UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,	)	
Plaintiff,	)	
v.	)	No. 1:16-cv-1807-TWP-DML
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,	)	
Defendants.	)	

Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction

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Introduction

At issue in this case is a single, but quite burdensome, change in the process a woman must go through in order to obtain an abortion in this state. Prior to this change in law, a woman seeking an abortion in Indiana was already required to get state-mandated counseling at least 18 hours before she could have an abortion. That counseling must include information about, among other things, the risks of and alternatives to abortion, and she must be offered pictures of embryos and fetuses at various gestational ages. In addition, providers were already required to perform an ultrasound and offer the woman the opportunity to view the image and hear the fetal heartbeat, if it is present. None of these requirements are challenged in this litigation. Rather, Planned Parenthood of Indiana and Kentucky ("PPINK") challenges solely the new requirement that women come receive this offer to view the ultrasound prior to the day of the abortion.

The Supreme Court has made clear that where a state places a new restriction on a woman's ability to get an abortion, a) there must be actual evidence that the added restriction furthers a legitimate state interest in ways that the existing regulatory scheme does not and b) the extent to which the interest is furthered by the new regulation must be balanced against the burdens it imposes on women. *Whole Woman's Health v. Hellerstedt*, --U.S.--, 136 S. Ct. 2292, 2309 (2016). As explained below, the defendants ("State") point to no reliable evidence that requiring women to receive the offer to view—which most women decline—earlier advances its stated interest in dissuading women from having an abortion to any greater degree than the extensive regulatory scheme already in place. Moreover, even if there were evidence of a slight effect, which there is not, it would be outweighed by the substantial burden imposed on women seeking abortions by the statute. The 18-hour ultrasound requirement imposes an undue burden and is unconstitutional. All the requirements for the grant of a preliminary injunction are met

here and one should issue.

Facts

The State has sought to contest some of the facts established by PPINK and has also injected factual claims that are simply not relevant to this litigation. It is therefore useful to briefly recapitulate and supplement the facts in this case.

1. The new law imposes significant burdens on women seeking abortions

There are only a limited number of abortion providers in Indiana, and there are none except for PPINK outside of the Indianapolis area. (Dkt. 24-1 ¶ 13). Because of serious budget difficulties PPINK has had to restrict the health centers containing ultrasounds, ultrasound technicians, and staff to deliver the required State-mandated information to just six centers: Mishawaka, Merrillville, Lafayette, Indianapolis, Bloomington, and Evansville. (*Id.* ¶¶ 41-43). Financial considerations, and a lack of clinic space, preclude ultrasound examinations from being performed at PPINK's Fort Wayne clinic. (Dkt. 24-1 ¶ 40, Dkt. 35-5 at 33-34). As a result women from the Fort Wayne area will have to make two lengthy and potentially costly trips to obtain an abortion from PPINK or pay hotel expenses if the ultrasound and abortion can be scheduled on consecutive days. (Dkt. 24-1 ¶¶ 18, 64). The problems associated with this are magnified because PPINK's patients are disproportionally low and lower income. (*Id.* ¶¶ 67-68).

However, it is not only women from Allen County who will have to travel extended distances now, on two occasions, to obtain abortions from PPINK. With ultrasound appointments in just six heath centers PPINK has to schedule women, wherever they are located, at more distant locations, requiring lengthy and disruptive trips. (Dkt 35-5 at 117). Moreover, the concentration of appointments in limited locations has meant that more and more appointments for abortion services are being double-booked, which is placing an unsustainable

burden on PPINK and its ability to provide abortions within the time periods allowed. (Dkt. 24-1 ¶¶ 50-55). Given that many women wait to seek an abortion until the end of the period when PPINK can provide abortions, the delay in scheduling a physically remote ultrasound examination may result in it being too late to obtain the abortion. (*Id.* ¶¶ 58, 73).

Additionally, women have also contacted PPINK and have been unable, because of work, childcare, or transportation considerations, to pursue an abortion from PPINK because of the difficulties imposed by lengthy travel for both the ultrasound and the abortion. (*Id.* ¶ 73; Declaration of Forest Beeley ["Beeley"] ¶ 9 [attached to this memorandum as Exhibit 1]).

2. The ultrasound requirement

In 2011 Indiana law was amended to provide that a woman seeking an abortion was required to have an ultrasound, and had to be given the opportunity to view the ultrasound and hear any fetal heartbeat, unless she certified in writing that she did not wish to do so. Ind. Code § 16-34-2-1.1(b) (2011). The purpose of the ultrasound is to assess fetal age and to ensure that the pregnancy is uterine, not ectopic. (Dkt. 24-1 ¶ 27).[1] The former provision provided that the ultrasound could occur at any time "[b]efore an abortion is performed." *Id.*

