IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-2428

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Plaintiff/Appellee,

v.

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

Defendants/Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:17-cv-01636-SEB-DML,
The Honorable Sarah Evans Barker, Judge

PETITION FOR REHEARING AND REHEARING *EN BANC*

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RULE 35(b)(1) STATEMENT IN SUPPORT OF REHEARING *EN BANC*

The State respectfully petitions the Court to grant rehearing and rehearing *en banc* pursuant to Fed. R. App. P. 35(b). A panel of this Court upheld a preliminary injunction against the enforcement of Indiana's parental notice law. Rehearing *en banc* is warranted because that decision presents a "question[] of exceptional importance," Fed. R. App. P. 35(b)(1)(B), namely, as articulated by Judge Kanne's dissenting opinion: "[D]oes the Constitution prohibit Indiana from requiring a mature minor to notify her parents of an impending abortion when she cannot show that avoiding notification is in her best interests?" Slip Op. 36 (Kanne, J., dissenting).

Rehearing *en banc* is also warranted because the panel decision here conflicts with another decision of this Court. *See* Fed. R. App. P. 35(b)(1)(A). As Judge Kanne's dissent explains, Slip Op. 48–49, the panel decision contravenes *A Woman's Choice–East Side Women's Clinic v. Newman*, 305 F.3d 684, 692 (7th Cir. 2002), which held that an abortion regulation may not be enjoined in a pre-enforcement challenge "while the effects of the law (and reasons for those effects) are open to debate."

INTRODUCTION

In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Supreme Court held that States may condition abortion for unemancipated minors on parental consent, so long as they permit judicial bypass of the consent requirement upon a determination that the abortion is in the minor's best interests or that the minor is mature enough to make the decision on her own. Accordingly, Indiana prohibits abortion on an unemancipated minor absent consent from one of her parents (or legal guardian or

custodian) or a judicial bypass order predicated on either the minor's best interests or her maturity to make the abortion decision. Ind. Code § 16-34-2-4(a).

Indiana's parental notice law also requires a minor who obtains a judicial bypass order to provide notice to her parents "before" the abortion; this notice requirement is subject to judicial override where doing so is in her best interests, though there is no "maturity" exception to the requirement. Ind. Code § 16-34-2-4(d).

Planned Parenthood of Indiana and Kentucky, Inc., sought a preliminary injunction against the parental notice law principally on the theory that it violates *Bellotti*, arguing that the law must provide for judicial override of the notice requirement on both best-interests grounds *and* maturity grounds. The district court held that *Bellotti* applies and that Planned Parenthood is likely to succeed on the merits and is entitled to an injunction.

On appeal, the panel majority averted the *Bellotti* question by holding that the parental notice law likely is facially invalid even apart from *Bellotti* on the theory that in operation it will impose an undue burden on the abortion rights of some unemancipated minors. Critically, the panel arrived at that assessment of the law's consequences even though the parental notice law has never gone into effect.

As Judge Kanne points out in his dissent, this holding contravenes this Court's decision in *A Woman's Choice–East Side Women's Clinic v. Newman*, which held that facially enjoining an abortion regulation on the ground that its consequences will impose an undue burden—that "it will be a failure *in operation*"—before it goes into effect requires showing that its impact *is not open to debate*. 305 F.3d 684, 692 (7th

Cir. 2002) (emphasis in original); *see id.* at 693 ("[I]t 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."). What is more, the panel majority's rationale for overriding *A Woman's Choice*—that *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), changed the standard for facial challenges to abortion regulations—threatens an array of commonplace, previously upheld abortion regulations, including the in-person counseling requirement *A Woman's Choice* upheld.

En banc review is justified both to settle the proper standard for pre-enforcement challenges to abortion regulations and to address the constitutionality of Indiana's parental notice law, including whether *Bellotti* applies.

BACKGROUND

Indiana's original parental notice law, enacted in 1982, required unemancipated minors to give one parent or legal guardian twenty-four hours actual notice or forty-eight hours constructive notice before an abortion. Ind. Code § 35-1-58.5-2.5(a) (1982). Two years later, the General Assembly eliminated the notification requirement in favor of a consent requirement with a right of judicial bypass for maturity and best interests. Ind. Code § 35-1-58.2-2.5(a) (1984).

