 at 90:15–91:2. It also does not disagree that the odds of continuing a pregnancy are 1.86 times higher after a woman views an ultrasound. ECF No. 217-7 ¶ 94.

Yet Whole Woman's Health proclaims that "ultrasound and fetal heart tone auscultation do not enhance patient decision-making or otherwise provide benefits to patients" and even charge that "the requirement that the patient affirmatively opt out of viewing the ultrasound or listening to the heartbeat is cruel and insensitive"—all without evidence or explanation. ECF No. 234 at 37. The State's experts have explained the usefulness of fetal ultrasounds and fetal heartbeat in obtaining informed consent. *See, e.g.*, ECF No. 215-1 ¶ 52; *see also* ECF No. 217-3 ¶ 12 ("I think actually seeing my baby would have made me feel like I could be a mother."); ECF No. 97-1 ¶ 5 ("I would like to think I would have made a different decision if I could have seen the baby moving or hear the heartbeat."). No evidence shows any women find an ultrasound "cruel" or "insensitive."

Whole Woman's Health contends that requiring fetal ultrasounds could subject women to more than one ultrasound and complains that the statute does not allow abortion providers to rely on ultrasounds performed by others. ECF No. 234 at 37. Yet it does not explain how the possibility of an extra ultrasound burdens access to abortion or would result in fewer women seeking an abortion. *See, e.g.*, ECF No. 217-3 ¶ 12; ECF No. 97-1 ¶ 5. And Dr. Glazer has testified that he performs ultrasounds as part of his abortion practice and will continue to do so at the South Bend clinic regardless of any legal requirement to do so. ECF No. 217-5 at 33:20–34:17, 43:4–8, 44:4–11, 47:24–48:3, 51:8–14, 56:6–19, 59:1–60:17, 90:1–8, 96:23–97:10. Whole Woman's Health is thus already performing fetal ultrasounds and will continue to do so; such practice is standard for abortion providers so requiring it imposes no burden on women or abortion providers.

7. The parental consent requirement does not impose an undue burden

Whole Woman's Health argues that the parental consent requirement imposes burdens on minor women by "caus[ing] adolescents psychological distress, delay[ing] their abortion care, and . . . plac[ing] them in danger when their parents or other family members are abusive or not safe to involve." ECF No. 234 at 40. But it provides no evidence that these supposed burdens, given the alternative of the judicial bypass procedure, amount to a substantial obstacle for a large fraction of minor women. Nor is there evidence that the judicial bypass itself imposes a substantial obstacle. Plaintiffs cite no cases holding that mere "psychological distress" amounts to an undue burden. Indeed, the judicial bypass procedure requires that the juvenile court rule on the minor's petition within 48 hours and provides for an expedited appeal. Ind. Code § 16-34-2-4(e), (g). And any danger of abuse should be considered during the "best interests" inquiry. *Id.* § 16-34-3-4(e). If the court does not follow these procedures, the minor may present an as-applied challenge.

These minor burdens pale in comparison to the State's weighty interest and Whole Woman's Health does nothing to counter the State's interest in allowing parents to exercise authority over their minor children. "It is cardinal with [the Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Whole Woman's Health argues that parental involvement laws "do not protect or promote the health of adolescents, nor do they lead to a higher likelihood of positive communication within families." ECF No. 234 at 40. But that misstates the State's interest, which is in "encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child." *Bellotti v. Baird*, 443 U.S. 622, 639 (1979).

Moreover, it is unsupported by the evidence. Whole Woman's Health cites to the testimony of Dr. Grossman and Dr. Moseson. But Dr. Grossman actually testifies that "[r]ecent research demonstrates that [parental involvement] requirements are associated with an increase in the proportion of minors who indicate that a parent is aware that they are seeking abortion care," ECF No. 234-1 at 208, which demonstrates that parental involvement statutes *do* further the State's interest. Even if some parents ultimately decide to let their child make the abortion decision, that does not reduce the State's interest in ensuring that the minor's parents have the opportunity to be involved. Dr. Moseson merely cites the same studies as Dr. Grossman. *Id.* at 526.

Accordingly, the benefits of the parental consent requirement outweigh its burdens, and this Court should grant summary judgment to the State.