[1] Dr. Stutsman, PPINK's medical director, testified that the ultrasound is not a medical necessity for this purpose as a woman's report of when her last menstrual period was with a bimanual pelvic exam with one hand in the vagina and the other on the abdomen can also assess the size of the uterus and detect fetal age. (Dkt. 35-4 at 72). On the other hand, the State's declarant, Dr. Francis, disagrees that this is a reliable method. (Dkt. 35-1 ¶ 10). However, a Practice Bulletin from the American College of Obstetricians and Gynecologists, focusing on medication abortions that must be performed earlier than surgical abortions, provides that: "before medical abortion is performed, gestational age should be confirmed by clinical evaluation or ultrasound examination." American College of Obstetricians and Gynecologists, *Practice Bulletin – Medical Management of First-Trimester Abortion* No. 143 at 8 (March 2014 – reaffirmed 2016), available at http://www.acog.org/-/media/Practice-Bulletins/Committee-on-Practice-Bulletins----Gynecology/Public/pb143.pdf?dmc=1 (last visited Oct. 10, 2016). These practice bulletins are "international publications designed to aid practitioners in making decisions about appropriate obstetric and gynecologic care." *Flores-Hernandez v. United States*, 910 F. Supp. 2d 64, 73 (D.D.C. 2012) (internal quotation omitted). *See also, e.g.. Runion v. United States*, No. 2:11-cv-00525, 2013 WL 4881727, *12 (S.D. W.Va. Sept. 12, 2013) ("The testimony in this case has without question established the authority of the ACOG practice bulletins among obstetricians."). There is no need to resolve the question of whether a manual examination is as reliable as an ultrasound inasmuch as Indiana law requires that an ultrasound be performed on a woman seeking an abortion and PPINK complies with the law.

Therefore, prior to July 1, 2016, to accommodate its patients who would have to travel long distances to the abortion clinics that were the only locations performing ultrasounds, PPINK would frequently schedule patients for ultrasounds on the same day as the abortion procedure. (Dkt. 24-1 ¶ 27). If a woman did not obtain an abortion after the ultrasound for whatever reason, *e.g.*, her pregnancy was too far along for the abortion to be performed, she could receive a refund of all monies paid, except for the cost of the ultrasound. (Beeley ¶ 12).[2] Although patients have been required since 2011 to view the ultrasound and listen to the fetal heartbeat, unless they execute a document affirmatively indicating that they do not wish to, the large majority of women choose not to view or listen and whether they do or not they rarely change their minds and determine not to proceed with the abortion. (Dkt. 24-1 ¶¶ 34-35).

The women who come to PPINK to obtain abortions do so after a great deal of reflection and contemplation. (Dkt. 24-1 ¶ 35; Dkt. 35-4 at 127). Nevertheless, along with the ultrasound they receive an enormous amount of information about abortions in general and the procedure they elect to have. (*See* Dkt. 24 at 3-4). In addition to the state-mandated information and the Department of Health brochure, featuring color photos of fetuses at various stages of development, women will also receive informed consent information from PPINK.[3]

The ultrasound machines that PPINK has purchased cost approximately $25,000. (Dkt.

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[2] During the course of her deposition Betty Cockrum, the President and CEO of PPINK, indicated that she did not know whether a refund would be issued of any fees paid other than the $100 ultrasound expense. (Dkt 35-5 at 131-35). Forest Beeley is the Director of Abortion Operations for PPINK and she does have this knowledge.

[3] This information concerns, among other things: the abortion options – medication or in-clinic abortions, how the cervix is opened for an abortion and side effects, how to take medications for the medication abortions and what are their risks and benefits, what will happen in the days following a medication abortion, what is an in-clinic abortion and its risks and benefits, what is sedation and its benefits and risks; and, patient care after an in-clinic abortion, among other information. Ex. 4 to the Deposition of Dr. Stutsman (attached to this memorandum as Exhibit 2) (Dr. Stutsman's deposition is already an exhibit to the State's response memorandum. [Dkt. 35-4]. These documents, identified by Dr. Stutsman as the information and consents given to the patients prior to abortion procedures, were not included as exhibits by the State. Therefore, only the deposition exhibit containing these documents and the deposition page accompanying it are attached as an exhibit to this memorandum.).

24-1 ¶ 28). These are purchased through GE Healthcare that provides a warranty, planned maintenance, replacement parts, software updates, clinical applications support, and guaranteed 24-hour response time so that if there is a problem the machine will be repaired or replaced within 24 hours. (Beeley ¶ 16). These are all essential features not provided by cheaper machines. (*Id.*). PPINK's ultrasounds integrate into its electronic medical record system so that the images are available throughout the PPINK system, another essential feature given that women will often be obtaining ultrasounds and abortions in different locations. (*Id.* ¶ 17). GE Healthcare offers a maintenance contract for its machines providing one free replacement probe a year, as opposed to the $8,000 cost of a new probe. (*Id.* ¶ 18).

