No. _____

IN THE
Supreme Court of the United States

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

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

INTRODUCTION AND STATEMENT OF THE CASE

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

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

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

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

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

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

I. Indiana's Parental-Notice Law

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

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

II. Federal Court Litigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"[h]ow much burden is 'undue' is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)." *Id.* at 159a. For this reason, "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." *Id.*

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: March 29, 2021

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2428

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC.,
Plaintiff-Appellee,

v.

KRISTINA BOX, Commissioner,
Indiana State Department of Health, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:17-cv-01636 – **Sarah Evans Barker**, *Judge.*

ON REMAND FROM THE SUPREME COURT OF
THE UNITED STATES
DECIDED MARCH 12, 2021

Before KANNE, ROVNER, and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* This appeal returns to us on remand from the Supreme Court of the United States. In 2019, we affirmed the district court's grant of a preliminary injunction against

enforcement of a new Indiana statutory restriction on minors' access to abortions. See *Planned Parenthood of Indiana & Kentucky, Inc. v. Adams*, 258 F. Supp. 3d 929 (S.D. Ind. 2017), *aff'd*, 937 F.3d 973 (7th Cir. 2019), *reh'g denied*, 949 F.3d 997 (7th Cir. 2019). The State defendants petitioned for a writ of certiorari. The Supreme Court granted the petition, vacated our decision, and remanded for further consideration in light of *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), which struck down a Louisiana law regulating abortion providers, but without a single majority opinion.

We apply the predominant and most sound approach to the "narrowest ground" rule in *Marks v. United States*, 430 U.S. 188 (1977), for assessing the precedential force of Supreme Court decisions issued without a majority opinion. The opinions in *June Medical* show that constitutional standards for state regulations affecting a woman's right to choose to terminate a pregnancy are not stable, but they have not been changed, at least not yet, in a way that would change the outcome here.

The Chief Justice's concurring opinion in *June Medical* offered the narrowest basis for the judgment in that case, giving stare decisis effect to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), on the essentially identical facts in *June Medical*. The *Marks* rule does not, however, turn everything the concurrence said—including its stated reasons for disagreeing with portions of the plurality opinion—into binding precedent that effectively overruled *Whole Woman's Health*. That is not how *Marks* works. It

does not allow dicta in a non-majority opinion to overrule an otherwise binding precedent. We applied those binding standards from *Whole Woman's Health* in our earlier decision, and that decision has not been overruled by a majority decision of the Supreme Court. We therefore again affirm the district court's preliminary injunction barring enforcement of the challenged law pending full review in the district court.

I. *Factual and Procedural Background*

Given the lengthy opinions already issued in this case, we summarize the issues leading up to this point. Indiana's Senate Enrolled Act 404, enacted in 2017, included amendments to Indiana's judicial-bypass process. That process, required by *Bellotti v. Baird*, 443 U.S. 622 (1979), creates a narrow legal path for an unemancipated minor to obtain an abortion without parental consent. The minor must first find her way to a state trial court. She must then obtain a court order finding either that the abortion would be in her best interests or that she is sufficiently mature to make her own decision. Ind. Code § 16-34-2-4(e). Senate Enrolled Act 404 amended the process in several ways, some of which the district court preliminarily enjoined. Only one amendment is at issue in this appeal: a new requirement that a minor's parents be notified that she is seeking an abortion through the bypass procedure—unless the judge finds that such parental notice, as distinct from requiring parental consent, is not in the minor's best interests. Ind. Code § 16-34-2-4(d). Maturity does not affect the new notice requirement.

To support its motion for preliminary injunction, plaintiff offered evidence on the likely effects of the new notice requirement. The evidence took the form of affidavits from seven witnesses familiar with the actual workings of the judicial bypass process and the situations of and stresses upon minors seeking abortions or advice on abortions. The State defendants chose not to offer evidence at that stage of the case. They also did not challenge the reliability or credibility of plaintiff's evidence.

The district court issued detailed findings of fact and conclusions of law finding that the new notice requirement was likely to impose an undue burden on the right to obtain an abortion for a significant fraction of minors for whom the requirement would be relevant. 258 F. Supp. 3d 929, 939–40. We affirmed, emphasizing the lopsided evidence showing both the likely burden and the absence of appreciable benefit from the new notice requirement. 937 F.3d at 989–90. We relied heavily on *Whole Woman's Health*, guided by its application of the "undue burden" standard adopted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). We also relied on *Whole Woman's Health*'s approval of a pre-enforcement injunction against challenged laws likely to impose an undue burden. 937 F.3d at 979−80.

In *Whole Woman's Health*, the Supreme Court affirmed a district court decision striking down a so-called admitting privileges requirement. The challenged Texas law required a physician who performed an abortion to have admitting privileges at a hospital

within thirty miles of the abortion site. The Supreme Court based its decision on detailed factual findings showing both the burdens imposed by that requirement and the lack of accompanying benefits. 136 S. Ct. at 2310–14.

In *June Medical* in 2020, the Court held unconstitutional a Louisiana admitting-privileges law that tracked nearly word-for-word the Texas law struck down in *Whole Woman's Health*. A plurality of four Justices examined the detailed evidence and findings on the likely burdens and benefits of the Louisiana admitting privileges law, and, following the reasoning and holding of *Whole Woman's Health*, the plurality voted to strike down the new law. 140 S. Ct. at 2122–32 (plurality opinion of Breyer, J.). Four Justices dissented in four opinions.

Chief Justice Roberts also voted to strike down the Louisiana law, concurring in the judgment in a separate opinion that is the focus here on remand. He had dissented in *Whole Woman's Health*. He wrote that he still disagreed with that decision, but he explained that principles of stare decisis called for the Court to adhere to that earlier result on the essentially identical facts. 140 S. Ct. at 2134, 2139 (Roberts, C.J., concurring in judgment). He then explained that he believed *Whole Woman's Health* had erred by balancing the challenged law's benefits against its burdens in evaluating its constitutionality. *Id.* at 2135–36. Both the plurality and the Chief Justice agreed, however, that enforcement of the Louisiana law was properly enjoined before it took effect.

Shortly after issuing *June Medical*, the Court issued its order in this case granting the State defendants' petition for a writ of certiorari, vacating our decision, and remanding for further consideration in light of *June Medical*. See *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 141 S. Ct. 187, 188 (2020). Such a "GVR" order calls for further thought but does not necessarily imply that the lower court's previous result should be changed. *Klikno v. United States*, 928 F.3d 539, 544 (7th Cir. 2019). Pursuant to Circuit Rule 54, the parties submitted their views on the remand.[1]

II. *Marks v. United States and Narrow Opinions*

A. *Marks and its Variations*

The remand poses questions about how to interpret and apply decisions by the Supreme Court issued without majority opinions. The Supreme Court's leading guidance on the question is one sentence in *Marks*: "When 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.'" 430 U.S. at 193, quoting *Gregg v. Georgia*,

[1] The State defendants at the same time petitioned for immediate en banc consideration of this case. No member of this court has requested an answer to or a vote on that petition. This decision on remand is being issued by the panel that heard this appeal originally. The pending petition is denied.

428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). In recent decades, plurality decisions have become more frequent, especially on some of the most controversial issues the federal courts face. Lower courts have tried to follow the *Marks* instruction in a variety of scenarios, and scholars and lower courts have identified several distinct models for applying *Marks*.

A helpful guide comes from Professor Ryan Sullivan:

> The first of these approaches interprets *Marks* as limited to a narrow subset of plurality decisions reflecting a clearly discernible "implicit consensus" or "common denominator" among the Justices. The second approach understands *Marks* as an instruction to lower courts to identify the opinion in a plurality decision that reflects the judgment-critical vote—typically the fifth concurring vote—and treat that opinion as the Court's holding. The third and final approach looks for points of majority consensus among different factions of concurring and dissenting Justices on distinct legal issues raised by the plurality decision.

Ryan Williams, *Questioning Marks: Plurality Decisions and Precedential Constraints*, 69 Stan. L. Rev. 795, 806–07 (2017).

The parties' positions here identify different approaches and set the stage for our consideration. Relying on the first model, which is predominant in precedent, plaintiff Planned Parenthood contends that the *June Medical* plurality and concurrence share the narrow, common ground that *Whole Woman's Health* has stare decisis effect on essentially identical facts. Because that is all that they share, that is the holding of *June Medical*, which thus did not produce a majority to overrule *Whole Woman's Health*. Not having been overruled, the standards and principles of *Whole Woman's Health* still govern here.

The State invokes both the second and third models for applying *Marks*. Using the second model, the State says the *June Medical* concurrence provided the swing vote and the narrowest ground for the judgment—stare decisis for *Whole Woman's Health* on identical facts. That much is clear. The State goes further, however, in asserting in effect that every word of the concurrence must therefore be treated as the binding, precedential holding of *June Medical*, whether those additional portions support the judgment or not. Under that approach, we would give the concurrence the effect of overruling *Whole Woman's Health* except as to virtually identical facts. Invoking the third model, using all opinions to predict votes in a future case, the State also argues that the *June Medical* concurrence and the dissents agreed on enough common ground to predict reliably that a majority of the Court would overrule *Whole Woman's Health* and strike down the Indiana statute challenged here.

We first identify questions in applying *Marks* and then address the variations argued by the parties, albeit in a different order. We close by addressing a couple of additional arguments raised in the briefs. The Supreme Court has observed that the *Marks* rule is "more easily stated than applied" and that it has "baffled and divided" lower courts. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994). We hope here to avoid adding evidence to support the "baffled" observation.

To identify a few of the problems baked into the *Marks* rule, how do we measure narrow v. broad? Does *Marks* require common ground among opinions, and what if there is none? What counts as a common ground? Is it simply the existence of a shared outcome or does it require a shared approach to resolving a given legal question? Is everything in the narrowest opinion controlling, or just the portion supporting the judgment? Can a "narrow" non-majority opinion overrule a previously controlling precedent? Do dissenting opinions count at all in measuring precedential effect?

B. *Dissenting Opinions and the Prediction Model of Precedent*

The last question, about dissenting opinions, is the easiest to answer, at least for a lower court like this one. The answer resolves the State's reliance on the third model, counting votes among all opinions. Dissenting opinions do not count in the *Marks* assessment. *Marks* itself wrote in terms of "those Members who concurred in the judgments" 430 U.S. at 193,

quoting *Gregg*, 428 U.S. at 169 n.15. The weight of circuit and-scholarly authority has taken the Court's instruction at face value.

We have rejected using dissents in *Marks* assessments: "under *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions." *Gibson v. American Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014); accord, e.g., *United States v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009) (stating that *Marks* applies to opinions of those "Members who concurred in the judgment[]" of the Court); *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 280 n.13 (4th Cir. 2019) (en banc) (same); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (same); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (same); *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3d Cir. 1994) (same); *United States v. Hughes*, 849 F.3d 1008, 1012 (11th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 1765 (2018) ("When determining which opinion controls, we do not 'consider the positions of those who dissented.'"), quoting *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) ("Stated differently, *Marks* applies when, for example, 'the *concurrence* posits a narrow test to which the *plurality* must necessarily agree as a logical consequence of its own, broader position.'") (emphasis added and removed), quoting *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc); *King*, 950 F.2d at 783 ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."); cf.

United States v. Davis, 825 F.3d 1014, 1025 (9th Cir. 2016) (en banc) ("[W]e assume but do not decide that dissenting opinions may be considered in a *Marks* analysis.");[2] *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) ("[W]e do not share the reservations of the D.C. Circuit about combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices.").

Scholars have generally agreed that dissenting opinions do not actually count, while noting that courts are not entirely consistent on this score. Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L.J. 207, 218 (2008); Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 Const. Comment. 321, 328 (2000); Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 Duke J. of Const. Law & Public Policy 285, 298–99 (2019); Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, in The Supreme Court and the Clean Water Act: Five Essays 81, 93–94 (L. Kinvin Wroth ed., Vt. Law Sch. 2007).[3]

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[2] The *Davis* en banc majority did not decide this question, but concurring and dissenting opinions disagreed on it. See 825 F.3d at 1029 (Christen, J., concurring) (*Marks* limits review to the opinions of Justices who concurred in judgment); *id.* at 1031 (Bea, J., dissenting) (*Marks* permits counting votes, including from dissenting Justices).

[3] To be sure, some of these scholars have urged a different approach, arguing that lower courts *should* use a prediction model, taking dissenting opinions into account to predict how the

This aversion to dissenting opinions in applying *Marks* is consistent with our more general approach to Supreme Court precedent. We simply do not survey non-majority opinions to count likely votes and boldly anticipate overruling of Supreme Court precedents. That is not our job. As we are frequently reminded, only the Supreme Court itself can overrule its own decisions. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); accord, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (instructing courts of appeals to leave to the Supreme Court "the prerogative of overruling its own decisions"), citing *Rodriguez de Quijas*, 490 U.S. at 484; *Scheiber v. Dolby Laboratories, Inc.*, 293 F.3d 1014, 1019 (7th Cir. 2002) (highlighting that in *State Oil v. Khan*, the Supreme Court "pointedly noted" that the

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Supreme Court will decide the next case, but they agree that the prediction model is rarely used by courts and even more rarely acknowledged. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 74 (1994) (arguing that "prediction has a proper, albeit circumscribed, role to play in inferior court decisionmaking," but "conced[ing] that others will disagree with this conclusion"); Eber, *When the Dissent Creates the Law*, 58 Emory L. J. at 232 (acknowledging that "most judges do not endorse the prediction model of precedent, at least openly") (footnotes omitted); Varsava, *The Role of Dissents*, 14 Duke J. of Const. Law & Public Policy at 321–22 ("Advocates of the predictive approach generally exclude dissenting opinions from the process, but the inclusion of dissents is a theoretical possibility.") (footnotes omitted).

Seventh Circuit had been correct in refusing to declare defunct the Court's directly controlling precedent). Accordingly, we decline the State's invitation here to add together the Chief Justice's concurrence and the dissenting opinions and declare *Whole Woman's Health* overruled.[4]

C. *Logical Subsets and Nesting Dolls*

We turn now to the first model of the *Marks* rule, argued by plaintiff and consistent with the substantial weight of authority: look for a "narrowest ground" that is a logical subset of the reasoning in other opinions concurring in the judgment. The *Marks* rule is easiest to apply when the fifth vote comes in a concurrence that agrees with part of the plurality's reasoning, so that the narrower opinion may be described as adopting a logical subset of a broader opinion's reasoning. The often-cited metaphor is Russian nesting dolls. We and other courts have often said that for the *Marks* rule to apply, there must be a genuine common denominator underlying the reasoning of a majority of justices. E.g., *Gibson*, 760 F.3d at 619; *Heron*, 564 F.3d at 884; *Rappa*, 18 F.3d at 1058; *King*, 950 F.2d

[4] We recognize that parties may decide to adopt the prediction model in making decisions about their conduct or in deciding how to litigate disputes. The prediction model has a distinguished pedigree: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897). But in a hierarchical court system, lower courts do not arrogate to themselves the task of overruling precedents of higher courts.

at 781. That opinion—the narrowest one—"must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781 (emphasis added).

Under this approach, when the reasoning underlying the decisive concurring opinion fails to fit within a broader logical circle drawn by the other opinions, *Marks* simply does not apply. *King*, 950 F.2d at 782; accord, *Alcan Aluminum Corp.*, 315 F.3d at 189 (explaining that where no single standard "constitutes the narrowest ground for a decision on that issue, there is then no law of the land").

In the simplest scenario, four Justices agree on two grounds for the judgment, and the decisive vote is cast by a concurring Justice who agrees with only one of those. In such a case, the concurring opinion's rationale provides the narrowest ground and is deemed controlling.

If we were to depart from this predominant understanding of *Marks* and applied it in the absence of a common denominator, then a single approach to a given legal question lacking majority support, perhaps lacking support from more than one Justice, would become national law. See *King*, 950 F.2d at 782. This would be true even if that single approach produced the critical fifth vote supporting the judgment of the Court. *Id.*; see also *Gaylor v. Mnuchin*, 919 F.3d 420, 433 n.9 (7th Cir. 2019) (stating that where one Justice's concurring opinion reached the same result as the plurality opinion, but did so under a different

constitutional clause, that concurring opinion was not a "logical subset" of the plurality opinion), quoting *Gibson*, 760 F.3d at 619; *Heron*, 564 F.3d at 884 ("When, however, a concurrence that provides the fifth vote necessary to reach a majority does not provide a 'common denominator' for the judgment, the *Marks* rule does not help to resolve the ultimate question."). If there is no common denominator, then there is no binding reasoning, just facts and a result.

The Supreme Court itself appears to follow this approach. In *King*, the District of Columbia Circuit illustrated this point with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where a plurality of four Justices wrote that evidence could be seized pursuant to the plain-view exception to the Fourth Amendment's warrant requirement only when the evidence was discovered inadvertently. See *King*, 950 F.2d at 782. Four other Justices wrote that inadvertence was not necessary for a valid seizure of evidence in plain view. *Coolidge*, 403 U.S. at 492, 506, 510, 516 (four opinions, each concurring in part and dissenting in part). Justice Harlan concurred in the judgment that the challenged search was unconstitutional, but he offered no rationale for evaluating the inadvertence requirement laid out by the plurality. *Id.* at 490 (Harlan, J., concurring in judgment).

In a later decision, *Texas v. Brown*, 460 U.S. 730 (1983), the Supreme Court said that the *Coolidge* plurality's inadvertence requirement did not constitute binding precedent and should be understood only as "the considered opinion of four Members of this Court." *Brown*, 460 U.S. at 737 (plurality opinion).

Eventually, the Supreme Court rejected the inadvertence requirement altogether. *King*, 952 F.2d at 782, citing *Horton v. California*, 496 U.S. 128 (1990).

In similar circumstances—where no opinion adopting a narrowest common denominator of the Court's reasoning can be identified—this court and other circuits have explicitly declined to apply *Marks*. See, e.g., *Gibson*, 760 F.3d at 619–20 (declining to apply *Marks* to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)); *Heron*, 564 F.3d at 884 (declining to apply *Marks* to *Missouri v. Seibert*, 542 U.S. 600 (2004)); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) (declining to apply *Marks* to *Baldasar v. Illinois*, 446 U.S. 222 (1980)); *Davis*, 825 F.3d at 1021–22 (declining to apply *Marks* to *Freeman v. United States*, 564 U.S. 522 (2011));[5] *Alcan Aluminum Corp.*, 315 F.3d at 189 (declining to apply *Marks* to *Eastern Enterprises*); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 (4th Cir. 2002) (also declining to apply *Marks* to *Eastern Enterprises*).

[5] In *Hughes v. United States*, the Supreme Court explained that in *Freeman*, "[n]o single interpretation or rationale commanded a majority" of Justices. 138 S. Ct. 1765, 1768 (2018). The Court acknowledged that some courts of appeals, including the Seventh Circuit, in applying *Marks* had adopted the reasoning of Justice Sotomayor's solo opinion concurring in the judgment. *Id.* Other courts, however, also applying *Marks*, adopted the plurality's reasoning. *Id. Hughes* resolved the sentencing issue in *Freeman* but explicitly declined "to reach questions regarding the proper application of *Marks*."

In other words, *Marks* does not command lower courts to find a common denominator—to find an implicit consensus among divergent approaches—where there is actually none. Cf. *Grutter*, 539 U.S. at 325 (discussing division among federal courts of appeals in applying *Marks* to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)); *Nichols*, 511 U.S. at 745 (discussing division among state and federal courts in applying *Marks* to *Baldasar*). It is not our duty or function to bring symmetry to any "doctrinal disarray" we might encounter in our application of Supreme Court precedent.[6]

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[6] These limits of *Marks* are recognized in legal scholarship. See, e.g., Richard Re, *Beyond the Marks Rule*, 132 Harv. L. Rev. 1943, 1982 (2019) ("[I]nstead of finding *Marks* holdings in all, or even most, fractured Supreme Court decisions, the logical subset approach aspires to recognize *Marks* holdings only when one opinion is logically and therefore inescapably 'narrower' than any other."); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 46–48 (1993) (*Marks* is available only "where the rationales for the majority outcome are nested, fitting within each other like Russian dolls"); Stearns, *The Case for Including Marks*, 17 Const. Comment. at 328 n.26 (explaining that *Marks* does not apply where "[t]he majority on the Court's judgment [is] composed of two minority camps, each reaching opposite resolutions of the two dispositive issues, but also reaching the same judgment"); Joseph S. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine after Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 113 (2007) (emphasizing *King*'s "Russian dolls" approach to *Marks*); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 767 (1980) ("Many of the most troublesome plurality [and concurring] opinions" do not "stand in a 'broader-narrower' relation to each other.").

The logical subset approach to *Marks* applies here. In *June Medical*, there is one critical sliver of common ground between the plurality and the concurrence: *Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts. 140 S. Ct. at 2120 (plurality); *id.* at 2139 (concurrence). The *Marks* rule therefore applies to that common ground, but it applies *only* to that common ground. That application offers no direct guidance for applying the undue burden standard more generally, let alone to the quite different parental notice requirement in this case. That absence of guidance answers our question: the *Marks* rule tells us that *June Medical* did not overrule *Whole Woman's Health*. That means *Whole Woman's Health* remains precedent binding on lower courts.

D. *The Swing-Vote Model*

To avoid this result, the State also invokes the second approach to *Marks* and plurality opinions, in which lower courts try to identify the decisive fifth vote on the Supreme Court and treat that vote's reasoning as controlling, even if it represents the views of only one justice. Courts and scholars have called this the "swing-vote" approach. The State argues here that we should adopt the strongest, most controversial version of this swing-vote approach, which "treats as binding *all* aspects of the opinion reflecting the median Justice's views, including propositions that no other participating Justice explicitly or implicitly assented to." Williams, *Questioning Marks*, 69 Stan. L. Rev. at 815; see also Re, *Beyond the Marks Rule*, 132 Harv. L. Rev. at 1979 ("In general, the median opinion would be outvoted whenever at least five Justices in

nonmedian opinions would converge on the same outcome."). The State here argues that we should treat as binding *everything* in the Chief Justice's *June Medical* concurrence, including its continued disagreement with *Whole Woman's Health*, whether that position was essential to the *June Medical* judgment or not, giving that non-majority opinion the power to overrule binding precedent established in a majority opinion.

This swing-vote model is not consistent with Supreme Court precedent or our circuit precedent, nor is it the predominant model in courts around the country. For example, in *United States v. Santos*, 553 U.S. 507 (2008), the Supreme Court split four-one-four on the decisive issue. Justice Scalia wrote a plurality opinion for four justices to affirm; Justice Stevens wrote a separate, narrower opinion concurring in that judgment. But Justice Stevens' concurring opinion expressed views on future cases not before the Court. The plurality addressed how *Marks* should apply. Justice Stevens' reasoning was the narrowest in support of the judgment, but the plurality flatly rejected the idea that everything in Justice Stevens' opinion was binding, in terms directly applicable here: "JUSTICE STEVENS' speculations on that point address a case that is not before him, are the purest of dicta, and form no part of today's holding." *Id.* at 523 (plurality opinion of Scalia, J.).

