No. 19-816

IN THE
Supreme Court of the United States

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

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General*
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
COURTNEY ABSHIRE
Deputy Attorneys General

Counsel for Petitioners

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At least three judges of the Seventh Circuit are on record stating that the Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), creates more problems than it solves. Pet. App. 118a (Easterbrook, J. and Sykes, J., dissenting from denial of rehearing en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)."); Pet. App. 46a n.2 (Kanne, J., dissenting) ("*Hellerstadt* [*sic*] does not resolve the contradictions in the Supreme Court abortion jurisprudence; it deepens them.").

Two more judges apparently believe that *Hellerstedt* obviates the need to apply the Court's other precedents. Pet. App. 34a (declining to decide whether *Bellotti v. Baird,* 443 U.S. 622 (1979), applies to parental notice statutes).

The need for Supreme Court intervention is unmistakable: "Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." Pet. App. 118a (Easterbrook, J., dissenting from denial of rehearing en banc). The Court should grant certiorari to provide an "authoritative answer," *id.*, to whether (and how) *Bellotti* applies to parental notice statutes, or, if *Bellotti* does not apply, how lower courts should apply the undue-burden test to pre-enforcement challenges.

ARGUMENT

I. The Court Should Clarify Whether, and How, *Bellotti* Applies to Parental-Notice Statutes

The Court has expressly approved laws that allow parents of minors who do not obtain judicial bypass to veto their daughter's abortion decision. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992). *Casey* thus does not support the proposition that "[a] law that gives anyone veto power over another's abortion decision is impermissible." Br. in Opp. to Cert. 14. Rather, the Court has held that "the constitutional rights of children cannot be equated with those of adults," particularly in the abortion context, where "parental consultation often is desirable and in the best interest of the minor." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979).

The Seventh Circuit tried to sidestep *Bellotti* by rebalancing the benefits and burdens of Indiana's parental notice law. But *Bellotti* has already done all the balancing that is required. It permits the State to "reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy. . . with the special interest of the State 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." *Id.* at 639. *Hellerstedt* does not hold otherwise. There, the Court struck down generally applicable health and safety regulations that would have affected both minors and adults.

The main issue here is whether *Bellotti*'s judicial bypass requirement for mature minors applies to

parental notice laws, an issue that has been expressly left open by the Court, *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510 (1990), and is the subject of a circuit conflict, *compare Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 375–79 (4th Cir. 1998) (holding that judicial bypass is not needed for parental notice statutes) *with Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997) (holding that judicial bypass is required for parental notice laws) *and Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (same).

The decision below conflicts in particular with the Fourth Circuit's decision in *Camblos*, which held that "the Constitution does not require for 'mere notice' statutes the full panoply of safeguards required by the Court . . . for parental consent statutes. 155 F.3d at 367. Planned Parenthood asserts that the statute at issue in *Camblos* contained a maturity exception, Br. in Opp. to Cert. 15, but that is materially inaccurate. The maturity exception there *permitted* bypass, it did not *require* it—in contrast with the decision below here. *Compare id.* at 356 *with* Pet. App. 17a. *Bellotti*, for that matter, held that, when it comes to parental *consent* requirements, "[a] pregnant minor is *entitled* . . . to show . . . that she is mature enough and well enough informed to make her abortion decision." 443 U.S. at 643 (emphasis added). The question is whether that entitlement to bypass for mature minors extends to parental notice laws. The Fourth Circuit said no, but the Seventh Circuit has now said yes. Only the Court can resolve the conflict, and it should do so in this case.

II. If *Hellerstedt* Balancing Applies, the Court Should Clarify Both Pre-Enforcement-Challenge Rules and the Large-Fraction Test

Even if every State's parental-notice law must undergo fresh, case-by-case undue-burden analysis, critical issues remain that only this Court can resolve, including the burdens and standards for pre-enforcement challenges and the parameters of the large-fraction test.