3. Abortions and women's psychological health

Although there are reports that purport to link abortion to an increase in psychological problems post-abortion (*see* Dkt. 35-2 ¶ 7, Dkt. 35-3 ¶ 11), these reports are clearly outliers whose results have been rejected by leading medical organizations with specialized expertise, following comprehensive literature reviews. For example, in December of 2011 the Academy of Medical Royal Colleges / National Collaborating Centre for Mental Health published a detailed review entitled *Induced Abortion and Mental Health - A Systematic Review of the Mental Health Outcomes of Induced Abortion, Including their Prevalence and Associated Factors* ("RC/NCCMH report"), which surveyed previous studies, including those of Dr. Coleman cited by the State, and which concluded, after a detailed review, that, "[t]aking into account the broad range of studies and their limitation, the steering group concluded that, on the best evidence available . . . [t]he rates of mental health problems for women with an unwanted pregnancy were the same whether they had an abortion or gave birth." (Declaration of John Stutmsan, M.D. ¶ 10, attached as Exhibit 3 to this Memorandum ["Stutsman"] quoting RC/NCCMH report [attached to

Stutsman as Exhibit 2] at 8). In 2008 the Task Force on Mental Health and Abortion of the American Psychological Association issued a report, *Mental Health and Abortion* ("APA report") after reviewing "all empirical studies published in English in peer-review journals post-1989 that compared the mental health of women who had an induced abortion to the mental health of comparison groups of women . . . or that examined factors that predicate mental health" among women in the United Sates obtaining elective abortions. (Stutsman ¶ 9, quoting APA report [Attached as Exhibit 1 to Stutsman] at 3). The report concluded that "the most methodologically sound research indicates that among women who have a single, legal, first-trimester abortion of an unplanned pregnancy for non-therapeutic reasons, the relative risks of mental health problems are no greater than the risks among women who deliver an unplanned pregnancy." (Stutsman ¶ 9, quoting APA report at 92).

The APA report cautions that "many of the[] personal characteristics that put women at risk for problem behaviors and unplanned pregnancy also put them at risk for mental or physical health problems, *whether or not a pregnancy is aborted or carried to term*." (Stutsman ¶ 11, quoting APA report at 14 [emphasis in original]). It specifically criticized Dr. Coleman's 2002 report cited by the State, indicating that it is "characterized by a number of methodological limitations that make it difficult to interpret the results." (Stutsman ¶ 12, quoting APA report at 12). Similarly, the RC/NCCMH report rated Dr. Coleman's 2002 report as "poor" and her 2011 report, also cited by the State, as having methodological problems that "bring[] into questions both the results and conclusions" of the study. (Stutsman ¶¶ 13-15, quoting RC/CCMH Report at 18 and Tables 8, 11,15, at 57, 72, 96).[4]

[4] Further, comparing the studies relied on in Dr. Coleman's 2011 meta-analysis to those considered in the RC/NCCMH report makes clear that many of the studies she relied on were either excluded from the report because of various methodological limitations, or were considered, but were given quality ratings of "fair," "poor," or "very poor." Compare P.K. Coleman, Abortion and mental health: A qualitative synthesis and analysis of research

Argument

I. PPINK will prevail on the merits of its claim

A. *Whole Woman's Health* clarified the meaning of the "undue burden" test explicated in *Casey* regardless of whether a State seeks to justify an abortion regulation on the grounds of the desire to protect a women's health or to advance the interest in protecting fetal life

The State does not deny that in *Whole Woman's Health* the Court interpreted the undue burden standard in *Planned Parenthood of Southeastern Pa.. v. Casey*, 505 U.S. 833 (1992) (plurality opinion), to stress that the standard requires that a court balance "the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. In applying this balance a court must give heed to the fact that the regulation is "of a constitutionally protected personal liberty." *Id.* Given the constitutional interests at stake a court is not to defer to legislative conclusions but must apply an independent review. *Id.* at 2310. A court must balance the asserted benefits against the burdens and, based on this calculus, determine if the burden is undue. *Id.*

The State does not disagree with any of this. Instead, it argues that the *Whole Woman's Health* applies only to the assessment of abortion regulations that a state claims are designed to protect women's health and not to the 18-hour ultrasound requirement here that the State asserts "is concerned with the protection of unborn life." (Dkt. 35 at 9). Instead, the State asserts that instead of *Whole Woman's Health* "the appropriate standard remains that of *Planned Parenthood*

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published from 1995-2009, 199 Brit. J. Psychiatry 180, 182-84, with App. 7, RC/NCCMH Report at 148 (excluding more than one-third of studies used in Coleman's 2011 analysis) and with RC/NCCMH Report at 57, 67, 92, Tables 8, 11, 15 (labeling numerous other studies relied on by Coleman as "fair," "poor," or "very poor"). Eleven of these studies were criticized in the APA Report as "methodologically quite poor," explaining "because of the absence of adequate controls for co-occurring risks and prior mental health in these studies, it is impossible to determine whether any observed differences between abortion groups and comparison groups reflect consequences of pregnancy resolution or preexisting differences between groups or methodological artifact" and concluding "[c]onsequently, these studies do not provide a strong basis for drawing conclusions regarding the relative risks of abortion compared to its alternatives." APA Report at 56-57 (analyzing studies detailed in Tables 1 and 2, APA Report at 23-26, 39-52).

of Southeastern Pennsylvania v. Casey." (*Id.* at 8). However, this argument fundamentally misconstrues *Whole Woman's Health* and is erroneous.

