No. 19-816

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

For decades, Indiana imposed a law requiring minors seeking abortion to obtain a parent's consent or a judicial bypass of that requirement. The law at issue here, Indiana Code § 16-34-2-4(d)–(e) (the "Act"), unique among the states, alters that requirement by preventing minors who have already been found by a court to be mature enough to make the decision to have an abortion independently from their parents from obtaining that abortion until a parent is notified. The only way for a mature minor to avoid such notification is to reveal private, sensitive facts about her home life that would enable a judge to find that notification is not in her best interests. Ind. Code § 16-34-2-4(d)–(e). Yet the extensive evidence credited by the district court demonstrated that because most minors who suffer from abuse or have other fears about their families would be unable to reveal such facts to a judge, the Act would provide no safety valve, but would instead result in minors avoiding the bypass altogether or notice to a parent that would allow parents to veto minors' abortion decisions and subject them to other harms. Pet. App. 17a. The State did not dispute this evidence, nor did it introduce any evidence regarding the law's benefits. Pet. App. 7a, 24a. Based on this record, the district court entered a preliminary injunction, finding that the Act likely imposed an undue burden on minors' right to access abortion. Pet. App. 10a–11a. The U.S. Court of Appeals for the Seventh Circuit affirmed, concluding that the district court's findings were

COUNTER-STATEMENT OF QUESTION PRESENTED—Continued

supported by the record and not clearly erroneous. Pet. App. 7a, 23a, 29a. The question presented is:

> Should the Court grant certiorari to review the affirmance of a fact-specific preliminary injunction where the court of appeals faithfully applied the Court's precedent, balancing the significant evidence of the burdens imposed by the Act against "no evidence," introduced by the state of Indiana, Pet. App. 24a, of any likely benefit?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Planned Parenthood of Indiana and Kentucky, Inc. hereby states that it is a wholly owned subsidiary of Planned Parenthood of the Great Northwest and the Hawaiian Islands, and that Planned Parenthood of Indiana and Kentucky, Inc. is a private non-governmental party, and no publicly held corporation owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

The Petition seeks review of a fact-bound interlocutory order of the U.S. Court of Appeals for the Seventh Circuit finding that Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") was likely to succeed in showing that a new Indiana abortion restriction imposes an undue burden on mature minors by requiring parental notice despite the fact that a court has already determined that they are capable of making the decision to have an abortion independently of their parents. The lower court reached this conclusion based on "unchallenged testimony" presented by PPINK that, because minors who fear familial consequences such as abuse would not reveal it in the bypass process, they would be unable to meet the "best interests" standard required for waiver of the notice requirement. Therefore, the Act's requirement of notice to mature minors' parents would "giv[e] parents a practical veto over the abortion decision," Pet. App. 7a–10a, 26a–27a. "The State chose to introduce *no* evidence in response," "did not challenge the reliability or credibility of [PPINK's] evidence," Pet. App. 7a (emphasis added), and "offered no evidence that any actual benefit is likely or that there is a real problem that the notice requirement would . . . solve." Pet. App. 24a.

I. The Challenged Law

Indiana has for decades had in place a parental consent statute, not at issue in this case, requiring that when an unemancipated minor seeks an abortion the

physician must obtain the written consent of a parent, legal guardian, or custodian. *See* Ind. Code § 16-34-2-4. Consistent with the requirements of *Bellotti v. Baird*, 443 U.S. 622 (1979) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this law contains a judicial procedure by which a minor can bypass the consent requirement by filing an action in juvenile court and demonstrating either that she is mature enough to make the abortion decision independently of her parents or that the abortion would be in her best interests. Ind. Code § 16-34-2-4(b), (e).

The challenged law, Indiana Code § 16-34-2-4, alters this long-standing process in a manner attempted by no other state. Under the Act, minors who have already been granted a judicial bypass on maturity grounds are prohibited from obtaining an abortion without first notifying a parent of their intent, unless the juvenile court makes a separate finding that notification is not in the minor's best interest. § 16-34-2-4(d)–(e).

