No. 17-1883

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Plaintiff-Appellee,

against

COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana
Indianapolis Division
No. 0745-1 : 1:16-cv-01807-TWP-DML
Honorable Tanya Walton Pratt, District Court Judge

BRIEF OF *AMICI CURIAE* BIOMEDICAL ETHICISTS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a preeminent group of physicians and professors in various fields—including medicine, public health, philosophy, and law—from nationally and internationally renowned universities across the United States who teach and/or write about biomedical ethics. Collectively, *amici* hold JDs, MDs, PhDs, AMs, MPPs, MPHs, MSs, MAs, LLMs, and LLBs, and have decades of experience in the field of biomedical ethics. Among *amici* are experts who have researched, published, and taught about the intersection of biomedical ethics and women's health, human rights, technology, and the law. Several *amici* serve on national biomedical ethics committees and/or direct university centers and institutes devoted to this subject. All *amici* have made important contributions to the scholarship and practice of biomedical ethics.

This case is a constitutional challenge to an Indiana law that requires women to have an ultrasound at least eighteen hours prior to an abortion and at the same time they receive informed consent information that is otherwise required by the State. As discussed below, the law would subject women to undue burdens in

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[1] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amici curiae* certify that this brief was not authored in whole or part by counsel for any of the parties; no party or a party's counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief. All parties have consented to *amici* filing this brief in this litigation.

exercising their constitutional right to choose to have an abortion, and could ultimately prevent many women from obtaining their desired medical treatment.

Amici are well suited to opine on whether the Act is consistent with biomedical ethics—an issue that *amici* understand could be a significant factor in this Court's review of the lower court's decision. They also have a strong interest in ensuring that the Court's decision accurately describes the principles of biomedical ethics implicated by the Act and how they should be applied.

A full list of *amici* is attached as an appendix to this brief.

SUMMARY OF THE ARGUMENT

Indiana House Enrolled Act No. 1337, Ind. Code § 16-34-2-1.1(a)(5) (2016) (hereinafter "the Act" or "the new ultrasound law") requires physicians to perform an ultrasound on patients seeking an abortion at least eighteen hours prior to an abortion and at the same time the patient receives informed consent information as required under an earlier Indiana law.[2]

As the district court concluded, while women can currently visit seventeen facilities in Indiana operated by Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") to comply with the State's existing informed consent requirements, only six of these facilities have the equipment necessary to satisfy the new

[2] Ind. Code § 16-34-2-1.1(b) (repealed 2016).

ultrasound law.[3] Implementation of the statute would mean that women would have 64% fewer locations available to them than under the existing law.

Dramatically reducing the number of facilities where informed consent appointments are available will have immediate and far-reaching effects on Indiana patients who seek to exercise their right to obtain an abortion. Unlike the existing law, the Act will: (i) prevent physicians from conducting ultrasounds at a time they determine to be most appropriate; (ii) increase the travel time and expense associated with obtaining an abortion; (iii) force patients to undergo abortions at later gestational phases; and (iv) limit—and in some cases altogether eliminate—procedures that would have otherwise been available to patients. As described further below, the latter three effects have a disproportionate impact on two vulnerable groups of Indiana's patients—low-income women and women who face domestic violence.

The Act flies in the face of the central tenet of biomedical ethics that medical practices should on balance create more good than harm. The new ultrasound law, if allowed to go into effect, would cause undue hardship to patients while providing limited to no utility, because it would not provide any information that is not already available from the informed consent sessions. In contrast, the

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[3] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-01807-TWP-DML, 2017 WL 1197308, at *7 (S.D. Ind. Mar. 31, 2017) ("*PPINK*").

logistical and financial consequences of the Act would create hardships for patients and in some cases preclude patients from being able to access treatment at all.

Because the Act would force physicians to choose between violating state law and violating their ethical obligations, we respectfully urge the Court to affirm the district court's decision to enjoin the new ultrasound law.