And whatever strengths the swing-vote model might have in other situations, it is not an appropriate application of *Marks* in these circumstances: First, the stated disagreement is not essential to the

concurrence's bottom-line vote to strike down the Louisiana law. The portions of the concurrence going beyond stare decisis did not support the judgment and are obiter dicta. Second, the dispute between the plurality and concurrence in *June Medical* was not about a new legal issue but about the scope and validity of a Court precedent. Applying the swing-vote test to treat everything in the concurrence as a binding holding would allow less than a majority to overrule a Court precedent that had been established by majority vote.

To frame the issue in simple, logical terms, the *June Medical* plurality adopted two propositions that we can label A and B. Proposition A was that *Whole Woman's Health* previously struck down a nearly identical Texas law, so stare decisis required striking down the new Louisiana law. Proposition B was that the majority opinion in *Whole Woman's Health* correctly stated and applied the undue burden test for abortion regulations. The Chief Justice's concurrence adopted Proposition A, applying stare decisis. It rejected Proposition B, adopting instead Not-B: the majority opinion in *Whole Woman's Health* misstated and misapplied the undue burden test.

Applying *Marks*, the best way to understand the two opinions together is that the plurality's adoption of Proposition B and the concurrence's adoption of Proposition Not-B are both obiter dicta. They were not necessary to the actual judgment striking down the new Louisiana law on stare decisis grounds, Proposition A, for which there were five votes. There was no majority to overrule *Whole Woman's Health*, so that

precedent stands as binding on lower courts unless and until a Court majority overrules it.

E. *Other Arguments*

Additional arguments raised here do not fit as neatly into the three principal models for applying *Marks*. The State argues that the Chief Justice's concurrence in *June Medical* should be deemed the narrowest opinion under *Marks* because it would leave more state laws undisturbed. In support of this approach, the State cites *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006), which recognized that an "alternative" reading of *Marks* might reasonably entail "that the 'narrowest grounds' are simply understood as the 'less far-reaching-common ground.'" For two reasons, we are not persuaded.

First, this approach, too, assumes that the narrower and broader opinions share some common ground in the first place. As the First Circuit observed, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* In *June Medical*, the plurality and concurring opinions arrived at the same result based on stare decisis. They disagreed on other points. For the reasons explained above, their narrow common ground is subject to *Marks*. But applying the *Marks* rule does not mean that we treat as controlling and precedential portions of the concurrence that were dicta, unnecessary to the fifth vote to strike down the Louisiana law.

Second, comparing the respective ranges of statutes that would survive the two different approaches, taking each approach in its entirety, rather than looking closely for shared reasoning, would be highly disruptive, producing arbitrary results and losing sight of the Court's actual decision. See Stearns, *The Case for Including Marks*, 17 Const. Comment. at 337–38 (the "narrowest grounds" rule does not stand for proposition that opinion that would strike the fewest laws controls). If the *entirety* of the Chief Justice's concurrence were given binding, precedential effect—on the theory that his reasoning would uphold more state laws than Justice Breyer's plurality would—then *June Medical*'s decision *striking down* one Louisiana law would be deemed to have swept away quite a bit of the Court's jurisprudence on the right to choose to terminate a pregnancy. That would be a remarkable result, especially given the Court's silence about such dramatic effects and the lack of a five-vote majority for that overruling. More generally, the State's novel and one-sided interpretation of *Marks* would give one Justice the ability to write obiter dicta that would sweep away constitutional precedents protecting individual rights by adopting broad reasoning that would confine the individual right most narrowly, yet without a majority having actually voted to overrule an earlier precedential opinion.

The State also argues that the Supreme Court itself appears to view all aspects of the Chief Justice's concurrence as controlling, so we should do the same. We do not see evidence that the Court views the entire concurrence as controlling. In fact, Chief Justice Rob-

erts did not view the dicta in his concurrence as binding: "The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case." 140 S. Ct. at 2133. See also *id.* at 2181 (Gorsuch, J., dissenting) ("*Whole Woman's Health* insisted that the substantial obstacle test '*requires* that courts consider the burdens a law imposes on abortion access together with the benefits the law confers.'") (cleaned up), quoting *Whole Woman's Health*, 136 S. Ct. at 2309.

Consistent with its view of the *June Medical* concurrence, the State also argues that we should abandon any consideration of actual benefits of the challenged Indiana notice requirement. Apart from the difficulty in applying *Marks* here, we do not see how having courts close their eyes to genuine and legitimate *benefits* of an abortion regulation makes it *less* likely to survive judicial review. The "undue burden" standard adopted in *Casey* logically implies the existence of a category of "due" burdens. Some regulations might restrict access and/or raise costs, but do so in service of legitimate goals and are on balance justified.

For example, state laws require that only persons with certain medical licenses may perform surgical or medical abortions. Those regulations may restrict access and raise costs. Given the health benefits, there is generally no serious doubt about the constitutionality of such burdens. In *Casey* itself, the Court found that new informed-consent requirements, a waiting period, and some record-keeping requirements would

impose genuine burdens but would also serve legitimate purposes. Those burdens were not deemed "undue." See 505 U.S. at 885–87 (mandatory 24-hour waiting period), 900–01 (recordkeeping and reporting requirement); see also *Whole Woman's Health*, 136 S. Ct. at 2309, 2311–12 (*Casey* requires consideration of both burdens and benefits). In this case, it may be that the evidence in a trial on the merits will show a different balance of benefits and burdens. At the preliminary injunction stage, however, the State chose not to offer evidence of benefits that might justify the burdens here. The lopsided evidence of substantial burdens and little or no benefits convinced the district judge to issue the preliminary injunction and convinced us to affirm that decision.[7]

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[7] We share considerable common ground with our dissenting colleague as we all do our level best to apply the *Marks* rule to *June Medical* in this challenging and fluid area of constitutional law. On the points that divide us at this stage of the case, we offer three observations. First, the dissenting opinion appears to be logically inconsistent, recognizing that *June Medical* did not overrule *Whole Woman's Health*, post at 35, yet seeming to give precedential effect to portions of the Chief Justice's concurrence that disagreed with the *June Medical* plurality's adherence to *Whole Woman's Health*. Post at 31–32. Second, on the record before us, the debate over the role of balancing benefits and burdens of restrictions on abortion simply should not matter in the end. The district court found that the new parental notice requirements would impose a substantial obstacle for the relevant group of pregnant minors, and, at least in the absence of countervailing benefits, that meant the burdens would be undue. 258 F. Supp. 3d at 939-40. On appeal, with the State still declining to offer evidence of genuine benefits, we agreed. 937 F.3d at 978, 981. Unless and until the State tries to offer evidence of benefits, the theoretical debate about the role of balancing should not af-

We recognize that the scope of *June Medical* and the effect of the concurrence has been controversial. The Eighth Circuit and a divided panel of the Sixth Circuit have treated the concurrence as controlling. See *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam) (combining concurrence and dissenting opinions); *EMW Women's Surgical Center P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Little Rock Family Planning Services v. Rutledge*, 984 F.3d 682, 687 n.2 (8th Cir. 2021). Those decisions are not consistent with this circuit's approach to *Marks*. A divided panel of the Fifth Circuit reached the same conclusion about *June Medical* that we do in *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020). At later stages of the same appeal, the panel adhered to that view, 978 F.3d 896, 904 (5th Cir. 2020), and that later opinion was vacated and rehearing en banc was granted, 978 F.3d 974 (5th Cir. 2020). Because a majority of Justices of the Supreme Court has not held otherwise, the balancing test set forth in *Whole Woman's Health* remains binding precedent. That is the precedent we followed in our original decision, and we continue to follow it now, using the approach to *Marks* we have followed before.

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fect our decision to affirm the preliminary injunction here. Finally, we must note once more that the *June Medical* plurality and concurrence agreed that the new Louisiana law was properly enjoined before it could take effect. 140 S. Ct. at 2114 (plurality) & 2142 (concurrence).

We need not repeat more from our original decision. The split decision in *June Medical* did not overrule the precedential effect of *Whole Woman's Health* and *Casey*. As in our original opinion, we have not decided the plaintiff's alternative ground for affirmance, adopted by the district court, that the requirements of *Bellotti v. Baird* apply to parental notice requirements as well as to parental consent requirements. 937 F.3d at 989–90; see also 258 F. Supp. 3d at 945–46. For the reasons explained above and in our original opinion, the district court's preliminary injunction barring enforcement of the new parental notice requirement in Ind. Code § 16-34-2-4(d) and (e) is *AFFIRMED*.

KANNE, *Circuit Judge*, dissenting. Here we are again, faced with the seemingly endless task of determining whether a law unduly burdens a woman's ability to obtain an abortion. When this case first came to us, the majority of this panel relied heavily on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to affirm the district court's pre-enforcement injunction against Indiana's brand-new parental-notification law because Indiana "offered no evidence to support [the law's] proposed benefits," *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 984 (7th Cir. 2019).

In the dissent to the initial opinion, I pointed out that (1) the Supreme Court had held several times that such parental-notification laws are constitutional; (2) Planned Parenthood's evidence did not show that Indiana's parental-notification law places an undue burden on a minor's ability to obtain an abortion; and (3) we should not be in the business of quashing state abortion regulations before they go into force and while their effects, and the 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. 2012).

Thereafter, our full court narrowly denied *en banc* review, with some colleagues expressing hope that doing so would "send this dispute on its way to the only institution" that can say whether Indiana's parental-notification law imposes an undue burden. *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial of rehearing *en banc*). The Supreme Court then

granted certiorari—but instead of fulfilling those hopes, it vacated the panel's decision and remanded it "for further consideration in light of" *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), a fractured case that produced six different opinions. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187, 188 (2020).

So now, with our previous decision in one hand and a half-dozen *June Medical* opinions in the other, we must figure out how the latter affect the former.

The majority says, in essence, that *June Medical* has no effect—that the plurality opinion, along with the Chief Justice's concurrence, simply followed *Whole Woman's Health*, and therefore our original opinion applying its balancing test must have been correct in all respects.

I disagree. The majority gives an expanded reading to the Chief Justice's *June Medical* concurrence, but viewing that narrow concurring opinion—as written, in conjunction with the plurality's opinion—compels a different outcome.

The plurality in *June Medical* held that the Louisiana law at issue was unconstitutional because it "poses a 'substantial obstacle' to women seeking an abortion [and] offers no significant health-related benefits." *June Medical*, 140 S. Ct. at 2132 (plurality opinion). The Chief Justice's concurrence, however, simply held only that the Louisiana law was unconstitutional because, under *Whole Woman's Health*, it

"imposed a substantial obstacle." *Id.* at 2139 (Roberts, C.J., concurring).

Thus, the finding of a "substantial obstacle" is the common denominator between the opinions—and we should correct our previous decision by abandoning the added weighing of benefits that Chief Justice Roberts explicitly rejected.

Further, while we cannot presume from the Supreme Court's remand order that our prior decision in this case was wrong, surely *June Medical* had *some* effect on the legal landscape. Else, why didn't the Supreme Court simply deny cert instead?[1] I do not believe that the Supreme Court is directing us to reassess our prior decision "in light of" a case that sheds no light on the matter whatsoever.

Rather, I do believe that *June Medical* does have a real effect. The Supreme Court knows it, other circuits accept it, and a faithful application of the *Marks* rule requires us to accept it, too.

* * *

[1] Indeed, this is just one of two cases that the Supreme Court sent back for us to reconsider after *June Medical*. "Sending these cases back …, instead of simply denying review, suggests the High Court rejected a balancing test and expects the Seventh Circuit to apply the more lenient undue-burden framework outlined in the Chief Justice's concurrence." *Whole Woman's Health v. Paxton*, 978 F.3d 896, 920 (5th Cir.), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020) (Willett, J., dissenting).

This analysis begins with what I think the majority has right, which is quite a bit.

To start, the majority of course identifies the correct basic rule from *Marks*: "When 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.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

Second, the majority correctly warns that "the *Marks* rule is 'more easily stated than applied' and that it has 'baffled and divided' lower courts." Majority Op. at 8 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)). That's beyond dispute.

Third, the majority fairly summarizes our cases interpreting the *Marks* rule. For example, "under *Marks,* the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions," *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014), so we cannot stitch together dissenting and concurring opinions to declare that a new rule of law has been handed down.

And though this next point is not as clear from our case law,[2] I also agree with the majority that we don't generally adopt every word of a "swing vote's" lone concurrence as the binding opinion of the Court; rather, we take only the part of that opinion that serves as "a logical subset of other, broader opinions," *id.* at 619 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) *(*en banc)), or the "'common denominator' for the judgment," *United States v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009).

Where I part ways with the majority is at the next and admittedly more difficult question: What part of Chief Justice Roberts's concurrence in *June Medical* is a "logical subset" of the plurality opinion or serves as the "common denominator" to support the judgment?

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[2] For example, two members of this panel, myself included, have applied *Marks* without emphasizing that we follow *only* the part of the concurrence that forms a logical subset of the plurality's reasoning, not necessarily everything the concurrence said. *See United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) (Hamilton, J.) ("*Marks* is easy to apply here. Even though eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results, her reasoning provided the narrowest, most case-specific basis for deciding [the case]. Her approach therefore states the controlling law." (citations omitted)); *Schultz v. City of Cumberland*, 228 F.3d 831, 842 n.2 (7th Cir. 2000) (Kanne, J.) ("A divided Court issued four separate opinions …, but under *Marks* …, Justice Souter's concurrence is the controlling opinion on this issue, as the most narrow opinion joining the judgment of the Court.").

The majority concludes that in *June Medical*, the "critical sliver of common ground between the plurality and the concurrence" is that "*Whole Woman's Health* was entitled to *stare decisis* effect on essentially identical facts." Majority Op. at 16. But that conclusion ignores the substance of Chief Justice Roberts's position. In fact, the majority disregards the Chief Justice's words entirely, save for one quote in the final pages. If the *Marks* rule demands one thing, it's that we (to paraphrase Justice Frankfurter) read the opinions, read the opinions, read the opinions, to discern a common denominator of the Court's reasoning. Henry J. Friendly, Benchmarks 202 (1967). And once we read the opinions, it becomes clear that the Chief Justice concurred on a much narrower and more specific ground than the majority determines.

The Chief Justice began his concurrence by reiterating his continued belief that *Whole Woman's Health* "was wrongly decided." *June Medical*, 140 S. Ct. at 2133 (Roberts, C.J., concurring). "The question" in *June Medical*, however, was "not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case." *Id.*

That led to a discussion of *stare decisis* principles. Among other things, Chief Justice Roberts stressed that "[*s*]*tare decisis* principles … determine how we handle a decision that itself departed from the cases that came before it. In those instances, '[r]emaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following' the recent departure." *Id.* at

2134 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (plurality opinion)).

Chief Justice Roberts then turned to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which established the undue burden standard that both parties agreed "provide[d] the appropriate framework to analyze Louisiana's law." *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring). As the Chief Justice put it: "Under *Casey*, … '[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.' Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are 'reasonably related' to a legitimate state interest." *Id.* (citation omitted) (quoting *Casey*, 505 U.S. at 877, 878).

Then, the Chief Justice observed that in *Whole Woman's Health*, the Court "faithfully recit[ed] this standard" from Casey but "added the following observation: 'The rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.'" *Id*. (quoting *Whole Woman's Health*, 136 S. Ct. at 2309). That suggestion was repeated by the *June Medical* plurality. *Id*. And "[r]ead in isolation from *Casey*," that suggestion "could invite a grand 'balancing test in which unweighted factors mysteriously are weighed.' Under such tests, 'equality of treatment is ... impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'" *Id*. at 2135–36 (citations omitted) (first

quoting *Marrs v. Motorola, Inc.*, 577 F.3d 783, 788 (7th Cir. 2009); and then quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

But according to Chief Justice Roberts, "[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. "*Casey* instead focuses on the existence of a substantial obstacle … ." *Id.* So, because "[w]e should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*," *id.* at 2138, "*Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation [was] a sufficient basis for the decision … in *Whole Woman's Health*" and thus too for the decision in *June Medical*, *id.* at 2139. "In neither case, nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration." *Id.*

Finally, the Chief Justice came to his ultimate conclusion:

> Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation. *Id.*

And *that* is the critical sliver of common ground between the plurality and the concurrence: *Casey*'s requirement of "a substantial obstacle before striking down an abortion regulation," and the Court's prior determination that "Texas's law imposed a substantial obstacle," compelled "the same determination about Louisiana's law." *Id*.

Therefore, the majority's formulation of the common ground ("*Whole Woman's Health* was entitled to *stare decisis* effect on essentially identical facts"), while true in some opaque sense, is imprecise.

Nowhere does the Chief Justice suggest that *Whole Woman's Health*'s formulation of a balancing test is entitled to *stare decisis* effect—only its requirement of a substantial obstacle is. In fact, he quite clearly warns us of a sinister "grand 'balancing test'" that departs from *Casey*, *id.* at 2135 (quoting *Marrs*, 577 F.3d at 788), and reminds us that when a decision "depart[s] from the cases that came before it, … '[r]emaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following' the recent departure," *id.* at 2134 (quoting *Adarand Constructors*, 515 U.S. at 231).

Translation: Where *Whole Woman's Health* paid lip service to *Casey* but then strayed from it by weighing benefits, it is better to remain true to *Casey*'s established substantial-obstacle analysis than to follow the errant departure from it. So courts should continue to apply the substantial-obstacle test from *Casey*.

The majority objects to reading this much into Chief Justice Roberts's opinion because "[t]he portions of the concurrence going beyond *stare decisis* did not support the judgment and are obiter dicta." Majority Op. at 18. But "[a] dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding." *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986), *abrogated on other grounds by Hart v. Schering–Plough Corp.*, 253 F.3d 272 (7th Cir. 2001). The Chief Justice's discussion of *Whole Woman's Health* and its flawed balancing test plainly formed the "analytical foundation" for his conclusion that only *Whole Woman's Health*'s finding of a substantial obstacle was to be given *stare decisis* effect.

At any rate, the Chief Justice's *stare decisis* discussion alone supports that conclusion. And even if *everything* but the Chief Justice's bottom-line conclusion were disregarded as dicta, still we are left with the same unavoidable outcome: "Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law *imposed a substantial obstacle* requires the same determination about Louisiana's law," and "I would [also] adhere to the holding of *Casey*, requiring a *substantial obstacle* before striking down an abortion regulation." *June Medical*, 140 S. Ct. at 2139 (Roberts, C.J., concurring) (emphases added).

The majority's abridged version of this bottom line—"*Whole Woman's Health* was entitled to *stare decisis* effect on essentially identical facts"—seems a

simply abstract statement of law, not the Chief Justice's ultimate conclusion supporting the judgment.

The majority also objects that following the Chief Justice's approach would "overrule" *Whole Woman's Health*. However, the majority also acknowledges that "[t]he question" in *June Medical* was "not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case." *Id.* at 2133. So if the Chief Justice did not overrule *Whole Woman's Health* by "respect[ing]" its statement that it was following *Casey*, *id.* at 2138, refusing to read it "in isolation from *Casey*," *id.* at 2135, and giving *stare decisis* effect to only the substantial-obstacle finding necessary to its judgment, *id.* at 2138, it is difficult to see how we would overrule *Whole Woman's Health* by doing the same.

My position also is not groundbreaking. The two other circuits that have conclusively resolved this issue came to the same outcome. *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam); *EMW Women's Surgical Ctr. P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 687 n.2 (8th Cir. 2021).

The majority disregards these cases as "not consistent with this circuit's approach to *Marks*." Majority Op. at 22. There are some differences in our approaches, to be sure. The Eighth Circuit, for example, declared that Chief Justice Roberts's "separate opinion is controlling" because he was the swing vote. *Hopkins*, 968 F.3d at 915. That's a bit oversimplistic

for our precedent requiring us to adopt only that portion of the concurring opinion that forms a "logical subset" of the plurality's reasoning. And the Sixth Circuit concluded that the Chief Justice's concurrence provides the governing standard "[b]ecause all laws invalid under the Chief Justice's rationale are invalid under the plurality's, but not all laws invalid under the plurality's rationale are invalid under the Chief Justice's." *Friedlander*, 978 F.3d at 433. We have not adopted that sort of reasoning.

But even if we cannot rely on their approaches under *Marks*, that those courts reached the same conclusion while applying different standards even between themselves is stronger evidence that their outcome is correct than that it is wrong. And in my view, our own standards governing the application of the *Marks* rule force the same result reached by those circuits. That really should come as no surprise given that, at bottom, each circuit is trying its level best to apply the same guidance from *Marks* to the same set of opinions in *June Medical*, varying circuit precedents notwithstanding.

There is also a speck of precedent from the Fifth Circuit that the majority suggests lends it support. That's a generous suggestion. The Fifth Circuit first addressed this issue when it considered Texas's motion to stay an injunction against the enforcement of its statute requiring women to undergo certain medical procedures before receiving "dilation and evacuation" abortions. *Whole Woman's Health v. Paxton*, 972 F.3d 649 (5th Cir. 2020). The panel majority denied the motion as "procedurally improper," *id.* at

652, but apart from that, it also devoted a few words to rejecting Judge Willett's dissenting view that the district court's injunction rested upon an invalid balancing test, *id.* at 654 (Willett, J., dissenting). The majority concluded that *Whole Woman's Health*'s "formulation of the [balancing] test continues to govern this case." *Id.* at 653 (majority opinion).

Two months later, the same panel again addressed the *Marks* issue and held to its prior conclusion over a lengthy dissent from Judge Willett. *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020). But *en banc* review has since been granted, and the panel's second decision has been vacated. *Whole Woman's Health v. Paxton*, 978 F.3d 974, 975 (5th Cir. 2020). Its earlier discussion, while technically still on the books, is clearly in limbo, too.

What's more, even if the Fifth Circuit panel agreed with the majority's *outcome*, its analysis conflicts with the majority's approach here. The majority here says that "[t]he logical subset approach to *Marks* applies" and that there is a "sliver of common ground between the plurality and the concurrence." Majority Op. at 16. But the Fifth Circuit panel held that Chief Justice Roberts's "concurrence cannot 'be viewed as a logical subset of the' plurality's opinion" or "logically compatible" with it. *Paxton*, 978 F.3d at 904 (quoting *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013)).

Which is to say, no other court has adopted the majority's reasoning. The majority has scant support from our sister circuits, and it might soon have none.

* * *

To summarize, *June Medical* is not nugatory, but neither does it overrule *Whole Woman's Health*. It simply demands that courts continue to apply *Casey*'s substantial-obstacle test, which survives both *Whole Woman's Health* and *June Medical* by operation of the *Marks* rule. The majority in this case erred, therefore, by weighing the benefits conferred by Indiana's law against its burdens. This is just the sort of "grand balancing test" that the Chief Justice disclaimed, and it goes far beyond the narrowest common ground supporting the judgment in *June Medical*. It thus has no place in our analysis, and the majority should have corrected its error on remand by returning to the settled substantial-obstacle test from *Casey*.