The key point is that *Whole Woman's Health* did not set out a constitutional test that is distinct from *Casey*. Instead, the Court in *Whole Woman's Health* definitively interpreted *Casey*'s "undue burden" standard. Although the context in *Whole Woman's Health* was a regulation that was justified on the grounds of protecting a woman's health, there is absolutely nothing in the decision that indicates that the Court intended the term "undue burden" to mean one thing when the articulated justification for an abortion regulation is to protect fetal life and another thing when it is to protect maternal health. No matter the state justification, the undue burden standard after *Whole Woman's Health* requires a balance of factually-supported burdens against factually-supported benefits.

Of course, if the benefit asserted by the State is its interest in protecting potential life, the benefits that a State must demonstrate concern the regulation's ability to protect this potentiality. The State chafes against this interpretation of *Whole Woman's Health* by arguing that there can be no balancing when PPINK wants to provide abortions and the State's goal is to try to dissuade women from obtaining an abortion. (Dkt. 35 at 10). However, it is precisely this conflict that the balance mandated by *Whole Woman's Health* recognizes. Indeed, in *Whole Woman's Health* the Court noted that *Casey* employed a balancing test concerning Pennsylvania's spousal notification law, 136 S. Ct. at 2309, a regulation that could be justified only based on a desire to preserve fetal life. Thus, *Casey* adopted the undue burden test "to balance the sometimes competing interests of pregnant women and state governments, in the context of abortion." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at *2 (W.D. Tex. Feb. 6, 2012). The balancing test requires that a state's interest in protecting fetal

life must give way if it is not demonstrated by actual facts that its means of addressing that concern—here the 18-hour ultrasound requirement—outweighs the demonstrable burdens imposed. This is what *Casey* requires as explained by *Whole Woman's Health.*

B. The 18-hour ultrasound requirement imposes a substantial burden on PPINK's patients' opportunity and ability to obtain an abortion

The new requirement now means that some women will have to travel a lengthy distance to obtain the ultrasound and then, on a separate day, travel a lengthy distance to obtain the abortion. The evidence is uncontested that:

- Women have had to be scheduled at more distant locations for ultrasounds, requiring lengthy and disruptive travel. (Dkt. 35-5 at 117).
- Women have had to wait for appointments and by the time they get their ultrasound they are over the time limit for obtaining abortions. (Dkt. 24-1 ¶ 73).
- Women have had to delay obtaining the ultrasound because of the difficulties in traveling the long distance, and are scheduling appointments that are likely too late for them to obtain an abortion. (*Id.*).
- Women are calling PPINK for appointments but then indicating they cannot schedule them because of difficulties with transportation, child care, and employment. (*Id.*; Beeley ¶ 9).[5]
- PPINK's patients are disproportionately poor and often lack access to their own cars, and are often unable to make the necessary travel, childcare, and work arrangements demanded by the 18-hour ultrasound law without substantial delay, missed work, threats

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[5] The State argues that these facts should be discounted because the comments of the persons calling PPINK for abortion appointments contain insufficient detail to demonstrate that the women did not obtain abortions elsewhere. (Dkt. 35 at 23). The Seventh Circuit in *Planned Parenthood v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016), rejected the argument that an unlawful abortion restriction can be ameliorated by the ability to obtain an abortion in another, more hospitable, state.

> The state's position is untenable. As we said in *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011), the proposition that
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> > the harm to a constitutional right [can be] measured by the extent to which it can be exercised in another jurisdiction ... [is] a profoundly mistaken assumption. In the First Amendment context, the Supreme Court long ago made it clear that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." . . . . The same principle applies here. It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the ground that those rights may be freely enjoyed in the suburbs.

Id. at 918–19. And, the "anecdotes" that the State seeks to diminish are the comments made directly to PPINK's staff and reported by them to PPINK's Director of Abortion Operations. (Beeley ¶ 6). They are undisputed facts.

to their ability to keep their abortion decision confidential, and other burdens. (Dkt. 24-2 ¶¶ 19-53). "In sum, as a result of the Act, a significant number of poor and low-income women will no longer be able to obtain the abortions they seek or will be delayed in doing so." (*Id.* ¶ 53).[6]

- The concentration of appointments in just the few PPINK health centers where ultrasound machines are present has already resulted in an increase in double-booking of appointments, which not only this creates a situation where the PPINK system is stressed in an unsustainable way, but it results in PPINK no longer having the ability to respond immediately to women who contact PPINK near the end of the period where an abortion can be obtained. (Dkt. 24-1 ¶¶ 50-58; Beeley ¶¶ 10-11).

The State argues that under *Casey* it is the burden of PPINK and its patients to demonstrate that abortion regulations are burdensome to a "large fraction of the cases in which the law is relevant," *Casey*, 505 U.S. at 89, and that PPINK has not demonstrated this. However, in making this argument the State ignores the fact that *Whole Woman's Health* establishes that this is not the severely limiting factor postulated by the State.

> Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a "large fraction" of Texan women "of reproductive age," which Texas reads *Casey* to have required. . . . But *Casey* used the language "large fraction" to refer to "a large fraction of cases in which [the provision at issue] is relevant," a class narrower than "all women," "pregnant women," or even "the class of women seeking abortions identified by the State." 505 U.S., at 894–895, 112 S. Ct. 2791 (opinion of the Court) (emphasis added). Here, as in *Casey*, the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Id.*, at 895.

Whole Woman's Health, 136 S. Ct. at 2320. In *Whole Women's Health* there were certainly many women who wished to obtain abortions who would still be able to obtain abortions at the facilities that would remain, even after the implementation of the challenged regulations that

[6] The State seems to suggest that because a significant percentage of women who experience unintended pregnancies and get abortions are poor, this somehow demonstrates that costs associated with obtaining an abortion are irrelevant to a poor woman's ability to obtain the care. But, of course, pointing to the number of poor women who manage to get abortions says nothing about the number of poor women who were significantly delayed or prevented from obtaining an abortion by cost barriers. For example, the State does not postulate how a low-income woman in Fort Wayne, for example, with young children and without reliable transportation, can begin to contemplate making the two lengthy trips now required to obtain an abortion. The point is PPINK is already seeing women foregoing their ability to obtain abortions at PPINK because of the new difficulties posed by the 18-hour ultrasound law.

"'erect[ed] a particularly high barrier for poor, rural, or disadvantaged women,'" *id*. at 2303 (quoting district court findings); but the Court concluded that for the women actually burdened by the regulations a substantial obstacle was erected, *id.* at 2318. Here, similarly, PPINK has been able to continue providing abortion services to women. However, for those whose pregnancies are late in the first trimester or who are physically remote from where ultrasound appointments must be met, and who are poor, or otherwise disadvantaged, the 18-hour ultrasound requirements is an actual, and certainly not an irrelevant, restriction.[7]

The State further asserts that the 18-hour ultrasound requirement is not markedly different than waiting period requirements, requiring two trips to obtain abortions, that have been approved by the Supreme Court in *Casey* and the Seventh Circuit in *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002). (Dkt. 35 at 13-15). However, as PPINK has noted previously (Dkt. 24 at 26-27), both the Supreme Court and the Seventh Circuit have recognized that additional burdens, not greatly different than those approved in earlier cases, can nevertheless render an abortion regulation invalid. *Whole Woman's Health*, 126 S. Ct. at 2313; *Schimel*, 806 F.3d at 919. Similarly here, the increased travel distances are but "one additional burden." *Whole Woman's Health*, 126 S. Ct. at 2313. Women must also deal with lengthier waits and the reality that PPINK may not be able to accommodate them given the rigid time limit on performing abortions. Given that the ultrasound must, under the statute, be given at the same time as the state-mandated information, the initial appointment will be much longer and women will not be able to have their children with them as children are not allowed to be present

[7] It is also worth noting that the Supreme Court's brief one paragraph discussion of the "large fraction" requirement takes place at the very end of its decision and long after it applies the balancing test that resulted in the finding that the Texas regulations were unconstitutional. Clearly it is the result of the balancing test that is fundamentally important here. As the Seventh Circuit noted, the"undue burden" test "is not a matter of the number of women likely to be affected." *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied* 134 S.Ct. 2841 (2014).

during the transvaginal ultrasounds.[8] Thus childcare will have to be obtained not only for the abortion itself but for the earlier appointment. The burdens that the State deem to be insignificant here are the type of barriers that the Court in *Whole Woman's Health* considered sufficient to demonstrate a substantial obstacle—"longer waiting times [] and increased crowding." 136 S. Ct. at 2313.

The State seeks to minimize these facts by arguing that PPINK could reduce the burdens by implementing the ultrasound requirement differently. This argument is curious inasmuch as the question is, given the reality of how PPINK provides its abortion services, whether there is an undue burden on its patients, not whether PPINK is making what the State believes to be wise business decisions. In any event, the State's arguments are unavailing. It first suggests that PPINK could ameliorate the difficulties caused by the law by accepting ultrasounds from outside providers. However, it ignores the fact that the 18-hour ultrasound law explicitly indicates that the ultrasound must be provided "at the same time that the pregnant woman receives" the state-mandated information. Ind. Code § 16-34-2-1.1(a)(5). Even if another ultrasound provider could be found, it is unrealistic to believe that the provider would, or even could, provide the information mandated by Indiana Code § 16-34-2-1.1(a)(1).[9]

The State also suggests that PPINK could obtain cheaper ultrasound machines. However,

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[8] One of the State's declarants indicates that she has had young children in the room with a woman obtaining a transvaginal ultrasound and she "rarely ha[s] problems with children being disruptive or distracting during the ultrasound." (Dkt. 35-1 ¶ 15). However, Dr. Stutsman, PPINK's medical director, is not aware of children being present during any transvaginal ultrasound. (Dkt. 35-4 at 123). PPINK's rule that children are not allowed to be present is "[b]ecause there's a pretty serious risk of distraction. And that's not a – that is not an ideal circumstance for performing and – and reading the ultrasound." (Dkt. 35-5 at 100). Given that children might become "disruptive or distracting," PPINK's policy is certainly not unreasonable.