ARGUMENT

I. The New Ultrasound Law Implicates Numerous Core Biomedical Ethical Principles.

The Act interferes with Indiana physicians' ability to deliver individualized medical care to their patients and makes it substantially more difficult for low-income patients and patients who face domestic violence to access abortions. The new ultrasound law thus obstructs the ethical principles and standards of conduct that guide the medical practice, the chief of which is that "a physician must recognize responsibility to patients first and foremost."[4] From this central obligation flow nine ethical principles espoused in the American Medical Association's Code of Medical Ethics, two of which are directly implicated by the Act:

1. A physician shall, while caring for a patient, regard responsibility to the patient as paramount; and

[4] *Principles of Medical Ethics*, Am. Med. Ass'n, https://www.ama-assn.org/sites/default/files/media-browser/2001-principles-of-medical-ethics.pdf (June 2001) (last visited July 24, 2017).

2. A physician shall support access to medical care for all people.[5]

The patient-physician relationship is further informed by four widely-recognized principles of biomedical ethics.[6] The first, *non-maleficence*, is embodied by the ancient phrase "do no harm" and directs physicians not to act in ways that might harm their patients unless the harm is justified by concomitant benefits.[7] The second principle, *autonomy*, recognizes that patients have ultimate control over their bodies and a right to "meaningful choice" when making medical decisions.[8] The third principle, *beneficence*, requires a physician to act in a way that is likely to benefit the patient. The final principle, *justice*, requires equitable treatment and a fair distribution of benefits and burdens.[9] As discussed below, the Act infringes upon each of these principles.

II. The New Ultrasound Law Restricts Physicians' Ability to Provide the Best Course of Treatment.

A fundamental standard of bioethics is that "[d]ecisions about a patient's medical care and management are always best made between the patient and the

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5 *Id.*

6 *See* Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* (7th ed. 2013) (hereinafter "Principles of Biomedical Ethics").

7 *Id.* at 150–55; Lois Snyder, Supplement to American College of Physicians Ethics Manual, Vol. 156 (Part 2) Annals of Internal Med. at 74 (6th ed. 2012).

8 Am. College of Obstetricians & Gynecologists, *Ethical Decision Making in Obstetrics & Gynecology*, ACOG Committee Opinion No. 390 (Dec. 2007); *Principles of Biomedical Ethics*, 101.

9 *Principles of Biomedical Ethics*, 250–51.

expert in medical care, the physician."[10] Because of their knowledge and training, physicians are in the best position to identify treatment options, and patients are in the best position to decide which option is most appropriate for them. These basic principles are reflected in the doctrine of informed consent, itself an integral part of contemporary biomedical ethics.[11] Under informed consent, physicians must offer their patients all suitable treatment options, and while physicians must be ready to provide guidance, it is ultimately for the patient to choose among the different options.[12]

The Act, however, undermines these basic principles. Under the new ultrasound law, physicians are required to provide medically inappropriate care, and patients are required to accept that care. The Indiana legislature thus unnecessarily interferes with the patient-physician relationship. As the American Congress of Obstetricians and Gynecologists has concluded in reviewing

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10 Am. Congress of Obstetricians & Gynecologists, *Talking Points on State Legislation; Gov't Mandates: Ultrasound & Abortion*, at 2, *available at* https://www.acog.org/~/media/Departments/LARC/TalkingPointsonUltrasoundMandates.pdf?dmc=1&ts=20130709T0142491575 (hereinafter "*Talking Points*").

11 Am. College of Obstetricians & Gynecologists, *Informed Consent*, ACOG Committee Opinion No. 439 (Aug. 2009) (hereinafter "*Informed Consent*").

12 *Id*.; *see also*, Nat'l Comm'n for the Protection of Human Subjects of Biomedical & Behavorial Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, Part C.1. (Apr. 18, 1979), *available at* http://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html.

legislation similar to the new ultrasound law, such "legislation interferes with the exercise of professional judgment."[13]

What the State advocates—a mandatory ultrasound eighteen hours before an abortion, with no exceptions—is contrary to the purpose of informed consent, which is "to prevent the practitioner from imposing treatments" on his or her patients[14] or to practice one-size-fits-all medicine. Medical care must be tailored to the needs of the individual patient and must be freely accepted by the patient.