The majority's error is even more disconcerting considering the procedural posture and "limited factual record" in this case. *Adams*, 937 F.3d at 988. The record is limited, of course, because the court enjoined enforcement of the law before it went into effect. The obvious question is, how is a state *ever* supposed to overcome the majority's "grand balancing test" when a court can stamp out its abortion regulations before they even get off the ground? Are we to expect the state to reach into some alternate reality, where its popularly enacted laws were let alone, and pluck evidence of their benefits from there? *See id.* at 997 (Kanne, J., dissenting) ("Generalized information about abortion regulation writ large cannot substitute for specific, tailored data regarding the statute at is-

sue."). If "weighing [the] costs and benefits of an abortion regulation" has really become "a job for the courts," *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring), then surely it must be "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*, 305 F.3d at 693.

The other reasons for my prior dissent remain unchanged. The Supreme Court has confirmed that parental-notification requirements are constitutional time and again. And Planned Parenthood has failed to show that requiring mature minors to notify their parents that they intend to have an abortion (where a judge has found that avoiding notification is not in their best interests) constitutes an undue burden under *Casey*. This court should reverse the district court's injunction and let Indiana exercise its legislative judgment that a parental-notification law best serves the interests of its citizens.

I respectfully dissent.

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2428

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Plaintiff-Appellee,

v.

JEROME M. ADAMS, Commissioner, Indiana State Department of Health, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:17-cv-01636 – **Sarah Evans Barker**, *Judge*.

ARGUED JANUARY 5, 2018
DECIDED AUGUST 27, 2019

Before KANNE, ROVNER, and HAMILTON *Circuit Judges*.

HAMILTON, *Circuit Judge*. Consistent with *Bellotti v. Baird*, 443 U.S. 622 (1979), Indiana statutes have long provided a fast and confidential judicial bypass procedure that is supposed to allow a small fraction of pregnant, unemancipated minors seeking abortions to obtain them without the consent of or notice to their

parents, guardians, or custodians. In 2017, Indiana added a parental notification requirement to the judicial bypass statute. Before the law took effect, plaintiff Planned Parenthood of Indiana and Kentucky, Inc. sued to enjoin its enforcement. In a careful opinion, the district court issued a preliminary injunction against enforcement of the new law's notice requirements. *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner*, 258 F. Supp. 3d 929, 956 (S.D. Ind. 2017). The defendant state officials have appealed a portion of the preliminary injunction. In light of the lopsided factual record, the deferential standard of review, and the preliminary status of the findings of fact and conclusions of law, we affirm.

I. *Legislative Changes*

As a general rule, Indiana prohibits physicians from performing abortions for unemancipated minors without the written consent of the minor's parent, legal guardian, or custodian. Ind. Code § 16-34-2-4(a). The law provides an exception, however, so that a 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 con- sent requirement. Ind. Code § 16-34-2-4(b). Known as a judicial bypass, this procedure 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. Ind. Code § 16-34-2-4(e). *Bellotti* requires this exception as a matter of federal constitutional law. 443 U.S. at 643–44 (opinion of Pow- ell, J.); accord, *Planned Parenthood of Southeastern*

Pennsylvania v. Casey, 505 U.S. 833, 899 (1992). Bypass is supposed to be fast and confidential. *Bellotti*, 443 U.S. at 644 (bypass proceeding and any appeals must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained").

In 2017, the Indiana General Assembly enacted Public Law 173-2017, also known as Senate Enrolled Act 404, which amended the parental consent and judicial bypass statutes in several ways. This appeal focuses on one new requirement for the judicial bypass process. Even if a judge concludes that a parent need not consent to the abortion, either because the unemancipated minor is mature enough to make her own decision or because the abortion is in her best interests, and even though the bypass process is supposed to be confidential per *Bellotti*, parents still must be given prior notice of the planned abortion unless the judge also finds such notice is not in the minor's "best interests." Ind. Code § 16-34-2-4(d). The young woman's attorney "shall serve the notice required by this sub- section by certified mail or by personal service." *Id.* A bypass court "shall waive the requirement of parental notification un- der subsection (d) if the court finds that obtaining an abortion without parental notification is in the best interests of the un- emancipated pregnant minor." Ind. Code § 16-34-2-4(e). That difference in language is important. Unlike the judicial bypass of the parental consent requirement,

which may be based on either maturity or best interests, judicial bypass of notice may be based only on "best interests."[3]

Out of the usual sequence for a judicial opinion, we ad- dress here one interpretive issue about the new notice requirement. We disagree with Planned Parenthood's argument that the statute permits notice to parents even if the bypass court refuses to allow the pregnant minor to proceed without her parents' consent. The statute requires notice to parents after a bypass hearing but "before the abortion is performed," Ind. Code § 16-34-2-4(d). We agree with the State that the requirement to serve notice is triggered only if the judge authorizes an abortion. See *Zbaraz v. Madigan*, 572 F.3d 370, 383 (7th Cir. 2009) ("Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality."), quoting *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). Bypass proceedings and appeals are sealed. Ind. Code § 16-34-2-4(h). The new statute does not provide a legal mechanism that would allow a

[3] These changes make Indiana something of an outlier. Only two states, Oklahoma and Utah, have parental notice statutes that appear to be more restrictive by not including any form of judicial bypass. See Okla. Stat. Ann. tit. 63, §§ 1-744 to 1-744.6; Utah Code Ann. § 76-7-304. The Supreme Court upheld the Utah statute, but its decision does not control here because that plaintiff "made no claim or showing as to her maturity or as to her relations with her parents." *H.L. v. Matheson*, 450 U.S. 398, 407 (1981); see also *id.* at 415–16 (Powell, J., concurring) (explaining that lack of detail about individual plaintiff's situation had been deliberate choice consistent with seeking broad judicial remedy).

judge to order notice to parents of a minor's unsuccessful attempt to seek bypass.[4]

In addition to the notice requirement, Public Law 173-2017 changed the consent and judicial bypass statutes in other ways. Indiana already required parents to show their consent in writing, but the new law raised that requirement. It required a physician performing an abortion for a minor not only to obtain written parental consent but also to obtain government-issued proof of identification from the consenting parent, as well as "some evidence, which may include identification or other written documentation that provides an articulable basis for a reasonably prudent person to believe that the person is the parent or legal guardian or custodian of the unemancipated pregnant minor." Ind. Code § 16-34-2-4(a)(3). The new law also required a physician who obtains parental consent to execute and save an affidavit certifying that "a reasonable person under similar circumstances would rely on the information provided by the unemancipated pregnant minor and the unemancipated pregnant minor's parent or legal guardian or

[4] The new, challenged Indiana notice requirement opens the door, however, for the minor's *parents* to choose to disclose her pregnancy, her abortion, and/or the judicial bypass process to anyone they like and for any purpose they like. Cf. *Planned Parenthood v. Casey*, 505 U.S. at 893 (noting that many women who feared notifying their spouses of planned abortions may fear "devastating forms of psychological abuse," including "the withdrawal of financial support, or the disclosure of the abortion to family and friends," which "may act as even more of a deterrent to notification than the possibility of physical violence").

custodian as sufficient evidence of identity and relationship." Ind. Code § 16-34-2-4(k)(2).

The new law also added a section imposing civil liability on anyone who "knowingly or intentionally aid[s] or assist[s] an unemancipated pregnant minor in obtaining an abortion without the consent required" by the consent statute. Ind. Code § 16-34-2-4.2(c). In the district court, the parties agreed that this provision would prohibit Planned Parenthood and its physicians from providing an unemancipated minor information regarding out-of-state abortion services which ostensibly would not require parental consent or notice. *Planned Parenthood*, 258 F. Supp. 3d at 934. The district court's preliminary injunction enjoined enforcement of all of those changes. *Id.* at 956. In this appeal, Indiana has not challenged those portions of the injunction, so we do not discuss them further.

Returning to the disputed new parental notice requirement in the judicial bypass procedure, it is relevant that Indiana law authorizes both criminal penalties and professional licensing sanctions against abortion providers and their employees for violating portions of Indiana's abortion law. E.g., Ind. Code § 16-34-2-7(b) (physician who intentionally or knowingly performs abortion in violation of Ind. Code § 16-34-2-4 commits Class A misdemeanor); Ind. Code § 25-1-9-4(a)(2)-(3) (Indiana Medical Licensing Board may discipline physicians who commit crimes); 410 Ind. Admin. Code § 26-2-8(b)(2) (abortion facilities, like some Planned Parenthood facilities, are subject

to license revocation or discipline for "permitting, aiding, or abetting the commission of any illegal act in an abortion clinic").

Before the new law took effect, Planned Parenthood brought this lawsuit against several defendants in their official capacities: 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 Juvenile Division of the Marion Superior Court (collectively, the "State"). The State appeals the portion of the preliminary injunction against the new parental notice requirement.

II. *The Evidence and Likely Effects*

In support of its motion for preliminary injunction, Planned Parenthood submitted affidavits from seven witnesses to show the likely effects of the statute. The State chose to introduce no evidence in response. The State argued that it was "self-evident" that it had met its burden to justify the law with a legitimate state interest. The State did not challenge the reliability or credibility of Planned Parenthood's evidence. That lopsided factual record indicates that, for the small group of minors affected by this law, requiring parental notice is likely a "deal breaker" for a significant fraction. Smith Decl.¶ 20. Our summary of the evidence draws heavily from Judge Barker's thorough opinion.

Planned Parenthood is a not-for-profit corporation that operates multiple Indiana health centers. Beeley

Decl. ¶ 3. Those centers provide reproductive health services and comprehensive sexuality education to thousands of women and men, including adults and teenagers. *Id.* Consistent with Indiana law, Planned Parenthood physicians provide abortions to minors at the four Planned Parenthood facilities in Indiana that offer abortion services. Beeley Decl. ¶¶ 4–5, 8. The vast majority of these minors obtain consent from their parents, guardians, or custodians. In fiscal year 2015 (the most recent data in the record), over 96 percent had obtained consent; fewer than four percent had obtained a judicial bypass. Beeley Decl. ¶¶ 9, 19. That amounts on average to about ten judicial- bypass abortions per year by Planned Parenthood. See Smith Decl. ¶ 9.

Planned Parenthood counsels minors to discuss their de- sire for an abortion with a parent. Beeley Decl. ¶ 20. Some minors tell Planned Parenthood staff that they do not want to, or feel they cannot, inform their parents that they are pregnant and wish to obtain an abortion. *Id.*, ¶¶ 20–21. In that case, Planned Parenthood gives the minor the telephone number of the bypass coordinator—a person who does not work for Planned Parenthood and who maintains a list of attorneys who can represent a young woman in a judicial bypass proceeding. Beeley Decl. ¶ 24; Smith Decl. ¶¶ 5-6. Planned Parenthood does not sponsor the bypass coordinator's efforts. Smith Decl. ¶ 6.

Over a six-year period, between October 2011 and September 2017, approximately 60 minors contacted Indiana's bypass coordinator. Smith Decl. ¶ 9. Most were seventeen years old. *Id*. Usually, the young

women interested in pursuing judicial bypass have not told their parents that they are pregnant and are seeking an abortion. *Id*., ¶ 14. These young women have expressed various reasons for not telling their parents. Some fear being kicked out of their homes. Others fear being abused or punished, or fear that their parents will try to block an abortion. *Id*., ¶¶ 15–16; Beeley Decl. ¶ 22; Flood Decl. ¶ 9; Pinto Decl. ¶¶ 14–15; Lucido Decl. ¶¶ 8–12. One young woman was forced to give birth because her mother discovered her pregnancy and blocked her ability to have an abortion. Glynn Decl. ¶ 13.

Other minors express related concerns like injury to their relationships with their parents or parental disappointment. Smith Decl. ¶ 17. Some minors do not know where their parents are and have no legal guardian or custodian who could fulfill the consent requirement. Beeley Decl. ¶ 23; Lucido Decl. ¶ 13. Consistently, the young women express their fear that their parent(s) will discover that they are pregnant and seeking an abortion. Smith Decl. ¶ 18; Glynn Decl. ¶ 12; Lucido Decl. ¶¶ 8–13.

The bypass coordinator currently informs young women that no one involved in the bypass process will notify their parents that they are pregnant or seeking an abortion. Smith Decl. ¶ 18. As the district court found, however, Indiana's new law makes this assurance impossible. 258 F. Supp. 3d at 936–37. The district court also found that bypasses granted to Planned Parenthood's patients "have generally been based on the juvenile court's finding that the minor was sufficiently mature to make the abortion decision

independent of her parents," as distinct from the minor's "best interests." *Id.* at 936, citing Beeley Decl. ¶ 26; Flood Decl. ¶ 6; Glynn Decl. ¶ 9.

III. *The District Court's Analysis*

The district court enjoined the enforcement of the parental notification requirement. *Planned Parenthood*, 258 F. Supp. 3d at 956. The court identified the tension in the case law regarding the standard for a pre-enforcement facial challenge of an abortion statute, *id.* at 937–39, and noted that "the severity and character of harm presented by certain abortion restrictions render them vulnerable to pre-enforcement facial challenges." *Id.* at 939. Crediting the uncontradicted affidavits offered by Planned Parenthood, the district court found that "the requirement of providing parental notification before obtaining an abortion carries with it the threat of domestic abuse, intimidation, coercion, and actual physical obstruction." *Id.* The court therefore rejected as "simply incorrect" the State's argument that Planned Parenthood must wait to challenge the law until it has evidence of the law's effect after it goes into effect. *Id.*

On the merits, the district court reviewed the evolution of both Supreme Court and circuit precedent in this challenging area of the law. 258 F. Supp. 3d at 940–46. Following the command of *Planned Parenthood v. Casey* in applying the "undue burden" standard, the district court identified the relevant group of young women as the "group for whom the law

is a restriction, not the group for whom the law is irrelevant." *Id.* at 939, quoting 505 U.S. at 894. The court then described that group as young women who face the possibility of interference, obstruction, or abuse as a result of the parental notification requirement. The district court entered a preliminary injunction because the notice requirement was likely to "create an undue burden for a sufficiently large fraction of mature, abortion-seeking minors in Indiana." 258 F. Supp. 3d at 939–40, citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

IV. *Pre-Enforcement Facial Challenge*

The State argues that the district court erred in issuing the preliminary injunction because a facial challenge requires evidence of a law's effects, and that evidence can be obtained only by allowing a law to go into effect. The State's position derives primarily from language in our decision in *A Woman's Choice-East Side Women's Clinic v. Newman*, where we said that "it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate." 305 F.3d 684, 693 (7th Cir. 2002). Strictly speaking, this passage was dicta in the opinion, which addressed a permanent injunction after discovery and a full trial, not the earlier preliminary injunction, but it was obviously considered dicta.

The State's position overstates the evidence required for a pre-enforcement facial challenge, as shown by a broader look at cases decided before and after *A Woman's Choice*. When we decided *A Woman's*

Choice, there was a sharper conflict in Supreme Court precedent on this question. In *United States v. Salerno*, the Supreme Court had said broadly that, outside the First Amendment, a law is facially invalid only where "no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). But *Salerno* was about the Bail Reform Act. In *Casey* and in *Stenberg v. Carhart*, the Court had invalidated two abortion statutes on pre-enforcement facial challenges without even mentioning *Salerno*. See *Casey*, 505 U.S. at 845, 895; *Stenberg*, 530 U.S. 914, 945 (2000).

The State argues that *A Woman's Choice* resolved the tension and that "the applicable test on a pre-enforcement facial challenge to an abortion regulation is whether the law will *incontrovertibly* impose an undue burden." State's Br. at 12. It is difficult to reconcile this rule of thumb with the general standard for preliminary injunctions, which requires the district court to exercise its sound equitable discretion in balancing several factors. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Also, other decisions by this court, both before and after *A Woman's Choice*, have recognized that the law on this question has not been as clear-cut as the State argues. See, e.g., *Zbaraz v. Madigan*, 572 F.3d at 381 n.6 (noting "some disagreement" over applicability of *Casey*'s "large fraction" test or *Salerno*'s "no set of circumstances" test—because of 2008 Supreme Court decision affirming *Salerno*'s applicability outside abortion context—but upholding parental no- tice requirement with judicial bypass under either standard); *Karlin v. Foust*, 188 F.3d 446, 483 (7th Cir. 1999)

(noting "considerable disagreement" over which standard to apply because *Casey* "appears to have tempered, if not rejected, *Salerno*'s stringent 'no set of circumstances' standard in the abortion context," but assuming applicability of *Casey*'s large fraction test because neither party appealed district court's use of *Casey* test); see also *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 788, 789 (7th Cir. 2013) (affirming injunction against requirement that physicians who perform abortions have admitting privileges at nearby hospital).

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*, which confirmed that the *Casey* undue burden standard applies to pre-enforcement facial challenges to statutes regulating abortion. 136 S. Ct. at 2309–10 (identifying *Casey* undue burden standard as applicable test); *id.* at 2314–18 (applying undue burden stand- ard to facial challenge to surgical center requirement statute); *id.* at 2320 (identifying denominator for large-fraction test). In *Whole Woman's Health*, the plaintiffs brought a pre-enforcement facial challenge to a Texas statute requiring that abortion facilities abide by the same minimum facility standards as ambulatory surgical centers. See *id.* at 2300; *id.* at 2301 (noting that petitioners brought suit on April 6, 2014 seeking "an in- junction prohibiting enforcement of the surgical-center provision anywhere in Texas"). The Supreme Court applied the undue burden standard and reversed the denial of an in-

junction, without citing *Salerno*. To support that reversal, the Court relied on pre-enforcement evidence from the district court. E.g., *id.* at 2317.[5]

These applications fit with the Supreme Court's recent acknowledgment that facial challenges may "proceed under a diverse array of constitutional provisions." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) (collecting cases); see also Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Calif. L. Rev. 915, 918 (2011) ("Facial challenges also succeed much more frequently than either Supreme Court Justices or most scholarly commentators have recognized.").

V. *Applying the Preliminary Injunction Standard*

To obtain a preliminary injunction, a plaintiff must show a reasonable likelihood of success on the

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[5] The briefing in *Whole Woman's Health* supports this approach. In its brief, Texas assumed that *Casey*'s "large fraction" test applied but argued that the Court should apply *Salerno*'s "no set of circumstances" test if the Court addressed the issue. Brief for Respondents at 30 n.10, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274), 2016 WL 344496, at *30 n.10. The Court did not address this argument explicitly but rejected it implicitly, following *Casey*. The dissenting Justices in *Whole Woman's Health* also did not invoke *Salerno*. Another portion of *Whole Woman's Health* challenged a requirement that had been allowed to take effect, that physicians have admitting privileges at nearby hospitals. The evidence showed that after the requirement took effect, it led to closure of about half the facilities providing abortions in Texas and imposed an undue burden on women's right to choose to terminate their pregnancies. 136 S. Ct. at 2312–13.

merits, the absence of an adequate remedy at law, and a threat of irreparable harm without the injunction. E.g., *Planned Parenthood of Indiana, Inc. v. Commissioner*, 699 F.3d 962, 972 (7th Cir. 2012). If the plaintiff makes this showing, the court weighs two additional factors: the balance of harms—harm to the plaintiff if the injunction is erroneously denied versus harm to the defendant if the injunction is erroneously granted—and the effect of the injunction on the public interest. *Id.*; accord, *Winter*, 555 U.S. at 24; *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992). The higher the likelihood of success on the merits, the less decisively the balance of harms needs to tilt in the moving party's favor.

In reviewing a district court's grant of a preliminary injunction, we review factual findings for clear error, legal conclusions *de novo*, and balancing of the equitable factors for abuse of discretion. The abuse of discretion standard means that the district court's weighing of evidence and balancing of the equitable factors receive "substantial deference." *Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). That deference is appropriate given the nature of preliminary injunction decisions, which must be based on incomplete information and are subject to further consideration and revision after discovery, more evidence, and a trial.

Motions for preliminary injunctions call upon courts to make judgments despite uncertainties. Uncertainty about a law's application does not necessarily preclude an injunction. We have read *Casey* as calling for consideration of a law's "*likely* effect." E.g.,

Karlin, 188 F.3d at 481 (emphasis added). *Casey* itself spoke in terms of possibilities in striking down a spousal notice law before it took effect. See, e.g., 505 U.S. at 893 ("*may* fear," "*likely* to prevent," "*will* impose"), 895 ("*will* operate") (opinion of the Court) (emphases added).

Our decision in *A Woman's Choice* is not inconsistent with this focus. In *A Woman's Choice*, the state had not appealed the preliminary injunction that preserved the status quo while the parties developed a more complete record. See 305 F.3d at 684. The preliminary injunction had been issued despite the district court's inability "to draw *definitive* conclusions." *Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1462 (S.D. Ind. 1995) (emphasis in original). And when we decided the appeal from the *permanent* injunction in that case, we distinguished the record before us from the record in *Casey* on spousal notice, a record showing a rule "facilitating domestic violence or even inviting domestic intimidation." *A Woman's Choice*, 305 F.3d at 692.[6]

[6] As noted above, our opinion in *A Woman's Choice* criticized the un-appealed preliminary injunction in that case, see 305 F.3d at 692–93, but on grounds tied to the pre-enforcement challenge issue discussed above, for which *Whole Woman's Health* provides more recent and authoritative guidance from the Supreme Court.

A. *Likelihood of Success on the Merits*

We consider first Planned Parenthood's likelihood of success on the merits, and then turn to the other equitable factors for preliminary injunctive relief. The district court concluded that Planned Parenthood demonstrated a likelihood of success on the merits because the parental notification requirement appeared highly likely to impose an undue burden for the minors whom it will affect. We agree with the district court's analysis, except that we do not need to decide whether the Supreme Court's requirements for parental consent statutes also apply in full to parental notice statutes.

Planned Parenthood demonstrated a likelihood of success on the merits because Indiana's notice law creates a substantial risk of a practical veto over a mature yet unemancipated minor's right to an abortion. This practical veto appears likely to impose an undue burden for the unemancipated minors who seek to obtain an abortion without parental involvement via the judicial bypass. The burden appears to be undue because the State has made no effort to support with evidence its claimed justifications or to undermine with evidence Planned Parenthood's showing about the likely effects of the law.

In *Whole Woman's Health*, the Supreme Court applied the *Casey* plurality's undue burden standard. 136 S. Ct. at 2309–10. The undue burden standard "is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality opinion). In both cases, the Court took a commonsense approach in considering the practical effects of the state regulations. *Whole Woman's Health*, 136 S. Ct. at 2317 ("Courts are free to base their findings on commonsense inferences drawn from the evidence."); *Casey*, 505 U.S. at 892 (opinion of the Court) (noting that district court's findings regarding effect of spousal notice statute and potential for domestic abuse "reinforce what common sense would suggest").

1. *The Relevant Group for Undue Burden Analysis*

If a statute "will operate as a substantial obstacle" "in a large fraction of the cases in which [it] is relevant," the statute "is an undue burden and therefore invalid." *Casey*, 505 U.S. at 895 (opinion of the Court); accord, *Whole Woman's Health*, 136 S. Ct. at 2320. The analysis starts with those "upon whom the statute operates"—i.e., "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894 (opinion of the Court). For the spousal notice law struck down in *Casey*, that was less than one percent of women seeking abortions. This group serves as the denominator for the relevant fraction *Casey* described. Under *Casey*, a statute that will have the practical effect of giving someone else a veto over a woman's abortion decision

is an undue burden. See 505 U.S. at 897 (spousal notice requirement would give husbands of spousal abuse victims "an *effective* veto" that "will often be tantamount to the veto found unconstitutional in *Danforth*") (emphasis added).