II. The Proceedings Below

Prior to the Act taking effect, PPINK filed suit alleging, *inter alia*, that the Act imposes an undue burden on some of its minor patients' right to access abortion, and sought a preliminary injunction. In support of that motion, PPINK proffered significant evidence from seven fact and expert witnesses, including from the Indiana judicial bypass coordinator (a

volunteer who maintains a pool of attorneys who can discuss the bypass process with minors and represent them in court if they so choose), attorneys who represent minors in judicial bypass proceedings in Indiana, and a psychologist specializing in abuse within families, among others. *See* Pet. App. 90a–92a. The State introduced no evidence in response either to rebut PPINK's showing of the burdens the Act would impose or to demonstrate any benefits the Act would confer. Pet. App. 7a.

The district court analyzed the record before it in a "careful" opinion and made "thorough" factual findings regarding the burdens and benefits of the Act based on the evidence. Pet. App. 7a. Turning first to the burdens the Act would impose, the district court recognized that the vast majority of minors served by PPINK consult their parents regarding their abortion decision and obtain parental consent, as PPINK encourages them to do. Pet. App. 65a. However, a small number of minors—approximately ten per year—most of whom are seventeen-years-old, cannot inform their parents that they are pregnant and wish to obtain an abortion without risking severe consequences, and choose to pursue a judicial bypass of the consent requirement. Pet. App. 66a. The district court credited the unrebutted testimony of PPINK employees, the bypass coordinator, and attorneys representing minors in bypass proceedings and found that these minors have "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." Pet. App. 67a. The

district court also found, based on the evidence, that the judicial bypasses that have been granted to PPINK's patients have generally been based on a juvenile court finding that the minor was sufficiently mature to make the abortion decision independently of her parents. Pet. App. 66a.

The district court further found that it was no answer to the Act's burdens to argue that minors could disclose these fears in the context of a bypass proceeding in order to try to persuade the juvenile court to find that notification was not in the minor's best interests. As the evidence showed, minors are extremely reluctant to disclose their abuse, particularly to strangers and government officials. Indeed, relying on the unrebutted evidence of Plaintiff's expert Dr. Pinto, the court found that "[r]esearch . . . 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." Pet. App. 92a.

Therefore, for these mature minors, 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." Pet. App. 73a. The court explained that while the notification requirement may not give parents formal legal authority to veto the minor's abortion decision, its practical effect would be to provide a veto, Pet. App. 89a–90a, and that in addition to actual obstruction of the abortion, "a large number of minors may face the risk of domestic

abuse" as a result of notification. Pet. App. 90a. Moreover, again relying on the unrebutted evidence of Dr. Pinto, the court found that the possibility of state-mandated parental notice would deter many minors from even attempting to obtain a judicial bypass, and may prompt pregnant minors to engage in hazardous self-help measures such as attempting to self-induce miscarriage. Pet. App. 91a. Based on all the evidence, the district court found that the Act "unquestionably burdens the right of abortion-seeking minors in Indiana." Pet. App. 92a–93a.

With respect to the Act's purported benefits, Indiana introduced no evidence that the Act conferred any benefit beyond those afforded by the preexisting parental consent requirement. Instead, the State merely relied upon the general rights of parents in rearing their children. Pet. App. 94a. Therefore, weighing the extensive evidence of burden against the absence of evidence of benefit of requiring parental notice for the handful of mature minors who seek a judicial bypass, the court found that the Act likely placed an "unjustifiable burden on mature minors in violation of the Fourteenth Amendment." Pet. App. 93a–94a. Accordingly, the district court entered a preliminary injunction against the Act.