The State suggests that an ultrasound eighteen hours before an abortion is in some way a "diagnostic or preliminary procedure."[15] It is not. To the contrary, the new law conflicts with optimal practice when an ultrasound is provided in association with abortion, which is that a physician should be permitted to perform an ultrasound when he or she determines it will be most useful.[16] Under the

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13 *Talking Points* at 2; *see also* Am. College of Obstetricians & Gynecologists, *Increasing Accession to Abortion,* ACOG Committee Opinion No. 613 at 1061 (Nov. 2014) ("Health care providers face laws inappropriately unique to the provision of abortion that mandate procedures and counseling that are not evidence-based or ethical . . . . [ACOG] opposes such interference with the patient–provider relationship, confirming the importance of this relationship in the provision of high-quality medical care.").

14 *Informed Consent* at 4.

15 Brief of Appellants Comm'r, Ind. State Dep't of Health, *et al.* at 24.

16 *See, e.g.*, Press Release, Planned Parenthood of Ind. & Ky., Inc., *PPINK, ACLU pleased by court ruling* (Apr. 3, 2017) *available at* https://www.plannedparenthood.org/planned-parenthood-indiana-kentucky/newsroom/ppink-aclu-pleased-by-court-ruling-2 ("Our doctors know the best medical protocol is to perform an ultrasound closer to the time

existing ultrasound law, in which physicians are permitted to perform ultrasounds on the same day of the abortion,[17] Indiana allows for better medical practice.

There may be instances in which a patient decides in consultation with her physician that an ultrasound is appropriate eighteen hours prior to an abortion procedure. Nothing under the current law prevents physicians and patients from making that determination. But the fact that a practice may be appropriate for a small percentage of patients does not justify requiring it for the high percentage of patients for which it is inappropriate. Such a policy would undermine the ability of physicians and patients to determine the best course of treatment for each patient.

III. The New Ultrasound Law Will Cause Substantial Harm to Women Seeking Abortions.

A. The New Ultrasound Law Will Delay and In Some Cases Prevent Physicians from Providing Abortion Care.

If allowed to go into effect, the Act will inevitably cause harm to women in Indiana seeking an abortion. The new ultrasound law would leave only six PPINK centers in Indiana that can satisfy the law's informed consent requirements. As a result, many women will face lengthy trips to receive care and will have to wait longer for openings in which to schedule their appointments. For some of these women, treatment will be delayed and therefore riskier; for others, treatment will

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of the procedure, not 18 hours in advance."). *See also* Nat'l Abortion Fed., *Clinical Policy Guidelines for Abortion Care*, at 15-16 (2017).

[17] *PPINK* at *1.

be inaccessible; and for all of these women, treatment will be more expensive and more difficult to keep confidential. The new ultrasound law thus conflicts with a physician's fundamental duty of non-maleficence.[18]

Moreover, as acknowledged by the district court, the Act will impose disproportionate additional costs on low-income Indiana patients who seek an abortion:

- Many patients do not have access to a personal vehicle and must pay for transportation to travel to their appointments.[19]

- Some patients must stay overnight in order to attend their appointments, and incur an expense for accommodations.[20]

- Because PPINK does not permit children to attend ultrasound consultations, patients will no longer be able to bring their children to their informed consent appointment; this in turn will incur additional childcare expenses or conflicts for many patients.[21]

- Many patients lack job security or do not receive paid time off. As a result, many patients (and their families) would be forced to choose between having an abortion and risking loss of income in order to take off two or more days of work, as the new law effectively requires.[22]

Since approximately 75% of PPINK patients who receive abortion services are considered "low-income" as compared to the Federal Poverty Line, and 49% are considered "poor," the increased costs imposed by the Act will do further harm