Casey qualified its holding on spousal notice by saying it was "in no way inconsistent" with the Court's parental notice and consent requirements for minors. 505 U.S. at 895. But here, as in *Casey*, evidence matters. See *id.* at 887–94 (discussing district court's findings and studies of domestic violence). Planned Parenthood's evidence—which the State did not rebut with its own—raises concerns about minors similar to those the *Casey* Court had about the practical veto imposed on some women by spousal notice. *Casey* shows that a practical veto can be an undue burden, whether that practical veto is held by a partner or a parent of a mature minor.

The *Casey* analysis focuses on proportions, not total numbers. See *Van Hollen*, 738 F.3d at 798 ("It is not a matter of the number of women likely to be affected."). Although the record does not indicate the exact number of unemancipated minors who will be affected as they go through the judicial by- pass, the number appears to be small. In fiscal year 2015, 96 percent of minors who had abortions at Planned Parenthood facilities in Indiana had their parent or guardian's consent. Beeley Decl. ¶ 9. Just four percent did not have consent. Between October 2011 and September 2017, about 60 young women contacted the bypass coordinator, and only some of them obtained an

abortion. Smith Decl. ¶ 9. On average, that is about 10 minors per year.[7]

In the district court, Planned Parenthood argued that the denominator for the *Casey* fraction is unemancipated minors seeking bypasses. These are the young women for whom the law's restriction is relevant. Cf. *Casey*, 505 U.S. at 895 (opinion of the Court) (defining denominator as "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement"). The district court found that the bypasses granted to Planned Parenthood patients "have generally been based on the juvenile court's finding that the minor was sufficiently mature." *Planned Parenthood*, 258 F. Supp. 3d at 936, citing Beeley Decl. ¶ 26. Accordingly, Planned Parenthood argues that the burdensome effects of the new parental notice requirement produce a large *Casey* fraction because most bypasses have been granted on maturity grounds, which is not a basis for excusing parental notice under the challenged Indiana law. We agree.

On this record, though, the correct numerator and denominator may both actually be even larger. Both numbers include not only young women who could be

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[7] In calendar year 2017, 236 minors obtained abortions in Indiana. Indiana State Department of Health, Terminated Pregnancy Report 2017, at 7, available at https://www.in.gov/isdh/files/2017%20Indiana%20Termi-nated%20Pregnancy%20Report.pdf.

deemed mature in a judicial bypass of the consent requirement, but also young women who are likely to be deterred from even attempting judicial bypass because of the possibility of parental notice. Indiana has aimed this requirement at the tiny group of minors who could show maturity but could not show that parental notice would not be in their best interests. The evidence in the preliminary injunction record indicates that the statute's effect will be broader because it will prevent some minors from even seeking bypass in the first place. The fear these minors feel at the prospect of the "chance that their parents will have to be informed that they are seeking an abortion … would be a deal breaker." Smith Decl. ¶ 20.

2. *The State's Interest in the Notice Requirement*

Whole Woman's Health reiterated that *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," and courts must balance these interests. 136 S. Ct. at 2309. *Whole Woman's Health* shows that courts must consider actual evidence regarding both claimed benefits and claimed burdens of abortion regulations. *Id.* at 2309–10. In that case, for example, Texas argued that its admitting-privileges requirement was intended to provide health benefits in cases with complications. The evidence showed, however, that "there was no significant health-related problem that the new law helped to cure." *Id.* at 2311.

In this case, the State 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. See *id.* The State has several substantial interests that can be relevant in this context, if there is reason to think they will be advanced by the new law. E.g., *Casey*, 505 U.S. at 871 (plurality opinion) ("protecting the potentiality of human life," quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)); *Casey*, 505 U.S. at 872 (plurality opinion) ("expressing a preference for normal childbirth," quoting *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 511 (1989)); *Planned Parenthood*, 258 F. Supp. 3d at 941 ("protecting children and adolescents, preserving family integrity, and encouraging pa- rental authority"). Against these potential State interests, minors also have constitutional rights that require protection. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."). In the face of evidence of burdensome effects, it is not enough for the State merely to recite its interests and to claim the new law will serve those interests or to say it is only experimenting.

The State's arguments assume that, in raising their children, parents will fulfill the role the Supreme Court has said is constitutional for them to fulfill. We can all hope that that is the reality for the vast majority of young women who face an unexpected pregnancy and that they will turn to their parents for guidance. But the evidence before the district court here illustrates a different and "stark social reality," *Ohio v. Akron Center for Reproductive Health*, 497

U.S. at 537 (Blackmun, J., dissenting), "that there is 'another world out there,'" *id.* at 541, quoting *Beal v. Doe*, 432 U.S. 438, 463 (1977) (internal quotation marks omitted). For 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. That practical effect is an undue burden because it weighs more heavily in the balance than the State's interests. We agree with the district court that 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. *Planned Parenthood*, 258 F. Supp. 3d at 948.

Indiana argues that parents need notice because they need to know about the abortion to be able to care for their daughter's health: "abortion is a facet of medical history that could have implications for future treatment." State's Br. at 22. While that rationale sounds reasonable at first, it is not sup- ported by logic or evidence. As a matter of logic, if we assume this knowledge would help parents care for their daughters later, the State's proposed benefit would not depend on giving parents *prior* notice of an abortion, as the statute requires. Planned Parenthood's evidence shows a serious risk that prior notice, instead of giving parents an opportunity to offer wise counsel, will actually give parents an opportunity to exercise a practical veto, preventing the pregnant minor from actually exercising the constitutional right the juvenile court has allowed her to exercise.

In fact, the State has offered no evidence that any actual benefit is likely or that there is a real problem that the notice requirement would reasonably be expected to solve. *Whole Woman's Health* shows that myths, speculation, and conventional wisdom are not enough to justify restrictions on the right to abortion. 136 S. Ct. at 2311 ("there was no significant health-related problem that the new law helped to cure"). In applying the undue burden standard, actual evidence is key in weighing both the extent of burdens and the extent of benefits a State offers to justify them. 136 S. Ct. at 2310, citing *Casey*, 505 U.S. at 888–94 (discussing evidence showing spousal notice requirement imposed undue burden on right to terminate pregnancy). In this case, the State offered no evidence to support these proposed benefits, such as how, why, and how often a minor's past abortion is likely to affect her mental health or her future health-care.[8]

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[8] Without relevant evidence in the record, our dissenting colleague cites studies cited in an amicus brief on appeal and in the concurring opinion in *McCorvey v. Hill*, 385 F.3d 846, 850–51 & n.3 (5th Cir. 2004) (Jones, J., concurring), to assert that a mature minor who has an abortion faces substantial risks to her mental and physical health and would benefit from her parents' support. Post at 45. Because these studies on this controversial subject are not in the record and have not been subject to adversarial testing in litigation, we do not address them in detail. As a general rule, how- ever, data on physical health indicate that "complications from an abortion are both rare and rarely dangerous." *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015); *id.* at 913 (noting studies finding "that the rate of complications is below 1 percent"); see also *Whole Woman's Health*, 136 S. Ct. at 2311–12 (finding no legitimate state interest in requiring facilities that perform abortions also

3. *The Burden Imposed by the Notice Requirement*

There is of course a formal legal difference between a notice requirement and a consent requirement. The Supreme Court has drawn that distinction on the basis that notice statutes "do not give anyone a veto power over a minor's abortion decision." *Ohio*

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have hospital admitting privileges because weight of the evidence revealed extremely low rate of abortion-related complications). Regarding mental health issues, the American Psychological Association undertook a comprehensive review of mental health studies of women who had abortions and found serious methodological problems in many published studies finding serious mental health risks. The APA task force found, among other things, that the "best scientific evidence published indicates that among adult women who have an *unplanned pregnancy*, the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy." American Psychological Association, Task Force on Mental Health and Abortion at 4 (2008), available at http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf.

Nothing we decide today prevents the State from presenting further evidence on such matters to the district court, where both the State's and Planned Parenthood's evidence can be tested and challenged without the urgent time pressure of a preliminary injunction proceeding. As the Supreme Court outlined in *Whole Woman's Health*, the district court, in "determining the constitutionality of laws regulating abortion procedures," will "place[] considerable weight upon evidence and argument presented in judicial proceedings," rather than deferring to a legislative resolution of "questions of medical uncertainty." 136 S. Ct. at 2310. The district court will then apply "the standard … laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is 'undue.'" *Id*.

v. Akron Center, 497 U.S. at 511, citing *H. L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981). Although a notice requirement is not the formal or legal equivalent of a consent requirement, it is equally clear that a notice requirement *can* operate as the *practical* equivalent of a consent requirement. *Casey* recognized just that possibility. That was the basis for striking down the spousal notice requirement. 505 U.S. at 833, 897 ("spousal notice requirement enables the husband to wield an effective veto over his wife's decision"); see also *Planned Parenthood v. Miller*, 63 F.3d 1452, 1459 (8th Cir. 1995) (distinguishing between notice providing an "opportunity" and consent providing a "tool" to obstruct abortion).[9]

The preliminary injunction record here shows the serious potential for the kind of harms identified in *Casey*. For a significant fraction of the small number of unemancipated minors seeking an abortion via judicial bypass, Indiana's notice requirement will likely operate as an undue burden by giving parents a practical veto over the abortion decision. The district court credited the unchallenged testimony of the bypass coordinator and a bypass attorney indicating that young

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[9] This reading of Justice Kennedy's opinion for the Court in *Ohio v. Akron Center* is consistent with Justice Kennedy's language in another opinion issued the same day. See *Hodgson v. Minnesota*, 497 U.S. 417, 496 (1990) (Kennedy, J., dissenting in part) ("Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed.") (emphasis added).

women have chosen not to inform their parents of their pregnancy out of fear of abuse. *Planned Parenthood*, 258 F. Supp. 3d at 946–47, citing Smith Decl. ¶¶ 16–17 and Flood Decl. ¶ 9. The district court also credited unchallenged testimony that pregnancy is a "flashpoint" for abuse. *Id.* at 946, citing Pinto Decl. ¶¶ 14–15.

This evidence parallels the evidence the Supreme Court accepted in *Casey*. 505 U.S. at 889 (opinion of the Court), quoting district court's finding of pregnancy as a "flashpoint for battering and violence within the family," and at 893 (crediting fear of "threats of future violence"). The district court found here that fear of abuse may "prompt pregnant minors to engage in hazardous self-help measures such as attempting to physically and/or chemically induce miscarriage or to entertain thoughts of suicide." *Planned Parenthood*, 258 F. Supp. 3d at 947, citing Pinto Decl. ¶ 16 (one patient attempted to induce miscarriage by convincing boyfriend to stomp on her stomach and push her down stairs; another patient attempted to induce miscarriage by drinking poison).

The district court also found that notice to parents could result in actual obstruction of the abortion itself, in addition to indirect obstruction via withdrawal of financial support. 258 F. Supp. 3d at 946. In *Casey*, the Supreme Court credited similar fears of women who were afraid of notifying their husbands of a pregnancy. 505 U.S. at 893 (discussing fear of "psychological abuse," including "verbal harassment, threats of future violence, the destruction of possessions, phys-

ical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends"). The district court found here that *Casey*'s concerns are "heightened with regard to unemancipated minors, who typically must rely on their parents … for financial support, housing, and transportation in addition to the many legal incapacities for which the parents must serve as proxy." 258 F. Supp. 3d at 946.

For young women who have these fears, the potential for parental notice is a threat that may deter them from even at- tempting bypass in the first place. *Id.* at 947, citing Pinto Decl. ¶ 28; see also Smith Decl., ¶ 20; Glynn Decl., ¶ 17; Flood Decl., ¶ 13. For some, as noted, it is a "deal breaker." Smith Decl. ¶ 20. We have recognized a similar deterrent effect before. *Indiana Planned Parenthood Affiliates Ass'n v. Pearson,* 716 F.2d 1127, 1141 (7th Cir. 1983) ("It is hardly speculative to imagine that even some mature minors will be deterred from going to court if they know that their parents will be notified if their petitions are denied, because no minor can be certain that the court will rule in her favor."). This record gives evidentiary weight to the possibilities we identified as concerns about mandatory notice even before *Bellotti* was decided. See *Wynn v. Carey*, 582 F.2d 1375, 1388 n.24 (7th Cir. 1978).

We must also recognize that any particular obstacle to exercising the right to choose to end a pregnancy does not exist in a vacuum. See *Whole Woman's Health*, 136 S. Ct. at 2313. Cumulative effects are relevant, especially in an environment in which very few

clinics and physicians perform abortions in Indiana. The deterrence shown in this record must be understood in the larger context of the logistical puzzle that the Indiana bypass statute already requires minors to solve.

A teenager who suspects she is pregnant but who has good reasons to fear telling her parents must figure out where to go to determine whether she is pregnant, how to get there (without missing school or work and without alerting her family), and how to pay for whatever that initial visit costs. If she visits a Planned Parenthood clinic, she might find out about the possibility of a judicial bypass to obtain an abortion. If she wants to pursue that route, she must then find her way to a state court, with or without a lawyer, and persuade a judge either that she is mature enough to have an abortion without her parents' consent or that doing so would be in her "best interests." Even if she proves that she is mature enough to have the abortion without her parents' consent, Indiana's new law would allow a judge to require parental notice unless she proves that an abortion without parental notice would be in her "best interests." Planned Parenthood's unchallenged evidence shows that the existence of that additional requirement is likely to cause a significant fraction of affected young women to be too afraid to even try to seek an abortion.

None of the district court's findings are clearly erroneous. The State's position that the parental notice requirement does not afford parents a legal *or* practical right to obstruct the abortion stretches too far. Notice is not the legal equivalent of consent, but a notice

requirement can have the same practical effect as a consent requirement, as *Casey* reasoned in striking down a spousal notice requirement. 505 U.S. at 896–98; see also *Indiana Planned Parenthood Affiliates v. Pearson*, 716 F.2d at 1132. The district court credited Planned Parenthood's evidence showing that Indiana's law has the serious potential to create that practical effect by triggering parental obstruction, triggering hazardous self-help, and deterring some minors from even attempting bypass. The preliminary injunction here was appropriate because, taken individually or collectively, those possibilities demonstrate serious potential for an undue burden. The undue burden analysis can include cumulative effects. See *Whole Woman's Health*, 136 S. Ct. at 2313 (de- scribing increased driving distances as "one additional bur- den … taken together with others").

In applying the undue burden test, we must also address two other oddities of the notice requirement. First, the State acknowledges that a 48-hour parental notice requirement, like the one the Eighth Circuit addressed in *Miller*, 63 F.3d at 1458, "raises additional questions about the opportunity for the parents to intercede and to obstruct the abortion." The only timing requirement in Indiana's statute is that notice be given "before the abortion is performed." Ind. Code § 16-34-2-4(d). That is troubling. It leaves the potential for a judge to require notice to be given even longer in advance than in *Miller*.

The two methods the statute identifies for delivering that notice pose similar practical problems. The statute requires that the "attorney representing the

unemancipated pregnant minor shall serve the notice required by this subsection by certified mail or by personal service." *Id.* That puts the minor and her lawyer in a difficult position. The lawyer cannot control the timing of delivery of a letter sent by certified mail. To comply with the requirement of actual notice before the abortion is to be performed, the lawyer will have to allow plenty of time for the letter to be delivered and received, and for the proof of receipt to be returned. As a practical matter, that is likely to require a planned delay of at least a week and per- haps longer. Abortions in Indiana require advance scheduling to comply with the State's informed-consent and cooling-off rules. See Ind. Code § 16-34-2-1.1(a).

The only alternative is personal notice to the parents, by the lawyer. Picture the scene: a stranger knocks at the door and announces to the young woman's parents that their daughter is pregnant and is seeking an abortion, that a judge has authorized the abortion, and that it will occur soon. The potential for serious trouble is self-evident, for the lawyer and for the pregnant minor and her constitutional rights. And all of this after a judge has already been convinced to bypass parental consent.

The district court's recognition of the likely practical con- sequences of this law is consistent with *Casey*. *Casey* distinguished its holding as to married women from the line of cases addressing parental notice or consent requirements because those cases "are 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." 505 U.S. at 895 (opinion of the Court). Just as the *Casey* court did not have to adopt that same assumption for married women, the district court was not required to adopt it in the face of this record with unchallenged evidence showing that the same assumption is too optimistic in a substantial fraction of relevant cases. After all, in this case, that assumption was directly refuted by evidence for purposes of the preliminary injunction.

The State argues that the notice requirement creates no additional risk for young women who fear parental notice. According to the State, these minors are "in no worse position than if [they] had not attempted bypass" because a young woman who initiates the bypass process but fails to convince a court to waive notice can make notice unnecessary by deciding not to have an abortion. The argument illustrates the potential for irreparable harm. A minor who obtains a bypass of parental consent, only to be forced to choose between parental notice and not having the abortion, will still have to weigh the consequences of notice. As the district court found, minors for whom the potential consequences include, for example, con- templating suicide or self-inducing a miscarriage, *Planned Parenthood*, 258 F. Supp. 3d at 947, citing Pinto Decl. ¶ 16, would not be in the same position as if they had never attempted bypass. They would be worse off.

Further, the State's brief acknowledges that at least one purpose of the notice requirement is to inhibit the effective- ness of the judicial bypass process itself. While the State asserts some interests that

could be legitimate, at least in theory, one of the interests proffered is to "ensure that parents of minor[s] are notified of their abortions and provides safeguards for the parent-child relationship *by preventing circumvention of the consent requirement*." State's Br. at 27 (emphasis added). The very purpose of the constitutionally required judicial bypass *is* to "circumvent" the consent requirement in appropriate cases. If the State had presented evidence that the judicial bypass procedure is being abused in some systematic way, we might see this differently. But without such evidence, the argument acknowledges that the new notice requirement is *designed* to impose a new burden on a minor exercising her constitutional right to seek a judicial bypass and thus to be able to make her own decision about her own pregnancy. Cf. *Casey*, 505 U.S. at 877 (plurality opinion) (regulation with "purpose or effect" of creating substantial obstacle to abortion decision is unduly burdensome).

Like the district court, we reject the State's and the dissent's argument that a bypass court can avoid any undue burden by simply considering the potential for abuse as part of the best-interests determination. The district court found that the trauma of even attempting to prove abuse would deter young women from pursuing bypass. *Planned Parenthood*, 258 F. Supp. 3d at 947. That finding is well-supported. It is not clearly erroneous. Indeed, the finding parallels the district court's finding in *Casey* that the Supreme Court credited. See *Casey*, 505 U.S. at 890 (opinion of the Court) (abused wives "may be psychologically unable to discuss or report the rape for several years after the incident").

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. The context of a preliminary injunction enjoining the enforcement of this statute on a limited factual record necessarily narrows our holding. The Supreme Court has announced clear bypass requirements for parental consent requirements. *Bellotti v. Baird*, 443 U.S. at 643–44 (opinion of Powell, J.) (requiring bypass based either on maturity or best interests). The open question is whether those requirements also apply to parental notice requirements. The district court decided that the standards for parental consent requirements apply equally to parental notice requirements. *Planned Parenthood*, 258 F. Supp. 3d at 945–46. The State acknowledges that, if *Bellotti* applies to notice statutes, then the Indiana law is unconstitutional because it does not allow a bypass of notice based on maturity. Because the Supreme Court has expressly declined to decide whether *Bellotti* applies to parental notice statutes, we decline to decide this appeal on this ground. Instead, we affirm the preliminary injunction based on Planned Parenthood's evidence of likely effects, which Indiana did not rebut in the district court with evidence of its own.

As the district court noted, we applied *Bellotti* to parental *notice* requirements in the 1980s. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) ("This standard [i.e., maturity *and* best interests-based bypass] also governs provisions requiring parental notification."), citing *Bellotti*, 443 U.S. at 651 (opinion of

Powell, J.), and *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983). But since then, the Supreme Court has said that it has not decided whether *Bellotti* applies to parental notice statutes. E.g., *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (per curiam) (reversing Ninth Circuit's invalidation of parental notice statute as inconsistent with *Bellotti* because the Court "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional."), citing *Akron Center*, 497 U.S. 502, 510 (1990) (expressly leaving question open). We have noted this evolution before. *Zbaraz v. Madigan*, 572 F.3d at 380 & n.5 (declining to decide applicability of *Bellotti* because parental notice statute satisfied *Bellotti* consent requirements).[10]

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[10] *H.L. v. Matheson* does not save this Indiana statute. The Court upheld Utah's parental notice requirement with no bypass at all, but it did so be- cause the plaintiff "made no claim or showing as to her maturity or as to her relations with her parents." 450 U.S. 406, 407 (1981). The Court said clearly what it was not deciding: "This case does not require us to decide in what circumstances a state must provide alternatives to parental notification." *Id.* at 412 n.22. Justice Powell, author of the lead opinion in *Bellotti*, joined the *H.L.* majority opinion "on the understanding that it leaves open the question whether [the statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." *Id.* at 414 (Powell, J., concurring), citing *id.* at 412 n.22. The majority refused to "assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors." *Id.* at 406 (opinion of the Court). The same assumption cannot be made here. Indiana's statute permits bypass of the notice requirement based on best interests but not based on maturity. See Ind. Code § 16-34-2-4(d), (e). We have to assume that the textual difference was intentional.

The district court acknowledged that the question whether *Bellotti*'s requirements for parental consent statutes apply equally to parental notice statutes "remains unanswered by the Supreme Court and the Seventh Circuit," but held that *Bellotti* "must" apply. *Planned Parenthood*, 258 F. Supp. 3d at 945–46. Although we otherwise agree with the district court's undue burden analysis, we affirm without deciding this question at this preliminary injunction stage.[11]

In other cases, the Court has upheld parental notice statutes based on the rationale that a parental notice statute that contains both a maturity- and best-interests-based bypass is necessarily constitutional. In each case, the Court upheld a statute permitting bypass based on either maturity *or* best interests. *Wicklund*, 520 U.S. at 294 (Montana statute with notice by- pass based on maturity, evidence of abuse, or notice not being in minor's best interests); *Hodgson v. Minnesota*, 497 U.S. 417, 497 (1990) (Kennedy, J., concurring in judgment) (upholding Minnesota parental notice requirement with bypass based on maturity or abortion without notice in minor's best interests); *Akron Center*, 497 U.S. at 508, 510–11 (upholding Ohio pa- rental notice requirement with bypass based on maturity, abuse, or notice not in best interests). We have taken the same approach. *Zbaraz*, 572 F.3d at 374, 380 (upholding Illinois parental notice requirement with bypass based on maturity or best interests).

[11] There is certainly support in the case law for the district court's conclusion. Five Justices in *H.L.* signaled that *Bellotti* should apply to notice bypass statutes. 450 U.S. at 420 (Powell, J., joined by Stewart, J., concur- ring) ("In sum, a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification other-

B. *Other Injunction Requirements*

Planned Parenthood showed a sufficient likelihood of succeeding on the merits to support the district court's injunction. The district court also did not abuse its discretion in concluding that Planned Parenthood satisfied the other requirements for a preliminary injunction.

