No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a court permits an unemancipated minor to have an abortion, may the State require that her parents be notified before the abortion occurs except where such notice would contravene her best interests?

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PETITION FOR WRIT OF CERTIORARI

All Defendants—the Commissioner of the Indiana State Department of Health, the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, the Members of the Indiana Medical Licensing Board, and the Judge of the Marion Superior Court Juvenile Division—respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's panel opinion on remand, which both denies rehearing en banc and affirms its prior judgment, App. 1a–41a, is as-yet unreported. This Court's judgment granting certiorari, vacating the judgment below, and remanding the case to the Seventh Circuit is reported at 141 S. Ct. 187 (2020). The original Seventh Circuit panel opinion, App. 1a–98a, is reported at 937 F.3d 973 (7th Cir. 2019). The Seventh Circuit's original order denying rehearing en banc, App. 156a–59a, is reported at 949 F.3d 997 (7th Cir. 2019). The order of the United States District Court for the Southern District of Indiana granting Planned Parenthood's motion for preliminary injunction, App. 99a–155a, is reported at 258 F. Supp. 3d 929 (S.D. Ind. 2017).

JURISDICTION

The Seventh Circuit panel entered judgment the same day it issued its opinion and denied rehearing en banc, on March 12, 2021. App. 1a, 156a. This Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code section 16-34-2-4 is reproduced at pages 160a–64a of the appendix.

INTRODUCTION AND STATEMENT OF THE CASE

This case, back before the Court a second time, concerns the constitutionality of an Indiana statute—enacted in 2017 but never permitted to be enforced—requiring that parents of minors granted judicial permission to have an abortion be notified before the abortion, unless the bypass court deems such notice contrary to the minor's best interests. Planned Parenthood of Indiana and Kentucky, Inc., brought the case arguing that such a parental-notification law must, to be constitutional, include an exemption from

notification if the bypass court deems the minor sufficiently mature to make her own abortion decision—akin to the standard for parental-consent laws announced in *Bellotti v. Baird*, 443 U.S. 622 (1979). The district court agreed with Planned Parenthood and preliminarily enjoined enforcement of the statute before it could go into effect, holding that *Bellotti* requires just such a "mature minors" exemption.

On appeal, however, a Seventh Circuit panel majority dispensed with *Bellotti* entirely and said that Indiana's parental-notice law failed the balancing test announced in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), even though the statute had never gone into effect and never had any opportunity to yield evidence of benefits or burdens. Judge Kanne dissented, protesting both that the injunction was based only on a pre-enforcement record and that the majority failed to consider the implications of *Bellotti*, which *lowered* the bar for regulating minors' access to abortions. The State requested en banc rehearing, but that was denied 6–5, with Judges Easterbrook and Sykes opining that "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." App. 159a.

Taking that cue, the State petitioned for a writ of certiorari, and the Court granted, vacated, and remanded the case for further consideration in light of *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020).

On remand, the State once again asked for en banc rehearing, but this time no judges (other than the assigned panel) were interested, as Judge Kanne put it, in "fac[ing] . . . the seemingly endless task of determining whether a law unduly burdens a woman's ability to obtain an abortion." App. 27a. The resulting panel opinion—though it acknowledged abortion doctrine to be both "not stable," *id.* at 2a, and "challenging and fluid." *id.* at 24a n.7—ultimately held that *June Medical* had no effect on its prior decision employing *Hellerstedt* balancing, and it once again affirmed the preliminary injunction, *id.* at 26a. Judge Kanne dissented, both because the majority misapplied the narrowest-grounds rule of *Marks v. United States*, 430 U.S. 188 (1977), in discerning the impact of *June Medical* and because it readopted its earlier resolution of the case using *Hellerstedt*.

Indiana is now out of meaningful lower-court options for defending its parental-notice law. The en banc Seventh Circuit has seemingly thrown up its hands in frustration with abortion doctrine. And the State's inability to enforce the law from the get-go prevents it from gathering evidence rebutting the Seventh Circuit panel's *Hellerstedt* balancing theory. This Court, therefore, truly is "the only institution that can give an authoritative answer" to the question presented. App. 159a. It should do so, principally to resolve a circuit split on the legality of abortion parental-notice laws, but also, potentially, to clear up yet another abortion-doctrine issue over which the circuits are (already) in conflict: The meaning of *June Medical* and, by extension, the prevailing doctrinal standard for evaluating abortion regulations.