[9] Among other things Indiana Code § 16-34-2-1.1(a)(1) requires that the woman be provided the name of the physician performing the anticipated abortion, Ind. Code § 16-34-2-1.1(a)(1)(A), and the State does not suggest how an outside provider of ultrasound services could do this. Nor does the State suggest how a woman is supposed to obtain an ultrasound within the limited time frame that must be met so the abortion can be provided within the limits imposed by Indiana law or how a woman is supposed to "drop in" to a hospital or out-patient clinic and demand and receive an ultrasound, which, in any event, will be more costly than those provided by PPINK. (Beeley ¶ 20).

it is clear that PPINK has obtained ultrasound machines with the features that are necessary for its practice and are the most economical ones available given its needs. Moreover, the State ignores the fact that PPINK must have the physical space available to utilize the ultrasound machines. For example, there simply is not the physical space available at PPINK's Fort Wayne health center for ultrasound services. (Dkt. 35-5 at 34).

PPINK is unable to afford the expense, both in terms of equipment and staffing, of providing ultrasound machines and technicians in all of its health centers. (Dkt. 24-1 ¶ 40). The State argues that PPINK could address some of the problems occasioned by the 18-hour ultrasound requirement by training its nurse practitioners to read the ultrasounds. Of course, such training would be useful only if there was an ultrasound present at the locations where the nurse practitioners worked. This is certainly not a viable option for an organization that, in the last fiscal year, did not meet revenue projections and had to close a number of health centers. (Dkt. 35-5 at 66-67; Dkt. 24-1 ¶ 3). Moreover, nurse practitioners are vital to the delivery of the numerous other health services provided by PPINK, and training them to provide ultrasounds would necessarily cause PPINK's other services to suffer. (Dkt. 35-5 at 105). Abortion services are just a small percentage of the services that PPINK provides. (*Id.* at 133).

However, the State argues that in the past as the State has created more and more regulatory restrictions on abortions, PPINK has managed "to adapt to new regulatory and market conditions, so its claim of inability to do so now is not credible." (Dkt. 35 at 15). But, PPINK is not "crying wolf." Women are currently suffering real harm as they are not able to obtain abortions from PPINK. PPINK's patients are being burdened.

C. The burdens imposed by the 18-hour ultrasound requirement are not justified by the State's interest in protecting fetal life

Having established the burden, *Whole Woman's Health* requires that this Court determine

whether the 18-hour ultrasound requirement advances the State's interest in protecting fetal life—the justification advanced by the State for the requirement—and whether any benefit in this regard justifies the burdens imposed by the requirement. The requirement does not advance the articulated State's interest. And, even if it did, the burdens imposed far outweigh the benefits.

Although the State takes issue with the apparently well-accepted proposition that an ultrasound is not necessary prior to an abortion, the issue here is not the utility of the ultrasound requirement itself given that PPINK does not claim that the ultrasound requirement is unconstitutional or otherwise improper. The question is whether requiring the ultrasound at least 18 hours before the abortion advances the State's interest in protecting fetal life. The State argues that providing the ultrasound at least 18 hours before the abortion will provide necessary information to the woman so that she can better understand the procedure and, the State hopes, will refuse to go through with the abortion. The State contends that the 18-hour ultrasound requirement has therefore been reasonably added to the "informed consent" process. However, the statute does not require that the woman review the ultrasound and listen to the fetal heartbeat. And, indeed, most women refuse to do so. Thus, "[t]he woman does not receive the information, so it cannot inform her decision." *Stuart v. Camnitz*, 774 F.3d 238, 252 (4th Cir. 2014) (referring to requirement that a physician display sonogram and describe the fetus, but allowing the woman to cover their eyes and ears). Given that women do not have to view or listen, and most do not, the State cannot argue that the 18-hour ultrasound requirement serves its goal.

The State argues further that "[r]arely are patients given only a few hours to digest vital information about their health and treatment choices." (Dkt. 35 at 19). Of course, the State ignores the difference between a doctor providing a previously unknown diagnosis to a patient and then sketching out various options and a woman seeking an abortion. Prior to the time a

PPINK comes in for her appointment, she already knows her diagnosis (that she is pregnant), knows her options (continue the pregnancy or have an abortion), and has received a great deal of information about abortion, including the risks and benefits, as well as information regarding the embryo or fetus, including the state's pictures of embryos and fetuses at various gestational ages. Thus women who appear on the day of their abortions have already been provided "vital information about their health and treatment choices." And, Dr. Stutsman notes, in contexts other than abortions, women frequently receive informed consent information immediately prior to procedures when the procedures are done in the office. (Dkt. 35-4 at 20-21 [referring to colposcopies, LEEP procedures {loop electrosurgical excision procedures}, and hystercopies]).

What the State is arguing is that seeing the actual fetus, or hearing the actual fetal heartbeat, will be so powerful that the woman will decide not to obtain the abortion and that this, to the State, beneficial effect is increased if the ultrasound is offered at least 18 hours before the abortion. But, if this was the case there would be some evidence as to this. Indeed, *Whole Woman's Health* demands that there be evidence. Instead the evidence in this case indicates that the opposite is true—most women choose not to view the ultrasound or hear the fetal heartbeat but, even if they do, virtually all choose to proceed with the abortion.