8. The facility requirements do not impose an undue burden

The facility requirements impose no excessive burden on abortion access. Plaintiffs generally assert that the physical plant requirements do not translate to increased patient safety, are expensive, and prevent Indiana clinics from offering certain types of abortion procedures. None of these concerns stands up to scrutiny. Plaintiffs completely ignore the similarity between Indiana's facility requirements and ACOG's facility recommendations. *See* ECF No. 218-5; ECF No. 214 at 63–64. They merely argue that women are burdened by the need to travel to other clinics (for the deep sedation or general anesthesia used in surgical abortions that cannot be used by facilities offering only medication abortions) and the increased costs that the South Bend clinic would incur before it could begin offering surgical abortions. ECF No. 234 at 24–25. Again, however, they fail to connect such assertions to any evidence showing that these regulations have actually posed substantial obstacles to women seeking abortion. *See* Part III.C, *supra*. Furthermore, Plaintiffs'

cited evidence merely assert that compliance would be "prohibitively expensive." ECF No. 234-1 at 298–99. Plaintiffs do not identify or estimate any such costs.

Plaintiffs now also purport to challenge 410 Indiana Administrative Code article 26.5, which covers clinics providing only medication abortions. As noted, Plaintiffs did not challenge the facility requirements found in 410 Indiana Administrative Code article 26.5 in their complaint, so the Court should not treat any such challenges as viable claims in the case.

Regardless, the physical plant requirements set forth in 410 Indiana Administrative Code article26.5 ensure the health and safety of pregnant women who seek medication abortions. They address staffing and director qualifications, fire prevention and building safety, wheel chair accessibility, waiting rooms, hand washing stations and restrooms, sterilization of medical equipment, reduction of hazards or pests, and other cleanliness measures. *See* 410 Ind. Admin. Code art. 26.5. The physical plant requirements also ensure that a clinic is ready to handle any complications that arise. *See* ECF No. 217-1 ¶ 37.

Such requirements are utterly benign and consistent with requirements for other types of healthcare facilities. For example, Defendants' expert, Dr. Christopher Stroud, operates several birth centers in Indiana, which are themselves subject to a detailed licensing scheme, codified at 410 Indiana Administrative Code art. 27. Among other requirements, the birth centers "are required to perform safety drills, to keep careful records describing the health and competency of all employees, to perform fire and other natural disaster drills, to document the regular preventative maintenance of all mechanical equipment in the building, and to provide ongoing education of the staff." ECF No. 215-1 ¶ 14. These requirements still apply even though the birth centers are not allowed to perform any surgical procedures, such as cesarean births. *Id*.

Tellingly, Plaintiffs claim neither that they currently fail to comply with these requirements, nor assert that, if given the chance, they would stop complying with any. Their standing even to challenge the facility requirements for medication-only clinics is therefore open to question even more than their standing to challenge the requirements for surgical abortion clinics. ECF No. 214 at 32. In any event, this Court does not need to engage in the undue burden balancing test because as a threshold matter, Plaintiffs have failed to demonstrate any obstacle that these requirements create to women seeking to have an abortion.

9. In-person physician exam and telemedicine rules impose no undue burden

The relevant group of women for whom the telemedicine law would be an actual restriction is those women who, absent the telemedicine ban and in-person physician examination requirement, would obtain medication abortions via telemedicine. Because Indiana has *never* allowed abortion via telemedicine and there is no prior law to which the Court may compare the telemedicine ban, it is not obvious how many women this group might comprise and Whole Woman's Health makes no attempt to estimate this number. Similarly, the numerator for the purposes of the large fraction test would be those women who cannot obtain an abortion by traditional means. But once again, Whole Woman's Health does not introduce any evidence of how many women that might be. Without such evidence, this Court cannot meaningfully apply the large fraction test. Therefore, the State is entitled to summary judgment on the telemedicine ban and in-person physician examination requirement. Ind. Code §§ 16-34-2-1(a)(1), 25-1-9.5-8(a)(4).

Moreover, the State has supplied testimony as to why in-person consultation is important in the abortion context. Dr. Calhoun testified that a decision as weighty as abortion needs to be considered carefully, and in-person interactions "are superior to remote interactions for decisions of that weight." ECF 217-1 ¶143. In-person interactions allow for better communication due to better eye contact, greater ability to read body language, and "overall development of a real person-

to-person relationship between doctor and patient." *Id*. Also, Dr. Calhoun states that "the indications for medication abortion are strict and must be determined precisely," and an in-person examination is the best method to ensure that a medication abortion is indicated. *Id*. at ¶ 144. Anything less than an in-person examination falls below the standard of care threshold for purposes of estimating due dates and gestational age, and an ultrasound is absolutely necessary to determine where the pregnancy is located, or whether there is a possibility of ectopic pregnancy. *Id*. at ¶ 145. Finally, in using telemedicine, it is not possible for the doctor to ensure who is actually taking the prescribed drugs, which is especially problematic given that some doctors prescribe Tramadol, a narcotic pain medication with addictive potential. *Id*. at ¶¶146-147.