I. Indiana's Parental-Notice Law

Indiana generally prohibits physicians from performing abortions for unemancipated pregnant minors without the written consent of the minor's parent, legal guardian, or custodian. Ind. Code § 16-34-2-4(a). Consistent with *Bellotti v. Baird*, 443 U.S. 622 (1979), however, Indiana provides an exception so that a pregnant minor who objects to the consent requirement or whose parent, guardian, or custodian refuses to consent may petition a juvenile court for a waiver of the consent requirement. Ind. Code § 16-34-2-4(b). Such "judicial bypass" permits the minor to obtain an abortion without parental consent if the court finds either that she is mature enough to make the abortion decision independently or that an abortion is in her best interests. *Id.* § 16-34-2-4(e). Indiana provides a fast and confidential judicial bypass procedure. *Id.* § 16-34-2-4(d); *see also* App. 160a–64a.

In 2017, the Indiana General Assembly enacted Public Law 173–2017, Senate Enrolled Act 404, to add a new requirement that, even where a juvenile court permits the abortion to go forward without parental consent, parents must still be given notice of the abortion unless the judge also finds that such notice is not in the minor's best interests. Ind. Code § 16-34-2-4(e). The notice statute does *not* provide exemption where the court finds only that the minor is mature enough to make her own abortion decision. Absent a "best interests" showing, the statute requires that the minor's attorney "shall serve the notice required by this subsection by certified mail or by personal service" and shall do so "before" the abortion. *Id.*

II. Federal Court Litigation

1. Before the new parental-notice law took effect, Planned Parenthood brought this lawsuit on behalf of hypothetical minor patients it might see in the future, challenging the law's constitutionality and seeking a preliminary injunction against its enforcement. The State opposed the motion on the grounds that only *Bellotti v. Baird*, 443 U.S. 622 (1979), not abortion doctrine more generally, governs the rights of minors to abortion and that *Bellotti*'s requirement that States permit "mature" minors to obtain an abortion without parental consent does not constrain parental-*notice* laws—which, unlike consent statutes, accommodate both the rights of the mature (but unemancipated) minor to have an abortion and the ongoing interests of her parents in her upbringing. In the State's view, notifying parents of the abortion, even where the minor need not obtain their consent, will better enable them to carry out their rightful parental roles and responsibilities. Notice will, for example, provide parents with critical aspects of their daughter's medical history, give them essential context for any post-abortion mental or emotional distress their daughter may experience, and put them on notice that perhaps they should pay more care to their daughter's sexual relationships.

In addition, the State argued that, even if the undue burden test applied more broadly, pre-enforcement preliminary relief was inappropriate and unnecessary because (1) plaintiffs could not supply evidence that the law would actually impose a substantial obstacle for *any* minors seeking an abortion, much less

for a "large fraction" of them; and (2) the Indiana judicial bypass procedure afforded actual minors seeking abortion without parental notice a chance to raise both facial and as-applied challenges to the law. By statute, such proceedings must yield a trial court order within 48 hours, with expedited appeal to follow, if necessary. Ind. Code § 16-34-2-4(e).

The district court rejected the State's defenses and granted the preliminary injunction. In so doing, the court explained that it could not "sidestep th[e] issue" of whether *Bellotti* applies to parental-notice statutes and held that it does so apply. App. 129a. The court acknowledged tension in the case law regarding the standard for pre-enforcement facial challenges to abortion statutes, App. 112a–16a, but concluded that a pre-enforcement challenge was appropriate here owing to the "the severity and character of harm" presented by the parental-notice law—namely, notwithstanding the existence of a best-interests exception, "the threat of domestic abuse, intimidation, coercion, and actual physical obstruction." *Id.* at 114a. The same "threats," the court ruled, meant that the parental-notice requirement was likely to "create an undue burden for a sufficiently large fraction of mature, abortion-seeking minors in Indiana." *Id.* at 115a–16a.

Critically, for purposes of estimating the fraction of minors who would suffer a substantial obstacle to abortion from the parental-notice law, the court defined the relevant universe not to be *all* minors needing judicial bypass orders, but only those "who face the possibility of interference, obstruction, or physical, psychological, or mental abuse by their parents if

they were required to disclose their pregnancy and/or attempt to obtain an abortion." *Id.* at 116a. The district court estimated (based only on declarations from lawyers, volunteers, Planned Parenthood employees, and a psychologist) that a high percentage of that group would find the notice requirement to be a substantial obstacle. *Id.* at 112a–13a.

