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

CIRCUIT RULE 54 STATEMENT OF POSITION

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CIRCUIT RULE 54 STATEMENT OF POSITION

On July 2, 2020, the Supreme Court granted Appellants-Defendants' Petition for Writ of Certiorari, vacated the judgment of this Court, and remanded the case for further consideration in light of *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). In response, Defendants-Appellants, the Commissioner of the Indiana State Department of Health, the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, the Members of the Indiana Licensing Board, and the Judge of the Marion Superior Court, Juvenile Division, submit this Circuit Rule 54 Statement of Position.

INTRODUCTION AND SUMMARY

At issue is the constitutionality of an Indiana statute requiring that "[u]nless the juvenile court finds that it is in the best interests of an unemancipated pregnant minor to obtain an abortion without parental notification . . . a parent, legal guardian, or custodian of a pregnant unemancipated minor is entitled to receive notice of the emancipated minor's intent to obtain an abortion before the abortion is performed on the unemancipated pregnant minor." Ind. Code § 16-34-2-4(d). In other words, the statute requires parental notice of an unemancipated minor's abortion unless a court finds such notice would contravene the child's best interests, regardless whether the minor is sufficiently mature to make her own abortion decision.

In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Supreme Court held that, to be constitutional, a law requiring parental *consent* for an unemancipated minor to have an abortion must permit exceptions where a court determines that the abortion would be in the minor's best interests or the minor is sufficiently mature to make her own

abortion decision. Although the Indiana parental notice statute does not contain the latter exception, Indiana has contended both in the district court and in this Court that *Bellotti* does not apply to parental *notice* statutes and that Plaintiffs had no evidence that the statute would otherwise burden minors' abortion rights. Appellants' Br., ECF No. 11 at 16–23; Defs.' Mem. in Opp. to Prelim. Inj., ECF No. 22 at 5–12.

In its previous consideration of this case, however, this Court did not address the application of *Bellotti*. Instead, the panel majority held that, under a legal standard it attributed to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), it "must balance" the "burdens a law imposes on abortion access together with the benefits those laws confer." It then asserted an absence of "evidence showing that there is a problem for the new parental-notice requirement to solve," and therefore invalidated the statute because the burdens of the law "weigh[] more heavily in the balance than the State's interests." *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 983, 991 (7th Cir. 2019). In dissent, Judge Kanne said that this Court "should not invalidate a law passed by a democratically-elected state legislature" because "Planned Parenthood has not introduced evidence that establishes that requiring mature minors to notify their parents that they intend to have an abortion . . . constitutes an undue burden." *Id.* at 992 (Kanne, J., dissenting). The full Court then denied rehearing en banc. Judge Easterbrook, joined by Judge Sykes wrote a concurrence to denial, explaining that "[o]nly the [Supreme Court] Justices" could clarify the proper application of the undue-burden standard. *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial).

The controlling opinion in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), namely the narrowest-grounds concurring opinion of the Chief Justice, makes it clear that the panel majority's methodology was incorrect. Courts are not to balance the benefits and burdens of a law regulating abortion. Rather, they are to look only at whether such a law imposes a "substantial obstacle" to abortion. Here, that requires the court to address whether *Bellotti* applies to parental notice laws and, if not, whether plaintiffs have provided concrete evidence that the parental notice law will prevent unemancipated minors from having abortions. But because the notice law has never been permitted to go into effect, no such evidence is available, and the law must be upheld against this pre-enforcement challenge.

I. The Court Should Immediately Rehear this Case En Banc

As set forth in more detail in Appellants' Petition for Rehearing En Banc filed contemporaneously with this Statement, the Court should proceed immediately to en banc consideration of this case on remand. This case raises three important issues that merit the full Court's consideration: (1) which *June Medical* opinion controls (an issue already generating conflict among lower courts); (2) whether the *Bellotti* judicial bypass standard applies to parental notice statutes (an issue that has already split the circuits and confounded this Court); and (3) whether this Court's decision in *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), remains good law as to the evidentiary standard for pre-enforcement challenges to abortion laws (an issue that split the original panel). Only the full Court sitting en banc can definitively resolve these issues and give proper guidance to lower courts within this circuit.