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18 *Id.*
19 *Id.* at *13–14.
20 *Id.*
21 *Id.*
22 *Id.* at *12–14.

by causing many low-income and poor patients to "delay their abortions as they attempt to come up with the necessary money and make the logistical arrangements."[23] These are serious harms to women seeking abortion services. And they are especially harmful because, as the court below found, there is no medical benefit associated with the law that might justify the risk to patient welfare.[24]

B. The New Ultrasound Law Will Restrict Physicians' Ability to Provide Medical Abortions.

The new ultrasound law creates a clear obstacle for Indiana women seeking medical (non-surgical) abortions, given the nine-week window when medical abortions are available.[25] Patients often do not realize that they are pregnant until after they have a missed menstrual period, at least four weeks following their previous menstruation. At that point, only a brief window remains to make financial and logistical arrangements necessary for a medical abortion.[26] But the

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23 *Id.* at *12 (internal quotation marks and citation omitted). *See also* Sarah E. Baum et al., *Women's Experience Obtaining Abortion Care in Texas after Implementation of Restrictive Abortion Laws: Qualitative Study*, PLOS ONE 11(10), at 8 (Oct. 26, 2016) (Noting difficulties patients face paying travel costs); Theodore Joyce, *The Supply-Side Economics of Abortion*, New Engl. J. Med. 365;16, at 1468 (Oct. 20, 2011) ("The pre-*Roe* data illustrate that . . . travel distance is a greater obstacle for less-advantaged women.").

24 *PPINK* at *23.

25 *Id.* at *2.

26 Decl. of Betty Cockrum at 10, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-01807-TWP-DML (S.D. Ind., Aug. 1, 2016) ECF No. 24-1.

new ultrasound law requires patients to attend two appointments, for which some patients "have to travel approximately 174 miles roundtrip."[27] In short, the logistical and financial obstacles that the Act imposes will make it impossible for many patients to schedule and attend both appointments within this limited time period, eliminating their ability to have their preferred medical treatment.

There are several reasons why a patient might prefer a medical abortion to a surgical abortion. Medical abortions require no surgery and no anesthesia.[28] The procedure also offers patients privacy and the ability to control the environment in which the abortion occurs, which is vitally important for many women, including patients who face domestic violence.[29] Because many patients who have abusive partners may face retaliation and violence in the event their pregnancy or abortion is discovered, medical abortions are often the only feasible option for these patients.

The Act, then, would violate the principles of autonomy and beneficence by effectively preventing physicians from providing medical abortions for many

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27 *PPINK* at *7.

28 UCSF Med. Ctr., *Medical Versus Surgical Abortion*, https://www.ucsfhealth.org/education/medical_versus_surgical_abortion/ (last visited July 21, 2017).

29 *See, e.g.*, *PPINK* at *12.

patients, and by preventing certain groups of especially vulnerable women from being able to exercise their right to an abortion altogether.[30]

C. The New Ultrasound Law Will Restrict Physicians' Ability to Provide Surgical Abortions.

If the Act goes into effect, many physicians will be unable to provide their patients with the option of undergoing a surgical abortion. As the district court found, "[d]ue to the fact that many women now have to make two separate, lengthy trips to obtain an abortion and the delays caused by overburdened health centers . . . some of these women will no longer be able to obtain an abortion within the required timeframe."[31] Indeed, the new ultrasound law sets off a chain reaction which limits a physician's ability to provide appropriate care:

- over a third of surgical abortions at PPINK currently occur within three weeks of the thirteen-week, six-day deadline for abortions at non-hospitals and surgical centers, such as PPINK, leaving patients with a very limited time within which to schedule appointments;

- it is difficult for low-income patients and patients with abusive partners to make multiple lengthy trips within such a short period of time, and gathering the necessary financial resources may make the procedure cost-prohibitive;

- the PPINK facilities offering informed consent appointments and abortions are strained and overbooked, and may try to squeeze in those patients who are closer to the cutoff point;

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30 *Id.*

31 *Id.* at *11.