2. On appeal, the State renewed its argument that only *Bellotti* supplied the relevant legal yardstick for parental-notice laws and that *Bellotti*'s requirement of a "maturity" exemption for consent laws did not apply to mere notice laws; notice statutes, unlike consent requirements, do not bar a mature minor from making her own decision yet do aid parents in directing the child's upbringing. The State also again argued that, even if the undue-burden test applied generally, it could not justify a pre-enforcement challenge here in light of the plaintiffs' failure to provide any data showing that the statute would actually impose a substantial obstacle on a large fraction of regulated minors.

The Seventh Circuit, in rejecting the State's arguments, sidestepped *Bellotti*: "Because we decide this appeal based only on an application of *Casey*'s undue burden standard, we need not and do not decide whether *Bellotti* applies to all parental notice requirements." App. 75a. Applying *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), by way of *Hellerstedt*, the Seventh Circuit panel—relying on a record devoid of any enforcement experience—concluded that "[f]or those pregnant minors affected by this Indiana law, the record indicates

that in a substantial fraction of cases, the parental notice requirement will likely have the practical effect of giving parents a veto over the abortion decision." *Id.* at 64a. The panel majority also weighed against the law various circumstantial factors, such as "an environment in which very few clinics and physicians perform abortions in Indiana," on the theory that the "cumulative effects" of such factors are relevant to the constitutional inquiry. *Id.* at 69a–70a.

As to possible factors weighing in support of the law, the Seventh Circuit concluded that an interest in equipping parents to fulfill their ongoing responsibilities in raising their minor, unemancipated daughters was insufficient *without proof of need*. The court faulted the State because it "has not yet come forward with evidence showing that there is a problem for the new parental-notice requirement to solve, let alone that the law would reasonably be expected to solve it." *Id.* at 62a–63a. Ultimately, it concluded, "the burden of this law on a young woman considering a judicial bypass is greater than the effect of judicial bypass on her parents' authority." *Id.* at 64a.

As for the "large fraction" test, the Seventh Circuit, like the district court, defined the relevant universe of affected minors (*i.e.*, the denominator) not to be all minors needing judicial bypass orders to obtain an abortion, but only those "who are likely to be deterred from even attempting a judicial bypass because of the possibility of parental notice." *Id.* at 62a.

Judge Kanne dissented, arguing that the court should not invalidate a state statute "while the effects of the law (and reasons for those effects) are open to

debate." *Id.* at 84a (quoting *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002)). In his view, parental-notice statutes further the State's "'important' and 'reasonabl[e]' interests in requiring parental consultation before a minor makes an irrevocable and profoundly consequential decision." *Id.* at 82a–83a (quoting *Bellotti*, 433 U.S. at 640–41).

The State petitioned for en banc rehearing, but the court denied the petition 6–5, with Judges Flaum, Kanne, Barrett, Brennan, and Scudder voting to grant the petition. Judge Easterbrook voted against rehearing but issued an opinion, joined by Judge Sykes, conveying the need for Supreme Court guidance both as to the meaning of the undue-burden standard and as to the decisional method for addressing pre-enforcement facial challenges to abortion laws. As to the latter concern, he wrote that "principles of federalism should allow the states . . . much leeway" to enforce new laws "[u]nless a baleful outcome is either highly likely or ruinous even if less likely." *Id.* at 157a. Otherwise, "a federal court should allow a state law (on the subject of abortion or anything else) to go into force" or else "the prediction" of negative outcomes "cannot be evaluated properly." *Id.*

As to the undue-burden standard more generally, Judge Easterbrook observed that "a grant of rehearing en banc in this case would be unproductive" because "a court of appeals cannot decide whether requiring a mature minor to notify her parents of an impending abortion . . . is an 'undue burden' on abortion." *Id.* at 158a. According to Judge Easterbrook,

"[h]ow 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)." *Id.* at 159a. For this reason, "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." *Id.*

3. The State petitioned for certiorari. This Court granted the State's petition, vacated the Seventh Circuit's decision, and remanded to the Seventh Circuit for further consideration in light of its opinion in *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020). On remand, the State requested that the Seventh Circuit rehear the case en banc.