II. Chief Justice Roberts's Opinion in *June Medical* Rejects the Balancing Test Previously Used by the Panel and Controls on Remand

A. Chief Justice Roberts squarely rejects the balancing test that the panel majority applied

As noted, the panel majority invalidated the Indiana parental notice law under *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which, in its view, required the Court to "balance" the "burdens a law imposes on abortion access together with the benefits those laws confer." The Chief Justice and four other Justices, however, have now rejected that standard in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).

June Medical involved a challenge to a Louisiana law requiring that abortion providers have admitting privileges at a hospital within 30 miles—a law materially identical (in both design and effect) to the Texas law previously invalidated in *Hellerstedt*. *Id.* at 2112. The Supreme Court invalidated the Louisiana law as well, but without a majority opinion. Instead, two opinions supported the judgment: Justice Breyer's four-justice plurality, *June Medical*, 140 S. Ct. at 2112, and Chief Justice Roberts's solo concurrence in the judgment, *id.* at 2133. The plurality and the Chief Justice both held that the *June Medical* plaintiffs had standing to challenge the Louisiana law on behalf of their patients. *Id.* at 2117–20 (plurality), 2139 n.4 (concurrence). Both reviewed the lower courts' opinions under the undue-burden standard, *id.* at 2120–2131 (plurality), 2135–2140 (concurrence), and concluded that the admitting-privileges requirement creates a "substantial obstacle" for women choosing abortion, *id.* at 2130 (plurality), 2139 (concurrence).

The plurality—echoing the test applied by the panel majority in this case—went on to discuss the law's benefits, which it found to be small in comparison to the law's burdens. *Id.* at 2130–31.

The Chief Justice, in contrast, treated the substantial-obstacle finding as conclusive. 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 (Roberts, C.J., concurring in the judgment). On the contrary, "*Casey* discussed benefits in considering the threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'" *Id.* at 2138. The Chief Justice held that "[s]o long as that showing is made, the only question for a court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Id.* And because the Court in *Hellerstedt* "was applying the undue burden standard of *Casey*," *id.*, "the discussion of benefits" in that case "was not necessary to its holding." *Id.* at 2139 n.3. The Chief Justice considered the plurality's discussion of benefits to be dictum as well, observing that "we are not considering how to analyze an abortion regulation that does not present a substantial obstacle." *Id.* at 2139.

The Chief Justice also gestured to Judge Easterbrook's point that weighing the benefits and burdens of a law is a task for the legislature, not the courts: "Pretending that we could pull [the balancing test] off would require us to act as legislators, not judges." *Id.* at 2136. Chief Justice Roberts explained that "courts applying a balancing test would be asked in essence to weigh the State's interests in 'protecting the potentiality of human life' and the health of the woman, on the one hand, against the

woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other." *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851, 871 (1992)). This "neutral utilitarian calculus" would yield an "unanalyzed exercise of judicial will" because "[t]here is no plausible sense in which anyone . . . could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *Id.*

B. Chief Justice Roberts's opinion represents the controlling common ground in *June Medical*

Though it is a solo concurrence, the Chief Justice's rejection of the very balancing test employed by the panel earlier in this case controls on remand.

Because no opinion commanded a majority, identifying the legal rule of *June Medical* hinges on *Marks v. United States*, 430 U.S. 188 (1977). Under *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). That means identifying the opinion providing the narrowest common ground supporting the judgment. *E.g.*, *Gaylor v. Mnuchin*, 919 F.3d 420, 433 (7th Cir. 2019); *United States v. Gerke Excavating*, 464 F.3d 723, 724 (7th Cir. 2006).