The Seventh Circuit affirmed, concluding based on the one-sided factual record at the preliminary injunction stage that the Act was likely to impose an undue burden on the mature minors it would affect. Pet. App. 17a. The court carefully reviewed the district court's "thorough" fact-finding, Pet. App. 7a, and held that

"none of the district court's findings are clearly erroneous." Pet. App. 29a. In particular, the Seventh Circuit agreed with the district court that it was no answer to the Act's burdens that juvenile courts could consider the potential for abuse as part of the best-interests analysis, because the evidence and findings established that it is difficult or impossible for many victims of abuse to disclose the abuse to a stranger like a judge. Pet. App. 33a (relying on district court's "well supported" finding that "the trauma of even attempting to prove abuse would deter young women from pursuing bypass").

The Seventh Circuit, therefore, upheld the district court's finding that the Act "creates a substantial risk of a practical veto over a mature yet unemancipated minor's right to an abortion." Pet. App. 17a. The court explained that not only would the Act's notice requirement subject affected minors to abuse, but giving "notice to parents could result in actual obstruction of the abortion itself." Pet. App. 27a. The court emphasized that PPINK's evidence raised concerns about minors similar to those the *Casey* Court had in striking down Pennsylvania's spousal notice law, namely that notice could give a spouse a practical veto over his wife's decision. Pet. App. 19a. In addition, the Seventh Circuit agreed with the district court that "[f]or young women who have these fears, the potential for parental notice is a threat that may deter them from even attempting bypass in the first place." Pet. App. 28a; *see also* Pet. App. 29a ("[PPINK's] unchallenged evidence shows that the existence of that additional [notice]

requirement is likely to cause a significant fraction of affected young women to be too afraid to even try to seek an abortion.").

Meanwhile, the Seventh Circuit noted that "the State has made no effort to support with evidence its claimed justifications [for the Act] or to undermine with evidence [PPINK's] showing about the likely effects of the law." Pet. App. 17a. The court found insufficient the State's mere recitation of the general interests that may be relevant in the context of parental involvement laws, in the absence of actual evidence of a problem in Indiana with its preexisting parental consent law, let alone evidence that the Act would actually solve the problem. As the Court noted, this Court's precedent requires "that courts must consider actual evidence regarding both claimed benefits and claimed burdens of abortion regulations." Pet. App. 21a (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016)). Looking at the unrebutted record of burden and the nonexistent evidence of benefits, the court of appeals agreed with the district court that the Act likely imposed an undue burden. Pet. App. 23a.

The Seventh Circuit explained that, because the district court's careful factual findings supported its conclusion that the burdens of Indiana's unique law outweighed any benefits, it is likely unconstitutional, and the preliminary injunction must be affirmed. Pet. App. 34a. There was, therefore, no reason for it to reach the question of whether all parental notice laws must meet the requirements for a judicial bypass laid out in this Court's decision in *Bellotti*. *Id.*

The State sought rehearing en banc, which was denied.

REASONS FOR DENYING THE WRIT

There is no basis for granting review of this fact-bound application of the "undue burden" standard granting a preliminary injunction against a one-of-a-kind abortion restriction. The record at this interlocutory stage consists of unrebutted evidence that Indiana's parental notice requirement would give parents a veto over their mature minors' abortion decisions, even after parental consent had been found unnecessary. And the State made "no effort" to offer any evidence that the notice requirement advanced any actual benefits. Pet. App. 17a. The State can point to no decision upholding such a law, and its scattershot attempts to manufacture various circuit splits all fail. Not only is there no split; there is not even another case assessing the validity of the type of restriction at issue here: a requirement that minors found mature enough to make an abortion decision independently of their parents, and therefore to warrant a bypass of the parental consent requirement, must nonetheless notify their parents of their abortion absent the revelation of highly sensitive facts that, the courts below found, most such minors would be deterred from revealing. The State is free to make a different record as the case proceeds, and there is no basis for this Court to intervene at this stage.

