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 EN BANC

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

The State respectfully petitions for rehearing en banc pursuant to Fed. R. App. P. 35(b). A panel of this Court previously upheld a preliminary injunction against the enforcement of Indiana's parental notice law. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019). Judge Hamilton, joined by Judge Rovner, authored the majority opinion, but Judge Kanne dissented. The State's petition for rehearing en banc fell a single vote short: Judges Flaum, Kanne, Barrett, Brennan, and Scudder voted to grant the petition, but Judges Wood, Rovner, Hamilton, St. Eve, Easterbrook, and Sykes voted to deny it. *See Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997 (2019).

Judge Easterbrook, joined by Judge Sykes, concurred, explaining that only the Supreme Court could clarify application of the undue burden test to this case. The State petitioned for a writ of certiorari, which the Supreme Court granted, vacating the judgment of this Court and remanding the case for further consideration in light of *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). *Box v. Planned Parenthood of Ind. & Ky.*, No. 19-816, 2020 WL 3578672 (July 2, 2020).

Rehearing en banc is warranted because this case "involves one or more questions of exceptional importance." *See* Fed. R. App. P. 35(b)(1)(A). As framed by Judge Kanne, the case asks: "[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?" *Adams*, 937 F.3d at 991 (Kanne, J.,

dissenting). That question demands full Court attention especially because answering it requires resolution of multiple important subsidiary questions:

- First, under the terms of the mandate, this Court must apply the Supreme Court's decision in *June Medical*, which did not generate a majority opinion. Nationwide, courts are already disagreeing over which *June Medical* opinion controls. The answer to that question will determine the precise standard for reviewing the parental notice law; equally important, it will impact challenges to other Indiana abortion statutes pending in district court. Given the broad significance of that basic question, the full Seventh Circuit should decide it straightaway.

- Second, the Court must decide whether the judicial bypass standard applicable to abortion parental *consent* statutes announced in *Bellotti v. Baird*, 443 U.S. 622 (1979), applies to abortion parental *notice* statutes. That question, left open by the Supreme Court, has already divided the circuits, and after previous panels of this Court resolved it, the most recent panel to consider the issue declared it open. The issue is plainly important and sufficiently contentious to warrant en banc consideration.

- Third, this case tests the continuing validity of *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), which said that district courts may not facially enjoin abortion laws before they go into effect where the impact of the law is open to doubt. Judge Hamilton's earlier opinion for the panel majority deemed that declaration to be nonbinding, both as dicta and as undermined by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *Adams*, 937 F.3d at

979–80. In dissent, Judge Kanne said that holding from *A Woman's Choice* "remains good law." *Id.* at 992 (Kanne, J., dissenting). The full Court needs to address the vitality of *A Woman's Choice*, and more generally the proper standard for pre-enforcement challenges to abortion regulations.

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 where the minor is sufficiently mature to make the decision herself or where the court determines that the abortion is in the child's best interests. Ind. Code § 35-1-58.2-2.5(a) (1984).

In 2017, the General Assembly reinstated the notice requirement alongside the consent requirement. *See* Ind. Code § 16-34-2-4(a)–(e). Under the new statute, an unemancipated minor must notify a parent, legal guardian, or custodian before an abortion occurs unless the court deems notice contrary to 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 on the ability of unemancipated minors to obtain abortions, the district court issued the preliminary injunction. The court relied chiefly on declarations from lawyers and a child psychologist predicting that, with the notice law in place, pregnant unemancipated minors would be "deterred from the [judicial bypass] process entirely." ECF 26 at 31.

In the district court and on appeal, the State argued that this Court's holding in *A Woman's Choice—East Side Women's Clinic v. Newman,* 305 F.3d 684 (7th Cir. 2002), 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. The panel majority rejected that standard, deeming *A Woman's Choice* unsound when decided and supplanted entirely by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *See Planned Parenthood of Ind. & Ky. v. Adams*, 937 F.3d 973, 979 (7th Cir. 2019) ("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 also 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 985–86. And it further determined that the burdens of the law outweigh its benefits: "[I]t is not enough," the panel held, for the State to rely on common-sense parental interests in (and authority over) unemancipated minors, and therefore the "practical effect [of the law] is an undue burden because it weighs more heavily in the balance than the State's interests." *Id.* at 983–84.