In *June Medical*, both the plurality and the Chief Justice's concurrence applied the "substantial obstacle" standard from *Casey*, while the Chief Justice's opinion, as noted above, rejected the balancing test also employed by the plurality. Identifying

the narrower opinion as between the plurality and the Chief Justice's concurrence depends on parsing their distinct interpretations of the "substantial obstacle" standard. Several considerations show that Chief Justice Roberts's concurrence is the narrower opinion.

1. *First*, the Chief Justice's opinion reflects a narrower common denominator, shared with the plurality, on when the undue-burden standard requires invalidation of state laws. The plurality and the Chief Justice agreed that under that standard a state law should be enjoined if it creates a substantial obstacle to choosing abortion. *June Medical*, 140 S. Ct. at 2120 (plurality), 2135 (concurrence). That logically unites the two opinions around a single rationale. To the extent anything in the plurality opinion supports a balancing approach to abortion regulations in addition to the substantial-obstacle test, it presents a broader rule that the Chief Justice's fifth vote did not endorse. Because the substantial-obstacle test set out in the Chief Justice's opinion provides a narrow common denominator—a test the plurality and concurrence agree on, and a logical subset of any potentially broader test—his opinion is the controlling one. *Gaylor*, 919 F.3d at 433.

Similarly, the Chief Justice's reading of the undue-burden standard is narrower in the sense that it is less radical than the plurality's. The Chief Justice's explication of that standard—indeed, roughly a third of his opinion—was devoted to situating *Hellerstedt* (the putative source of any balancing test) within the broader framework of Supreme Court abortion jurisprudence, particularly the Court's earlier decisions in *Casey* and *Mazurek v. Armstrong*, 520 U.S. 968 (1997). His reasoning

culminated with the observation that the Court "should respect the statement in [*Hellerstedt*] that it was applying the undue burden standard of *Casey*," *June Medical*, 140 S. Ct. at 2138, under which a substantial obstacle is the *sine qua non* of a successful challenge to an abortion law. Insofar as the plurality opinion can be read as authorizing *other* grounds for abortion challenges, it reflects a more ambitious revision of Supreme Court abortion jurisprudence that, lacking support from the Chief Justice, cannot be the law under *Marks*.

2. *Second*, Chief Justice Roberts's opinion is narrower in its practical effects. Several courts applying *Marks* have considered the "narrower" rule to be the one that would lead to invalidation of fewer state laws. *Planned Parenthood of Se. Pennsylvania v. Casey*, 947 F.2d 682, 693–94 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); *Coe v. Melahn*, 958 F.2d 223, 225 (8th Cir. 1992); *see also United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) ("[T]he less sweeping opinion would require the same outcome in a subset of the cases that the more sweeping opinion would."). Here, where the plurality and the Chief Justice share the common ground of applying the undue-burden standard, the narrower opinion is the one that interprets the standard as leaving more state laws undisturbed. In the event of ambiguity, in other words, this Court should resolve the *Marks* question in the State's favor, to save state laws from invalidation.

Several aspects of the Chief Justice's opinion appear to be narrower than the plurality's in that way. The Chief Justice's rule would enjoin only those state laws that create a substantial obstacle for the choice to obtain an abortion, and he expressly rejected a rule invalidating laws based on a weighing of benefits and burdens.

June Medical, 140 S. Ct. at 2135–39. The Chief Justice insists that proof of good-faith compliance efforts on the part of abortion providers are "necessary" to establish an undue burden. *Id.* at 2141. He also calls for a law-by-law analysis of challenged laws' individual effects. *Id.* at 2138 ("The several restrictions [at issue in *Casey*] that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional."). All of those limitations would save at least some state laws from invalidation.