On March 12, 2021, the Seventh Circuit denied rehearing en banc and reaffirmed its panel decision, declining to reconsider that earlier decision in light of *June Medical*. App. 156a. Yet, in Judge Kanne's words, the panel majority held that "*June Medical* ha[d] no effect" on its prior decision applying the *Whole Woman's Health* balancing test. *Id.* at 28a (Kanne, J., dissenting). Applying *Marks v. United States*, 430 U.S. 188 (1977), Judge Hamilton, writing for the majority, explained that the narrowest common ground in *June Medical* was "the Chief Justice's concurring opinion . . . giving stare decisis effect to *Whole Woman's Health*." App. 2a. Despite this concession, Judge Hamilton went on to say that "[t]he *Marks*

rule does not, however, turn everything the concurrence said—including its stated reasons for disagreeing with portions of the plurality opinion—into binding precedent that effectively overruled *Whole Woman's Health*." *Id.* For this reason, the court held that the balancing test from *Whole Woman's Health* "remains precedent binding on the lower courts." *Id.* at 18a.

Accordingly, the majority did not reconsider its prior decision upholding the district court's preliminary injunction. *Id.* at 26a. It explicitly recognized, however, a circuit conflict over which *June Medical* opinion controls and whether the *Hellerstedt* balancing test remains applicable. *Id.* at 25a. Critically, Judge Hamilton, in his 2–1 majority opinion, observed that "[t]he opinions in *June Medical* show that constitutional standards for state regulations affecting a woman's right to choose to terminate a pregnancy *are not stable*." *Id.* at 2a (emphasis added). Later, the majority opinion added that abortion doctrine is "challenging and fluid." *Id.* at 24a n.7.

In dissent, Judge Kanne criticized the majority for holding that "*June Medical* has no effect" on this case. *Id.* at 28a. He explained that "while we cannot presume from the Supreme Court's remand order that our prior decision in this case was wrong, surely *June Medical* had *some* effect on the legal landscape. Else, why didn't the Supreme Court simply deny cert instead?" *Id.* at 29a. While he agreed with the majority's determination that Chief Justice Roberts's concurrence is the narrowest common ground, Judge Kanne contended that concurrence could not be divorced

from its reasoning. *Id.* at 34a. Hence, the "critical sliver of common ground between the plurality and the concurrence" is "*Casey*'s requirement of a substantial obstacle before striking down an abortion regulation." *Id.* at 35a. Thus, "courts should continue to apply the substantial-obstacle test from *Casey*." *Id.* Judge Kanne then concluded that "the majority in this case erred . . . by weighing the benefits conferred by Indiana's law against its burdens" and that "the majority should have corrected this error on remand." *Id.* at 41a.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because the Circuits Are in Conflict over Whether Abortion Parental-Notice Statutes Must Include "Mature Minor" Exemptions

Even before the confusion over *Hellerstedt* balancing and the meaning of *June Medical*, the circuits had reached conflicting holdings as to whether abortion parental-*notice* statutes must conform to the same judicial-bypass standards as abortion parental-*consent* statutes. Namely, the circuits are split over whether parental-notice statutes must include an exemption for minors deemed by a juvenile court to be sufficiently mature to make their own abortion decisions. As this Court has itself noted on several occasions, the parental-notice standard is an important, unresolved question. This case is the perfect vehicle for finally addressing it.

1. The abortion rights of minors long have been defined by a different doctrinal line of authority than

the abortion rights of adults. In *Bellotti v. Baird*, the Court recognized that "constitutional principles [must] be applied with sensitivity and flexibility to the special needs of parents and children" due to "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 443 U.S. 622, 634 (1979); *see also H.L. v. Matheson*, 450 U.S. 398, 425 (1981) (Stevens, J., concurring) ("[A] state legislature has constitutional power to utilize, for purposes of implementing a parental-notice requirement, a yardstick based upon the chronological age of unmarried pregnant women. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution.").

Consequently, the Court in *Bellotti* allowed regulation of access to abortion by minors that it would never have tolerated as to adults: the permission of someone other than the person seeking the abortion, namely either parents or a juvenile court. 443 U.S. at 625–26. In particular, the Court held, a statute generally requiring parental consent for a minor to obtain an abortion is valid so long as it (1) allows the minor to bypass parental consent if she proves to a court that she is sufficiently mature to make the decision on her own or that the abortion is in her best interests; and (2) ensures that the minor may undertake the judicial proceeding both anonymously and expeditiously. *Id.* at 643–44. Under that framework, the Court has upheld both parental-consent and parental-notice laws. *See Planned Parenthood of Se. Pa. v.*

Casey, 505 U.S. 833, 899 (1992) (parental consent); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 518–19 (1990) (parental notice).