The statute largely remained in this form until 2017, when the General Assembly reinstated the notice requirement alongside the consent requirement. *See* Ind. Code § 16-34-2-4(a)–(e) (eff. July 1, 2017). Under the new statute, an unemancipated minor must notify a parent, legal guardian, or custodian before an

abortion occurs unless the court determines that judicial bypass serves the best interests of the minor. Ind. Code § 16-34-2-4(d).

Before the parental notice law went into effect, Planned Parenthood filed this lawsuit and sought preliminary injunctive relief, claiming the notice requirement would amount to a parental veto in violation of *Bellotti v. Baird*, 443 U.S. 622 (1979). ECF 14 at 14–18. Though the Supreme Court has not applied *Bellotti* to parental notice laws, and though Planned Parenthood supplied no direct evidence of the law's impact, the district court issued the preliminary injunction, accepting declarations from lawyers and a child psychologist that due to the law unemancipated minors "might well be deterred from the [judicial bypass] process entirely." ECF 26 at 31.

On August 27, 2019, a panel of this Court affirmed in an opinion by Judge Hamilton joined by Judge Rovner, with Judge Kanne dissenting. The State argued that *A Woman's Choice* precludes a district court from facially enjoining an abortion law on operational grounds before it goes into effect if the law's effects are open to debate, but the panel majority rejected that standard. It concluded that *A Woman's Choice* was unsound when decided and is now supplanted entirely in the wake of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *See* Slip Op. 11 ("The biggest problem for the State's argument is that *A Woman's Choice* was decided before the Supreme Court decided *Whole Woman's Health v. Hellerstedt* . . . ."). The panel majority's concluded that predictions of the law's effects supplied by Planned Parenthood's lawyer and psychologist witnesses are sufficient to justify a preliminary injunction, where only a showing of "likely" success is necessary. *Id.* at 23–25. And it

further determined that Indiana may not rely on common-sense parental interests in, and authority over, unemancipated minors and had failed to prove the law is necessary to address a legitimate interest. *Id.* at 19–21.

Judge Kanne dissented, insisting that *A Woman's Choice* remains good law and observing that the evidentiary basis for the majority's decision was "entirely speculative." Slip Op. 39 (Kanne, J., dissenting). He pointed out that while the majority relied "on evidence that minors in abusive homes will be at risk if their parents discover that they plan to have an abortion," the law's "'best interests' exception completely covers that scenario." *Id.* at 44. Planned Parenthood failed to identify *any* "instance where an Indiana court rejected a minor's 'best interests' argument and required parental consent, but abuse followed," *id.*, and provided as evidence only "declarations from individuals involved in the bypass process discussing their personal observations and anecdotes and a declaration by one child psychologist discussing the challenges which children in abusive homes face in obtaining abortions," *id.* at 47. It provided "no evidence regarding why a notification requirement will substantially obstruct mature minors (when the court has concluded that the child's best interests warrant notification) from obtaining an abortion." *Id.* at 48. Judge Kanne determined that the State's interests in safeguarding parental rights and interests in the upbringing of unemancipated children fully justify the law—even for mature minors. He also concluded that *Bellotti* does not apply and that regardless Indiana's "best interests" exception is a sufficient safeguard.

REASONS FOR GRANTING THE PETITION

I. With the Decision Here, the Standards for Pre-Enforcement Facial Challenges to Abortion Regulations Are in Disarray

The panel majority set aside the question whether *Bellotti* requires Indiana's parental notice law to have an exemption for mature minors and opted instead to evaluate whether the law will, as a matter of operational impact, impose an undue burden on minors seeking an abortion. Slip Op. 29. On that question of likely impact, the central point of disagreement between the majority and dissent is whether the law may be enjoined before it has even become enforceable. That debate, in turn, revolves around the meaning and continued vitality of this Court's decision in *A Woman's Choice*, which rejected a pre-enforcement challenge grounded, as in this case, only on debatable predictions about the statute's operational effects.