The plurality, it should be noted, does not unambiguously *adopt* a contrary rule that would invalidate state laws without those limitations, *i.e.*, based on lack of proven benefits, without proof of good-faith compliance, or by merging the alleged burdens of different laws. Although the plurality stated that *Hellerstedt* requires a court "to weigh the law's asserted benefits against the burdens it imposes on abortion access," *June Medical*, 140 S. Ct. at 2112 (quotes omitted), that was dictum in light of the plurality's identification of a substantial obstacle. *See id.* at 2139 n.3 (Roberts, C.J., concurring in the judgment) (observing that *Hellerstedt*'s discussion of benefits was *dictum* for that reason), 2139 (noting the "plurality['s] express[] acknowledge[ment] that we are not considering how to analyze an abortion regulation that does not present a substantial obstacle"). Other explanations for the plurality's discussion of medical benefits are possible as well.[1] But to the extent the plurality's

[1] For example, by reaching the laws' burdens after first finding a substantial obstacle, the plurality may have meant to endorse a view that the State is required to prove the benefits of the law *if and only if* the challengers can show that it imposes a substantial burden on a woman's abortion decision.

rule goes beyond substantial obstacles caused by the particular law challenged, it would invalidate more laws than the Chief Justice's—rendering its opinion broader, and therefore not controlling.

3. *Third*, Chief Justice Roberts's opinion shares considerable common ground with the opinions of the four *dissenting* justices. A Supreme Court case's controlling rules include all propositions of law that command a majority of the Court, even majorities that combine justices who disagree on the judgment. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 572 (2012) (combining the dissent and the solo opinion of Chief Justice Roberts in stating that the "Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from regulated activity").[2] This Court has previously derived a Supreme Court rule by combining a concurrence and a dissent. *Gerke Excavating*, 464 F.3d at 725.[3] At least one other circuit has also done so. *See Student Pub. Interest Research Grp. of N.J. v. AT & T Bell Labs.*, 842 F.2d 1436, 1451 (3d Cir. 1988) (deriving holding from a concurrence and dissent).

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[2] *See also Alexander v. Choate*, 469 U.S. 287, 293, nn.8–9 (1985) (discussing the Court's "holding" in *Guardians Association v. Civil Serv. Commission*, 463 U.S. 582 (1983), by combining the votes of the plurality with those of dissenters in that case); *United States v. Jacobsen*, 466 U.S. 109, 117–18 (1984) (deriving the holding of *Walter v. United States*, 447 U.S. 649, 659-60 (1980), by adding the concurrence of two Justices to the dissent of four Justices); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 17 (1983) (stating that "the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the Colorado River test"); *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* 206–13 (2016).

[3] A later panel dismissed that discussion in *Gerke Excavating* as dictum. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014). But in *Gibson*, the Supreme Court opinions under analysis did not overlap enough to make a *Marks* analysis possible. *Id.* at 620–21. In *June Medical*, the Chief Justice and the dissenters share common ground.

As Justice Kavanaugh observed, five members of the *June Medical* Court (the Chief Justice and the four dissenters) expressly rejected interpreting *Hellerstedt* as creating a balancing test. 140 S. Ct. at 2182 (Kavanaugh, J., dissenting). The same five also agreed that abortion providers cannot prove that laws create a substantial obstacle without first proving that they themselves made a good-faith effort to comply. *Id.*at 2141 (Roberts, C.J., concurring), 2160–65 (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., dissenting). These commonalities between the Chief Justice and the dissenting justices establish a rule that binds this Court—or at least illustrate how those justices will decided future cases, which is tantamount to the same thing.

4. *Fourth*, the Supreme Court itself appears to view Chief Justice Roberts's substantial-obstacle test as controlling. When *June Medical* was decided, three petitions for certiorari arising from this Court on Indiana abortion laws were pending, including this case. After *June Medical*, the Court granted, vacated, and remanded two petitions in light of *June Medical* (including the petition arising from this case) and denied the other. *See Box v. Planned Parenthood of Ind. & Ky.*, No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020) (granting, vacating, and remanding); *Box v. Planned Parenthood of Ind. & Ky.*, No. 18-1019, 2020 WL 3578669 (U.S. July 2, 2020) (granting, vacating, and remanding); *Hill v. Whole Woman's Health*, No. 19-743, 2020 WL 3578684, at *1 (U.S. July 2, 2020) (denying certiorari). The Court's treatment of those petitions is revealing.