- women who are rescheduled to accommodate a patient closer to Indiana's cutoff date for abortions may not be able to attend a later appointment.[32]

As the district court found, under such circumstances, "it would be surprising if the new ultrasound law did *not* prevent a significant number of . . . low-income women from obtaining an abortion."[33] Indeed, the district court credited PPINK's account of nine PPINK patients who have already been prevented from obtaining an abortion due to the new ultrasound law.[34] For eight of these patients, concerns related to the need to travel further for the initial informed consent appointment, including risk of job loss, childcare, and safety, made it impossible for their physicians to provide abortion care.[35]

The eighteen-hour waiting period between an ultrasound and an abortion violates fundamental ethical principles when it imposes serious harm on women without any counterbalancing benefit to the patient.

IV. The New Ultrasound Law's Disproportionate Effects on Low-Income Patients and Patients Who Face Domestic Violence Violate the Principle of Justice.

The new ultrasound law violates the bioethical principle of justice because it forces physicians to treat particular groups of patients differently without a morally relevant justification. As an initial matter, the Act requires Indiana physicians to

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32 *Id.* at *6–9, *11–12, *20–23.
33 *Id.* at *21 (emphasis in original).
34 *Id.* at *13–14.
35 *Id.*

treat patients seeking abortions differently from all other patients. While other patients may schedule ultrasounds in consultation with their physicians and at a time that suits them, the Act forces patients who are seeking abortions to undergo an ultrasound at an arbitrary date that is wholly unrelated to their medical care.

As discussed above, the effect of the increased costs associated with the new ultrasound law is magnified for low-income patients. The district court concluded that it is already difficult for low-income and poor patients to amass the funds and make the necessary logistical arrangements to have an abortion, and for patients "faced with the already high costs of an abortion and a lack of means to afford them, the additional expenses of lengthy travel, lost wages, and child care created by the new ultrasound law create a significant burden."[36] As the Seventh Circuit has previously recognized, while a "90-mile trip is no big deal for persons who own a car or can afford a[ ] . . . ticket," it may be "prohibitively expensive" for low-income and poor patients, especially when considering lost wages and the cost of additional childcare.[37] The Act undermines bioethics by effectively blocking low-income and poor patients from accessing the same type of medical care as wealthier patients.

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36 *Id.* at *12.

37 *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016).

Patients who face domestic violence and fear retaliation if their pregnancy or abortion is discovered are particularly vulnerable as a result of the additional financial and travel burdens that the Act imposes. For these patients, it is already difficult to spend one lengthy day away without alerting their abuser and subjecting the patient and others in her household to potential harm. Being absent for two or more days, as would be the case under the new ultrasound law, puts the safety of these patients and their ability to have an abortion in jeopardy.[38] As a result, the new ultrasound law disproportionately harms women who face domestic violence by increasing risks to their physical safety and wellbeing, and forces physicians to impose such risks on their patients. These risks are not outweighed by any counterbalancing medical benefit and cannot be justified from a biomedical ethics perspective.[39]

CONCLUSION

For the foregoing reasons *amici* join Appellees in urging the Court to affirm the district court's decision.

Respectfully submitted,

JANICE M. MAC AVOY*

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38 *PPINK* at *11; Audrey F. Saftlas et al., *Prevalence of Intimate Partner Violence Among an Abortion Clinic Population*, 100(8) Am. J. Pub. Health 1412, 1412–15 (Aug. 2010).

39 *See PPINK* at *24 (finding that "the State failed to present nearly any evidence that the timing of the ultrasound furthers this interest or its interest in furthering women's mental health.").

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rules of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 4,210 words, excluding parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

Dated: August 3, 2017

/s/ Janice M. Mac Avoy
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CERTIFICATE OF SERVICE

I hereby certify that, on August 3, 2017, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit through the Court's CM/ECF system, which will serve an electronic copy on all counsel of record. I further certify that I will cause an original and seven copies of this brief to be filed with the Court at directive of the Clerk of the Court.

The participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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