I. The Interlocutory Nature of the Decision Below, the Petitioners' Failure to Present Any Record Evidence, and the Unique Law at Issue Render this Case an Unsuitable Vehicle for Review

Absent extraordinary circumstances, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *see also* Stephen M. Shapiro et al., Supreme Court Practice 285 (10th ed. 2013) ("[I]n the absence of some such unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari"). This is so even in cases that, unlike this one, present questions of undoubted importance. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring); *Va. Military Inst.*, 508 U.S. 946 (Scalia, J., concurring). The Petition does not even attempt to demonstrate a reason to depart from this Court's practices in this case.

The Seventh Circuit considered only whether the district court abused its discretion in granting a preliminary injunction on the "lopsided" record before it at this "preliminary" stage of the case. Pet. App. 17a; *see also id.* at 34a ("The context of a preliminary injunction enjoining the enforcement of this statute on a limited factual record necessarily narrows our holding."). The court noted that the State remained free to present evidence to the district court as the case progressed on the merits. Pet. App. 25a n.6. But rather than follow the Seventh Circuit's suggestion, the State

has sought interlocutory intervention from this Court. There is no reason not to await final judgment, especially where, as here, the State not only failed to proffer *any* evidence to support its law, but "did not challenge the reliability or credibility of [PPINK's] evidence." Pet. App. 7a.

There is also no important or recurring conflict with respect to the type of abortion restriction at issue. Indiana's law—adding a notice requirement for minors who have been adjudicated mature enough to bypass a parental consent requirement—is an extreme outlier, and unlike any law that has been upheld (or even considered) by any court.[1] *See* Shapiro et al., *supra*, at

[1] In *H.L. v. Matheson*, 450 U.S. 398 (1981), this Court rejected a challenge to a Utah parental notice law that contained no express judicial bypass process whatsoever, but that challenge was brought on behalf of a minor who did not claim either to be mature or that notification would be contrary to her best interests. 450 U.S. at 407. As this Court's subsequent cases make plain, the decision in *H.L.* was limited to the specific facts presented by the plaintiff in that case. *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (declining "to decide whether a parental notification statute must include some sort of bypass provision to be constitutional"); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510–11 (1990) ("[A]lthough our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures." (citing *H.L.*, 450 U.S. at 413)). While the Seventh Circuit noted that Oklahoma's statutes appear not to provide for a judicial bypass option of its parental notice requirement, Pet. App. 4a–5a, in fact Oklahoma courts regularly waive parental notice. *See*, *e.g.*, Raffaella Espinoza & Ryan Webb, Okla. State Dep't of Health, Abortion Surveillance in Oklahoma (2019), https://www.ok.gov/health2/documents/2018%20ITOP%20Report.pdf (reporting the number of abortions performed after receiving judicial authorization to do

246–47 (conflicts of authority typically do not merit review until they become important and recurring).

II. The Court of Appeals' Holding that the Challenged Law Likely Imposes a Substantial Obstacle in the Path of Minors Seeking Abortion Is a Straightforward Application of the Undue Burden Test and Does Not Conflict with Any Decision of this Court or Any Circuit

The decision below is a straightforward application of the undue burden test to a unique law. The State argues that the decision below creates conflicts with (or at least confusion about) this Court's precedents, *see* Pet. Writ Cert. ("Pet.") 3, 10, 14, but the State identifies no actual conflict, confusion, or split. At bottom, the State disagrees with the court of appeals' application of the undue burden standard to the particular restriction and facts at issue in this case. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Nor did the lower court misapply the law here.

Contrary to the State's argument, there is no conflict between the Seventh Circuit's application of the

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so without parental notice and consent); Doris L. Fransein, Tulsa County Juvenile Division Policies and Procedures 54 (2019), http://www.tulsacountydistrictcourt.org/files/TulsaCountyJuvDivPoliciesAndProcedures12132018.pdf (laying out procedures for judicial authorization for abortion without parental notification).

undue burden test to the Act and this Court's decision in *Bellotti*. The State argues that the court below determined that *Bellotti* "is irrelevant when evaluating regulation of minors' access to abortion," and that it read *Whole Woman's Health* to "wipe out" *Bellotti*. Pet. 14, 15. That is doubly incorrect: it is not what the Seventh Circuit did, and this Court's abortion jurisprudence, including *Bellotti*, *Casey*, and *Whole Woman's Health*, plainly apply to laws affecting minors.