Critically, the State petitioned for certiorari from the two vacated decisions on the grounds that they misapplied the undue-burden standard by employing a balancing test rather than on a more traditional finding of a substantial obstacle.[4] Meanwhile, the State's cert petition in *Whole Woman's Health All. v. Hill*, 937 F.3d 864 (7th Cir. 2019), presented questions involving Plaintiffs' standing and the propriety of this Court's remedy—*not* questions about the propriety of a balancing test.

The Supreme Court's vacatur of both PPINK decisions suggests that a majority of the Supreme Court considered this Court's undue burden analysis inconsistent with the proper test—otherwise the Court would have simply denied certiorari. And its denial of certiorari in *Whole Woman's Health* confirms that the Court was not merely acting reflexively to issue GVR orders in all abortion cases pending at the cert stage when *June Medical* came down.

The error justifying vacatur and remand in the two PPINK cases is not difficult to identify: Because they enjoined state laws as conferring insufficiently weighty benefits, they bypassed the substantial-obstacle requirement that the Chief Justice considered indispensable in *June Medical*. The likeliest explanation for the Court's actions, in other words, is that the Chief Justice's narrow focus on the substantial-obstacle requirement controls.

[4]As in this case, in *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Ind. State Dep't of Health*, this Court similarly weighed the benefits and burdens of Indiana's ultrasound/waiting period law. 896 F.3d 809, 826–32 (7th Cir. 2018), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky.*, No. 18-1019, 2020 WL 3578669 (U.S. July 2, 2020).

5. *Fifth*, at least one circuit has already held that Chief Justice Roberts's concurrence is the controlling opinion. In *Hopkins v. Jegley*, No. 17-2879, 2020 WL 4557687 (8th Cir. August 7, 2020), the court vacated preliminary injunctions against four Arkansas abortion laws as it held that "Chief Justice Roberts's vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling." *Id.* at *2 (citing *Marks*). The court also observed that "[i]n light of Chief Justice Roberts's separate opinion, 'five Members of the Court reject[ed] the Whole Woman's Health cost-benefit standard.'" *Id.* (quoting *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting)). *See also Whole Woman's Health v. Paxton*, No. 17-51060 (5th Cir. Aug. 21, 2020) (Willett, J., dissenting) (explaining how the Chief Justice's *June Medical* opinion is controlling under *Marks* and citing the Supreme Court's remand in this case as an indication that the Court understood *June Medical* to supply a new controlling rule). This Court should do the same.[5]

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[5] *But see Whole Woman's Health v. Paxton*, No. 17-51060 (5th Cir. Aug. 21, 2020) (holding that neither the plurality opinion nor Chief Justice Roberts's concurrence controls because the two opinions have no "common denominator"); *American College of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, No. TDC-20-1320, 2020 WL 3960625, at *16 (D. Md. July 13, 2020) (applying the plurality's balancing test). Two other recent district court decisions apply the traditional *Casey* undue burden test to invalidate pre-viability abortion bans, but do not directly address whether the plurality or the Chief Justice's opinion in *June Medical* controls. *See SisterSong Women of Color Reproductive Justice Collective v. Kemp*, No. 1:19-cv-02973, 2020 WL 3958227 (N.D. Ga. July 13, 2020); *Memphis Ctr. for Reproductive Health v. Slatery*, No. 3:20-cv-00501, 2020 WL 4274198 (M.D. Tenn. July 24, 2020).

Chief Justice Roberts's controlling opinion in *June Medical* clarifies that the *Casey* "substantial obstacle" test, not free-form judicial balancing of costs and benefits, is the proper standard for evaluating state abortion laws. This Court should apply that standard to Indiana's parental notice law.