Yet even under the *Bellotti* doctrine, the circuits are in conflict over whether the judicial bypass requirements the Court has imposed on parental-consent statutes also apply to parental-notice statutes. The Eighth and Fifth Circuits have held that parental-notice statutes are subject to the same judicial-bypass standard as parental-consent statutes. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) ("In short, parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass."); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997) (applying *Bellotti* to parental-notice statute), *overruled on other grounds*, *Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001). In contrast, the Fourth Circuit has held that parental-notice statutes are subject only to a "best interest" exception and need not include a maturity exception. *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 373 (4th Cir. 1998) ("[W]e hold that a notice statute . . . need not include . . . a bypass for the mature minor in order to pass constitutional muster.").

This Court has itself on multiple occasions noted the significant, unresolved nature of this question. *See Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (observing that the Court has declined to decide whether a parental-notice statute must include a judicial-bypass provision); *Ohio v. Akron Ctr. for Re-*

prod. Health, 497 U.S. 502, 510 (1990) (same); *Matheson*, 450 U.S. at 405–06 (declining to reach the issue of whether parental-notice statute was constitutional as applied to a mature minor); *see also Zbaraz v. Madigan*, 572 F.3d 370, 380 (7th Cir. 2009) (noting that "the Supreme Court has repeatedly stated that it has 'declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional'" (internal citation omitted)).

Against that background, there can hardly be any question that, prior to *Hellerstedt*, lower courts would have evaluated Indiana's parental-notice law by determining whether *Bellotti* requires a mature-minor judicial-bypass exception. Now, however, in the wake of *Hellerstedt* and *June Medical*—cases that had nothing to do with minors—the Seventh Circuit (per a two-judge panel majority) thinks *Bellotti* is irrelevant to evaluating regulation of minors' access to abortion. *See* App. 26a ("As in our original opinion, we have not decided the plaintiff's alternative ground for affirmance, adopted by the district court, that the requirements of *Bellotti v. Baird* apply to parental notice requirements as well as to parental notice requirements.").

Meanwhile, Judge Kanne observed in dissent (consistent with *Bellotti*) that "State-imposed restrictions on mature minors cannot, by themselves, be constitutionally problematic." *Id.* at 91a. And the remainder of the Seventh Circuit is apparently so confused that it refuses even to vote on whether to address the issue. *Id.* at 6a n.1 (explaining that "[n]o member of this court has requested an answer to or a vote on" the

State's petition for rehearing en banc), 157a–59a (opinion of Judges Easterbrook and Sykes explaining that "a grant of rehearing en banc in this case would be unproductive" because "[t]he quality of our work cannot be improved by having eight more circuit judges try the same exercise").

The Court should take this case both to make it clear that *Hellerstedt* did not wipe out the Court's prior abortion precedents (such as the holding of *Bellotti* placing minors on a separate abortion-rights track from adults) and to resolve the circuit conflict over whether the Fourteenth Amendment requires "mature minor" judicial-bypass exceptions for parental-notice requirements.

2. The question whether and how to apply *Bellotti* is legally consequential here. For while *Bellotti* generally establishes a more government-friendly track for evaluating the abortion rights of minors, its requirement of a "mature minor" exception is ill-suited for parental-*notice* laws, which serve interests far broader than those served by parental *consent* statutes. In short, even after their unemancipated minor daughter has an abortion, parents still have rights and responsibilities in the care and upbringing of their child. Ignorance of such a profound event in their young daughter's life is a barrier to parental support and guidance from which even a mature minor who has an abortion would surely benefit.

American law has long recognized that "[i]t is cardinal with [the Court] that the custody, care and nur-

ture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Court's jurisprudence has "historically . . . reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862 (1977) (Stewart, J., concurring). For good reason: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925). Indeed, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

Accordingly, to assist parents in raising and protecting children, States may impose restrictions on unemancipated minors greater than those they may impose on adults. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."); *Prince*, 321 U.S. at 168 (recognizing that "[t]he state's authority over children's activities is broader than over like actions of adults"); *Ayotte v. Planned Parenthood of*

Northern New England, 546 U.S. 320, 326–27 (2006) ("States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their 'strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'") (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990) (opinion of Stevens, J.)); *see, e.g.*, *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (stating the Court "recognize[s] that there is a compelling interest in protecting the physical and psychological well-being of minors[]" when shielding them from "literature that is not obscene by adult standards[]").