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." *Id.* at 993 (Kanne, J., dissenting). He said 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 995. Planned Parenthood 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.* Finally, he said, the State's interests in safeguarding parental rights and interests in rearing unemancipated children fully justify the law—even for mature minors.

The State petitioned for en banc rehearing, but, as noted, this Court denied the petition 6 to 5. Critically, 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." *Box*, 949 F.3d at 998. Otherwise, "a federal court should allow a state law (on the subject of abortion or anything else) to go into force" or else "the prediction" of negative outcomes "cannot be evaluated properly." *Id.*

As to the undue-burden standard more generally, Judge Easterbrook understood the standard to require, under *Hellerstedt*, "weighing costs against benefits." *Id.* at 999. With *that* standard, he observed, "a grant of rehearing en banc in this case would be unproductive" because "weighing costs against benefits" is an analysis "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.* For this reason, "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." *Id.*

Following that suggestion, the State petitioned for certiorari, urging the Court to clarify the proper application of the undue-burden standard. While holding this case, the Supreme Court did just that in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). Chief Justice Roberts's concurrence—which, as discussed below, represents the controlling narrowest common ground supporting the judgment—clarified that when applying the undue-burden standard, courts are not to balance the benefits and burdens of a challenged abortion regulation, but must instead ask only whether the regulation is rational and whether it imposes a "substantial obstacle" to the abortion decision. *Id.* at 2135–39 (Roberts, C.J., concurring in the judgment).

The Court then granted the State's cert petition in this case, vacated the judgment of this Court, and remanded the case for further consideration. The State has separately submitted its Statement of Position under Circuit Rule 54 explaining in detail why Chief Justice Roberts's opinion controls and how it applies to this case.

REASONS FOR GRANTING THE PETITION

Five judges of this Court previously voted to grant rehearing en banc in this case, with two more voting to deny only because they could not discern a test for abortion rights susceptible to objective judicial administration. The Chief Justice's controlling opinion in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), resolves that objection by eliminating judicial balancing and restoring more judicially manageable standards. So, this case now presents an en banc-worthy question that the Court should feel confident addressing.

The case also presents subsidiary questions warranting en banc consideration: Which opinion from *June Medical* controls, and what does that mean for the undue burden standard, including the roles of balancing interests and discerning the cumulative effects of multiple abortion regulations? Do the bypass requirements for abortion parental consent statutes announced in *Bellotti* apply to parental notice statutes? Is *A Woman's Choice* still controlling circuit precedent governing the standard for pre-enforcement facial challenges to abortion statutes, and if not, what evidence is necessary to justify a facial preliminary injunction against an abortion regulation?

This is a critical case that presents an unusually rich opportunity for the Court to announce circuit precedent governing abortion doctrine.

I. The Full Court Should Decide Which *June Medical* Opinion Controls

The meaning of *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), is sufficiently disputed and fundamental that the full Court should consider it. *June Med-*

ical concerned a Louisiana law that required abortion doctors to have admitting privileges at a hospital within thirty miles of the abortion clinic. *Id.* at 2112. The Court held that the law imposed an undue burden on a woman's decision to have an abortion, but no opinion commanded a majority. *Id.* at 2112–13 (plurality), 2134 (Roberts, C.J., concurring in the judgment). The plurality opinion balanced the benefits of the law against its burdens, citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *June Medical*, 140 S. Ct. at 2120 (plurality). But Chief Justice Roberts concluded that, far from creating a balancing test, *Hellerstedt* simply applied the undue-burden framework of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), under which abortion laws are permissible unless they pose a "substantial obstacle" to women seeking abortions. *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment). He explained that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts," *id.* at 2136, and "[w]e should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*," *id.* at 2138.

This Court must eventually determine which opinion is controlling. A prompt en banc decision would benefit all concerned.

