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

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 Hudson
Deputy Solicitor General
Julia C. Payne
Thomas J. Flynn
Deputy Attorneys General

Counsel for Petitioners

QUESTIONS PRESENTED

For decades Indiana has permitted a minor to have an abortion so long as she has parental consent or a bypass order from a juvenile court based on either her maturity or her best interests. Now, when a juvenile court permits an unemancipated minor to have an abortion, a new statute requires notice to her parents unless the court finds such notice to be against the minor's best interests. The district court enjoined enforcement of this statute and the Seventh Circuit affirmed, 2–1, with a dissent by Judge Kanne. The en banc court denied rehearing by a vote of 6–5, with Judge Easterbrook writing a concurrence in denial (joined by Judge Sykes) saying that rehearing would be pointless because only *this* Court can decide how its abortion precedents apply to this situation. The questions presented are:

1. Whether an abortion clinic may assert third-party standing on behalf of its hypothetical minor patients to challenge a statute requiring parental notice before abortion.

2. Whether Indiana may, consistent with the Fourteenth Amendment, generally require lawyers for unemancipated minors to notify parents of court-authorized abortions, subject to judicial bypass upon a finding that such notice would be against the minor's best interests.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

CONSTITUTIONAL PROVISIONS

STATUTES

PETITION FOR WRIT OF CERTIORARI

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 panel opinion, App. 1a–57a, is reported at 937 F.3d 973 (7th Cir. 2019). The Seventh Circuit order denying rehearing en banc is unreported and is reproduced at pages 115a through 119a of the appendix. The order of the United States District Court for the Southern District of Indiana granting Planned Parenthood's motion for preliminary injunction, App. 58a–114a, 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, on August 27, 2019. App. 1a. Petitioners then filed a timely petition for rehearing en banc, which the Seventh Circuit denied on October 30, 2019. 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 120a–124a of the appendix.

INTRODUCTION AND STATEMENT OF THE CASE

In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court held that minors seeking abortion have less protection from state regulation than adults, such that States may require minors to obtain either parental consent or a court order permitting the abortion based on her maturity or best interests. The courts below, however, held that Indiana's parental-notice law must be invalid because it cannot survive the same undue-burden balancing test that applies to regulation of adults. The full Seventh Circuit denied rehearing en banc 6–5, but Judge Easterbrook (joined by

Judge Sykes) commented that "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute, such as the one Indiana has enacted." App. 118a.

As that remark demonstrates, the Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), leads even the most experienced and distinguished members of the federal judiciary to throw up their hands in confused frustration. The Court should therefore grant certiorari at the very least to clarify the standard for evaluating abortion regulations applicable to minors, and perhaps to clarify the undue burden standard more generally. Otherwise, Indiana will be left without a fair opportunity to defend its abortion regulations because lower-court judges cannot understand the appropriate constitutional standard.

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. 120a–124a.

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 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 "bests 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 context for any post-abortion mental or emotional distress their daughter may incur, and put them on notice that perhaps their daughter needs more guidance in her sexual behavior.

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, rather than decide how the *Bellotti* standard applied, relied entirely on the balancing test of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016). The court acknowledged tension in the case

law regarding the standard for pre-enforcement facial challenges to abortion statutes, App. 71a–75a, 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.* 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 74a–75a.

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 74a. 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 74a–75a.

2. On appeal, the State renewed its argument that only *Bellotti* supplied a relevant legal yardstick for parental-notice laws and that its 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. 34a. Applying *Casey* by way of *Hellerstedt's* balancing test, the court—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." App. 23a. 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. App. 29a.

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." App. 21a–22a. 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." App. 23a.

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." App. 20a–21a.

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." App. 43a (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." App. 41a–42a (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 "unless a baleful outcome is either highly likely or ruinous even if less likely." App. 116a–17a. 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.* Judge Easterbrook observed that this Court may address the proper method of evaluating pre-enforcement facial challenges in *June Medical Services L.L.C. v. Gee*, No. 18–1323. App. 117a–18a.

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." App. 117a–18a. 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 118a. For this reason, "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." *Id.*

REASONS FOR GRANTING THE PETITION

I. *Hellerstedt* Is Wreaking Havoc Among Lower Courts Reviewing Abortion Laws

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), has left lower court judges confused and conflicted over proper application of undue-burden doctrine. While the Court in *Hellerstedt* purported merely to apply the undue-burden test from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), many lower court judges have taken it to create an entirely new decisional rubric, one that not only raises the bar for States defending new abortion laws, but one that also undermines the Court's own pre-*Hellerstedt* decisions and thereby reopens many standard abortion regulations to fresh constitutional scrutiny. The need to resolve such confusion is paramount, as abortion practitioners have exploited the opportunity by bringing omnibus challenges to state abortion laws, including those previously upheld by this Court, such as informed-consent requirements, waiting periods, physician-only laws, and clinic-licensing regulations. *See Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-1904 (S.D. Ind.); *June Med. Servs. L.L.C. v. Gee*, No. 3:17-cv-404 (M.D. La.); *Jackson Women's Health Org. v. Currier*, No. 3:18-cv-171 (S.D. Miss.); *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-500 (W.D. Tex.); *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-428 (E.D. Va.).