In *Bellotti*, this Court balanced the burdens of requiring parental consent for abortion against the state's interests and determined that, in order to protect minors' rights, such laws must contain a confidential and expeditious mechanism enabling minors to bypass the parental involvement requirement. *See Bellotti*, 443 U.S. at 647 (holding that the law would "impose an *undue burden* upon the exercise by minors of the right to seek an abortion" because the law could operate as a veto over a minor's abortion decision (emphasis added)). In *Casey*, the Court reaffirmed its prior precedent regarding parental consent requirements, *see* 505 U.S. at 899, and held that abortion restrictions should be evaluated under the undue burden test, which is "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," 505 U.S. at 877. Nowhere did the Court suggest that the undue burden standard applies only to laws that affect adult women. And less than four years ago, in *Whole Woman's Health*, this Court reaffirmed that "[t]he rule announced in *Casey*

. . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," 136 S. Ct. at 2309.

The Seventh Circuit conducted a straightforward, fact-bound application of this Court's decisions to the limited preliminary injunction record in this case, weighing the asserted state interests against the burdens imposed by the law. As to the Act's burdens, the court held that the district court made well-supported factual findings based on unrebutted evidence that, among other concerns, the Indiana law mandated "notice to parents [that] could result in actual obstruction of the abortion itself."[2] Pet. App. 27a; *see also Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring) (finding that an abuse exception to a two-parent notice requirement was inadequate because, *inter alia*, of an "abused minor's reluctance to report sexual or physical abuse").

It also analyzed the asserted state interests, including the state interests that relate to minors, as this Court discussed in *Bellotti*, 443 U.S. at 633–39. Pet. App. 22a–24a. It determined that for the small subset of minors who cannot obtain parental consent but who

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[2] Contrary to the State's claim, Pet. 17, the court below did not rely on a "cumulative" burden theory, and no such theory has been advanced in this case. Accordingly, the Fifth Circuit's *dicta* about "cumulative effects" in *In re Gee*, 941 F.3d 153, 171 (5th Cir. 2019) is inapposite. The panel below simply examined the context in which the Act affects minors' access to abortion. Considering the factual context in which the Act operates is consistent with this Court's decisions. *See Whole Woman's Health*, 136 S. Ct. at 2301–02, 2313, 2318; *Casey*, 505 U.S. at 891–92.

are sufficiently mature to consent to the abortion on their own, the "State . . . 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." Pet. App. 24a.

Based on these findings, the court held that the Act likely imposes an undue burden on minors' access to abortion. This holding is entirely consistent with precedent. A law that gives anyone veto power over another's abortion decision is impermissible. *See*, *e.g.*, *Casey*, 505 U.S. at 893–94 (striking down spousal consent requirement because it would give husbands veto power over their wives' abortion decision); *Ohio v. Akron Ctr.*, 497 U.S. at 510–11 (collecting cases holding that states may not enact laws that give parents "absolute veto power over a minor's decision to have an abortion"); *Bellotti*, 443 U.S. at 647 (holding parental consent and notice law unconstitutional because some parents would obstruct their child's attempt to access abortion). The court's routine application of the undue burden test to the limited evidentiary record at this preliminary stage of the litigation does not merit review.