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wise would not be in her best interests."); *id.* at 428 n.3 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (exception to parental notice required for emancipated minors, mature minors, and minors for whom notice would not be in minor's best interests). And the *Akron* majority observed that no- tice of a bypass proceeding without any exception for a mature or emancipated minor would be unconstitutional. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 441 n.31 (1983). The Sixth Circuit had upheld the ordinance's notice requirement, though, and the petitioners did not challenge that ruling. *Id.* at 439 n.29.

At least two other circuits have applied *Bellotti* to parental notice requirements. See *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997) (declining to read the Supreme Court's silence as a holding that *Bellotti* does not apply to parental notice statutes), overruled on other grounds, *Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001); *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."). At least one other circuit has gone the other way. *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 373 (4th Cir. 1998) ("[W]e hold that a notice statute that [includes at least the *Hodgson* 'best interest' exception] need not include, in addition, a bypass for the mature minor in order to pass constitutional muster").

First, Planned Parenthood demonstrated a likelihood of irreparable harm. In applying the undue burden standard to a restriction on abortion, it is hard to separate the merits from irreparable harm. As discussed above, the record supports the conclusion that young women would suffer irreparable harm if injunctive relief were denied. See *Doe v. Mundy*, 514 F.2d 1179, 1183 (7th Cir. 1975) (enforcement of hospital policy would violate right to privacy and cause irreparable harm); see also *Christian Legal Society v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (presumption of irreparable harm applies to First Amendment violations); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary.").

Planned Parenthood also does not have an adequate legal remedy. The State has not argued otherwise. Instead, it argues that a pregnant minor seeking a judicial bypass could challenge an adverse notification ruling by raising a constitutional challenge in an expedited appeal after the bypass proceeding. Given the time pressures at work in such cases, we reject that alternative as an insufficient answer to the burdens here. See *Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1098 (7th Cir. 1988) (irreparable injury implies inadequacy of legal remedies); see also 11A Wright & Miller § 2944 ("Probably the most common method of demonstrating that there is no adequate legal remedy is by showing that plaintiff will suffer irreparable harm if the

court does not intervene and prevent the impending injury.").

Because Planned Parenthood satisfied these threshold showings, the district court also balanced the equities and considered whether an injunction would be in the public interest. *Planned Parenthood*, 258 F. Supp. 3d at 955. The district court's conclusions on these points were well within the bounds of its discretion.

The district court did not err on the balance of harms. The more likely it is that a plaintiff will win on the merits, the less the balance of harms needs to weigh in the plaintiff's favor. *Planned Parenthood v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013); *Planned Parenthood of Indiana, Inc. v. Commissioner*, 699 F.3d 962, 972 (7th Cir. 2012); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992). On this record, Planned Parenthood's likelihood of success on the merits is substantial. A final judgment in Planned Parenthood's favor would not undo the irreparable harm to which its patients would have been subjected in the meantime, absent the injunction. It was within the district court's sound discretion to weigh those consequences more heavily than any irreparable harm the State faces by delay in implementing its statute.

The district court also did not err on the public interest analysis. 258 F. Supp. 3d at 955, citing *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner*, 984 F. Supp. 2d 912, 931 (S.D. Ind. 2013). Because Planned Parenthood has shown that it is likely

to succeed on the merits and that the balance of harms favors the injunction, those showings weigh more heavily in the balance than the State's interest in enforcing a law that Planned Parenthood has shown is likely unconstitutional. See, e.g., *Preston v. Thompson*, 589 F.2d 300, 306 n.3 (7th Cir. 1978) (injunction in public interest where continuing constitutional violation is proof of irreparable harm).

For all of these reasons, the district court's preliminary in- junction barring enforcement of the new parental notice requirement in Ind. Code § 16-34-2-4(d) and (e) is

AFFIRMED

KANNE, *Circuit Judge*, dissenting. The question presented in this case is straightforward and narrow: does 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?

The Supreme Court has confirmed that both parental consent and parental notification laws are constitutional. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 899 (1992) ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 518–19 (1990) ("We continue to believe that a State may require the physician himself or her- self to take reasonable steps to notify a minor 's parent because the parent often will provide important medical data to the physician."); *H. L. v. Matheson*, 450 U.S. 398, 409 (1981) ("[A] statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor." (quoting *Bellotti v. Baird*, 443 U.S. 622, 640 (1979)); *Id.* at 413 ("That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute.").

These statutes are constitutional because the State possesses "important" and "reasonabl[e]" interests in requiring parental consultation before a minor makes an irrevocable and profoundly consequential

decision. *Bellotti*, 433 U.S. at 640–41 ("[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. … [A] State reasonably may determine that parental consultation often is desirable and in the best interest of the minor."); *see also* Majority Op. at 19; *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r, Indiana State Dep't of Health*, 258 F. Supp. 3d 929, 941 (S.D. Ind. 2017) ("[T]he law recognizes legitimate state interests in protecting children and adolescents, preserving family integrity, and encouraging parental authority.").

Indiana law requires a minor seeking an abortion to obtain consent from her parents unless she can demonstrate to a judge her maturity or show that an abortion is in her best interests. Ind. Code Ann. § 16-34-2-4(e) (2017). This statutory scheme is constitutional. *Bellotti*, 443 U.S. at 643–44.

In 2017, the Indiana General Assembly enacted a law requiring a minor seeking an abortion to notify her parents. Ind. Code Ann. at § 16-34-2-4(d). The minor may receive a judicial bypass by showing that obtaining an abortion with- out notification is in her best interests, but there is no exception for maturity alone. The district court concluded that the statute imposes an undue burden. The majority agrees, but I cannot.[1]

[1] I do agree, however, with the majority's determination that the statute's "requirement to serve notice is triggered only if the

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. We 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." *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002). Because the majority's opinion is inconsistent with our precedent— which remains good law despite the majority's suggestion to the contrary—I respectfully dissent.

I. ANALYSIS

1. Parental Consent and Parental Notification Are Different

Consent and notification requirements are manifestly different, and the Court has repeatedly confirmed that its parental-consent jurisprudence does not necessarily apply to statutes imposing notification requirements. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 295–96 & n.3 (1997); *Akron Center*, 497 U.S. at 510 ("[A]lthough our cases have required bypass procedures for parental consent statutes, we have not

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judge authorizes an abortion." Majority Op. at 4. The new statute does not permit "a judge to order notice to parents of a minor's unsuccessful attempt to seek bypass." *Id.*

decided whether parental notice statutes must contain such procedures.").

We have not decided whether the judicial bypass described in *Bellotti* is required for parental notification statutes. *Zbaraz v. Madigan*, 572 F.3d 370, 380 (7th Cir. 2009). The Fifth and Eighth Circuits have held that parental-notification statutes are unconstitutional without a *Bellotti*-type bypass. *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1107 (5th Cir. 1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) ("[T]he State has no legitimate reason for imposing a restriction on [the] liberty interests [of mature, informed minors] that it could not impose on adult women."). But the Fourth Circuit has held that, "provided that a parental notice statute does not condition the minor 's access to abortion upon notice to abusive or neglectful parents, absent parents who have not assumed their parental responsibilities, or parents with similar relationships to their daughters," it is facially constitutional. *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998).

The majority opinion opts not to decide whether to incorporate the *Bellotti*-bypass requirements into the parental notification context. I have no objection to deferring an exhaustive discussion of that issue to another day. But the majority opinion then concludes that Indiana's failure to allow judicial bypass of the notification requirement for mature minors consti-

tutes an undue burden. Because the evidentiary basis for that conclusion is entirely speculative, I cannot agree.

2. The Preliminary Injunction Record and Decision

As the moving party, Planned Parenthood bears the burden of justifying an injunction. *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 972 (7th Cir. 2012). We shouldn't lightly substitute our judgment for the General Assembly's, especially when "the effects of the law (and reasons for those effects) are open to debate." *A Woman's Choice*, 305 F.3d at 693. Our constitutional system encourages legislative experimentation, and we must be "ever on our guard" when exercising our authority to countermand democratic impulses. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).[2]

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[2] As the majority notes, Majority Op. at 10–13, the Supreme Court has inconsistently articulated the standard for pre-enforcement injunctions of statutes regulating abortion. *Compare United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that, outside the First Amendment context, "the challenger must establish that no set of circumstances exists under which the Act would be valid"), *and Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) ("The latitude given facial challenges in the First Amendment con- text is inapplicable here" in the abortion context.), *with Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (conducting an undue burden analysis without first discussing the standard the plaintiff must meet), *and Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (same). We high- lighted this confusion in *A Woman's Choice* and attempted to synthesize the Supreme Court jurisprudence: the *Salerno* standard is relaxed

At the preliminary injunction hearing, Planned Parenthood introduced seven declarations supporting its motion. I limit my review to the portions of the declarations which the district court considered in connection with its undue burden analysis. Forest Beeley, the Director of Surgical Services for Planned Parenthood, testified that minors often do not wish to inform their parents they are seeking an abortion because of "a fear of being kicked out of the home, a fear of being abused or punished in some way, and a fear that the parent will attempt to block the abortion." R. 14-1, Beeley Decl. at 4. Kathryn Smith—a former Planned Parenthood employee and current volunteer "Indiana by-pass coordinator"—testified regarding her experience in at- tempting to find volunteer attorneys to represent minors in judicial bypass proceedings. She testified that minors typically do not wish to tell their parents because they fear their parents will "throw them out of the house or … punish them." R. 14-3, Smith Decl. at 3; *see also* R. 14-4 , Glynn Decl.

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in the abortion context, but we do not "ignore the fact that enforcement has not commenced" when reviewing an injunction. 305 F.3d at 687.

The majority suggests that *A Woman's Choice* is no longer good law because, in *Whole Woman's Health v. Hellerstadt*, the Supreme Court once again conducted an undue burden analysis without discussing the procedural context of the challenge. 136 S. Ct. 2292, 2309–10. *Hellerstadt* does not resolve the contradictions in the Supreme Court abortion jurisprudence; it deepens them. Like *Stenberg* and *Casey*, the Court simply ignored the language from *Salerno* and *Gonzales* indicating that preenforcement injunctions require special justification.

at 3; R. 14-5, Flood Decl. at 2 ("Two of the women expressed concerns about abuse if their parents discovered they had an abortion."). Smith testified that the judicial bypass process is "incredibly daunting and intimidating." *Id.* at 4.

Finally, Planned Parenthood (and the district court) relied heavily upon Dr. Suzanne M. Pinto's declaration. Dr. Pinto works as a psychologist in Colorado and specializes in treating abused minors and victims of domestic violence. She detailed examples of sexual and physical abuse inflicted by parents on minors. And she noted that "[p]regnancy is a particular flash point. As a physical manifestation of sexual activity pregnancy can signify a teen's independence from parental control." R. 14-6, Pinto Decl. at 5.

Dr. Pinto asserted that, if the statute stands, abused minors will summarily reject judicial bypass as an option out of "fear of exposing their abuse, fear or being forced to describe their abuse to strangers in an adversarial court hearing, fear that that they or their families will get into trouble if they bring up the abuse, and fear" of increased abuse at home. *Id.* at 8; *see also* R. 14-7, Lucido Decl. at 4 ("In many cases, teens seeking a judicial bypass have abusive parents, and the young women have a well-founded fear based on past experience that if one or both of her parents were to learn of the pregnancy or the minor's desire to have an abortion, it would precipitate additional abuse."). Dr. Pinto thus argues that minors will be un-

able to make the full disclosure that the "best interests" exception would require. Pinto Decl. at 8,[3] *see also* Lucido Decl. at 7–8 (detailing the practical challenges a minor in an abusive home may face if attempting to obtain a judicial bypass).

The district court credited the testimony that minors may encounter post-notification obstruction by parents. 258 F. Supp. 3d at 946. The district court further emphasized that "a large number of minors may face the risk of domestic abuse at the hands of one or more of their parents in the event that a parent is notified of the minor's pregnancy." *Id.* (citing Pinto Decl. at 4). The court was particularly concerned that the "fear of retaliatory abuse" might deter a minor from even attempting to obtain judicial bypass (even if she could satisfy the "best interests" exception). *Id.* at 947. The district court's undue burden analysis might be summarized by this passage discussing the harms posed by the new statute:

> [F]or many young women in Indiana, the requirement of providing parental notification before obtaining an abortion carries with it the threat of domestic abuse, intimidation, coercion, and actual physical obstruction. The State's argument that those seeking to

[3] Dr. Pinto seemed to believe that the challenged statute requires parental notice "even if the court has not yet ruled upon, or has denied, the minor's petition to make the abortion decision without parental con- sent." *Id.* at 4. As indicated above, I join the majority's rejection of that interpretation: the statute requires notice only upon the determination that an abortion is to occur.

> challenge the law must wait until evidence of this type of harm accrues is simply in- correct. The Court need not sit idly by while those most vulnerable among us are subjected to unspeakable and horrid acts of violence and perversion, nor may we blind ourselves to the fact that for millions of children (including young women) in the United States the threat of such abuse is real.

Id. at 939 (citing Pinto Decl. at 4).

3. The Statute Does Not Impose an Undue Burden

Given this evidentiary background, the district court concluded—and the majority agrees—that the new Indiana statute imposes an undue burden. But I disagree. Consider the following scenarios: if the minor cannot satisfy the maturity or "best interests" exceptions, she cannot obtain a judicial bypass for either consent or notification (and that is constitutional, per *Bellotti*). If she can show that obtaining an abortion without involving her parents is in her best interests, she can obtain judicial bypass of both consent and notification. If she can show maturity but not that obtaining an abortion without involving her parents is in her best interests, she can obtain judicial bypass of consent but not of notification. Is that an undue burden?

A. Evidence Regarding At-Risk Minors Does Not Establish the Need for a Maturity Exception

In finding that it is an undue burden, the district court and majority rely on evidence that minors in abusive homes will be at risk if their parents discover that they plan to have an abortion. But the "best interests" exception completely covers that scenario. If the minor can demonstrate a likelihood of retributive abuse, the court will conclude that the minor's best interests require bypassing the notification requirement. Planned Parenthood has not identified an instance where an Indiana court rejected a minor's "best interests" argument and required parental consent, but abuse followed.

State-imposed restrictions on mature minors cannot, by themselves, be constitutionally problematic. "[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." *Matheson*, 450 U.S. at 425 (Stevens, J., concurring). Would we invalidate a law that requires parental consent for a minor to marry because it did not include an exception for minors who can demonstrate their maturity? *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."); *Matheson*, 450 U.S. at 425 n.2 (Stevens, J., concurring) ("Instead of simply enforcing general rules

promulgated by the legislature, perhaps the judiciary should grant hearings to all young persons desirous of establishing their status as mature, emancipated minors instead of confining that privilege to unmarried pregnant young women.").

A minor's maturity has no relation to the likelihood of abuse (or, at least, Planned Parenthood has not introduced evidence explaining why that might be so). *See Camblos*, 155 F.3d at 373 ("A notice requirement does not become a veto merely because the minor has become mature enough that she must be allowed to decide for herself whether to end her pregnancy."); *see also Matheson*, 450 U.S. at 425 (Stevens, J., concurring) ("Almost by definition, however, a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval. Furthermore, if every minor with the wisdom of an adult has a constitutional right to be treated as an adult, a uniform minimum voting age is surely suspect."). Thus, Planned Parenthood's evidence regarding at-risk minors is irrelevant to the question of whether the Constitution requires an exception to parental notification for mature minors.

When a court concludes that a minor is mature enough to decide to have an abortion but also that the minor's best interests would be served by notifying her parents, the State has a legitimate and significant interest in requiring that notification. *Camblos*, 155 F.3d at 374 ("[E]ven the most mature teenager will benefit from the experienced advice of a parent, and, as a consequence of that dialogue, make a more in-

formed, better considered, abortion choice."). Abortion can be emotionally and physically traumatic for adult women. *See McCorvey v. Hill*, 385 F.3d 846, 850–51 & n.3 (5th Cir. 2004) (Jones, J., concurring) (collecting clinical and scientific studies). As Planned Parenthood notes, teenage women are a particularly vulnerable demographic, and studies indicate they face an exceptionally high risk of suicidal ideation and emotional turmoil following an abortion. *See Amicus* Br. of Arizona at 11 (citing three studies finding significant mental health risk for post-abortion adolescents, including one study which found a 50% chance of suicidal ideation). A mature minor may wish to keep her abortion secret from her parents and yet benefit greatly from their support before and in the aftermath.

B. The Risk of Deterrence Inherent in Judicial Bypass Proceedings Cannot be an Undue Burden

Perhaps recognizing that the evidence regarding the challenges for abused minors is unrelated to the maturity exception, the majority argues that "the potential for parental no- tice is a threat that may deter [minors] from even attempting bypass in the first place." Majority Op. at 24. In other words, the notification requirement will deter minors from attempting bypass—even if they would qualify under the "best interests" test—because the mere possibility of their parents discovering "would be a deal breaker." Smith Decl. at 4.

Because the State put on no evidence of its own, I assume that possibility to be a concern. But that logic

applies equally to judicial bypass requirements for parental consent statutes. If the minor does not succeed in obtaining judicial bypass, then the minor must obtain the consent of her parents (which, of course, necessarily includes notice of her pregnancy). Certainly, the possibility that a minor might have to obtain her parents' consent could deter her from seeking judicial bypass. Indeed, the risk of deterrence applies with greater force to parental-consent statutes. *See Akron Ctr.*, 497 U.S. at 510 (explaining that consent statutes involve "greater intrusiveness" than notification statutes). Yet the Supreme Court has repeatedly confirmed that parental-consent statutes, subject to the *Bellotti* exceptions, are constitutional.

And there are persuasive reasons why requiring mature minors to notify their parents poses a lesser risk of deterrence. There is a direct relationship between the likelihood of deterrence and the likelihood that the minor will satisfy the "best interests" test. The higher the possibility that the minor will be abused if her parents discover her pregnancy, the higher the likelihood that the court will grant a judicial by- pass for notice. If the minor cannot show that likelihood of mistreatment, she will be less likely to satisfy the "best interests" tests but also less likely to be deterred by the potential consequences of her parents discovering her pregnancy. And, similarly, the more mature the minor, the lower the risk that parental notification will result in a "practical veto." Majority Op. at 15; s*ee also Camblos*, 155 F.3d at 373 ("[T]here is every reason to believe that the burden imposed upon the mature minor by a parental notice requirement will actually be less onerous than that

imposed upon the immature minor."). *Bellotti* demonstrates that the burdens inherent in judicial bypass proceedings cannot be undue.

And that's all the evidence which Planned Parenthood introduced: several declarations from individuals involved in the bypass process discussing their personal observations and anecdotes and a declaration by one child psychologist discussing the challenges which children in abusive homes face in obtaining abortions. There's 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. There's no evidence comparing the decision-making process for immature minors with that of mature minors. And there's no evidence regarding how, in practice, the inclusion of a "best interests" exception and the exclusion of a maturity exception will influence minor decision-making.

That's because, of course, Indiana "has been disabled from implementing its law and gathering information about actual effects." *A Woman's Choice*, 305 F.3d at 687. This is the same fundamental problem that necessitated reversal of the permanent injunction in *A Woman's Choice*. The district court's issuance of a pre-enforcement preliminary injunction prevented collection of actual data about the law's effects. During the bench trial, the district court reviewed data from other states, but those studies did not adequately account for "state-specific characteristics." *Id.* at 690. That reliance on da- ta from other communities and utter lack of Indiana-specific information is

why the "pre-enforcement nature of th[e] suit matter[ed]." *Id.*; *see also id.* at 692 ("If Indiana's emergency- bypass procedure fails to protect Indiana's women from risks of physical or mental harm, it will be a failure *in operation*; it is not possible to predict failure before the whole statute goes into force.").

The majority dismisses *A Woman's Choice* because we are reviewing a preliminary injunction, not a permanent injunction. But the court in *A Woman's Choice* reversed the 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. Thus, 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. Generalized information about abortion regulation writ large cannot substitute for specific, tailored data regarding the statute at issue. *See id.* ("Indiana is entitled to an opportunity to have its law evaluated in light of experience *in Indiana*."). To call this reasoning in *A Woman's Choice* dicta is to misunderstand the majority opinion in that case.[4]

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[4] The majority argues that the State must introduce actual evidence about the benefits and burdens imposed by the statute and suggests that it can still do so at trial. But, like in *A Woman's Choice*, the preliminary injunction will prevent the State from defending its statute with actual operational data at trial. The majority distinguishes *A Woman's Choice* on procedural grounds without recognizing that affirmance will put the State in the position we found so problematic in *A Woman's Choice*.

To the extent Planned Parenthood may believe that the notification statute will have unanticipated or inexplicable effects, the proper time to bring the challenge is after enforcement has revealed those effects. *Id.* at 693.[5]

II. CONCLUSION

The challenged Indiana statute requires parental notification but allows for judicial bypass of that requirement when it would be in the minor's best interests. Planned Parenthood provided evidence that obtaining parental notification will often not be in the minor's best interests, but the statute al ready complies with Supreme Court jurisprudence focused on those concerns.

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[5] The majority also suggests that *A Woman's Choice* has been rendered irrelevant by the Supreme Court's decision in *Hellerstadt*. Majority Op. at 11–12. As explained above, *Hellerstadt* ignored seemingly contradictory jurisprudence and so does not clarify the confusion we identified in *A Woman's Choice*. More importantly, *Hellerstadt* involved a district court record that contained eight peer-reviewed studies regarding the likelihood of abortion complications and testimony from at least four experts regarding the same. 136 S. Ct. at 2311. The present record contains essentially no comparable empirical data. To the extent that Dr. Pinto's declaration qualifies as expert testimony, Planned Parenthood hasn't shown why the information regarding abused minors demonstrates the necessity of a maturity exception. *A Woman's Choice* supports reversal here because, like in that case, the party seeking invalidation of the statute has not provided probative evidence of an undue burden.

The operative question is whether, given the State's manifest interest in involving parents in consequential decisions by their children, the notification requirement constitutes a substantial obstacle for mature minors. The record provides no clarity on that point, and so—because the law was enjoined pre-enforcement—we can only speculate. As the majority recognizes, "evidence matters." Majority Op. at 16.

The district court abused its discretion by enjoining the law pre-enforcement, and its decision should be reversed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., Plaintiff, v. COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, MARION COUNTY PROSECUTOR, LAKE COUNTY PROSECUTOR, MONROE COUNTY PROSECUTOR, TIPPECANOE COUNTY PROSECUTOR, MEMBERS OF THE INDIANA MEDICAL LICENSING BOARD, JUDGE, MARION SUPERIOR COURT, JUVENILE DIVISION, Defendants.	)	Case No. 1:17-cv-01636-SEB-DML

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This cause is before the Court on the Motion for Preliminary Injunction [Docket No. 6], filed on May 18, 2017. Plaintiff Planned Parenthood of Indiana and

Kentucky, Inc. ("PPINK") seeks to have Defendants Commissioner, Indiana State Department of Health, Marion County Prosecutor, Lake County Prosecutor, Monroe County Prosecutor, Tippecanoe County Prosecutor, and Members of the Indiana Medical Licensing Board (collectively, "the State") enjoined from enforcing Senate Enrolled Act No. 404 ("SEA 404"), set to go into effect on July 1, 2017, which amends Indiana law to impose new conditions and regulations concerning the provision of abortion services to unemancipated minors.[1] The Court heard arguments on June 13, 2017. Having now considered those arguments, the parties' evidentiary and written submissions, and the controlling principles of law, we hereby GRANT Plaintiff's Motion for Preliminary Injunction.