In *A Woman's Choice*, this Court reconciled the tension between the *Salerno* "no set of circumstances" test for facial constitutional challenges with *Casey*, which enjoined abortion regulations susceptible to at least *some* constitutional applications: The best way to harmonize those standards, this Court concluded, is to resolve any uncertainty about a law's likely effects in the State's favor. *A Woman's Choice–E. Side Women's Clinic v. Newman*, 305 F.3d 684, 692–93 (7th Cir. 2002). Finding no direct evidence in the record about the operational impact of Indiana's in-person counseling and waiting-period requirements (which had been enjoined before ever going into effect, *see A Woman's Choice–E. Side Women's Clinic v. Newman*, 132 F. Supp. 2d 1150 (S.D. Ind. 2001) (Hamilton, J.)), this Court held 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." 305 F.3d at 693. Thus, under *A Woman's Choice*, a court confronted with a pre-enforcement challenge to a law asks whether "the effects of the law . . . are open to debate." *Id.* If they are, the statute may be challenged only as applied or after a fair period of operation. *See id.* at 692 ("If Indiana's emergency-bypass procedure fails to protect Indiana's women from risks of physical or mental harm, it will be a failure *in operation*; it is not possible to predict failure before the whole statute goes into force.").

The "open to debate" language in *A Woman's Choice* was not mere dicta: That decision reversed the district court's permanent injunction "because the record contained no data about the actual or likely effects of the Indiana statute specifically. And collecting that data was impossible because the district court issued a preliminary injunction." Slip Op. 48 (Kanne, J., dissenting). As Judge Kanne's dissenting opinion in this case recognizes, "[t]o call this reasoning . . . dicta is to misunderstand the majority opinion in that case." *Id.* at 49.

The panel majority here, however, rejected *A Woman's Choice*, questioning both its initial meaning and validity in light of an earlier decision, *Karlin v. Foust*, 188 F.3d 446, 483 (7th Cir. 1999), and its continued vitality under *Zbaraz v. Madigan*, 572 F.3d 370, 381 (7th Cir. 2009), and *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 788–89 (7th Cir. 2013). Slip Op. 11. But *A Woman's Choice* resolved any uncertainty about facial-challenge methodology left over from *Karlin*, and *Van Hollen* featured unequivocal pre-enforcement evidence demonstrating that new admitting privileges requirements would leave women without abortion

providers. *Van Hollen*, 738 F.3d at 788–89. And to the extent *Zbaraz*—which *upheld* Illinois's parental notice law—expressed uncertainty about the standard for pre-enforcement challenges to abortion laws, that confusion only reinforces the need for *en banc* review here.

The panel also suggested that the pre-enforcement framework from *A Woman's Choice* did not survive *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Slip Op. 11–12. But like *Van Hollen*, that decision 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. The point of *A Woman's Choice* was not that *no* pre-enforcement challenge to any abortion regulation could ever succeed; it was only that where a law's likely effects are open to debate, the law must be permitted to go into effect before a facial challenge can be successful. In *Van Hollen* and *Hellerstedt* those effects were not open to debate. Here, as in *A Woman's Choice*, they are. *See* Slip Op. 48–49 (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.").

In light of this conflict between the panel decision here and the holding and reasoning of *A Woman's Choice*, *en banc* review is amply justified.

II. The Panel Decision Also Creates Intra-Circuit Tension Over the Meaning of *Hellerstedt* That the *En Banc* Court Should Resolve

Review by the *en banc* court is further justified by the contradictions between the panel majority's reading of *Hellerstedt* and the interpretation of *Hellerstedt* this Court adopted just five days earlier in *Whole Woman's Health Alliance v. Hill*, No.