At the most specific level, this case is—aside from potential third-party standing issues, *see* Part II, *infra*—the perfect vehicle for finally addressing

whether parental-notice statutes must conform to the same judicial-bypass standards as parental-consent statutes. The parental-notice standard is an important, unresolved question (as noted by this Court on several occasions), *and* a question over which the circuits are divided.

More generally, this case also offers a chance to address multiple dimensions of the doctrinal havoc wrought by *Hellerstedt*. The decision below crystallizes many such issues, including the relevance of pre-*Hellerstedt* case holdings, the method for deciding pre-enforcement challenges under the undue-burden standard, the manner of balancing benefits and burdens under that standard, and the process for defining the fraction of women substantially burdened by an abortion regulation. To the extent some or all of these issues remain unresolved following *June Medical*, both this case and *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, No. 18-1019 (U.S.), are (subject to third-party standing issues) excellent vehicles for resolving them.

A. The Court needs to address whether and how its pre-*Hellerstedt* decisions (here, *Bellotti*'s definition of the abortion rights of minors) continue to apply

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*, 443 U.S. 622 (1979), 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." *Bellotti*, 443 U.S. at 634; *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.").

As a consequence, the Court in *Bellotti* permitted a regulation of access to abortion by minors that it would never have permitted as to adults: the consent 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 standard for parental consent laws also applies 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 Reprod. 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 notice statute must include some sort of bypass provision to be constitutional'" (internal citation omitted)).

Against that background, there can hardly be any question but 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*—a case that had nothing to do with minors—the district court and at least two (and apparently four) circuit judges think *Bellotti* is irrelevant when evaluating regulation of minors' access to abortion. Meanwhile, Judge Kanne observed (consistent with *Bellotti*) that "State-imposed restrictions on mature minors cannot, by themselves, be constitutionally problematic." App. 50a. And Judges Easterbrook and Sykes are so confused that they have refused to address the issue squarely. App. 116a–18a.

The situation is even more perplexing in light of the Seventh Circuit's previous decision in *Whole Woman's Health Alliance v. Hill*, 937 F.3d 864, 877 (7th Cir. 2019), where the court rejected the argument that *Hellerstedt* authorizes a fresh attack on ordinary state-licensing regimes similar to what this Court has previously upheld. The Seventh Circuit's decision in that case presents its own cert-worthy issue over an injunction requiring the State to issue a clinic license, *see id., petition for cert. docketed*, No. 19-743 (Dec. 11, 2019), but at least there the court respected pre-*Hellerstedt* Supreme Court abortion-rights doctrine. Here, the en banc Seventh Circuit has demonstrated

its inability to achieve any consistency on such matters, App. 116a–18a, and Indiana should not be left in the lurch.

The Court should take this case both to make it clear that *Hellerstedt* does 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.

B. The Court needs to provide guidance on several aspects of the undue burden standard, including instructions for pre-enforcement facial challenges

As recounted above, concurring in the Seventh Circuit's 6–5 denial of rehearing en banc, Judge Easterbrook (joined by Judge Sykes) wrote 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," and "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." App. 117a–118a. *Cf. Freedom from Religion Foundation, Inc. v. Chao*, 447 F.3d 988, 990 (7th Cir. 2006) (Easterbrook, J., concurring in denial of en banc) ("[o]nly the rule's proprietors can bring harmony . . ."), *cert. granted sub nom Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007).

In other words, two of the most distinguished judges in the federal judiciary are utterly confounded by the Court's abortion precedents. The Court should intercede to establish coherence and predictability to the doctrine.

1. One fundamental problem is that *Hellerstedt* left lower courts with a quintessentially legislative task. Lower courts have understood the decision to require them to balance the benefits of an abortion regulation against its burdens, and in so doing "give significant weight to evidence in the judicial record in these circumstances." *Hellerstedt*, 136 S. Ct. at 2309–10. Such a directive inevitably puts courts in the position 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." App. 118a. Thus, a regulation that is constitutional in one State might be unconstitutional in another merely because the judicial record is different or because the judge weighs the evidence differently.

As a consequence, the circuits have brought to the surface several disagreements over how to apply *Hellerstedt* balancing. While the Seventh Circuit has merely asked whether a law's burdens outweigh its benefits, App. 118a, the Eighth Circuit has required plaintiffs challenging abortion laws to show that a law's burdens "substantially" outweigh its benefits. *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018); *see also Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (de-

fining "undue" burden as "a burden [that] *significantly* exceeds what is necessary to advance the state's interests.").