Factual Background

I. Relevant Statutory and Regulatory Law

Indiana Code § 16-34-2-1.1(a) provides that an abortion cannot "be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed." If the woman seeking an abortion is an unemancipated minor, current law requires that the physician performing the abortion obtain the written consent of one of

[1] Because 42 U.S.C. § 1983 provides that a judicial officer cannot be sued for injunctive relief "unless a declaratory decree was violated or declaratory relief was unavailable," PPINK seeks only declaratory relief against Defendant Judge of the Marion Superior Court, Juvenile Division.

the minor's parents or legal guardians. Ind. Code § 16-34-2-4(a) (amended July 1, 2017). Indiana law provides a constitutionally-mandated "judicial bypass" procedure for the parental-consent requirement by which a minor may obtain an abortion without the consent or knowledge of a parent or guardian if she files a petition in the juvenile court located in the county where she resides or where the abortion is to be performed and demonstrates to the court's satisfaction either that she is sufficiently mature to make the abortion decision independently or that the abortion would be in her best interests. Ind. Code § 16-34-2-4(b), (d) (amended July 1, 2017). Once a petition is filed, the juvenile court must render its decision on the bypass request within 48 hours. Ind. Code § 16-34-2-4(e).

Under the recently enacted legislation (SEA 404), an unemancipated minor is still permitted to seek a judicial bypass from a juvenile court and the court must still waive the parental-consent requirement if she demonstrates maturity or that it is in her best interests to obtain the abortion. Ind. Code § 16-34-2-4(b), (d) (eff. July 1, 2017). However, the amended law alters the judicial bypass procedure by adding a parental-notification requirement that provides in relevant part as follows:

> Unless the juvenile court finds that it is in the best interests of an unemancipated pregnant minor to obtain an abortion without parental notification following a hearing on a [bypass] petition …, a parent, legal

> guardian, or custodian of a pregnant unemancipated minor is entitled to receive notice of the emancipated [sic] minor's intent to obtain an abortion before the abortion is performed on the unemancipated pregnant minor. The attorney representing the unemancipated pregnant minor shall serve the notice required by this subsection by certified mail or by personal service and provide the court with documentation of the attorney's good faith effort to serve the notice, including any return receipt for a certified mailing.

Ind. Code 16-34-2-4(d) (eff. July 1, 2017). Therefore, even if the juvenile court has found the unemancipated minor sufficiently mature to make the abortion decision independently, absent a best interests finding by the juvenile court, "the court shall, subject to an appeal …, order the attorney representing the unemancipated minor to serve the notice required under subsection (d)." Ind. Code § 16-34-2-4(e) (eff. July 1, 2017).

SEA 404 also imposes new requirements on physicians performing abortions that must be followed before an unemancipated minor can obtain an abortion with parental consent. Under current Indiana law, a consenting parent is required to evidence his or her consent in writing. Ind. Code § 16-34-2-4(a) (amended July 1, 2017). However, under the amended statute, the physician performing the abortion must obtain government- issued proof of identification from the consenting parent as well as "some evidence, which

may include identification or other written documetation, that provides an articulable basis for a reasonably prudent person to believe that the person is the parent." Ind. Code § 16-34-2-4(a)(2), (3) (eff. July 1, 2017). SEA 404 further provides that the physician who obtains such consent must execute a sworn affidavit that contains a

> [c]ertification that, to the physician's best information and belief, a reasonable person under similar circumstances would rely on the information provided by the unemancipated pregnant minor and the unemancipated pregnant minor's parent or legal guardian or custodian as sufficient evidence of identity and relationship.

Ind. Code § 16-34-2-4(k)(2) (eff. July 1, 2017). This affidavit must be included in the minor's medical record. *Id.*

Finally, SEA 404 adds a new section to the current statute that provides that any person (other than the minor's parent, stepparent, grandparent, stepgrandparent, sibling, or stepsibling) who "knowingly or intentionally aid[s] or assist[s] an unemancipated pregnant minor in obtaining an abortion without the consent required" under Indiana law, (Ind. Code § 16-34-2-4.2(c) (eff. July 1, 2017)), is liable for damages, including punitive damages, attorney's fees, and court costs. Ind. Code § 16-34-2-4.2(d) (eff. July 1, 2017). The parties agree that this provision would prohibit PPINK and its physicians from providing an unemancipated minor information regarding out-of-state

abortion services which ostensibly would not require parental consent or notice.

Various penalties can be imposed on abortion providers and their employees for violating portions of SEA 404. A physician who performs an abortion intentionally or knowingly in violation of Indiana law pertaining to parental notice and consent commits a Class A misdemeanor. Ind. Code § 16-34-2-7(b). Additionally, a physician with an Indiana license who commits a crime that has a direct bearing on the physician's ability to practice competently or is harmful to the public or who knowingly violates any state law or rule regulating the medical profession is subject to discipline from the Indiana Medical Licensing Board. Ind. Code § 25-1-9-4(a)(2), (3). Likewise, abortion facilities, such as PPINK, which are licensed by the Indiana State Department of Health pursuant to 410 IAC 26-2-1, are subject to having their licenses revoked or other discipline imposed for a number of reasons, including "permitting, aiding or abetting the commission of any illegal act in an abortion clinic," (410 IAC 26-2-8(b)(1), (2)), or failing to have authorized individuals make entries in medical records. 410 IAC 26-7-2(b)(3).

II. Plaintiff's Current Policies and Procedures

A. Minor Abortions with Parental Consent

PPINK is an Indiana not-for-profit corporation that operates a number of health centers in Indiana that provide reproductive health services and comprehensive sexuality education to thousands of women,

men, and teens throughout the State. Beeley Decl. ¶ 3. Four of the health centers operated by PPINK in Indiana offer abortion services. Three of those centers, located in Bloomington, Indianapolis, and Merrillville, offer both surgical abortion services and abortions using only medication. *Id.* ¶¶ 4–5. The fourth center, located in Lafayette, provides only medication abortions. *Id.* ¶ 6. At PPINK, surgical abortions are available through the first trimester of pregnancy, or 13 weeks and 6 days after the first day of a woman's last menstrual period, and medication abortions are available through 70 days after a woman's last menstrual period. *Id.* ¶ 6. PPINK provides abortions to minors at its facilities that offer abortion services consistent with Indiana law. *Id.* ¶ 8.

Under Indiana law, PPINK is required to provide any woman seeking an abortion certain state-mandated information at least 18 hours prior to the abortion. Ind. Code § 16-34-2-1.1(a)(1). PPINK provides this information at the woman's initial visit. At this same visit, the PPINK patient signs all the necessary paperwork, including the consent for the abortion and all other required documents. Beeley Decl. ¶¶ 10–11. If the patient is a minor and her parent consents to the abortion, the parent signs the consent and other required paperwork with the minor at this initial visit. *Id.* ¶ 12. PPINK currently requires both the parent and the minor to provide identification, preferably a photo ID, but does not require any additional forms of identification or other documentation to prove the parental relationship. *Id.* ¶¶ 13–14. At present, non-physician PPINK staff is responsible for reviewing the initial paperwork as well as the parent's and the

minor's identifications because physicians usually do not see the patient until the time of the abortion and often are not present at the health center during the initial visit. *Id.* ¶¶ 10, 15.

B. Minor Abortions Following Judicial Bypass

While the large majority of abortions that PPINK's physicians perform for minors occur with parental consent, PPINK also performs abortions for minors who do not have a parent's consent and who have instead obtained a judicial bypass of the consent requirement as provided for under Indiana law. Beeley Decl. ¶¶ 9, 19. When a minor indicates to PPINK that she is considering an abortion, PPINK first counsels her to discuss the decision with a parent. If the minor indicates that she still wishes to obtain the abortion, PPINK again counsels her to try to obtain parental consent. However, in some cases, the minor informs PPINK staff that she does not want to or feels she cannot inform her parent(s) that she is pregnant and that she wishes to obtain an abortion. *Id.* ¶¶ 20–21. In this situation, PPINK provides to the minor the telephone number of the "bypass coordinator," informing her that the bypass coordinator is a woman who does not work for PPINK but who maintains a list of attorneys who can discuss with the minor the option of seeking a judicial bypass of the consent requirement in juvenile court and can also represent the minor in court, if she so chooses. *Id.* ¶ 24; Smith Decl. ¶ 6.

The bypass coordinator, who is not an attorney, monitors a floating pool of Marion County attorneys

who represent the minors in bypass cases, most of which matters are filed in the Marion Superior Court, Juvenile Division. Smith Decl. ¶¶ 2, 4–5. PPINK does not in any way sponsor the efforts of the bypass coordinator, and, in some cases, the bypass coordinator will be contacted by a minor who is seeking an abortion from a provider other than PPINK. *Id.* ¶ 6. Since October 2011, Indiana's bypass coordinator has been contacted by approximately 60 minors who expressed an interest in obtaining an abortion without parental consent, most of whom were 17 years of age. *Id.* ¶ 9. Not all of these minors ultimately pursued the bypass process to obtain an abortion in Indiana. *Id.* The bypasses that have been granted to PPINK's patients have generally been based on the juvenile court's finding that the minor was sufficiently mature to make the abortion decision independent of her parents. Beeley Decl. ¶ 26; Flood Decl. ¶ 6; Glynn Decl. ¶ 9.

When contacted by a minor seeking an abortion without parental consent, the bypass coordinator outlines in general fashion the process of obtaining a judicial bypass and what must be demonstrated in court to be granted one. Beeley Decl. ¶ 11. In many cases, this conversation will last for some time, but occasionally the minor will want only basic information from the bypass coordinator and those conversations are brief. *Id.* ¶ 10. During this conversation, the bypass coordinator attempts to make sure that no one is forcing the minor to obtain an abortion and that the minor is certain about her decision. *Id.* ¶ 12. If the minor is interested in pursuing the judicial bypass procedure following this conversation, the bypass coordinator then refers her to an attorney from the pool who

explains the bypass hearing procedures in more detail. Glynn Decl. ¶ 14.

Generally, the minors who show interest in pursuing the judicial bypass procedure have not yet told their parents that they are pregnant and are seeking an abortion. Smith Decl. ¶ 14. Over the years, minors in this situation have indicated to PPINK and the bypass coordinator various reasons why they have not told their parents about their pregnancy and desire to seek an abortion, including fears of being kicked out of the home, of being abused or punished in some way, and/or that their parent(s) will attempt to block the abortion.[2] *Id.* ¶¶ 15–16; Beeley Decl. ¶ 22; Flood Decl. ¶ 9; Dr. Pinto Decl. ¶¶ 14–15, 19; Lucido Decl. ¶¶ 8–12. Other minors simply do not know where their parents are and do not have a legal guardian or custodian who can step in to fulfill the consent requirement. Beeley Decl. ¶ 23; Lucido Decl. ¶ 13. Whatever the particular reason, the young women consistently express fear that their parent(s) will discover that they are pregnant and seeking an abortion. Smith Decl. ¶ 18; Glynn Decl. ¶ 12; Lucido Decl. ¶¶ 8–13. Currently, the bypass coordinator informs the minors that no one involved in the bypass process will notify their parents that they are pregnant or seeking a bypass. Smith Decl. ¶ 18. This assurance will no longer be possible under SEA 404's notice provision.

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[2] On at least one occasion, the mother of a young woman seeking a judicial bypass discovered her plans through a third party and prevented her from seeking an abortion, instead forcing her to give birth. Glynn Decl. ¶ 13; *see also* Dr. Pinto Decl. ¶ 29.

C. Referral Practices

PPINK is regularly contacted by women, including minors, for abortion services and subsequently discovers, either during the initial telephone consultation or during the visit to one of its health centers, that it is unable to perform the abortion or that the individual might prefer to obtain an abortion elsewhere. In some cases, this is because the woman's pregnancy is past the first trimester (the time during which abortions are available in Indiana) or because there are other reasons why it would be desirable or necessary for the woman to obtain an abortion in another state. Beeley Decl. ¶ 27. In these circumstances, PPINK frequently informs the women, including minors, that they have the option to receive abortion services in states other than Indiana. *Id.* ¶ 28. PPINK is aware, for example, that there are abortion providers in neighboring states, including Illinois, Michigan, Ohio, and Kentucky, who offer abortion services into the second trimester. *Id.* ¶ 29. When applicable, PPINK informs those seeking abortion services of the availability of such services in other states. *Id.*

Similarly, PPINK believes that SEA 404's parental notice requirement and identification/affidavit requirements are more stringent than comparable requirements in Indiana's neighboring states. *Id.* ¶¶ 30–31. PPINK would like to be allowed to inform unemancipated minors who seek abortion services after July 1, 2017 not only of Indiana's requirements, but also of the fact that other states may have less restric-

tive requirements. *Id.* ¶ 32. It is undisputed that doing so would subject PPINK and its staff to both civil liability and licensing sanctions under the amended statute.

Legal Analysis

I. Standard of Review

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; and (3) irreparable harm absent the injunction. *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health*, 699 F.3d 962, 972 (7th Cir. 2012). If the moving party fails to demonstrate any one of these three threshold requirements, the injunctive relief must be denied. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbot Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). However, if these threshold conditions are met, the Court must then assess the balance of the harm—the harm to Plaintiff if the injunction is not issued against the harm to Defendants if it is issued—and determine the effect of an injunction on the public interest. *Id.* "The more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *Id.* at 1100.

II. Likelihood of Success on the Merits

A. Indiana Code § 16-34-2-4(d), (e)

1. Nature of PPINK's Challenge

In its Response Brief to PPINK's motion and again at oral argument, the State devoted significant time and attention to the fact that PPINK's challenge to SEA 404's parental-notification provision is what is known as a "pre-enforcement facial challenge," meaning, that PPINK has challenged the constitutionality of this statute prior to its implementation and without reference to any specific or individual application of the law.

The State contends that because the nature of PPINK's challenge to SEA 404 relates to the statute's impact on abortion-seeking minors in Indiana—specifically, that the law's effect will place a "substantial obstacle" in the path of those minors—PPINK is obligated to present "actual evidence" of the law's "operational effect" as opposed to offering "mere hypothesis" of its "likely impact." *See* Defs.' Resp. at 12–15. As the State contends, we cannot know what SEA 404's effects will be, much less if those effects will represent a substantial obstacle to abortion-seeking minors in Indiana, until after the law takes effect on July 1, 2017. It maintains further that, following the law's implementation, the correct path and forum for a challenge would be on an as-applied basis in the State's juvenile courts and on expedited appeal to the Indiana Supreme Court thereafter.

In advancing this argument, the State has touched on an issue for which neither the Supreme Court nor the Seventh Circuit has provided crystal-clear guidance. It appears the State derived this standard from *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002), a case in which the Seventh Circuit reversed a district court's injunction restraining enforcement of an informed-consent provision requiring abortion-seeking women in Indiana to attend a second clinic visit so that certain information could be provided to them in person. In *A Woman's Choice*, the Seventh Circuit held that it was an abuse of discretion for the district judge to issue a pre- enforcement injunction of the two-visit provision prior to determination of the law's effects or the reasons for those effects. *Id.*

More precisely, the Seventh Circuit found unpersuasive the evidence accepted by the district court establishing that similar two-visit provisions in Mississippi and Utah reduced by 10% the number of abortions performed in those states as compared to their neighboring states who did not require multiple visits. Though the district court concluded that a similar provision in Indiana would produce similar results, thereby creating an undue burden on abortion in Indiana, the Seventh Circuit concluded:

> Because Indiana has been disabled from implementing its law and gathering information about actual effects, any uncertainty about the inferences based on other states' experience and how that experience

> would carry over to Indiana must be resolved in Indiana's favor.

Id. at 687.

Prior to discussing this evidence, however, the Seventh Circuit noted the incongruity between the Supreme Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), which stated that, except in First Amendment cases, a law may be held facially unconstitutional only when "no set of circumstances exists under which the Act would be valid," and the Court's subsequent decisions in both *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) and *Stenberg v. Carhart*, 530 U.S. 914 (2000), where the Court, faced with pre-enforcement facial challenges, held invalid a statute forbidding the use of the "intact dilation and extraction" method of abortion (*Stenberg*) and a statute requiring a woman to provide spousal notification before obtaining an abortion (*Casey*). *See A Woman's Choice*, 305 F.3d at 687, 691. Judge Easterbrook, writing for the panel, described these cases as "irreconcilable directives from the Supreme Court," but concluded that, given their incompatibility, the language of *Salerno* must give way to the subsequent holdings in *Stenberg* and *Casey*. Though recognizing the justiciability of pre- enforcement facial challenges to abortion regulations in light of *Stenberg* and *Casey*, he nevertheless distinguished the magnitude of potential harm posed by the two-visit provision in *A Woman's Choice* as compared to the spousal-notification provision in *Casey*, stating that "[t]he record in this case does not show that a two-visit rule operates similarly to a spousal-notification rule by facilitating

domestic violence or even inviting domestic intimidation." *Id.* at 692.

As we understand it, and as the Seventh Circuit described it, the severity and character of harm presented by certain abortion restrictions render them vulnerable to pre-enforcement facial challenges. And while it may be difficult to neatly sort out the restrictions that fall into this category and those that do not, our task is simplified here. The Supreme Court in *Casey* enjoined enforcement of a spousal-notification statute, finding that the effects of requiring spousal notice—which, in some cases, would include domestic physical and psychological abuse and obstruction—were simply too great to countenance. We find the same to be true here. As explained below, for many young women in Indiana, the requirement of providing parental notification before obtaining an abortion carries with it the threat of domestic abuse, intimidation, coercion, and actual physical obstruction. The State's argument that those seeking to challenge the law must wait until evidence of this type of harm accrues is simply incorrect. The Court need not sit idly by while those most vulnerable among us are subjected to unspeakable and horrid acts of violence and perversion, nor may we blind ourselves to the fact that for millions of children (including young women) in the United States the threat of such abuse is real. *See e.g.,* Dr. Pinto Decl. ¶ 10.

We pause, however, to acknowledge that the likelihood of such harm is not present in the large majority of cases. At least that is our hope and assumption. In well- functioning families, a child will find it both

helpful and safe to discuss her pregnancy and the decision whether to bear a child with her most-trusted advisors and confidants, which group typically includes her parents. PPINK itself recognizes the importance of parental consultation within the ideal family structure, which, presumably, is the reason the organization advises every minor who expresses her desire to obtain an abortion to first discuss the matter with her parents. *See* Beeley Decl. ¶ 20. In fact, PPINK's data from fiscal year 2015 shows that 96.3% of minors who had abortions at PPINK did so with the legal consent of a parent or legal guardian. *Id.* ¶ 9. But we cannot limit our analysis or our concerns only to the majority of cases; for most minors, if past experience holds true, SEA 404's proposed amendments are neither restrictive nor relevant.

The fact that minors in well-functioning families are not likely to face these problems does not alter the hardship created by the notice requirement on its face. We turn our analysis now to those minors described above, namely, 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. And, as discussed in detail below, that hardship is more than merely a state- created disincentive; rather, it represents a substantial state-imposed obstacle to the exercise of the minor woman's free choice. Given that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant," *Casey*, 505 U.S. at 894, we find that SEA 404's parental-notification provision will create an undue

burden for a sufficiently large fraction of mature, abortion-seeking minors in Indiana. It is, therefore, unconstitutional and invalid on its face. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

2. Undue Burden

The primary issue presented by this case is whether the parental-notification requirements of Ind. Code § 16-34-2-4(d), (e) (eff. July 1, 2017) create an "undue burden" for abortion-seeking minors in Indiana.

It serves us well in seeking to resolve this issue to return to the landmark decision in *Roe v. Wade*, 410 U.S. 113 (1973), in which the Supreme Court announced that a woman's Constitutional rights to privacy and liberty, as derived from the Due Process Clause of the Fourteenth Amendment, are "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. Reaffirming this "most central principle of *Roe v. Wade*," in *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992), a plurality of the Court wrote that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Implicit in that promise is the "right of an individual…to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 851–52 (citing *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972)).

Indeed, the Supreme Court has recognized that when it comes to the abortion decision, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Id.* at 852. The effect of state regulation of woman's choice to have an abortion touches not only upon the private sphere of the family but also upon the bodily integrity of the pregnant woman and is, therefore, "doubly deserving of scrutiny." *Id.* at 896. Accordingly, States are prohibited from enacting legislation which places an "undue burden" on a woman's ability to make the abortion decision—*i.e.,* legislation having the effect of placing a "substantial obstacle" in the path of the woman's choice. *Id.* at 877.[3]

Among the restrictions proscribed by the Court's ruling in *Casey* were statutes requiring a woman to provide notice to her spouse prior to an abortion. The Court found that requiring such notification was "likely to prevent a significant number of women from obtaining an abortion. [Notice] does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle." *Id.* at 893–94. It has thus become the law of the land that a woman's right to privacy as forefended by the Fourteenth Amendment prevents the States from

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[3] "The three-Justice lead opinion in *Casey* is in some parts the opinion of the Court and in some the limiting concurrence. Although the undue burden test was endorsed by only three justices, as the narrowest ground for the Court's holding it is as binding on the lower courts as would be a majority opinion." *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 921 n.11 (9th Cir. 2004) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

requiring her to provide notification of her decision to have an abortion.

The question now before the Court is whether this rule also extends to unemancipated minors by preventing States from requiring them to give notice to their parents in all cases except where they are able to satisfy a juvenile court judge that obtaining an abortion without notice is in their best interests.

It is well settled that the rights to privacy and liberty, like many constitutional rights, extend in full force to minors. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (Powell, J.) ("A child, merely on account of h[er] minority, is not beyond the protection of the Constitution."); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights."). This means that, for both the adult and the minor woman, state-imposed burdens on the abortion decision can be justified only upon a showing that the restrictions advance "important state interests." *Roe v. Wade*, 410 U.S. at 154, *accord, Danforth*, 428 U.S. at 61.

The difference between abortion regulations concerning adults and those concerning minors is that certain important state interests not present in the case of an adult woman must be considered and weighed against the minor's rights to privacy. In addition to the State's interests in the preservation of fetal life and encouraging childbirth rather than abortion, *cf. Maher v. Roe*, 432 U.S. 464 (1977); *Harris v.*

McRae, 448 U.S. 297 (1980), the law recognizes legitimate state interests in protecting children and adolescents, preserving family integrity, and encouraging parental authority.

It has long been accepted that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635. In recognition of these vulnerabilities, the Court has held that the State may validly limit the freedom of children to choose for themselves in the making of important choices that entail potentially serious consequences, including the decision whether to seek an abortion. *Id.* (collecting cases).

Often, the preferred method by which a state may limit a child's decision-making freedom is to encourage parental consultation: "As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." *Id.* at 640.