A. If the Court does not reach the pre-enforcement-challenge standard in *June Medical*, a preliminary injunction case is the best vehicle for addressing it

As Judge Easterbrook observed below, the Court may address the proper standard for pre-enforcement facial challenges to abortion regulations in *June Medical Services L.L.C. v. Russo*, Nos. 18-1323, 18-1460. Pet. App. 117a. Indeed, the briefs of Louisiana, the United States, and *amici* Arkansas, Indiana, and 18 other States urged the Court to reach that issue, *see* Br. for the Resp't/Cross-Pet'r 25; Br. for the United States 6; Br. for the States of Arkansas, Indiana, et al. 3. And at oral argument the United States made a particularly focused plea for the Court to decide the case on pre-enforcement grounds. Tr. 65–66. If the Court in *June Medical* does ultimately clarify the pre-enforcement standard favorable to state regulation, GVR may be appropriate in this case. If the Court does not reach the pre-enforcement issue in *June Medical*, however, it should grant either or both the petitions in this case and *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-1019, because the

preliminary injunction posture of both cases makes them particularly well-suited for the Court to reach that issue.

If *Bellotti* no longer supplies the appropriate undue-burden framework for parental involvement laws, a principal concern for judicial analysis will be a challenged law's impact on minors seeking abortions. Plaintiffs challenging an abortion law using *Hellerstedt* must first show that the law actually imposes a burden and, if they pass that threshold, prove that the law's burdens substantially outweigh its benefits. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959 (8th Cir. 2017). Indiana's parental-notice law, however, has never been permitted to go into effect, so no data exists showing its effect on minors seeking abortions. That circumstance will not change between now and final judgment unless the Court intercedes and vacates the injunction. If the law were permitted to go into effect long enough to yield meaningful operational data, a district court might reasonably address whether the law is valid in light of its impact. Consequently, the Court should resolve the issue of the correct standard for pre-enforcement challenges at the preliminary injunction stage so that all concerned have fair notice of their litigation burdens prior to final judgment.

As things stand, however, the evidence is insufficient to support a pre-enforcement facial challenge. Planned Parenthood asserts that "the Court struck down [the law in *Hellerstedt*] based on evidence very similar to the evidence here," but that is plainly untrue. Indiana's parental notice law in no way threatens to close *any* abortion clinics, much less

reduce them by half or more. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 2316 (2016). Far from even predicting such dire results, Planned Parenthood has merely shown that most minors currently seek judicial bypass on maturity grounds. It has offered no evidence (other than expert speculation) that such minors would fail both to bypass parental notice on best-interests grounds and to obtain an abortion despite parental notice. Proceeding to summary judgment or trial without this Court's intervention would yield only more speculation by more experts and would not be likely to yield a different result.

On this point, it is worth noting that Planned Parenthood argues that the undue burden test is so context-specific that a law could be facially valid in one State but facially invalid in another. Br. in Opp. to Cert. 17. But even if such a seemingly inequitable series of outcomes is permissible, it surely must depend on data of a statute's actual operational impact in each State. Duly enacted state laws should not be invalidated on the basis of mere speculation, even by so-called experts in the sociology of minors seeking abortions. Accordingly, now, at the preliminary-injunction stage, is exactly the right time for the Court to address when, if ever, pre-enforcement facial challenges to abortion regulations can be successful.

B. The Court should clarify the proper application of the "large-fraction" test

The Seventh Circuit defined the denominator of the large-fraction test to include two groups that

Planned Parenthood argues would be most burdened by the law: "young women who could be deemed mature in a judicial bypass of the consent requirement" and "young women who are likely to be deterred from even attempting judicial bypass because of the possibility of parental notice." Pet. App. 20a–21a.[1] Defining the denominator so narrowly ensures a finding in *every* case that an abortion law imposes a "substantial obstacle" on *all* for whom it is relevant. The scope of relevant impact must be much broader for the large-fraction test to have any meaning. Here, Indiana's parental-notice law is relevant to any minor who would not otherwise inform her parents that she intends to have an abortion. The large-fraction question then comes down to the percentage of *those* minors who would find the notice law to be a substantial obstacle.