III. The Parental Notice Law Passes Muster Under Supreme Court Precedents and the Substantial Obstacle Test

Because the balancing test employed by the panel majority no longer applies, the Court must return to the question whether Indiana's parental notice law imposes a "substantial obstacle" on the right to abortion for unemancipated minors. First, that question requires the Court to answer whether the *Bellotti* judicial bypass test for parental consent statutes applies to parental notice statutes. If it does not, plaintiffs can demonstrate likely success on the merits only by providing concrete evidence that the law, in its operational impact, prevents unemancipated minors from choosing abortion—more precisely, whether it prevents that choice by minors who would prefer not to notify their parents but cannot obtain judicial bypass from the notice requirement. Because the parental notice law has never gone into effect, however, no such evidence is available.

A. Supreme Court doctrine leaves open whether *Bellotti* applies to the parental notice law; this Court should rule it does not

It remains an open question, unresolved by Supreme Court or Seventh Circuit precedents, whether the *Bellotti* judicial bypass standard for parental consent laws also applies to parental notification statutes. *See Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (noting that the Court has declined to decide whether a parental notification statute must include a judicial bypass provision); *Ohio v. Akron Ctr. for Reprod.*

Health (*Akron II*), 497 U.S. 502, 510 (1990) (noting that the Court has not decided whether parental notification statutes must contain judicial bypass procedures); *H.L. v. Matheson*, 450 U.S. 398, 405–06 (1981) (declining to reach the issue of whether parental notification statute was constitutional as applied to a mature minor); *Zbaraz v. Madigan* (*Zbaraz II*), 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 Court should settle the issue by distinguishing parental notice from parental consent and ruling that *Bellotti* is inapplicable to parental notice laws.

1. The applicability of *Bellotti* is an open question

In *Bellotti v. Baird*, the Court addressed the constitutionality of a Massachusetts statute that required minors to obtain parental consent before having an abortion. 443 U.S. 622, 625–26 (1979). The Court articulated a four-part test to address this question. In order to pass constitutional muster, a parental consent statute must provide a judicial bypass procedure that (1) allows the minor to have an abortion without parental consent if she is sufficiently mature to make the decision on her own; (2) allows the minor to have an abortion without parental consent if it is in her best interests; (3) ensures the anonymity of the minor throughout the judicial proceeding; and (4) may be conducted expeditiously. *Id.* at 643–44. Applying this standard, the Court held that the Massachusetts statute was unconstitutional because it did not allow for judicial bypass for a minor who was sufficiently mature to make the decision on her own. *Id.* at 651.

In *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983), this Court applied *Bellotti* to a parental notice statute, citing a footnote in *City of Akron v. Akron Center for Reproductive Health, Inc.* (*Akron I*), 462 U.S. 416, 441 n.31 (1983), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *See Pearson*, 716 F.2d at 1132 & n.2. This Court reaffirmed its *Pearson* holding in *Zbaraz v. Hartigan* (*Zbaraz I*), 763 F.2d 1532, 1539 (7th Cir. 1985).

But after *Pearson* was decided, the Supreme Court in *Akron II* dispelled this interpretation of *Bellotti* and *Akron I*. First, the Court observed that "although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statues must contain such procedures." *Akron II*, 497 U.S. at 510. The Court then specifically left open the question "whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures." *Id.* Again in *Lambert* the Court observed that it had "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional." 520 U.S. at 295.