In addition, here the Seventh Circuit panel majority asked not merely whether the challenged statute imposed a substantial obstacle to abortion, but also whether the statute *plus* the "cumulative effects" of other laws and circumstantial factors did so. App. 29a. Other courts, however, have limited the inquiry to burdens imposed by the specific statute being challenged. In *In re Gee*, the Fifth Circuit observed that "the Supreme Court has not blessed" cumulative effects claims. 941 F.3d 153, 172 (5th Cir. 2019). It then opined that such challenges are "unprecedented" because "the Court has analyzed abortion provisions separately rather than cumulatively." *Id. See also June Medical*, 905 F.3d at 810 n.60 ("[O]ther abortion regulations are unrelated to admitting privileges and therefore have no bearing on the constitutionality of Act 620.").

There is also the problem of defining the relevant universe of prospective abortion patients for purposes of the "large fraction" test. The decision below declared the dominator 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. 21a; *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 819 (7th Cir. 2018), *petition for writ of certiorari pending*, No. 18-1019) (declaring that an 18-hour ultrasound law would be an undue burden on "low income women who do not live near one of

PPINK's six health centers where ultrasounds are available"). 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 fractional 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, 955, 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.* The Fifth and Sixth Circuits have similarly defined the denominator broadly. *See, e.g., 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"); *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490, 515–16 (6th Cir. 2012) (in challenge to ban on some medication abortions, defining denominator as "all" Ohio women attempting to obtain an abortion).

The Ninth Circuit in *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014), moreover, directly recognized the split among the circuits on this issue, explicitly disagreeing with the

Sixth Circuit to define the denominator to be only "*women who, in the absence of the Arizona law, would receive medication abortions* under the evidence-based regimen." *Id.* (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 Fifth, Sixth, and Eighth Circuits to define the denominator in a way that ensures a near 1:1 ratio—and thereby guarantees facial invalidation. As Indiana explained in its Petition in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-1019 (U.S.), the Court needs to address how courts should go about defining the denominator for the "large-fraction" test.

2. These problems are compounded with pre-enforcement challenges, which Judge Kanne referred to as "an important and recurring issue of federalism: Under what circumstances, and with what evidence, may a state be prevented from enforcing its law before it goes into effect?" App. 118a.

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. 112a. 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.

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 on the basis of nothing more than speculation as to the law's likely impact. App. 13a–14a (Hamilton, J.); *see also* App. 55a (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."); *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018) (affirming preliminary injunction before any significant period of enforcement). 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 (and in the 18-hour ultrasound case) the Seventh Circuit relied on mere second-hand anecdotes and speculation to invalidate laws that have never been enforced in any meaningful way.

The Seventh Circuit's use of *Hellerstedt* to permit pre-enforcement facial challenges based only on speculative effects sharply contrasts with the Fifth Circuit's holding in *June Medical*. There, the court required a clinic challenging Louisiana's hospital admitting privileges law to "put forth affirmative evidence" that the law, not the clinic's own business decisions, imposes an undue burden. *June Med.*, 905 F.3d at 807 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019). Such proof would require permitting the law to go into force to see, for example, whether the suppliers' market for abortion procedures would adapt to the new requirement.

June Medical is now before this Court, of course, and Judge Easterbrook (joined by Judge Sykes), rather than fight the battle within the Seventh Circuit over the pre-enforcement standard, has expressed hope that this Court will address this issue: "Perhaps the Justices will say something about the circumstances under which it is appropriate for a district court to issue pre-enforcement relief that forever prevents the judiciary from knowing what a law really does." App. 117a.

If the Court does reach the pre-enforcement facial standard in *June Medical*, it may be appropriate for the Court to GVR this case in light of that decision. If it does not, however, it should take either or both this case and *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-1019 (U.S.), to resolve the circuit split and clarify the proper evidentiary standard for pre-enforcement facial challenges to abortion laws.

II. If the Court Rejects Third-Party Standing in *June Medical*, It Should GVR this Case for Further Consideration on that Issue

In *June Medical Services, L.L.C. v. Gee*, No. 18-1323, the Court is considering whether abortion providers may assert the undue burden rights of hypothetical future patients when challenging abortion regulations. If the Court rejects third-party standing in that case, it may be advisable to grant this petition, vacate the decision below, and remand for further consideration in light of *June Medical*.

Here, the challenged statute is designed to safeguard parental rights and familial harmony after the

abortion has occurred, and abortion providers do not inherently share in that interest. Furthermore, minors going through the Indiana judicial bypass system have a tailor-made opportunity to assert their own rights. A minor could assert an as-applied challenge to the notification statute during the "best interests" hearing. If the minor is unsuccessful in convincing the juvenile court judge that parental notice is not in her best interests or that the parental notice is unconstitutional as applied to her, the statute specifically provides for an expedited appeal in state court. Ind. Code § 16-34-2-4(g).

***

In his opinion below concurring in denial of en banc rehearing, Judge Easterbrook eschewed further consideration of Indiana's parental-notice law under prevailing abortion doctrine, confessing that "[t]he quality of our work cannot be improved by having eight more circuit judges try the same exercise." App. 118a. "It is better," he said, "to send this dispute on its way to the only institution that can give an authoritative answer." *Id.* This Court is the only body that can bring urgently needed clarity to this area of law. It should heed Judge Easterbrook's call to do so.

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

*Counsel of Record

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

Counsel for Petitioners

Dated: December 27, 2019