This Court's decision in *Bellotti* and its predecessor, *Planned Parenthood of Cent. Mo. v. Danforth*, depart from this long-accepted principle as to the minor's decision to have an abortion. In these decisions the Court has held that parents may not exercise "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 428 U.S. 52, 74 (1976). In other words, when the fundamental interest of the parents to control the upbringing of their child and the fundamental interest of the minor to obtain an abortion conflict irreconcilably and irrefutably—such as with parental-consent statutes—the minor's right must prevail.

With parental-notice statutes, however, the two interests are not diametrically opposed in the same

way. In the notice context, *both* the parents' interests in being informed of their child's medical decision and the minor's interest in making her own abortion decision can be protected. With respect to Indiana's parental-notice statute, for example, the concern in *Danforth* about parents having an absolute veto power over the minor's abortion decision is simply not present: The Indiana statute requires notice *after* the decision has been made and approved by a court, and it requires only that the notice occur "before" the abortion, which does not demand sufficient time for the parents to try to dissuade the child from proceeding.

The interests served by parental notification apply even to minors judged to be mature enough to make their own decisions. Even if a minor is sufficiently mature to make the abortion decision on her own (and override her parent's wishes in that limited regard), plainly her parents still have a profound interest in her life going forward. Again, Indiana's statute applies to *unemancipated* children. As a child's parents love her, care for her, and look out for her best interests, they need to know what their daughter has been through. An abortion is a facet of medical history that could have implications for future treatment, not to mention an episode that can both inform parental guidance as to sexual behavior and bear on the child's emotional needs and mental health. So even if parents cannot stop the abortion, they need to know about it to be able to help the child deal with its consequences. That broader interest bolsters the compelling government interests supporting a requirement of parental *notice* as compared with those supporting a requirement of parental *consent*.

In response to these compelling state interests, the Seventh Circuit expressed concerns about application of the statute to mature minors suffering from parental abuse. *See* App. 68a. But the statute already contains an exception where parental notification would not be in the minor's best interests. *See* Ind. Code § 16-34-2-4(e) ("The juvenile court shall waive the requirement of parental notification . . . if the court finds that obtaining an abortion without parental notification is in the best interests of the unemancipated pregnant minor."). As Judge Kanne observed in dissent, evidence that a minor is being physically, emotionally, or sexually abused by a parent—and that informing that parent of the abortion decision may result in further abuse—goes directly to that exception. App. 91a (Kanne, J., dissenting). The "best interests of the minor" standard also naturally entails an inquiry into whether the parents might attempt to obstruct the minor from following through with her decision. Hence, the Seventh Circuit's concerns are already addressed by the statute's judicial bypass procedure, and further inquiry into the minor's maturity is unnecessary.

Accordingly, with the abortion decision safeguarded by judicial bypass, and the safety of the child with respect to notice safeguarded by the best-interests inquiry, the State may support the rights and responsibilities of the parents.

II. Even If Juvenile Abortion Rights Are Protected by the Same Standard as Adult Abortion Rights, the Court Should Resolve the Post-*June Medical* Chaos over the Controlling Test

In a word, *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), has been a disaster for lower courts to implement. The circuits disagree not only which *June Medical* opinion controls, but also as to what it means to discern the narrowest common ground from a splintered Supreme Court decision—*i.e.*, the test from *Marks v. United States*, 430 U.S. 188 (1977). And district courts have their own takes on the matter, which is leading them to conduct lengthy and expensive trials premised on standards that may prove outdated, untenable, or both. The dispute over *June Medical* is sufficiently fundamental that, even if the Court thinks juveniles have the same abortion rights as adults, it should take this case to clarify the controlling standard—and to explain how it applies to pre-enforcement challenges seeking preliminary injunctions.

1. To revisit the matter briefly, the Court in *June Medical* invalidated a Louisiana law requiring abortion doctors to have admitting privileges at a hospital within thirty miles of the abortion clinic, but no opinion commanded a majority. 140 S. Ct. at 2112–13 (plurality), 2134 (Roberts, C.J., concurring in the judgment). The plurality balanced the benefits of the law against its burdens, citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *June Medical*, 140 S. Ct. at 2120 (plurality). But Chief Justice Roberts

concluded that *Hellerstedt* merely applied the undue-burden framework of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), under which abortion laws are permissible unless they pose a "substantial obstacle" to women seeking abortions. *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment). He explained that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.* at 2136. The dissent would have reversed *Hellerstedt* outright. *Id.* at 2149 (Thomas, J., dissenting), 2154 (Alito, J., dissenting).