19-2051, 2019 WL 3949690 (7th Cir. Aug. 22, 2019). The panel decision here reads *Hellerstedt* to authorize reopening long-settled issues and to endorse evaluating the alleged burden in light of the "cumulative effects" of anything potentially affecting the availability of abortions, including factors the State may not control. *Hill*, on the other hand, rejects the idea that *Hellerstedt* wrought such a sea change to abortion doctrine. Reconciling these differing views is essential—particularly as this case and *Hill* proceed past the preliminary-injunction stage—and can be done only by this Court's *en banc* review.

The Supreme Court acknowledged in *Bellotti* that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Bellotti v. Baird*, 443 U.S. 622, 639 (1979). The only question in *Bellotti* was whether a minor's interest in abortion outweighed that "deeply rooted," *id.* at 638, parental right in the context of a parental consent requirement. Yet the panel majority here would not even give the State that much; it held that *Hellerstedt* in effect wipes the slate clean and requires the State to provide specific evidence demonstrating "that any actual benefit is likely or that there is a real problem that the notice requirement would reasonably be expected to solve." *See* Slip Op. 20–21 (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016)).

Hellerstedt, however, merely establishes that when a State enacts an abortion regulation that has *not yet* been upheld based on a newly identified government interest, it must provide evidence demonstrating a need for the regulation. *See* 136 S. Ct. at 2311. The statute at issue here is merely a variation on parental notice and

consent laws previously upheld and predicated on the same interests the court has previously deemed sufficient. The only real question is whether Indiana's variation can pass muster without a "maturity" exception. *See* Part III, *infra*. The panel majority here, however, takes *Hellerstedt* a step further to mean that courts should continually demand proof of government need, even for long-recognized government interests. *See* Slip Op. 46–47 (Kanne, J., dissenting) (noting that the majority's "logic applies equally to judicial bypass requirements for parental consent statutes," which "the Supreme Court has repeatedly confirmed . . . are constitutional").

This is not what *Hellerstedt* requires, as this Court recognized in *Hill*. There, the district court had relied on *Hellerstedt* for the proposition that—in spite of the many Supreme Court decisions *upholding* abortion licensing laws—Indiana's licensing law was "not necessary" and was thus invalid because the State had not "shown why the state's interests, to the extent they are advanced by a licensing requirement at all, may not be equally well advanced by a registration requirement." *Whole Woman's Health Alliance v. Hill*, 388 F. Supp. 3d 1010, 1048 (S.D. Ind. 2019) (citing *Hellerstedt*, 136 S. Ct. at 2315). The panel corrected this misreading of *Hellerstedt*, holding that, in light of the Supreme Court's longstanding "recognition of the state's power to license abortion care providers[,] . . . to the extent the district court viewed Indiana's licensing scheme as unconstitutional because licensing provided insufficient benefits to the state as a general matter, that conclusion cannot stand." 2019 WL 3949690 at *7.

Furthermore, the panel decision here misread *Hellerstedt* to make "[c]umulative effects . . . relevant, especially in an environment in which very few clinics and physicians perform abortions in Indiana." Slip Op. 25 (citing *Hellerstedt*, 136 S. Ct. at 2313). Here again it diverges from *Hill*. In *Hill* the district court had erroneously concluded that a "confluence of factors"—including Indiana's 18-hour pre-abortion in-person counseling requirement, "high monetary costs undefrayed by state aid," a "reportedly hostile" "social environment," and "the high opportunity costs" of obtaining an abortion—made Indiana's licensing requirement for a clinic in South Bend unduly burdensome. 388 F. Supp. 3d at 1047–48. This Court repudiated such reasoning, rejecting a "wholesale exemption from licensing" in South Bend notwithstanding the district court's "cumulative burden" finding. 2019 WL 3949690 at *11. In short, the panel decision here rejected parental notice in part because Indiana has too few abortion clinics, while *Hill* reaffirmed licensing regardless of the number of abortion clinics. These views are fundamentally inconsistent.