Indeed, in most cases, parental consultation is more than desirable; it is fundamental. It is deeply rooted in our Nation's history and tradition as well as our jurisprudence, 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). The duty to prepare the child for these obligations "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). This process of child rearing has long been understood to be, in large part, "beyond the competence of impersonal political institutions," *Bellotti*, 443 U.S. at 638, and should, therefore, be left to the family—the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494, 503–504 (1977). Concomitant with our Nation's deep-rooted respect for the private realm of the family is the parents' "traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years." *H. L. v. Matheson*, 450 U.S. 398, 419 (1981) (Powell, J., concurring) (citing *Bellotti*, 443 U.S. at 637–639).

In the context of deciding on whether to undergo an abortion, however, these state interests in protecting children and preserving the family, important as they are, are not without limits; at times, the State must in certain instances yield to the pregnant minor's interests in her own privacy and bodily integrity, for, as we noted previously, the abortion decision necessarily entails long-term consequences unique to the human condition and must therefore be considered unique also in the eyes of the law.

Recognizing these limitations in *Planned Parenthood v. Danforth*, the Supreme Court held unconstitutional a law requiring an unmarried minor to obtain the written consent of a parent or person *in loco parentis* prior to an abortion in all cases except those where a licensed physician had certified the abortion as necessary in order to preserve the life of the mother. 428 U.S at 72, *overruled on other grounds by Casey,* 505 U.S. 833. There, the Court held that "[j]ust as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party 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 consent." *Id.* at 74.

Though the *Danforth* Court acknowledged the longstanding acceptance of the State's "somewhat broader" authority to regulate the freedom of children than of adults, it nevertheless rested its decision on two points: first, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority"; and, second, "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 74–75. The Court thus concluded that, when weighed against one another, the competent and mature minor's interests in privacy and bodily integrity outweighed the State's interest in granting the family, be it parent or spouse, the right to veto the mature

minor's decision—a power the State itself did not possess. *Id.*

Three years after *Danforth*, the Court addressed a Massachusetts statute that required parental consent to be obtained for every nonemergency abortion where the mother was less than eighteen years of age and unmarried, with the sole exception being instances where a parent had died, deserted the family, or was otherwise unavailable. *Bellotti*, 443 U.S. 622. Writing for a plurality of the Court, Justice Powell expressly noted that the statute did not "permit[] any minors—mature or immature—to obtain judicial consent to an abortion without any parental consultation whatsoever," but instead mandated that "an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion." *Id.* at 646.

The Powell plurality concluded that, when construed in such a manner, the law imposed an undue burden on the exercise by minors of their right to seek an abortion, and that, in order to comport with the Constitution, statutes requiring parental consultation and consent must include an alternative path to an abortion:

> [E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without

> parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Bellotti, 443 U.S. at 647–48 (Powell, J.)

This alternative to parental consent described Justice Powell has become known as a "judicial bypass," which must: (1) allow the minor to bypass parental consent requirements if she "is mature enough and well enough informed to make the abortion decision independently"; (2) allow her to bypass consent requirements where the abortion would be in the minor's best interests; (3) ensure the minor's anonymity; and (4) be conducted in expeditious fashion. *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997).

In its challenge to SEA 404, PPINK contends that these "judicial bypass" requirements set out in *Bellotti* for parental-consent statutes should also apply to parental- notification statutes. If applied in this manner, the *Bellotti* factors would render SEA 404's amendment to Ind. Code § 16-34-2-4(d), (e) unconstitutional, given that the amendment eliminates a pregnant minor's ability to bypass parental notification through a showing that she is mature enough and

well enough informed to make the abortion decision independently.

For years following the *Bellotti* decision, the language of Justice Powell's plurality opinion, which discussed not only parental consent but also parental involvement and consultation in decisionmaking, was interpreted just as PPINK posits, to wit, as expanding the Court's *Danforth* decision forbidding states from providing parents an absolute veto over a mature minor's decision by requiring states to afford mature minors an opportunity to bypass all hostile parental involvement in their decision.

In *H.L. v. Matheson*, 450 U.S. 398, 411 (1981), the Court held that a statute requiring parental notification did not violate the constitutional rights of *immature* and *dependent* minors, concluding that, as applied to those minors, the statute "plainly serve[d] the important considerations of family integrity and protecting adolescents." Though the majority in *Matheson* did not decide whether a notice requirement would be constitutional as applied to emancipated or mature minors, *see id.* at 407 n.14, 412 n.22, five Justices expressed the view that in light of *Bellotti* it would be unconstitutional to apply a notice requirement to minors who could demonstrate their maturity. *See id.* at 420 ("[A] State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti* [], joined

by three other Justices, stated at some length the reasons why such a decisionmaker is needed.") (Powell, J., joined by Stewart, J., concurring); *id.* at 451, n.49 ("[U]nder Justice Powell's reasoning in *Bellotti* [], the instant statute is unconstitutional. Not only does it preclude case-by-case consideration of the maturity of the minor, it also prevents individualized review to determine whether parental notice would be harmful to the minor.") (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

Then, in *City of Akron v. Akron Center for Reproductive Health* (*"Akron I"*), Justice Powell, writing for the Court, stated in a footnote that an Ohio statute which required parental notification, but contained "no provision for a mature or emancipated minor *completely* to avoid hostile *parental involvement* by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion ... would be unconstitutional." 462 U.S. 416, 422 n.31 (1983), *overruled on other grounds by Casey,* 505 U.S. 833 n.3 (citing *Matheson*, 450 U.S. at 420, 428) (emphasis added).

In *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1131–32 (7th Cir. 1983), the Seventh Circuit applied these Supreme Court cases to a challenge brought by Planned Parenthood as to the constitutionality of an Indiana statute which Planned Parenthood maintained would allow a juvenile court to deny waiver of notice for a concededly mature minor if the court found that notice would be in child's best interests—a challenge almost identical to the one raised by PPINK here.

There, the Seventh Circuit held that "[t]he plurality opinion [in *Bellotti*] also concluded that a state is required to make [the judicial] bypass procedure available under notification statutes as well [as consent statutes]"; therefore, the State cannot constitutionally "give the juvenile court the authority to refuse to waive notification despite a finding that the minor is mature." *Id.* at 1134 (citing *Matheson*, 450 U.S. 398, 454 n.9 (Powell, J., concurring)); *see also Zbaraz v. Madigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) ("*Zbaraz I*") (holding that the *Bellotti* standard "also governs provisions requiring parental notification").

In reaching this conclusion, the Seventh Circuit reasoned that notice statutes should receive the same treatment as consent statutes because, "as a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has." *Pearson,* 716 F.2 at 1132. It explained:

> Unemancipated minors are fundamentally different from adults because they are financially dependent upon their parents and have numerous legal incapacities. In addition, parents have considerable leeway to impose punishment upon their children for disobedience. Because of this, minors often have no choice but to comply with parental directives.
>
> Although notification requirements do not give parents the legal power to veto their daughter's abortion decision, as a practical

> matter they may. "[Y]oung pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Bellotti* [], 443 U.S. at 647 (plurality opinion of Powell, J.). It was a recognition of this vulnerability that led the plurality in *Bellotti* [] to state that confidentiality was necessary in a waiver-of-consent proceeding. *See id.*
>
> Because parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion, we will apply the Supreme Court's analysis with respect to consent bypass procedures in our consideration of the constitutional sufficiency of Indiana's notification bypass procedures.

Id. at 1132.

If we were to rely solely on the reasoning and disposition of *Pearson*, the answer to the question before us would appear relatively straightforward: *Bellotti* forbids a state from requiring parental notification of a minor without affording the minor an opportunity to bypass the notice requirements through a showing of maturity.

However, in the years following the Supreme Court decision in *Akron I*, 462 U.S. 416 (1983), the Court has pulled back from this interpretation of *Bellotti* and its progeny, stating that, "although our cases

have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures." *Ohio v. Akron Ctr. for Reprod. Health* ("*Akron II*"), 497 U.S. 502, 510–11 (1990) (citing *Matheson*, 450 U.S. at 413). The Court thereafter has repeatedly "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional." *Lambert*, 520 U.S. at 295.

In response to the Supreme Court's clarification of *Bellotti*, the Seventh Circuit recognized in *Zbaraz v. Madigan* ("*Zbaraz II*") that its conclusions in *Pearson*, 716 F.2d 1127 and *Zbaraz I*, 763 F.2d 1532 had been premature; to the extent they rested on language from opinions addressing only the constitutional requirements concerning parental-consent statutes they lacked precedential support. 572 F.3d 370, 379–80 (7th Cir. 2009). Much like the Supreme Court in *Akron II*, the Seventh Circuit in *Zbaraz II* declined to decide whether a parental notification statute lacking a *Bellotti*-type bypass violated the Constitution, holding instead that because the Illinois statute at issue in *Zbaraz II* satisfied the *Bellotti* criteria for consent statutes, it therefore *a fortiori* satisfied any criteria that might be required for bypass provisions in notice statutes. *Zbaraz II,* 572 F.3d at 380.[4]

[4] The State contends that *Zbaraz II* should be read as stripping *Zbaraz I* and *Pearson* of any controlling weight and that we should look to the Seventh Circuit's pre-*Bellotti* decision in *Wynn v. Carey*, 582 F.2d 1375, 1388 (7th Cir. 1978) for the "proper doctrinal rule" concerning parental-notification statutes. Defs.' Resp. at 5–6. We disagree. The Seventh Circuit recognized in *Zbaraz II* that its prior decisions in *Zbaraz I* and *Pearson* had

In short, the specific question remains unanswered by the Supreme Court and the Seventh Circuit as to whether a statute requiring parental *notice* must, similar to a parental-*consent* statute, include a provision allowing a minor to bypass parental notice upon showing that she is mature enough and well enough informed to make the decision on her own. In the case before us, we cannot sidestep that issue. Accordingly, we hold that it must. Though not identical in every aspect, state-mandated requirements of parental notice impose many of the same consequential burdens on young women as do state-mandated requirements of parental consent. Indeed, in many cases, requiring notice is tantamount to requiring consent.

We need look no further than the Supreme Court's plurality opinion in *Casey* to understand this fundamental truth. In invalidating Pennsylvania's spousal-notification statute, the Court explained that, although many women in well-functioning marriages were likely to discuss the abortion decision with their spouse, the same cannot be said, nor mandated, of all

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interpreted the Supreme Court's plurality opinion in *Bellotti* as setting the appropriate standards for parental- notification statutes in addition to parental-consent statutes—an interpretation that "conflicted" with subsequent Supreme Court decisions indicating that *Bellotti* encompassed only parental consent. *See Zbaraz* II, 572 F.3d at 380. The Seventh Circuit did not, however, overturn its decisions in *Pearson* or *Zbaraz I*. Indeed, we find that much of the reasoning expressed in those opinions regarding the impact of requiring parental notice is likely as true today as it was when they were decided.

women. *Casey*, 505 U.S. at 892. Millions of women in the United States are victims of regular physical and psychological abuse at the hands of their husbands, said the Court in *Casey*, which abuse results in those women possessing justifiable fears that informing their husbands of their intent to have an abortion could result in further infliction of abuse in the form of "verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends." *Id.* at 893.

Ultimately, the *Casey* plurality concluded:

> Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*.

Id. at 897.

The concerns raised in *Casey* regarding the deleterious effect of state-mandated notice are, if anything, heightened with regard to unemancipated minors, who typically must rely on their parents in ways unique to all other relationships. Unemancipated minors depend on their parents for financial support, housing, and transportation in addition to the many legal incapacities for which the parents must serve as

proxy. This unparalleled dependence often constrains a minor's ability to disobey parental directives. For instance, many minors may encounter post-notification interference from their parents in the form of parental disappointment and disapproval, withdrawal of financial support, or actual obstruction of the abortion decision itself. In such cases, although the notification may not have granted the parents' legal authority to veto the minor's decision, the practical effect will be one and the same. *See Pearson*, *supra.*

In addition to actual obstruction, a large number of minors may face the risk of domestic abuse at the hands of one or more of their parents in the event that a parent is notified of the minor's pregnancy. As Dr. Suzanne Pinto has reported to this Court, millions of children in our country are abused at home each year. *See* Dr. Pinto Decl. ¶10. This abuse can take several forms—physical, sexual, or emotional—and can vary in degree from family to family. *Id.* For young women in particular, a key aspect of abuse often involves their sexuality, and, as a physical manifestation of sexual activity, a teen's pregnancy can serve as a flashpoint for parental retaliation or repercussions, igniting an abusive parent's anger and fueling his or her belief that the minor has low moral fiber, resulting in further and more aggressive maltreatment. *Id.* ¶¶ 14–15.

According to the sworn declarations of Kathryn Smith, Indiana's "bypass coordinator," and Katherine Flood, a practicing attorney representing minors in Indiana consent-bypass proceedings, many of the young women whom they have assisted in attaining a

bypass of Indiana's parental-consent requirements chose not to inform their parents of their pregnancy out of concern that they would face precisely this type of obstruction or abuse if their parents discovered they were seeking an abortion. Smith Decl. ¶¶ 16–17; Flood Decl. ¶ 9.

Under SEA 404's proposed amendments, minors can no longer avail themselves of the judicial bypass procedures with the knowledge and comfort that their attempts would remain confidential, because, in every case where the juvenile court does not find that proceeding without notice is in the minor's best interests, it must order parental notice be issued before the abortion. Ind. Code § 16-34-2-4 (eff. July 1, 2017).

As borne out in Dr. Pinto's testimonial examples, fear of retaliatory domestic abuse may, in many cases, prompt pregnant minors to engage in hazardous self-help measures such as attempting to physically and/or chemically induce miscarriage or to entertain thoughts of suicide. *Id.* ¶ 16. Not surprisingly, the evidence also establishes that the threat that their parents may become aware of their pregnancy if they prove unsuccessful in court often suffices to deter many minors from even attempting to avail themselves of their constitutionally-protected right to seek a bypass of Indiana's parental- consent requirements. *See e.g.*, Dr. Pinto Decl. ¶ 28. Contrary to the State's contention, this deterrent effect is not ameliorated by the fact that under SEA 404's proposed parental-notification provision, a minor may obtain a bypass of notice if she can persuade the juvenile court that proceeding without notice is in her best interests. "It is

hardly speculative to imagine that even some mature minors [or those for whom it would be in their best interests] will be deterred from going to court if they know that their parents will be notified if their petitions are denied, because no minor can be certain that the court will rule in her favor." *Pearson*, 716 F.2d at 1141.

Indeed, as the Supreme Court recognized in *Casey*: "If anything in this field is certain, it is that victims of [domestic abuse] are extremely reluctant to report the abuse to the government." *Casey*, 505 U.S. at 893. As a result, many minors will find it difficult or impossible to make a full disclosure of their abuse in order to convince the court that proceeding without providing notice to their abuser is in their best interests. Research conducted in this area suggests that only about half of all abused minors ever disclose their abuse, and those who do, typically make their disclosure to a trusted adult with whom they have developed a rapport in a therapeutic environment. Dr. Pinto Decl. ¶ 20. Faced with the prospect of either disclosing her abuse to a relative stranger or being ordered to notify her abuser of her pregnancy and attempt to circumvent Indiana's consent requirements, it is no wonder that a minor might well be deterred from the process entirely.

Put simply, this deterrent effect of SEA 404's proposed parental-notification requirements unquestionably burdens the right of abortion-seeking minors in Indiana. What we must determine is whether that effect amounts to an "undue burden." *See Casey*, *supra.* In resolving that issue, we shall address the State's

proffered justifications for the infringements imposed by SEA 404.

As previously recognized, the State's deep-rooted respect for the private realm of the family and its recognition of the guiding role of parents in the upbringing of their children typically justify limitations on the freedoms of minors. However, "[c]onsent and involvement by parents in important decisions by minors long have been recognized as protective of their *immaturity*." *Bellotti*, 443 U.S. at 649 (emphasis added). Accordingly, PPINK maintains that the State has "no" interest whatsoever in promoting parental involvement in the case of *mature* minors, and, therefore, it cannot sustain an invasion of those minors' privacy. *See* Pls.' Br. at 20. We stop short of concurring in PPINK's position that the State's interest is zero, given that a parent's interest in, as well as responsibility for, the rearing and welfare of his or her unemancipated minor does not end at the abortion decision, nor is it completely extinguished by a judicial finding of maturity. These minors are, after all, unemancipated, meaning that for the remainder of their minority, they will likely continue to rely on their parents in each of the ways described above. Similarly, their parents will retain a coterminous interest in providing them with guidance, support, and stewardship. Nonetheless, these roles and responsibilities may be greatly diminished in the case of the minor who has shown that she is mature enough and well enough informed to make the abortion decision independently.

Accordingly, the State may not rely on the reserved rights of parents in the rearing of their children to justify its intrusion into the private life of the minor and the private domain of the family. The inescapable fact is that the government's intervention in this respect will have a far greater impact on the pregnant minor's bodily integrity than it will on the parents' authority. For this reason, the mature minor as the individual who bears the full consequences of the ultimate decision is entitled to an opportunity to proceed without state-mandated interference from her parents. Because SEA 404 offers no such opportunity, it places an unjustifiable burden on mature minors in violation of the Fourteenth Amendment.[5]

B. Indiana Code § 16-34-2-4(a) and Indiana Code § 16-34-2-4(k)

PPINK next challenges the portions of SEA 404 that apply to cases in which the minor has received

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[5] We are not alone in reaching this conclusion. The Courts of Appeals for both the Fifth and Eighth Circuits addressed similar challenges in *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), both drawing similar conclusions, to wit, that parental notification statutes must include a *Bellotti*-type bypass. *See also Nova Health Sys. v. Fogarty*, 2002 WL 32595281 (N.D. Okla. June 14, 2002) (reaching same conclusion). If enacted, however, Indiana would stand alone as the only state, of the seventeen requiring parental notification, to impose a notice requirement on unemancipated minors seeking an abortion without the opportunity to establish her maturity as a bypass of parental notice. *See* Pl.'s Br. at 21 n.13.

parental consent to obtain an abortion. Here, the amended statute requires physicians, in addition to obtaining government-issued proof of identification from a consenting parent, to procure "some evidence" of identity from the minor and her consenting parent before the abortion is performed, which "may include identification or other written documentation," capable of providing "an articulable basis for a reasonably prudent person to believe" that the individual presenting as the minor's parent is, in fact, the minor's parent. Ind. Code § 16-34-2-4(a)(3) (eff. July 1, 2017). The physician performing the abortion would after reviewing such authenticating information be required under SEA 404 to execute an affidavit attesting that a "reasonable person under similar circumstances" would have relied on the documentation that was provided by the minor and her parent "as sufficient evidence of identity and relationship." Ind. Code §16-34-2-4(k)(2) (eff. July 1, 2017). PPINK challenges these requirements on two grounds: first, the amendments are unconstitutionally vague on their face, and, second, they violate the Equal Protection Clause of the Fourteenth Amendment. We address first PPINK's vagueness challenge.

"The void for vagueness doctrine rests on the basic due process principle that a law is unconstitutional if its prohibitions are not clearly defined." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012). The due process clause "does not demand 'perfect clarity and precise guidance,'" however. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). Rather, a statute is unconstitutionally vague only "if it fails to define the offense with sufficient definiteness

that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

For example, "[t]he Constitution tolerates a lesser degree of vagueness in enactments 'with criminal rather than civil penalties because the consequences of imprecision are more severe.'" *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999). Likewise, vagueness concerns are heightened where a statute "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates*, 455 U.S. at 499. The Seventh Circuit has also recognized that sanctions against a person's license are sufficiently severe to implicate void-for-vagueness concerns. *See United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1129–30 (7th Cir. 1984); *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1123–24 (7th Cir. 1983). In a facial vagueness challenge, like the one before us, "the question is whether the statute is vague in all its operations." *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 520 (7th Cir. 2010).

These specific statutory provisions in SEA 404 provide no meaningful guidance to a physician in determining what additional identification (separate

from the government- issued form of identification that the consenting parent is already required to present under the statute) and/or other documentation would be sufficient to satisfy SEA 404's "some evidence" standard and provide "an articulable basis for a reasonably prudent person to believe" that the minor's parent is in fact who he or she purports to be. As such, SEA 404 fails to provide PPINK and its physicians "fair notice" as to the standard(s) to which their conduct must conform in order to avoid possible criminal prosecution and licensing sanctions. Physicians are left to guess as to the ways they are required "to conform [their] conduct to the law." *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999).

Both at oral argument and in its Response Brief, the State has conceded that the identification requirement is vague "at its margins," admitting that it is unclear what "outer limits of permissible evidence" would be acceptable under the statute. *See* Defs.' Resp. at 17–18. Despite these admissions, the State argues that the identification requirement is not unconstitutionally vague because there are certain pieces of evidence—such as a birth certificate with the minor's name and her parent's name, an amended birth certificate or adoption decree for an adoptive parent, or some type of court order memorializing a person's status as a legal guardian or custodian—that would clearly satisfy the statutory requirements. Because PPINK's physicians are under no obligation to test the limits of the statute, the State contends, they could simply choose to accept only those "acceptable" forms of documentation before performing abortions on minors with parental consent. The State further

maintains that the availability of such "safe harbors" defeats PPINK's vagueness challenge.

The State's rejoinder fails on all fronts. First, the only authority the State cites in support of its "safe harbor" argument is the Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). But *Gentile* does not support the proposition for which it is cited by the State, to wit, that a statute cannot be unconstitutionally vague as long as there is at least one clear way of complying with the statutory requirements that individuals can choose to follow.[6] (The State conceded this weakness in its cited authority during oral argument.) Moreover, as PPINK highlights in its briefing, if that were in fact an accurate statement of law, a number of prior cases that have held statutes void for vagueness would have been wrongly decided. For example, in *Akron I*, the Supreme Court held unconstitutionally vague a requirement that fetal and embryonic remains be disposed of "in a humane and sanitary manner" following an abortion, 462 U.S. at 451–52, *overruled on other grounds by Casey*, 505 U.S. 833 (1992), despite the fact that certain means of disposal, including a burial

[6] In *Gentile*, the Supreme Court held that a disciplinary rule governing pretrial publicity that included a safe harbor provision permitting an attorney to discuss the "general nature of the … defense … without elaboration" was void for vagueness. 501 U.S. at 1048. The Court found the provision unconstitutionally vague insofar as "general" and "elaboration" are "both classic terms of degree" that misled the plaintiff into believing that he could give a press conference following the indictment of his client without fear of discipline. *Id.* at 1048–49. This holding clearly has no relevance to the issues before us.

or cremation, would undoubtedly be deemed "humane and sanitary" under any definition. Similarly, in *Kolender v. Lawson*, 461 U.S. 352 (1983), the Supreme Court invalidated a statute requiring individuals encountered on the streets to provide police officers with "credible and reliable" identification when requested. *Id.* at 359–60. That statute was deemed unconstitutionally vague despite the fact that certain types of identification, such as government-issued photo identification, would most likely fall within anyone's definition of the term.