As the Seventh Circuit panel majority recognized, App. 25a, the circuits have already split over which *June Medical* opinion controls, and what that means. The Sixth and Eighth Circuits have applied Chief Justice Roberts's opinion to reject the *Hellerstedt* balancing test. *See Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020); *EMW Women's Surgical Ctr. P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 687 n.2 (8th Cir. 2021). Meanwhile, a split panel from the Fifth Circuit said that no *June Medical* opinion controls for lack of a "common denominator" and that the *Hellerstedt* balancing test "retains its precedential force." *Whole Woman's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020). But Judge Willett dissented, siding with the Eighth Circuit and citing the remand in *this* case to show this Court thought that *June Medical* meant *something*. *Id.* at 920 (Willett, J., dissenting). The Fifth Circuit panel's decision was

later vacated when the full Fifth Circuit granted rehearing en banc. *See Whole Woman's Health v. Paxton*, 978 F.3d 974, 975 (5th Cir. 2020).

Now, the Seventh Circuit has said that the Chief Justice's opinion represents the controlling narrowest grounds for decision under *Marks* (agreeing with the Sixth and Eighth Circuits), but that its control extends only to the extent of upholding the result in *Hellerstedt*, thereby leaving the *Hellerstedt* balancing standard in place (effectively agreeing with the now-vacated Fifth Circuit decision, albeit via a slightly different route).

In the wake of all this confusion, district courts around the country are holding full-blown trials, applying whatever standard they deem appropriate. *See, e.g.*, *Jackson Women's Health Org. v. Dobbs*, 3:18-cv-00171 (S.D. Miss.) (trial set for Dec. 6, 2021); *Bernard v. Indiv. Members of the Ind. Med. Licensing Bd.*, No. 1:19-cv-01660 (S.D. Ind.) (trial scheduled for June 21, 2021); *Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-1904 (S.D. Ind.) (trial held Mar. 15–18, 2021); *see also Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, 2020 WL 6063778 (M.D. Tenn. Oct. 14, 2020) (following trial, applying *Hellerstedt* balancing to strike down waiting period law without reference to *June Medical*). Yet even the decision below recognized that abortion doctrine is both "challenging and fluid" and "not stable," which implies those trials—not to mention the extensive expert witness discovery that characterizes abortion litigation nowadays—may prove to be a waste of time and resources.

At some point, the Court will need to determine what standard controls. Accordingly, even if the Court ultimately concludes that juvenile and adult abortion decisions are protected by the same constitutional standard, this case presents an excellent vehicle for re-articulating that standard—and for assessing how it applies to a pre-enforcement challenge seeking a preliminary injunction.

2. In his dissent, Judge Kanne pointed out that "*June Medical* has real effect. The Supreme Court knows it, other circuits accept it, and a faithful application of *Marks* requires us to accept it, too." App. 29a (Kanne, J., dissenting). Giving *June Medical* "real effect" means jettisoning the freewheeling balancing test of *Hellerstedt*—not to mention rejecting pre-enforcement facial injunctions where, as here, the impact of a new abortion regulation is open to debate.

As often happens with new abortion laws, in this case abortion providers asked for a preliminary injunction against enforcement of the parental-notice law in its entirety before the statute even became enforceable. In other circuits, such pre-enforcement facial challenges have been met with pointed skepticism. The Eighth Circuit rejected a pre-enforcement facial injunction "[b]ecause the record [wa]s practically devoid of any information" about the burdens imposed by Missouri's laws, such that the court "lack[ed] sufficient information to make a constitutional determination" under *Hellerstedt*. *See Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018).

Yet here the district court enjoined Indiana's parental-notice statute based on speculation as to the law's effects on minors seeking abortions. App. 130a–33a. Because it did so, however, and because the Seventh Circuit affirmed, Indiana will never have a chance to develop an actual record as to the effects of the law. As Judge Kanne observed, "[t]he obvious question is, how is a state ever supposed to overcome the majority's 'grand balancing test' when a court can stamp out its abortion regulations before they even get off the ground? Are we to expect the state to reach into some alternate reality, where its popularly enacted laws were let alone, and pluck evidence of their benefits from there?" App. 40a.