With regard to the numerator, Planned Parenthood argues that "because the record shows that most bypasses granted in Indiana have been based on a maturity finding, a large fraction of those minors for whom the Act is relevant would be burdened." Br. in Opp. to Cert. 21. But it does not follow that "mature minors" would fail to convince a juvenile court that notification contravenes their best interests. After all, "[a] minor's maturity has no relation to the likelihood of abuse," and "Planned Parenthood has not identified

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[1] Planned Parenthood misstates the denominator as "all unemancipated minors seeking judicial bypass," but the paragraph of the Seventh Circuit's opinion that Planned Parenthood cites summarizes Planned Parenthood's own argument, not the court's holding. Pet. App. 20a. In the following paragraph, the Seventh Circuit defines what it considers to be the "correct numerator and denominator." *Id.* at 20a–21a.

an instance where an Indiana court rejected a minor's 'best interests' argument and required parental consent, but abuse followed." Pet. App. 50a–51a (Kanne, J., dissenting). Nor does it follow to say that parental notice would always thwart the abortion plans of mature minors. "Almost by definition . . . a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval." *H.L. v. Matheson*, 450 U.S. 398, 425 (1981) (Stevens, J., concurring). The opportunity to obtain an abortion notwithstanding parental notice is particularly available given that the minor's attorney controls the precise timing of notice, which must only occur "before" the abortion (Ind. Code § 16-34-2-4(d))—perhaps while the minor is on her way to the clinic.

With respect to the large-fraction conflict between the decision below and *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017), Planned Parenthood argues that because the district court found that medication abortion would no longer exist in Arkansas under the new law, the numerator and denominator in that case were "one and the same." Br. in Opp. to Cert. 22–23. But the Eighth Circuit *rejected* that holding. It was not enough for the district court to say that women who preferred a medication abortion would be thwarted from that precise service; instead, the district court should have specifically determined the fraction of women who preferred medication and could not travel to a surgical abortion clinic. *Jegley*, 864 F.3d at 959–60. The Eighth Circuit held, in other

words, that the numerator and denominator cannot be defined by the same terms. In contrast, here the Seventh Circuit defined both the numerator and denominator in terms of mature minors unlikely to seek or obtain judicial bypass on best-interests grounds. The Seventh Circuit should instead have defined the denominator as *all* minors who would not otherwise notify their parents of the abortion (the relevant universe) and the numerator as those minors who would not obtain an abortion owing to the parental notice law.

The Court should grant the petition to resolve the circuit conflict over proper application of the large-fraction test. *See June Medical Servs. L.L.C. v. Gee*, 905 F.3d 787, 813–15 (5th Cir. 2018) (noting circuit conflict in large-fraction methodology and rejecting district court's large-fraction analysis).

III. If It Rejects Third-Party Standing in *June Medical*, the Court Should GVR this Case; Otherwise, It Should Take this Case To Address the Fourteenth Amendment Issues

Planned Parenthood argues that Indiana has waived the issue of third-party standing, but the case has not yet been fully litigated in the district court, so that assertion is premature. Indiana has not yet even filed an answer, as the parties agreed to stay the proceedings pending appeal of the preliminary injunction. ECF No. 37 (order granting motion to stay proceedings pending appeal). Indiana will yet have the opportunity to present its third-party-standing objections in the district court, so it only makes sense

to GVR this case if the Court rejects third-party standing in *June Medical*.

Planned Parenthood argues that its interests do not "conflict with those of its mature minor patients who seek to obtain an abortion without parental involvement," but only with the interests of parents in parental rights and family harmony. Yet minors, too, have an interest in parental oversight and familial harmony. "A mature minor may wish to keep her abortion secret from her parents and yet benefit greatly from their support before and in the aftermath." Pet. App. 52a (Kanne, J., dissenting). In any event, if the Court rejects third-party standing in *June Medical*, that issue should, in this case, be addressed in the first instance by the courts below, which is why GVR would be appropriate.

If, however, the Court does not reach the third-party standing issue in *June Medical*, petitioners agree this case, in this posture, would *not* be an appropriate vehicle for the Court to address third-party standing. In that circumstance, however, the Court should nonetheless grant the petition and set it for plenary briefing and argument on the Fourteenth Amendment issues.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
COURTNEY ABSHIRE
Deputy Attorneys General

Counsel for Petitioners

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