In response, Plaintiffs cite testimony from Dr. Grossman, some of which was not previously disclosed to Defendants. The Grossman report submitted by Plaintiffs with their summary judgment brief includes at least the following additions relating to telemedicine, apparently inserted in response to Defendants' summary judgment arguments:

- Paragraph 9: Several new sentences concerning how the mifepristone Risk Evaluation and Mitigation Strategy (REMS) applies to telemedicine, backed by an entirely new source citation and footnote;
- Paragraph 85: Eight new sentences concerning how abortion services could be provided and abortifacient drugs dispensed via telemedicine;
- Paragraph 89: New text asserting that abortion providers can effectively screen for pressure to abort via telemedicine;

ECF No. 234-1 at 146–242. In the course of discovery, Plaintiffs had an opportunity to submit a rebuttal report in time for Defendants to use it in their deposition of Dr. Grossman, but they did not do so. Accordingly, the Court should strike these new and undisclosed portions of Dr. Grossman's report and ignore them for purposes of deciding Defendants' Motion for Summary Judgment. Fed. R. Civ. P. 37(c)(1). Doing so would leave Defendants' evidence regarding the advantages of in-person counseling unrebutted in at least some respects, such as better doctor-patient

communication, better ability to determine indications for medication abortion, and better assurance that the patient is the one actually taking the prescribed medicine.

Regardless, Plaintiffs have not demonstrated that Indiana's telemedicine requirements impose an undue burden. They merely theorize that permitting telemedicine would result in many more abortions, but they supply no evidence to prove such speculation.

10. The admitting privileges requirement does not impose an undue burden

The critical inquiry with respect to the admitting privileges requirement is whether it results in the closure of abortion clinics within the State. *Compare Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2304 (2016) (invalidating admitting privileges requirement where evidence showed that closure of clinics would reduce number of abortions by half), *with June Med. Servs. v. Gee*, 905 F.3d 787, 791 (5th Cir. 2018) (upholding admitting privileges requirement where "there is no evidence that any of the clinics will close as a result of the Act"), *cert. granted*, 140 S. Ct. 35 (2019). Whole Woman's Health has introduced absolutely no evidence that any abortion clinic in Indiana has been forced to close, or even been unable to open, due to the admitting privileges requirement, and the inability of individual doctors to obtain privileges is not sufficient. Moreover, Indiana's admitting privileges statute is distinguishable from the statute struck down by the Supreme Court in *Hellerstedt* because it permits physicians to obtain admitting privileges at hospitals more than 30 miles away and it allows clinics to meet the admitting privileges requirement by employing a back-up physician. Indeed, Whole Woman's Health has done just that here, meaning that the admitting privileges requirement is imposing no burden on its patients. *See* ECF No. 234 at 21. Consequently, this Court should grant summary judgment to the State on the admitting privileges requirement. Ind. Code § 16-34-2-4.5(a)(1).

D. Whole Woman's Health disclaims a "cumulative burdens" challenge, but uses cumulative impacts to challenge Indiana's entire regulatory scheme on abortion

In its complaint, Whole Woman's Health asserted that "[t]he challenged laws, individually *and collectively*, impose an undue burden on access to previability abortion in Indiana." ECF No. 1 ¶ 197 (emphasis added). Now, in response to the State's arguments that a "collective" or "cumulative" burdens claim is not viable, Whole Woman's Health states that "Plaintiffs make no such claim." ECF No. 234 at 51. Whole Woman's Health must be held to its disclaimer.

Yet, Whole Woman's Health attempts to argue that this Court, in evaluating each of the challenged laws individually, must consider "the real-world context in which each restriction operates," including "constraints on abortion access imposed by other laws—both challenged and unchallenged." *Id.* But this argument is precisely the avenue that Supreme Court precedent forecloses. *See Casey*, 505 U.S. at 874 (explaining that state abortion laws are unconstitutional "[o]nly where *state regulation imposes* an undue burden on a woman's ability to make th[e abortion] decision" (emphasis added)); *Hellerstedt*, 136 S. Ct. at 2309 (holding that courts must examine "the burdens *a law imposes* on abortion access together with the benefits those laws confer" (emphasis added)). A challenged law is not unconstitutional unless *that law* imposes an undue burden.

Because "cumulative burdens" challenges to state regulatory regimes are not viable, this Court should hold Whole Woman's Health to its word, and "evaluate the constitutionality of each challenged law individually." ECF No. 234 at 52.