Given the pending challenges to many of Indiana's abortion laws, it is critical for the Court to address and resolve these tensions. In *Hill*, the plaintiffs have challenged nearly the entire array of Indiana abortion regulations—not only licensing, but also informed consent, waiting period, and other regulations long upheld by the Supreme Court and this Court. One of these plaintiffs' theories is that Indiana's abortion laws are invalid owing to the "cumulative burden" they place on the abortion right—a theory inconsistent with the court's decision in *Hill* but seemingly embraced by the panel majority here. Absent rehearing *en banc* here, the

parties and the district court in *Hill* will be left with inconsistent indications about the standards for constitutional challenges to abortion regulations.

III. The *En Banc* Court Should Decide Whether *Bellotti* Applies To Indiana's Parental Notice Law

The only remaining theory by which Indiana's parental notice law can be invalidated here is if *Bellotti* applies. Whether *Bellotti*'s requirements for parental consent laws also apply to parental notification requirements is an open question and was the focal point of the complaint, the parties' preliminary injunction briefing, the district court's decision, and the parties' appellate briefs. *See 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)). This uncertainty is all the more reason for the Court to rehear this case *en banc*.

Ultimately, this Court should settle the issue by ruling that *Bellotti* is inapplicable to parental notice laws. Extending *Bellotti* is inappropriate in light of the governmental interests served by parental notice laws, which are far broader than the interests served by parental consent laws. Crucially, even after the 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 exercising those rights and carrying out that responsibility.

Bellotti and its predecessor, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), departed from the long-accepted principle that parents may exercise control of the medical decisions of their minor children on the basis of the proposition

that 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 irreconcilably and irrefutably conflict—such as with parental consent statutes—the minor's right must prevail. With regard to parental notice statutes, however, the two interests are not diametrically opposed in the same way; both the parents' interest in being informed of their child's medical decision and the minor's interest in making her own abortion decision can be protected. *Bellotti* and *Danforth*'s concern with parents having an "an absolute, and possibly arbitrary, veto" over the minor's abortion decision, *id.* at 74, is thus not present here, because the Indiana statute requires notice only *after* the abortion decision has been made and approved by a court.

Accordingly, with the abortion decision safeguarded by judicial bypass, the balance of interests shifts towards the parents. 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 parental notice law applies only to *unemancipated* children. As they love and care for their daughter, parents need to know what she has been through. An abortion is a facet of medical history that could have implications for future treatment; it can also inform parental guidance as to sexual behavior and bear on the child's emotional needs and mental health. Even if parents cannot prevent the abortion, they need to know about it to be able to help their child deal with its consequences. That broader interest bolsters the compelling government interests

supporting a requirement of parental *notice* compared with those supporting a requirement of parental *consent*.

As Judge Kanne's dissent explains, the concerns of the district court (Short App. 29) and the panel majority (Slip Op. 23–25, 29) regarding abused minors are also misplaced. That a minor is being abused by a parent, or that informing a parent of the abortion decision may result in further abuse, goes to whether parental notice is in the minor's *best interest*, not to whether she is sufficiently mature to make the abortion decision on her own. And Indiana law already provides for such a best-interests inquiry, which also naturally encompasses whether the parents might attempt to obstruct the minor from following through with her decision. *See* Ind. Code § 16-34-2-4(e). Such concerns are thus already addressed by the statute's judicial bypass procedure, and there is no need for further inquiry into the minor's maturity.

The district court and panel majority also incorrectly rely on the portion of *Casey* invalidating spousal notification requirements. Short App. 27–29; Slip Op. 22, 26. *Planned Parenthood of Southeastern Pennsylvania v. Casey* held that "[a] husband has no enforceable right to require a wife to advise him before she exercises her personal choices." 505 U.S. 833, 898 (1992). In contrast, parents usually do have, and often exercise, legally enforceable rights to control the choices of their minor children. Indeed, *Casey* upheld a parental consent requirement "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart" even while it invalidated a spousal notification requirement because it declined to

"adopt a parallel assumption about adult women." *Id.* at 895. The State has a compelling interest in "safeguarding the physical and psychological well-being of a minor," *New York v. Ferber*, 458 U.S. 747, 756–57 (1982), which distinguishes the parental notice law from the spousal notification statute invalidated in *Casey*.

CONCLUSION

The petition for rehearing and rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 3,898 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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