In an attempt to create justification for the burdens imposed here the State cites to one study, Gatter, *et al.*, *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 Obstetrics and Gynecology No. 1 at 81 (Jan. 2014) (available through http://journals.lww.com/greenjournal/Pages/toc.aspx?year=2014&issue=01000) (last visited Oct. 19, 2016), which concludes, in a review of more than 15,000 visits of women seeking abortion services from Planned Parenthood Los Angeles, that "[n]early all pregnancies (98.8%) were terminated; 98.4% of pregnancies among women who viewed their ultrasound images and 99.0% who did not." *Id.*

at 81.[10] Although the study did find that "[v]oluntarily viewing the ultrasound image may contribute to a small proportion of women with medium or low decision certainty deciding to continue the pregnancy," *id.*, this is entirely irrelevant to the case at hand. Women in Indiana are already offered the opportunity to view their ultrasound. The only relevant question is whether requiring women to be offered at least 18 hours before their abortion would increase the number of women who choose to proceed with the abortion. This study sheds absolutely no light on that question. Moreover, the study notes that given that a decision to continue the pregnancy is more likely as gestational age increase "it is the information the ultrasound scan renders – i.e., gestational dating – rather than the image that influences women's decisionmaking." *Id.* at 86.[11]

The State produces only one piece of evidence to support the argument that receiving the ultrasound at least 18 hours before the abortion will have any different effect on the abortion determination than receiving the ultrasound the day of abortion. Dr. Francis repeats testimony that she gave before the General Assembly in support of the 18-hour ultrasound requirement. She notes that she had one patient who told her that she had an abortion at PPINK, but regretted it and that the patient felt that "an ultrasound waiting period would have given her more time to consider her decision and change her mind." (Dkt. 35-1 ¶ 13). Dr. Francis states that the patient received the ultrasound the day of the procedure but chose not to view it because if she had she would have changed her mind and given that she was at the clinic and had paid for the abortion she felt pressure to continue. (*Id.*). According to the doctor, the patient opined that if she had received the ultrasound earlier "she likely would have viewed the image and she does not think

[10] The study cautions that these percentages may be even higher as "[a]lthough we categorized women in this sample who did not receive an abortion as choosing to continue their pregnancy, we cannot verify that they carried the pregnancy to term. Some may have sought abortion care elsewhere or miscarried, obviating the need to return for care if they did not want to continue the pregnancy." *Id.* at 86.

[11] In this regard it is important to note that in the study abortion services were provided through 24 weeks gestational age. The women receiving abortion services from PPINK have a gestational age restriction of 13 weeks 6 days.

she would have come back to proceed with the medication abortion." (*Id.*).

This statement is repeated numerous times throughout the State's memorandum as proof that the 18-hour ultrasound requirement would cause more women to change their minds. It does not demonstrate this. Even in the sympathetic physician's retelling, the statement is highly speculative. The woman did not view the ultrasound but now, in retrospect, says that she believes that a) if it had been offered to her beforehand she would have viewed it and b) if she viewed it, she might have changed her mind. However, not even from the perspective of hindsight can the woman say that receiving the ultrasound earlier would have definitely led to her deciding to view the ultrasound, let alone determining not to proceed with the abortion ("she likely would have viewed the image," "she does not think she would have come back the next day"). This is nothing but speculation on top of speculation—not evidence.[12]

Thus there is no evidence to support the State's claims that requiring women to be offered the opportunity to see the ultrasound prior to the day of the abortion will alter women's decisions. Even if there has been one example of a woman who might not have obtained an abortion, as alleged by the State, *Whole Woman's Health* demands that this paucity of proof be balanced against the real burdens the statute is currently imposing on PPINK's patients. 136 S. Ct. at 2309 ("The rule announced in *Casey*, however, require that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."). The balance shows that the requirement is an unconstitutional undue burden.

D. The burdens are also not justified by the State's erroneous suggestion that abortion increases women's risk of psychological problems

Changing its claim that the statue is designed to protect fetal live, the State also argues that viewing the ultrasound image will have beneficial effects for the woman, even if she obtains

[12] Contrary to the State's implication, if a woman does change her mind after the ultrasound PPINK will issue a refund of all coast paid, minus the ultrasound expense. (Beeley ¶ 12).

an abortion. (Dkt. 35 at 21). The State cites to studies, primarily by the same author, that purport to demonstrate that women who have abortions are more likely to suffer psychological problems. This argument is also unsuccessful.