Plainly, the answer to the question matters for this case. Both the panel majority and Judge Easterbrook thought that a freewheeling balancing test applied under *Hellerstedt*. But if it does not (per the Chief Justice), the case will turn on very different legal tests (see Parts II and III, infra). And even if the balancing test still applies, the Supreme Court believes the issue demands reconsideration. *See Box v.*

Planned Parenthood of Ind. & Ky., No. 19-816, 2020 WL 3578672 (July 2, 2020). A panel of this Court has already applied the balancing test to this case, so now the full Court should tackle the issue, as five judges of this Court have already voted to do.

The answer to the meaning of *June Medical* matters for other cases challenging Indiana abortion laws pending in the Southern District of Indiana. *See, e.g.*, *Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-01904 (S.D. Ind.) (challenging *26* abortion statutes and regulations); *Bernard v. Indiv. Members of the Ind. Med. Licensing Bd.*, No. 1:19-cv-01660 (S.D. Ind.). The full Court declare how to apply the undue burden test after *June Medical.*

The circuits have already split over which *June Medical* opinion controls. The Eighth Circuit applied Chief Justice Roberts's opinion. *See Hopkins v. Jegley*, No. 17-2879, 2020 WL 4557687, at *2 (8th Cir. Aug. 7, 2020). A split panel from the Fifth Circuit disagreed; the majority said that no opinion controls for lack of a "common denominator," and Judge Willett sided with the Eighth Circuit—and cited the remand in *this* case to show the Supreme Court thought that *June Medical* means something. *Whole Woman's Health v. Paxton*, No. 17-51060 at 4, 8 (5th Cir. Aug. 21, 2020). Meanwhile, a federal district court has applied the plurality's balancing test. *See 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).

The early onset of national disagreement over this issue further justifies en banc consideration.

II. The Full Court Should Decide if *Bellotti* Applies to Notice Laws

This case also presents the open question whether the requirements for parental *consent* laws announced in *Bellotti v. Baird*, 443 U.S. 622 (1979), apply to parental *notification* requirements. In *Bellotti*, the Court said that, to be valid, an abortion 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. 443 U.S. at 643–44.

This Court has not finally decided whether *Bellotti*'s judicial bypass standard applies to parental notification statutes. At first, this Court said it did. *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *Zbaraz v. Hartigan* (*Zbaraz I*), 763 F.2d 1532, 1539 (7th Cir. 1985). But then, in *Ohio v. Akron Center for Reproductive Health*, the Supreme Court said that "although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statues must contain such procedures." 497 U.S. 502, 510 (1990). And in *Zbaraz v. Madigan* (*Zbaraz II*), 572 F.3d 370, 380 (2009), this Court observed 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)." The issue is open for review because "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.'" *Id.*

Other circuits are in conflict over the issue. While the Eighth Circuit extended the *Bellotti* standard to parental notice statutes in *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995), the Fourth Circuit came to the opposite conclusion in *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998) ("[T]he Constitution does not require for 'mere notice' statutes the full panoply of safeguards required by the Court in *Bellotti II* for parental consent statutes.").

The panel in this case averted the *Bellotti* question only because it thought the *Hellerstedt* balancing test applied. With balancing out of the way, this issue is now ripe for decision. And given how panels of this Court have already wavered on the issue, and the circuit conflict that already exists, this is an appropriate issue for en banc consideration.

III. The Full Court Should Decide the Standards for Pre-enforcement Challenges to Abortion Regulations, Including Whether *A Woman's Choice* Remains Valid Circuit Precedent

Assuming that *Bellotti* does not require exceptions to parental *notice* statutes for mature minors the way it does for parental *consent* statutes, this Court will also need to address whether Planned Parenthood has otherwise adequately proven that the parental notice law will likely impose a "substantial obstacle" to abortion. That question, in turn, requires the Court to confront the standard for pre-enforcement

facial challenges to abortion regulations—a standard that the panel majority in this case put in flux, and which requires additional consideration in light of *June Medical*.