IV. The State Is Entitled to Summary Judgment on the Equal Protection Claims

A. Normal undue burden analysis applies to Whole Woman's Health's claims that the laws impermissibly burden the "fundamental right to abortion"

Whole Woman's Health asserts that the challenged laws violate equal protection by "impos[ing] unique burdens on abortion patients, but not on patients seeking similarly situated medical interventions." ECF No. 234 at 69. This Court has already determined that the undue burden test

applies to such claims, *see* ECF No. 116 at 53 ("We think the standard under the Equal Protection Clause is the same as that under the Due Process Clause, that is, the undue burden standard."), and Whole Woman's Health does not dispute that this standard applies, *see* ECF No. 234 at 69–70. Consequently, the analysis under the Equal Protection Clause is no different than that under the Due Process Clause. *See supra* Part III. Again, the State prevails under this standard.

B. The challenged laws do not discriminate on the basis of sex

Whole Woman's Health next argues that "[t]he challenged classifications enforce unconstitutional sex-stereotypes." ECF No. 234 at 70. The Supreme Court has never endorsed the theory that abortion regulations discriminate on the basis of sex. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268–74 (1993) (rejecting the idea that opposition to abortion is equivalent to "animus against women" or that to disfavor abortion "is ipso facto to discriminate invidiously against women as a class"); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (rejecting the proposition that heightened scrutiny applies to abortion regulations because they affect only women).

Whole Woman's Health rejects these precedents because they do not hold that "opposition to abortion can *never* reflect animus towards women," ECF No. 234 at 71 (emphasis in original), and because "no showing of animus is required," *id.* at 72 n.19 (citing *Casey*). But *Casey*, as well as *every other* Supreme Court case to review an abortion statute, analyzes abortion regulation under the Due Process Clause, not as sex-based discrimination under the Equal Protection Clause. And the other federal cases that Whole Woman's Health relies on are not abortion cases at all. *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 725, 739 (2003) (holding that state

employees have a private right of action for money damages under the Family Medical Leave Act); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139–40 (1977) (holding that employer's pregnancy leave policy violated Title VII). Indeed, the *only* case Whole Woman's Health cites that analyzes an abortion statute under equal protection principles does so on state constitutional grounds and is, therefore, unavailing here. *See Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 244–46 (Iowa 2018). The dearth of federal cases accepting or even acknowledging Plaintiffs' theory demonstrates its primary weakness: if abortion regulations discriminated on the basis of sex, such claims would be at the center of *every* abortion case because such discrimination would subject the statutes to heightened scrutiny, rather than the undue burden test.

Regardless, abortion regulations do *not* draw distinctions on the basis of sex, but on the basis of a particular medical procedure. The regulations apply only to women simply because only biological women have abortions. It would be illogical to apply abortion regulations to biological men who will never have need of an abortion. *See Casey*, 505 U.S. at 838 ("[I]t is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband.").

Whole Woman's Health argues that the State does not impose "similar conditions on comparable or riskier medical interventions," ECF No. 234 at 70, but this example merely illustrates that the challenged regulations distinguish on the basis of procedures, not on the basis of sex. The supposedly "riskier medical interventions" to which Whole Woman's Health refers are child delivery, C-section procedures, chorionic villius sampling, and amniocentesis, *see* ECF No. 234-1 at 27, 190, all procedures that, like abortion, are performed only on biological women. And even if this Court credits Whole Woman's Health's evidence that childbirth may in some circumstances be riskier for the mother, the State's interest in fetal life both distinguishes abortion from all other

medical procedures (delivery, C-section, chorionic villius sampling, and amniocentesis do not have the purpose of killing the baby) and justifies many aspects of informed consent that Whole Woman's Health attacks. *See Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.").

Nor do the State's abortion regulations reinforce sex stereotypes concerning women. Indiana's laws make no assumptions that "women are the center of home and family life" or that "caregiving is women's work." ECF No. 234 at 70 (internal quotation marks and citations omitted). On the contrary, Indiana's abortion regulations do not require a woman to raise the child that she bears, but instead encourage adoption as an alternative to abortion. *See* Ind. Code § 16-34-2-1.1(a)(2)(C) (requiring clinic to inform women of "adoption alternatives"). While the laws do seek to inform women's abortion decisions, this state interest has been expressly condoned by the Supreme Court. *Casey*, 505 U.S. at 878 ("[T]he State may take measures to ensure that the woman's choice is informed."). And the only "special protection" afforded by the regulations is for the life of the fetus, another interest condoned by the Supreme Court. *See id.* at 876 ("[T]here is a substantial state interest in potential life throughout pregnancy.").