Additionally, even if the existence of a safe harbor were sufficient to insulate a statute from a vagueness challenge as the State contends, we are not persuaded that such a safe harbor exists here, given the imprecise and ambiguous statutory language at issue. It is not clear, for example, that PPINK and its physicians could ensure their compliance with the amended statute even if, as the State suggests, they required a birth certificate in all cases to prove the parental relationship before performing the abortion. We can easily imagine a situation in which the parent's name listed on the birth certificate does not match the parent's identification, such as in cases of parental divorce or marriage. The statute provides no guidance regarding whether a birth certificate in that case would still provide "an articulable basis for a reasonably prudent person to believe" that the individual is the parent of the minor or whether a "reasonable person under the same circumstances" would still rely on the birth certificate to prove the parental relationship. Thus, even with documentation that the State contends "would plainly suffice" to meet the statute,

the obvious vagueness problems associated with SEA 404's identification and affidavit requirements are not eliminated.

Moving beyond this limited example, it is clear that the statute provides no guidance regarding the contours of the identification and affidavit requirements. For example, a physician could not be sure after reading the statutory language whether matching surnames on a parent's and the minor's government-issued forms of identification would suffice to satisfy the statute. Even if matching last names on government-issued forms of identification would suffice in some circumstances, it is not clear whether under the statute that evidence would suffice where the surname is a common one, like "Jones" or "Smith," or in cases in which the appearance of the purported parent seems suspiciously youthful, such that, although sharing the same surname with the minor, the two might be only siblings. Nor is there guidance in the statute that would enable a physician to determine whether identification from a parent indicating a matching address with that of the minor, even if their last names were different, would be legally reliable in terms of the kind of evidence required under this statutory structure. The uncertainty is even greater when the documentation presented is less official than government-issued forms of identification or when the minor lacks any form of identification in her name. There is no clarity in the statute as to what circumstances, for example, would justify a "reasonably prudent" person to accept a document such as a utility

bill or school transcript as evidence of the parental relationship when more formal identification is not available.

We emphasize that this litany of problems is not simply an academic exercise. Rather, it illustrates the extent to which the imprecision embedded in the statutory scheme has serious real-world implications for PPINK and its physicians as well as for the minors who seek abortion services with their parent's consent. It is clear that the statutory provisions at issue qualify as penal statutes under prevailing law, given that any physician who performs an abortion on an unemancipated minor without obtaining proper identification and documentation from her parent and executing an affidavit is subject to criminal prosecution, *see* Ind. Code § 16-34-2-7(b), and the affidavit requirement subjects the physician to criminal prosecution for perjury, *see* Ind. Code § 35-44.1-2-1(a)(1). The Indiana State Department of Health may also revoke PPINK's license to operate as an abortion clinic based on any violation of these amendments, which, as noted above, the Seventh Circuit has recognized is a sufficiently severe sanction to implicate void-for-vagueness concerns.[7]

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[7] We are not persuaded at this juncture that the *mens rea* requirements in the criminal statute enforcing the abortion requirements, (*see* Ind. Code § 16-34-2-7(b) (prohibiting the "perform[ance] of an abortion intentionally or knowingly in violation of [the statutes]")), and the perjury statute (*see* Indiana Code § 35-44.1-2-1(a) (providing that perjury requires a "false … affirmation, knowing the statement to be false or not believing it to be true")) stand as a sufficient safeguard against the significant

Because the statute leaves unspecified the parameters for compliance, prosecuting officials who are responsible for enforcement of the statute, including the Indiana State Department of Health, are afforded unfettered discretion to determine on a case-by-case basis whether the law has been violated. Given the highly controversial and often politicized nature of abortion rights, the danger that locally-elected prosecutors and other enforcement officials could use the imprecision and malleability of the standard to further their own views and agendas is especially problematic. Moreover, we find that PPINK has shown a likelihood that the vagueness of the identification and affidavit amendments "threatens to inhibit the exercise of constitutionally protected rights," *Colautti v.*

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vagueness concerns raised by SEA 404's identification and affidavit requirements, particularly in this case where the requirements implicate constitutional rights. Unlike cases in which courts have found relevant the existence of a *mens rea* requirement, the *mens rea* requirement in the case at bar is not a part of the action proscribed. Therefore, while physicians may not be criminally convicted without the requisite *mens rea*, they are still required by law to act in compliance with the vague identification and affidavit amendments, neither of which contain a *mens rea* requirement. Accordingly, physicians' confusion regarding whether they are in compliance with the identification and affidavit requirements will still cause them to refrain from performing abortions when they cannot be sure whether they are in compliance with the amendments. In any event, there is no *mens rea* requirement constraining the ability of the Indiana State Department of Health to take action against an abortion provider's license upon a finding that the provider has allowed the commission of "any illegal act," (410 IAC 26-2-8), which the parties agree would include the failure of its physicians to obtain sufficient documentation of parental identity to satisfy the statute.

Franklin, 439 U.S. 379, 391 (1979), as it is likely that physicians who are presented with documentation that they cannot be certain complies with SEA 404 (which, given the utter lack of guidance in the statute, will not be uncommon) will simply refuse to perform the abortion.[8] For these reasons, we hold that PPINK has shown a likelihood of succeeding on its claim that the level of vagueness inherent in the identification and affidavit requirements of SEA 404 cannot pass constitutional muster.[9]

[8] The State conceded at oral argument that the safest option for physicians in questionable cases would be to decline to perform the abortion on the minor.

[9] Because we find that PPINK is likely to succeed in showing that the identification and affidavit requirements are void for vagueness, we need not address PPINK's alternative argument that those amendments also violate the Equal Protection Clause.

C. Indiana Code § 16-34-2-4.2(c)

Finally, PPINK challenges the provision in SEA 404 that would prevent it from advising its clients of abortion options outside of Indiana. PPINK has indicated that its current practice is to regularly inform women, including minors, of their options for obtaining a legal abortion in Indiana as well as other states, particularly when other states have less onerous parental-consent requirements than does Indiana. However, the amended statute prohibits any person (other than the minor's parent or stepparent, grandparent or stepgrandparent, sibling or stepsibling) from "knowingly or intentionally aid[ing] or assist[ing] an unemancipated pregnant minor in obtaining an abortion without the consent required" under Indiana law. Ind. Code § 16-34-2-4.2(c) (eff. July 1, 2017). Both sides agree that this amendment would apply to PPINK and other medical providers and prohibit them from providing information to young women about abortion options outside the state of Indiana where parental-involvement requirements might be less expansive. PPINK argues that this is a content-based restriction on speech that cannot survive strict scrutiny and therefore violates the First Amendment.

The State rejoins that PPINK's dissemination of information about out-of-state abortion practices is "professional speech," and, as such, it is afforded lesser protection under the First Amendment. This argument is a nonstarter. Initially, we note that "[t]he Supreme Court has never formally endorsed the professional speech doctrine." *Serafine v. Branaman*, 810

F.3d 354, 359 (5th Cir. 2016). While the Seventh Circuit has not had occasion to directly address the issue, a number of other circuit courts have embraced the doctrine based on Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 230–33 (1985). *Id.* at 359 n.2 (collecting cases). Even if we were to assume for purposes of our analysis here that the professional speech doctrine is valid, it is inapposite to the facts before us. Indiana Code § 16-34-2-4.2(c) applies not just to physicians and other professionals, but prohibits private citizens as well from disseminating information about out-of-state abortion services with the intention of assisting a minor in obtaining an abortion without the consent required under Indiana law.

Moreover, even if the restriction applied only to medical providers, the professional speech doctrine is still not applicable. Although the Supreme Court has not set forth a specific test for what constitutes professional speech, lower courts, relying on Justice White's concurrence in *Lowe*, have opined that the professional speech doctrine is "properly confined to occupational-related speech made to individual clients." *Serafine*, 810 F.3d at 360; *see also Moore-King v. County of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013) ("Professional speech analysis applies … where a speaker 'takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances.'") (quoting *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988)). The doctrine does not apply if "the personal nexus between professional and client does not exist,

and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted." *Serafine*, 810 F.3d at 359 (quoting *Lowe*, 472 U.S. at 232).

Here, the information PPINK and its physicians seek to convey to clients, to wit, factual information concerning consent requirements and abortion options in other states, is not tied to any medical procedure or professional advice that PPINK is providing to any particular individual patient. Rather, the fact that other states may have more lenient parental consent and notification requirements for abortions is generic, non-medical information that does not involve professional judgment, is publicly available from a wide variety of sources, including the internet, and could be provided by anyone. As PPINK argues, the mere fact that this non-medical information is being conveyed by medical providers does not transform it into professional speech. Accordingly, as a content-based restriction on pure speech, Indiana Code § 16-34-2-4.2(c) is subject to strict scrutiny. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969). The State has not disputed that this is a content-based restriction in any event.

To satisfy strict scrutiny, the State must show that the amended statute is narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015). The State concedes that it has little interest in prohibiting adult citizens from receiving factual information about the availability of abortion services that are legal in other states but may not be legal in Indiana. *See, e.g.*, *Bigelow v.*

Virginia, 421 U.S. 809, 827–28 (1975) (holding that Virginia's "interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach … was entitled to little, if any, weight"). However, the State contends that it has broader authority to regulate the dissemination of such information to minors as it has a compelling interest in safeguarding the parent-child relationship and protecting the physical and psychological well-being of minors, which interest does not end at the State's borders.

As we acknowledged above, these interests are undoubtedly compelling state interests. However, the State has failed to show how these interests are advanced by prohibiting private individuals, including medical providers, from disseminating information about lawful abortion practices in other states. The State has not articulated the specific psychological harm to minors that is caused by the dissemination of truthful information concerning lawful abortion options, particularly given that such information is widely available to the public. Nor has the State presented evidence that prohibiting the mere dissemination of accurate facts about abortion services that are lawfully available to minors outside of Indiana will correspondingly promote family integrity or facilitate family communication. "In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification." *Weinberg v. City of Chi.*, 310 F.3d 1029, 1038 (7th Cir. 2002). The State has failed to satisfy its burden on the facts currently before us. Accordingly,

PPINK has shown that it is likely to succeed in establishing that the amendment cannot survive strict scrutiny and therefore violates the First Amendment.

However, because there are various other valid applications of Indiana Code § 16-34-2-4.2(c) that do not involve impermissible restrictions on speech, we find that PPINK has demonstrated that it is likely to succeed only in establishing that this particular application of the amendment is unconstitutional. Accordingly, PPINK's entitlement to injunctive relief extends only that far. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) ("We prefer … to enjoin only the unconstitutional applications of a statute while leaving other applications in force, … or to sever its problematic portions while leaving the remainder intact.") (internal citations omitted).

III. Irreparable Harm/Inadequate Remedy at Law

Relying on the constitutional nature of its claims, PPINK argues that, absent injunctive relief, it will face irreparable harm for which there is no adequate remedy at law. The State does not contend that an adequate remedy at law exists, but argues that PPINK has failed to establish that the denial of injunctive relief in the case at bar will result in irreparable harm. However, the State's contention rests entirely on the conclusion that PPINK cannot show a likelihood of success on the merits. For the reasons detailed above, we disagree with the State's argument and find that, without injunctive relief, PPINK faces the denial of

its constitutional rights, which is the quintessential irreparable harm.

It is well established that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Campbell v. Miller*, 373 F.3d 834, 840 (7th Cir. 2004) (internal quotation marks and citation omitted); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that likelihood of success on First Amendment violation presumed to constitute irreparable injuries). Accordingly, we conclude that PPINK has made the necessary showing of irreparable harm. Moreover, because the State does not contend that PPINK has an adequate remedy at law, coupled with the fact that demonstrating irreparable harm is "probably the most common method of demonstrating that there is no adequate legal remedy," *see Campbell*, 373 F.3d at 840 (citations omitted), we hold that PPINK has also established that no adequate remedy at law exists.

IV. Balance of Equities and the Public Interest

Because PPINK has succeeded in making the requisite threshold showing of a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent injunctive relief, we now "weigh[] the balance of harm to the parties if the injunction is granted or denied and also evaluate[] the effect of an injunction on the public interest." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012) (citations omitted), *cert. denied*. The fact that we have found

that PPINK has made a strong showing that it is likely to succeed on the merits of its claims puts a judicial thumb on the scale in ruling in its favor, given that "[t]he more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *Id.* (citation omitted).

The State argues that it has a strong interest in the implementation of statutes passed by the Indiana General Assembly, but our court has previously recognized that the public "do[es] not have an interest in the enforcement of a statute that … PPINK has shown likely violates the [Constitution]." *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 984 F. Supp. 2d 912, 931 (S.D. Ind. 2013). According to the State, SEA 404 serves the public interest by furthering the State's interests "in protecting pregnant minors, encouraging parental involvement in their minor children's decision to have an abortion, and ultimately promoting fetal life." Defs.' Resp. at 29. We do not dispute that the State has such compelling interests, but as important as those interests may be, the State cannot advance those interests by enacting statutes that do not pass constitutional muster. Given that PPINK has shown a likelihood of prevailing on the merits of its claims that the challenged provisions of SEA 404 place an undue burden on a mature minor's ability to obtain an abortion, impose unconstitutionally vague standards on physicians, and unlawfully burden speech, we hold that the balancing of harms and the public interest favor the issuance of a preliminary injunction.

V. Bond

Rule 65(c) of the Federal Rules of Civil Procedure provides that "[t]he court may issue a preliminary injunction … only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, it is well established under Seventh Circuit law that "[u]nder appropriate circumstances bond may be excused, notwithstanding the literal language of Rule 65(c)." *Wayne Chem. Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (citations omitted). Because the State is not facing any monetary injury as a result of the issuance of the preliminary injunction, we hold that no bond is required here. *See Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (recognizing there is no reason to require a bond in cases in which "the court is satisfied that there's no danger that the opposing party will incur any damages from the injunction").

VI. Conclusion

In striking the balances required by the Constitution, particularly in the area of abortion rights, it behooves all who have a hand in shaping governmental policy, whether in the judiciary, the legislature, or the executive branch, to keep two fundamental factual realities in mind:

First, these decisions always impose a direct and immediate impact on the lives of all our citizens, not

just women, but perhaps most of all on the women who would seek to avail themselves of this highly significant procedure. The underlying principles that infuse these statutes and judicial opinions reach far beyond mere theory and legal debate to affect directly the behavior and freedom of individuals, families, communities, and society; and

Second, when it comes to our children, while parents or others entrusted with their care and wellbeing have the lawful and moral obligation always to act in their best interests, children are not bereft of separate identities, interests, and legal standing. Thus, it is both reasonable and just, as the law recognizes, that the closer a minor child is in age, maturity, and other circumstances to reaching her majority and the further along she has moved on the continuum towards self-determination, the more expansive are her legal entitlements.

For the reasons detailed above, Plaintiff's Motion for Preliminary Injunction is GRANTED. Defendants (with the exception of the Judge of the Marion Superior Court, Juvenile Division) are hereby PRELIMINARILY ENJOINED until further order of this Court from enforcing the following sections of Senate Enrolled Act 404:

- the bypass procedure set out in Indiana Code § 16-34-2-4 (eff. July 1, 2017);

- the new identification and affidavit requirements contained in Indiana Code § 16- 34-2-4(a) and (k) (eff. July 1, 2017); and

- Indiana Code § 16-34-2-4.2(c), only insofar as it would prohibit persons, including PPINK and its physicians, from disseminating to minors information regarding legal abortion practices in states other than Indiana.

Defendants are hereby further ordered to inform forthwith all the affected Indiana state governmental entities of this injunction.

IT IS SO ORDERED.

Date: 6/28/2017

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2428
PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,
Plaintiff-Appellee,
v.
KRISTINA BOX*, Commissioner, Indiana State Department of Health, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:17-CV-01636-SEB-DML — Sarah Evans-Barker, *Judge*.

On Petition for Rehearing and Rehearing En Banc

OCTOBER 30, 2019

Before WOOD, *Chief Judge*, FLAUM, EASTERBROOK, KANNE, ROVNER, SYKES, HAMILTON, BARRETT, BRENNAN, SCUDDER, and ST. EVE, *Circuit Judges*.

PER CURIAM. On consideration of defendants-appellants' petition for rehearing and rehearing en banc, filed on September 24, 2019, a majority of

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* We have substituted the current Commissioner, Indiana State Department of Health, for her predecessor, sued in an official capacity. Fed. R. App. P. 43(c)(2).

judges in active service voted to deny the petition for rehearing en banc. Judges Flaum, Kanne, Barrett, Brennan, and Scudder voted to grant the petition for rehearing en banc. Judges Rovner and Hamilton voted to deny panel rehearing; Judge Kanne voted to grant panel rehearing.

Accordingly, the petition for rehearing and rehearing en banc filed by defendants-appellants is DENIED.

EASTERBROOK, *Circuit Judge*, with whom SYKES, *Circuit Judge*, joins, concurring in the denial of rehearing en banc. Talk is cheap, which makes it easy for the plaintiffs in a preenforcement suit to predict the worst and demand that an in- junction issue before the disaster comes to pass. If the judge issues the injunction, the prediction cannot be tested—unless by chance a similar rule in some other state is not enjoined, and then the judiciary can learn by that experience. See, e.g., *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002). 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. And principles of federalism should al- low the states that much leeway. Talk of the states as laboratories is hollow if federal courts enjoin experiments before the results are in.

One case pending before the Supreme Court arises from a pre-enforcement injunction. A district court

predicted that enforcement of an admitting-privileges requirement would close two of the three abortion clinics in Louisiana. *June Medical Services LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017). The court of appeals reversed, believing that prudent steps by physicians would keep all three open. *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), rehearing en banc denied, 913 F.3d 573 (5th Cir. 2019). The Supreme Court granted a petition for review. *June Medical Services L.L.C. v. Gee*, No. 18–1323 (Oct. 4, 2019). Before the Justices can address whether Louisiana's statute creates an "undue burden," they must first decide what it would do if implemented—and the pre-enforcement injunction has made that difficult. (The Court stayed the Fifth Circuit's decision, so the injunction re- mains in effect.) 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.

If that happens, a grant of rehearing en banc in this case would be unproductive. And whether or not it happens, a grant of rehearing en banc would delay the ultimate resolution of this dispute. For a court of appeals cannot decide whether requiring a mature minor to notify her parents of an impending abortion, when she cannot persuade a court that avoiding notification is in her best interests, is an "undue bur- den" on abortion. The "undue burden" approach announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), does not call on a court of appeals to interpret a text. Nor does it produce a

result through interpretation of the Supreme Court's opinions. How 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). Only 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. Three circuit judges already have guessed how that inquiry would come out; they did not agree. The quality of our work cannot be improved by having eight more circuit judges try the same exercise. It is better to send this dispute on its way to the only institution that can give an authoritative answer.

KANNE, *Circuit Judge*, with whom FLAUM, BARRETT, BRENNAN, and SCUDDER, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*. This case implicates an important and recurring issue of federalism: Under what circumstances, and with what evidence, may a state be pre- vented from enforcing its law before it goes into effect? Given the existing unsettled status of pre-enforcement challenges in the abortion context, I believe this issue should be decided by our full court. Preventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.

Ind. Code § 16-34-2-4

Sec. 4. (a) No physician shall perform an abortion on an unemancipated pregnant minor less than eighteen (18) years of age without first having obtained from one (1) of the parents, a legal guardian, or a custodian accompanying the unemancipated pregnant minor:

(1) the written consent of the parent, legal guardian, or custodian of the unemancipated pregnant minor;

(2) government issued proof of identification of the parent or the legal guardian or custodian of the unemancipated pregnant minor; and

(3) some evidence, which may include identification or other written documentation that provides an articulable basis for a reasonably prudent person to believe that the person is the parent or legal guardian or custodian of the unemancipated pregnant minor.

The physician shall keep records of the documents required under this subsection in the unemancipated pregnant minor's medical file for at least seven (7) years.

(b) A minor:

(1) who objects to having to obtain the written consent of her parent or legal guardian or custodian under this section; or

(2) whose parent or legal guardian or custodian refuses to consent to an abortion;

may petition, on her own behalf or by next friend, the juvenile court in the county in which the pregnant minor resides or in which the abortion is to be performed, for a waiver of the parental consent requirement under subsection (a) and the parental notification requirement under subsection (d). A next friend may not be a physician or provider of abortion services, representative of the physician or provider, or other person that may receive a direct financial benefit from the performance of an abortion.

(c) A physician who feels that compliance with the parental consent requirement in subsection (a) would have an adverse effect on the welfare of the pregnant minor or on her pregnancy may petition the juvenile court within twenty-four (24) hours of the abortion request for a waiver of the parental consent requirement under subsection (a) and the parental notification requirement under subsection (d).

(d) Unless the juvenile court finds that it is in the best interests of an unemancipated pregnant minor to obtain an abortion without parental notification following a hearing on a petition filed under subsection (b) or (c), 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. The attorney representing the unemancipated pregnant minor shall serve the notice required by this subsection by certified mail or by personal service and provide the court with documentation of the attorney's good faith effort to serve the notice, including any return receipt for a certified mailing. The court shall retain the documentation provided in the confidential records of the waiver proceedings held under this section.

(e) The juvenile court must rule on a petition filed by a pregnant minor under subsection (b) or by her physician under subsection (c) within forty-eight (48) hours of the filing of the petition. Before ruling on the petition, the court shall consider the concerns expressed by the pregnant minor and her physician. The requirement of parental consent under this section shall be waived by the juvenile court if the court finds that the minor is mature enough to make the abortion decision independently or that an abortion would be in the minor's best interests. The juvenile court shall waive the requirement of parental notification under subsection (d) if the court finds that obtaining an abortion without parental notification is in the best interests of the unemancipated pregnant minor. If the juvenile court does not find that obtaining an abortion without parental notification is in the best interests of the unemancipated pregnant minor, the court shall, subject to an appeal under subsection (g), order the attorney representing the unemancipated pregnant minor to serve the notice required under subsection (d).

(f) Unless the juvenile court finds that the pregnant minor is already represented by an attorney, the juvenile court shall appoint an attorney to represent the pregnant minor in a waiver proceeding brought by the minor under subsection (b) and on any appeals. The cost of legal representation appointed for the minor under this section shall be paid by the county.

(g) A minor or the minor's physician who desires to appeal an adverse judgment of the juvenile court in a waiver proceeding under subsection (b) or (c) is entitled to an expedited appeal, under rules to be adopted by the supreme court.

(h) All records of the juvenile court and of the supreme court or the court of appeals that are made as a result of proceedings conducted under this section are confidential.

(i) A minor who initiates legal proceedings under this section is exempt from the payment of filing fees.

(j) This section does not apply where there is an emergency need for a medical procedure to be performed to avert the pregnant minor's death or a substantial and irreversible impairment of a major bodily function of the pregnant minor, and the attending physician certifies this in writing.

(k) A physician receiving parental consent under subsection (a) shall execute an affidavit for inclusion in the unemancipated pregnant minor's medical record. The affidavit must

(1) The physician's name.

(2) Certification that, to the physician's best information and belief, a reasonable person under similar circumstances would rely on the information provided by the unemancipated pregnant minor and the unemancipated pregnant minor's parent or legal guardian or custodian as sufficient evidence of identity and relationship.

(3) The physician's signature.

(l) A person who, with intent to avoid the parental notification requirements described in subsection (a), falsely claims to be the parent or legal guardian or custodian of an unemancipated pregnant minor by:

(1) making a material misstatement while purportedly providing the written consent described in subsection (a)(1); or

(2) providing false or fraudulent identification to meet the requirement described in subsection (a)(2);

commits a Level 6 felony.