Indiana has encountered facial pre-enforcement challenges to its abortion laws many times before, but until *Hellerstedt* the Seventh Circuit had applied a rigorous standard to them. In *A Woman's Choice—East Side Women's Clinic v. Newman*, 132 F.Supp.2d 1150 (S.D. Ind. 2001) (Hamilton, J.), the district court issued pre-enforcement injunctions against Indiana's 18-hour in-person counseling law based on data from other States suggesting such a law might cause a 10% decline in abortions. The Seventh Circuit, however, reversed and held that the large-fraction test of *Casey* means that a record of actual enforcement in Indiana is generally necessary and that "it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate." *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (Easterbrook, J.).

In the wake of *Hellerstedt*, however, the Seventh Circuit has now reversed course and held that district courts may issue pre-enforcement injunctions against a law regulating the abortion process based on nothing more than speculation as to the law's likely impact. App. 52a–55a (Hamilton, J.); *see also id.* 96a (Kanne, J., dissenting) ("[T]he entire course of litigation in *A Woman's Choice* involved pre-enforcement speculation about the statute's effects. That problem is also present here."). That redirection is particularly surprising because the Court's decision in *Hellerstedt* rested on actual evidence that new admitting privileges and ambulatory surgical center licensing laws would shut down a high percentage of Texas's abortion clinics. 136 S. Ct. at 2310–18. In contrast, here the Seventh Circuit relied on speculation to invalidate a law that has never been enforced.

This Court should resolve the circuit split and clarify the proper evidentiary standard for pre-enforcement facial challenges to abortion laws.

3. Beyond the difficulties surrounding pre-enforcement challenges, the "large fraction" test also stumps lower courts attempting to define the relevant universe of prospective abortion patients. The decision below declared the denominator to include all "young women *who are likely to be deterred* from even attempting a judicial bypass because of the possibility of parental notice." App. 62a. But defining the denominator that narrowly—essentially, in terms of the women substantially burdened—effectively guarantees a "fraction" of 1:1.

Such a definition of the denominator conflicts, for example, with the approach taken by the Eighth Circuit in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, which upheld a hospital admitting-privileges statute applicable to medication-only abortion practitioners because the law was not "an undue burden for a large fraction of women seeking medication abortions in Arkansas." 864 F.3d 953, 959 (8th Cir. 2017). The court held that "the 'relevant denominator' . . . [was] women seeking medication abortions in Arkansas" generally—not the much smaller number of women seeking medication abortions specifically from providers that did not have hospital admitting privileges. *Id.* at 958.

The Sixth Circuit has similarly defined the denominator broadly. *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490, 515–16 (6th Cir. 2012) (in challenge to a ban on some medication abortions, defining denominator as "all" Ohio women attempting to obtain an abortion). Meanwhile, the Fifth Circuit has now *twice* defined the denominator broadly, but those decisions have been reversed or vacated for other reasons. *See Paxton*, 978 F.3d at 911 (defining the relevant denominator as "all women between 15-20 weeks LMP who seek an outpatient second trimester D&E abortion"), *vac'd by* 978 F.3d 974; *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 802 (5th Cir. 2018) (defining the relevant denominator as "all women seeking abortions in Louisiana"), *rev'd by June Med.*, 140 S. Ct. at 2133.

The Ninth Circuit in *Planned Parenthood Arizona, Inc. v. Humble*, moreover, directly recognized the split

among the circuits on this issue, explicitly disagreeing with the Sixth Circuit and instead defining the denominator to be only "*women who, in the absence of the Arizona law, would receive medication abortions* under the evidence-based regimen." 753 F.3d 905, 914 (9th Cir. 2014) (emphasis added). Because this group of women, however small, could face delays or increased costs, the Ninth Circuit struck down the law as facially invalid. *Id.* at 917.

In sum, the Seventh and Ninth Circuits have split with the Sixth and Eighth Circuits (and the Fifth, however fleetingly) to define the denominator in a way that ensures a near 1:1 ratio—and thereby guarantees facial invalidation. For this reason, the State urges the Court to address how courts should go about defining the denominator for the "large-fraction" test.

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This case presents a simple question, namely, whether States can ensure that parents of unemancipated minor children are notified of their daughters' court-authorized abortion. But answering that seemingly direct question has plainly roiled the Seventh Circuit's judges—regardless of how they ultimately voted—owing to the "not stable" and "fluid" constitutional standards applicable to abortion regulations. Indeed, at least some, if not most, Seventh Circuit judges have refused to engage the issue at all because only this Court can say what "undue burden" means in any given context. Accordingly, the State urges the Court to grant its petition and clarify abortion-rights doctrine, at least with respect to parental-notice laws.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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