Whole Woman's Health's preferred "policies that would protect potential life" do not demonstrate insincerity on the State's part. *See* ECF 234 at 71. Indeed, one would think that the very new-mother financial support Whole Woman's Health complains to be lacking would, if anything, demonstrate state expectations about the proper roles for birth mothers. And even if the State's abortion regulations reflect the idea that pregnant women are, by definition, mothers-to-be, *cf. Gonzales v. Carhart*, 550 U.S. 124, 128 (2007) (upholding the federal Partial Birth Abortion

Act, which "recognizes that respect for human life finds an ultimate expression in a mother's love for her child"), the State may prefer childbirth over abortion. *Casey*, 505 U.S. at 883.

For these reasons, Whole Woman's Health's sex-discrimination claim is not cognizable, and this Court should grant summary judgment to the State on that issue.

C. The challenged laws pass the rational basis test

Whole Woman's Health also argues that the challenged statutes unconstitutionally discriminate against abortion providers. Because abortion providers are not a protected class, rational basis review applies, *see Heller v. Doe by Doe*, 509 U.S. 312, 319–20 (1993), a point that Whole Woman's Health does not contest. *See* ECF No. 234 at 73.

Despite asserting equal protection claims against *all* the challenged laws, ECF No. 1 ¶ 199, Whole Woman's Health advances an argument that only *one* of the challenged laws, the admitting privileges requirement, Ind. Code § 16-34-2-4.5(a)(1), presents a genuine issue of material fact, ECF No. 234 at 73. The Supreme Court has repeatedly held that the State has a legitimate interest in ensuring that abortions are performed "under circumstances that insure maximum safety for the patient." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)). Thus, the only remaining issue is whether the admitting privileges requirement is rationally related to that interest.

Whole Woman's Health argues that a material issue of fact exists because it has presented evidence that "abortion is safer than interventions Indiana permits to be performed without admitting privileges." ECF No. 234 at 73. But under rational basis review, the State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955).

Whole Woman's Health further argues that the admitting privileges requirement "does little or nothing to further patient health." ECF No. 234 at 20, 73. But while Dr. Grossman opines that most abortion complications may be treated in the clinic or by a specialist at a hospital, ECF No. 234-1 at 164–69, neither he nor Plaintiffs present any evidence that the legislature could not have rationally concluded that the admitting privileges requirement might help *some* abortion patients by providing continuity of care. *See Heller*, 509 U.S. at 320 ("[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" (quoting *F.C.C. v. Beach Communications*, 508 U.S. 307, 313 (1993)). Nor do they refute the testimony of Dr. Calhoun that admitting privileges allow doctors to care for the patient in a seamless manner and to "take responsibility for their own complications," ECF No. 217-1 ¶ 109, and that admitting privileges requirements serve as credential mechanisms for abortion doctors, *id.* ¶ 98. There is no way to predict in advance which patients might need which type of care.[1]

The admitting privileges requirement need not be essential to *every* patient's wellbeing to pass rational-basis review. *Heller*, 509 U.S. at 321 ("A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). The cases that Plaintiffs cite, *see* ECF No. 234 at 20 (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–14 (2016); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 909–22 (7th Cir. 2015); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 787–99 (7th Cir. 2013)), only apply the undue burden test and do nothing to support a rational-basis claim.

[1] Whole Woman's Health also cites the testimony of Dr. Martin Haskell. *See* ECF No. 234 at 20 (citing ECF No. 234-1 at 321). However, Dr. Haskell is not an expert witness and may only testify to those complications occurring in his own patients, not the overall efficacy of the admitting privileges law.

Because Whole Woman's Health has not established a material issue of fact on the admitting privileges law nor advanced arguments that any other state statutes violate the rational basis test, this Court should grant summary judgment to the State on the equal protection claims.

V. The State Is Entitled to Summary Judgment on the First Amendment Claims

Whole Woman's Health claims that the informed-consent requirements violate "the freedom of speech protected by the First Amendment by compelling abortion providers to deliver the government's message." ECF No. 203 ¶ 10. The standard for determining whether the informed consent requirement violates the First Amendment is identical to the standard for determining whether it imposes an undue burden: it must be truthful and nonmisleading. *Casey*, 505 U.S. at 882; *see also National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373–74 (2018) (distinguishing informed consent requirements from pure speech regulations). Because Plaintiffs cannot materially dispute that the required information is untruthful or misleading, *see supra* Part III.A.5, the State is entitled to summary judgment on the First Amendment Claims.

CONCLUSION

Defendants respectfully request this Court grant their Motion for Summary Judgment.

Respectfully submitted,

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