In *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002), this Court held that, under *Casey*, "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." The panel majority here, however, rejected *A Woman's Choice*, questioning both its initial meaning and validity in light of *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). *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 979 (7th Cir. 2019). It also suggested that *A Woman's Choice* did not survive *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *Adams*, 937 F.3d at 979–80.

Judge Kanne disagreed, contending that "the entire course of litigation in *A Woman's Choice* involved pre-enforcement speculation about the statute's effects. That problem is also present here." *See Adams*, 937 F.3d at 997 (Kanne, J., dissenting)). Further, neither subsequent cases of this Court or the Supreme Court had undermined the pre-enforcement challenge standard of *A Woman's Choice*. *Id.* at 992; *see also Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 949 F.3d 997, 998 (7th Cir. 2019) (Easterbrook, J., concurring in denial) ("Unless 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.").

The conflict between the split panel decision here and the holding and reasoning of *A Woman's Choice* amply justifies en banc review so that the full Court may set forth the standard applicable in pre-enforcement challenges to abortion laws. Whether a state can expect its abortion laws to be tested based on *actual* operational impact rather than speculation is a critical question requiring en banc attention.

June Medical likewise supports en banc consideration of the question. In his concurrence to denial, Judge Easterbrook expressed hope that "[p]erhaps 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." *Box*, 949 F.3d at 998 (Easterbrook, J., concurring in denial). And indeed, in his *June Medical* concurrence, Chief Justice Roberts clarified that a challenger to an abortion regulation must provide concrete evidence that the regulation will impose a substantial obstacle. With "no evidence" that the challenged law "would amount in practical terms to a substantial obstacle to a woman seeking an abortion," a court must "conclude that it is not an undue burden." *Id.* at 2137 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992)). The Chief Justice also stressed courts should require abortion providers to make "good-faith" efforts to comply with new abortion laws before enjoining such laws. *See id.* at 2141.

Here, the district court did not permit the law to go into effect, but enjoined it based only on the speculations of lawyers and psychologists about what *might* happen. That raises the exact problem anticipated by *A Woman's Choice* and Chief Justice Roberts. As Judge Easterbrook observed, "[t]alk is cheap, which makes it easy for the plaintiffs in a pre-enforcement suit to predict the worst and demand that an injunction issue before the disaster comes to pass." *Box*, 949 F.3d at 998. Such "cheap" speculation surely cannot prove a likely "substantial obstacle" to abortion, particularly because an injunction means the speculation "cannot be evaluated properly." *Id.*

Past Indiana abortion litigation has confirmed the need to determine a law's actual impact before enjoining it. Abortion providers previously predicted they could not adequately provide access to informed-consent counseling "in the presence" of pregnant women 18 hours before an abortion, *see A Woman's Choice*, 305 F.3d at 687, but adapted once the law went into effect. Dep. of Betty Cockrum, Appellants' App. 78–79, ECF No. 14, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 17-1883 (7th Cir.).

And more recently, Planned Parenthood predicted it could not handle providing ultrasounds to women 18 hours before an abortion, but now, even while that law has been enjoined, it has added an ultrasound machine in Fort Wayne, which it concedes is sufficient to justify dismissal of that lawsuit. *See* Stipulation of the Parties, ECF No. 84, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-01807 (S.D. Ind.) (citing "Plaintiff's addition of a new ultrasound machine at a new clinic in Fort Wayne" as reason to dismiss the case and vacate

the injunction); Order, ECF No. 85, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-01807 (S.D. Ind.) (lifting the injunction and dismissing the case); Joint Circuit Rule 54 Statement, ECF No. 76-1, *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, No. 17-1833 (7th Cir.) (informing this Court of the district court's dismissal).

The point is that, except perhaps in extreme cases, one cannot know the impact of an abortion law until it goes into effect and all concerned make good-faith compliance efforts. Only then can courts apply the "substantial obstacle" standard equitably. But given that the panel has already disagreed internally, with the majority voting to depart from this Court's precedents, en banc consideration is necessary to settle the matter.

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 3,891 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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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 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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