First, although the State does cite to two studies by Dr. P.K. Coleman concerning psychological harm following an abortion, the State neglects to note that the studies have been universally criticized and refuted. *See* pages 5-7, *supra.* Second, even if Dr. Coleman is correct, the State does not make any argument (much less offer any evidence) as to how receiving the ultrasound at least 18 hours before the procedure could lead to a different degree or amount of psychological harm than receiving the ultrasound on the day of the procedure. What is demonstrably true, however, is that the 18-hour ultrasound requirement will lead to women being delayed in obtaining abortions, or unable to obtain them altogether—which may also cause psychological harm. *See e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (denying a woman the right to choose to terminate her pregnancy may cause imminent psychological harm and other forms of psychological distress).[13]

Again, the balance required by *Whole Woman's Health* is totally in PPINK and its patients' favor. The statute is no more valid if deemed to protect the health of the woman than it is if deemed to be designed to advance the State's interest in fetal life.[14]

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[13] There is a link between the State's "psychological harm" argument and its resurrection of Dr. Coleman's thoroughly discredited claim that women who have abortions suffer psychological harm. This is the implication that women who are seeking to obtain abortions are somehow weak and uncertain. This is simply not true as in the experience of PPINK "women have made a firm and well-thought out decision to have an abortion before they arrive for their appointment." (Dkt. 24-1 ¶ 35). The 18-hour ultrasound requirement is nothing more than an effort to create an impediment, unfortunately sometimes an insurmountable one, to women making this firm and well-thought out decision.

[14] As a final argument the State contends that given that occasionally when a woman has an ultrasound examination on the date of the abortion it is discovered that she is past the time period for obtaining an abortion, the 18-hour ultrasound requirement will have the beneficial effect of providing women with accurate information as to fetal age prior to the date of the abortion. (Dkt. 35 at 21). However, the State ignores the fact that the physicians who read the ultrasounds are not available until the day of the abortion, (Dkt. 24-1 ¶¶ 32-33, 77), and there is nothing in

II. The other requirements for the grant of a preliminary injunction are met here

The State's sole response to PPINK's arguments concerning the irreparable harm that the new statute is causing, and will continue to cause, is to argue that all PPINK has to do to comply with the new law is to expend additional monies to supply more of its health centers with ultrasound machines and staff and this will obviate any problems caused by the new law. This argument completely ignores the fact, as PPINK noted in its original memorandum, that to the extent that the challenged statute imposes an undue burden on PPINK's patients irreparable harm is presumed. (Dkt. 24 at 30), and it ignores the actual harm suffered by PPINK's patients.

Moreover, also missing from the State's argument is an acknowledgement that the uncontested facts demonstrate that due to revenue shortages PPINK is having to contract services, and is certainly in no position to expand them. (Dkt. 35-5 at 65-68). What the State seems to be arguing is that PPINK should radically alter its fundamental purpose and abandon its "core mission" (*id.* at 34) of assisting with family planning, so that it can provide more abortion services.[15] But, as this Court has noted, a substantial interference with "organizational objectives" that precludes an organization from fulfilling its purposes is irreparable harm, regardless of the presumed harm that flows from a violation of the Constitution. *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 739 (S.D. Ind. 2016), *aff'd,* --F.3d--, 2016 WL

Indiana law that requires anything different. Moreover, this argument has no bearing on either the issue of maternal health or the issue of the State's interest in protecting fetal life.

[15] As Betty Cockrum noted in her deposition:

> Our core mission is to help persons plan their pregnancies with one objective being to reduce the number of abortions that are performed. Because the number of abortions that is performed is largely driven by unintended pregnancy. And so our goal is, on the front end, to first educate so that Hoosiers understand the implications of becoming sexually active and they learn how to protect themselves from pregnancy until they wish to be pregnant. They learn to protect themselves from sexually transmitted disease and ideally their pregnancies are planned.

(Dkt. 35-5 at 34-35).

5682711, No. 16-1509 (7th Cir. Oct. 3, 2016).

The State argues that the balance of harms and the public interest factors weigh in its favor and against preliminary relief. (ECF 35 at 31-32). This ignores the fact that "the more likely [the preliminary injunction movant] is to win, the less the balance of harms must weigh in his favor." *Turnell v. CentiMark Corp.*, 796 F3d 656, 662 (7th Cir. 2015). Given the fact that PPINK will clearly succeed on its legal claims here the balance of harms need not strongly weigh in its favor, *Exodus*, 165 F. Supp. 3d at 740, although it certainly does.

Although the State contends that the citizens of Indiana have a strong interest in the implementation of laws passed by the General Assembly, it does not suggest "how an injunction requiring it to comply with the Constitution could be harmful." *Id.* (citing *Christian Legal Society v. Walker*, 453 F.3d 853, 857 (7th Cir. 2006)). Nor does the public have any interest in the enforcement of an unconstitutional law – even one that promotes fetal life. Instead, "the public interest is served when constitutional rights are vindicated." *Id.* at 742, and the public interest is not served when the government pursues a legitimate goal by unconstitutional means.[16]

Conclusion

All the requirements for the grant of a preliminary injunction are met here and one should issue, without bond, enjoining Indiana Code § 16-34-2-1.1(a)(5), to the extent that it requires an ultrasound examination to be performed at least 18 hours prior to the performance of an abortion.

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[16] The State does not oppose PPINK's argument that any preliminary injunction should issue without bond.

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Certificate of Service

I hereby certify that on this 24th day of October, 2016, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's system on:

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