Responding to these cases, this Court in *Zbaraz II* concluded that its holding in *Pearson* extending *Bellotti* to parental notice requirements was premature. 572 F.3d at 380. It held that "subsequent Supreme Court case law conflicts with the conclusions in *Zbaraz I* and *Pearson*, both of which rest on language in opinions addressed only to the constitutional requirements of requiring parental *consent* (in contrast to merely notification)." *Id.* (emphasis in original). Following the Supreme Court's example, this Court also declined to decide whether the *Bellotti* judicial by-

pass standard applies to parental notification statutes. *Id.* It observed that "our holding in *Zbaraz I* (and *Pearson*) appears to be in conflict with *Akron II* and *Lambert*, and would merit revisiting if ever we are squarely presented with this question in the future[.]" *Id.* at 380 n.5.

2. This Court should hold that *Bellotti* does not apply

This case now squarely presents the question whether the Fourteenth Amendment requires exempting from abortion-parental-notice statutes minors found by a court to be sufficiently mature to make the abortion decision. Extending *Bellotti* to the parental notice context, however, would be ill-suited in light of the governmental interests served by such laws, which are far broader than the interests served by parental consent statutes. In short, 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. Such ignorance is an obstacle to parental support and guidance, from which even a mature, but unemancipated, 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 nurture 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). Supreme Court 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). "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). For this reason, 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.'") (citing *Hodgson v. Minnesota*, 497 U.S. 417, 444–445 (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[]").

The Supreme Court's decision in *Bellotti* and its predecessor, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), depart from this long-accepted principle as to the minor's decision to have an abortion, where 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." *Danforth*, 428 U.S. at 74. 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 girl's right must prevail.

With regard to parental notice statutes, however, the two interests are not diametrically opposed in the same way, and 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. The concern in *Danforth* about parents having an absolute veto power over the minor's abortion decision is not present because the Indiana statute requires notice *after* the decision has been made and approved by a court, and merely "before" the abortion occurs, which does not require 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 lim-

ited regard), plainly her parents still have a profound interest in her life going forward. Again, these are *unemancipated* children we are talking about. As they love her, care for her, and look out for her best interests, parents 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*.

The panel expressed concerns about application of the statute to mature minors suffering from parental abuse. *See Adams*, 937 F.3d at 985–88. 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. *Adams*, 937 F.3d at 995–96 (Kanne, J., dissenting). The "best interests of the minor" standard would also naturally entail an inquiry into whether the parents might attempt to obstruct the minor from following through with her decision. Hence, the

district court'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 is in a position to support the rights and responsibilities of the parents.

B. Plaintiffs have not otherwise established that the parental notice law imposes a substantial obstacle to abortion

If the *Bellotti* standard does not apply, plaintiffs can prevail only with concrete evidence that the statute in fact imposes a "substantial obstacle" to abortion. Here, however, "Planned Parenthood has not introduced evidence that establishes that requiring mature minors to notify their parents that they intend to have an abortion (in a scenario where the judge has found that avoiding notification is not in their best interests) constitutes an undue burden." *Id.* at 992 (Kanne, J., dissenting). Under the correct legal standard, that should preclude finding an undue burden on remand.

As Judge Easterbrook observed, this case comes to the Court on a pre-enforcement challenge, "which makes it easy for the plaintiffs . . . to predict the worst and demand that an injunction issue before the disaster comes to pass." *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 998 (7th Cir. 2019) (Easterbrook, J., concurring in denial). For this reason, "[u]nless a baleful outcome is either highly likely or ruinous even if less likely, a federal court should allow a state law (on the subject of abortion or anything else) to go into force; otherwise the prediction cannot be evaluated properly." *Id.*; *see also A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) ("[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.").

Planned Parenthood has not met that burden here, and because the parental notice law has been enjoined for the entire three-year period since it was enacted, Planned Parenthood's predictions concerning the effects of the law "cannot be tested," which should be fatal to a preliminary injunction. *Box*, 949 F.3d at 998 (Easterbrook, J., concurring in denial).

Under this Court's precedents, the pre-enforcement constitutionality of a state statute cannot depend on a district judge's assessment of which party's predictions about its effects will most likely turn out to be true; rather, "any uncertainty . . . must be resolved in Indiana's favor." *A Woman's Choice*, 305 F.3d at 687. In the earlier panel decision, however, Judge Hamilton dismissed that statement from *A Woman's Choice* as mere dicta already abrogated by *Hellerstedt*. *Planned Parenthood of Ind. & Ky. v. Adams*, 937 F.3d 973, 979 (2019). In dissent, Judge Kanne stood up for *A Woman's Choice,* stating that "the majority's opinion is inconsistent with our precedent—which remains good law despite the majority's suggestion to the contrary." *Id.* at 992 (Kanne, J., dissenting) (citing *A Woman's Choice* for the proposition that "[w]e should not invalidate a law passed by a democratically-elected state legislature 'while the effects of the law (and reasons for those effects) are open to debate'"). *Id.* And Judge Easterbrook cited *A Woman's Choice* with approval in his concurrence to denial of rehearing en banc. *Box*, 949 F.3d at 998.

The "open to debate" language in *A Woman's Choice* was not mere dicta, as the panel decision held. *Adams*, 937 F.3d at 979. The Court in *A Woman's Choice* 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." *Adams*, 937 F.3d at 997 (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.*

Furthermore, while the panel majority in this case deemed *A Woman's Choice* incompatible with *Karlin v. Faust*, 188 F.3d 446 (7th Cir. 1999), this Court in *A Woman's Choice* explained that *Karlin* did not resolve how and when factual arguments about the effects of an abortion statute should be evaluated. 305 F.3d at 687–88. *A Woman's Choice* then resolved that question. And the result in *A Woman's Choice* was consistent with *Karlin*, which *upheld* Wisconsin's informed consent statute. 188 F.3d at 485–86.

Meanwhile, *Van Hollen* and *Hellerstedt*, also cited by the panel majority, featured unequivocal evidence demonstrating that new admitting privileges requirements would leave women without abortion providers. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 788–89 (7th Cir. 2013); *see also June Medical Services v. Russo*, 140 S. Ct. 2103, 2140 (Roberts, C.J., concurring in the judgment). 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 Adams*, 937 F.3d at 997 (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.").

Similarly, in *June Medical*, Chief Justice Roberts focused on the compliance efforts of the abortion doctors and the record, which was "nearly identical" to that of *Hellerstedt*. 140 S. Ct. at 2139. He explained that the district court's finding that the doctors had attempted in good faith to comply with the law "was necessary to ensure that the physicians' inability to obtain admitting privileges was attributable to the new law rather than a halfhearted attempt to obtain privileges." *Id.* at 2141. The Court's GVR in this case shows that the record here is insufficient to show an undue burden under that standard.

Furthermore, while the Supreme Court in *Casey* cited "a bevy of social science evidence" against the spousal notification requirement, *June Medical*, 140 S. Ct. at 2137 (Roberts, C.J., concurring in the judgment), the record here contains nothing comparable, and in any event the Supreme Court's invalidation of that requirement was fundamentally based not on social science data so much as the fundamental proposition that "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992). That distinction is also precisely why the panel decision in this case was incorrect to rely on *Casey*'s invalidation of spousal notification requirements. *Adams*, 937 F.3d at 982. For while "[a] husband has no enforceable right to require a wife to advise him before she exercises her personal choices," *Casey,* 505 U.S. at 898, parents generally do have, and must exercise, legally enforceable rights to control the

choices of their minor children. Indeed, the Court in *Casey* upheld the 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 as it overturned the spousal notification requirement because "[w]e cannot adopt a parallel assumption about adult women." *Id.* at 895.

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In sum, because the parental notice law has never been permitted to go into effect, Planned Parenthood cannot provide concrete evidence that it imposes a substantial obstacle to abortion. The Court should therefore vacate the preliminary injunction.

CONCLUSION

WHEREFORE, Defendants file this Circuit Rule 54 Statement of Position and request that this Court reverse its decision in this case.

Respectfully submitted,

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Dated: August 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit 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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