Nor should this Court grant review to decide whether the judicial bypass requirement for parental consent laws discussed in "*Bellotti* applies to *all* parental notice requirements." Pet. App. 34a (emphasis added). Because the court properly found that Indiana's law likely imposes an undue burden by giving parents veto power over mature minors' abortion decisions, it did not purport to answer that question,

making this case an extremely poor vehicle to decide it. Moreover, there is no circuit split on this question. As the State correctly notes, three circuits did opine on that question, more than twenty years ago. Two circuits found that a bypass was required for a parental notice law. *See Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997) (bypass provision authorizing parental notification would "cut the core out of *Bellotti*"), *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) ("parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass"). The final circuit, the Fourth Circuit, did not rule to the contrary in *Planned Parenthood of the Blue Ridge v. Camblos*, as the State claims. The law challenged in that case contained a confidential bypass for both mature and best-interest minors, and therefore, its suggestion that a judicial bypass is not needed for parental notice statutes is not a holding, but *dicta*. 155 F.3d 352, 375–79 (4th Cir. 1998) (en banc). There is, therefore, no circuit split, and nothing about those three cases is in conflict with the Seventh Circuit's decision here regarding Indiana's unique law.

Nor is this case a good vehicle to address a purported "disagreement" among the lower courts regarding how to balance an abortion restriction's benefits and burdens after *Whole Woman's Health.* Pet. 16–17. First, the lopsided record here, leading to an unchallenged finding that the Act imposes a practical veto for

some minors, is more than sufficient to establish a substantial obstacle to these minors' access to abortion. *Bellotti*, 443 U.S. at 647. In any event, the appellate decisions cited by the State, Pet. 16, are not in conflict. The State points to the Eighth Circuit's decision in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018), and the Ninth Circuit's decision in *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014). But the Eighth Circuit mentioned the balancing test only in *dicta*, which creates no decisional conflict. *Jegley*, 864 F.3d at 958. And the Ninth Circuit's decision in *Humble* predates *Whole Woman's Health*, so to the extent that court needed guidance, as the State claims, this Court provided it in that case.[3] There is simply no "havoc" wrought by this case or any other about the application of the undue burden test as a result of *Whole Woman's Health* that would merit this Court's review.

The State complains that the undue burden test requires courts to undertake a "quintessentially legislative task," Pet. 16, but courts regularly apply fact-based balancing tests in a wide variety of contexts. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (explaining that, in evaluating the constitutionality of a state election law, courts must "first consider the

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[3] In any event, the Ninth Circuit got it right: "The more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test; conversely, the stronger the state's justification, the greater the burden may be before it becomes 'undue.' " *Humble*, 753 F.3d at 912.

character and magnitude of the asserted injury to [individual] rights. . . . It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."). Nor does the State's concern that a regulation that is constitutional in one state might be unconstitutional in another, Pet. 16, warrant review. While it is hard to imagine that minors and their parents are so different in Indiana that a similar law would be upheld in another state, *Whole Woman's Health* is clear that the undue burden test is context-specific. *See* 136 S. Ct. at 2309–10 (explaining that courts must carefully evaluate the record evidence in a given case and balance a law's benefits against its burdens). Indeed, the State's concern about states ending up with different laws is surprising given that it has argued before this Court that abortion restrictions may be constitutional in one state and unconstitutional in another depending upon the factual context. *See* Brief for the States of Arkansas, Indiana, [et al.] as Amici Curiae in Support of Respondent Dr. Rebekah Gee, *June Med. Servs., L.L.C. v. Gee*, Nos. 18-1323, 18-1460 (Jan. 2, 2020), 2020 WL 92191. At bottom, these complaints by the State amount to nothing more than disagreement with *Whole Woman's Health* and this Court's abortion jurisprudence generally and do not warrant review of this case, particularly given the "lopsided" and preliminary record.

III. No Circuit Conflict Exists with Respect to the Propriety of Pre-Enforcement Preliminary Injunctions

The State argues that the Seventh Circuit's decision deepens a preexisting conflict regarding the propriety of pre-enforcement challenges to abortion restrictions and the evidentiary showing required in such challenges. Pet. 19–22. No such conflict exists.

This Court has repeatedly made clear that pre-enforcement challenges to abortion restrictions are not subject to any heightened evidentiary requirement. *Whole Woman's Health* itself included a pre-enforcement facial challenge to one of the two laws at issue, and the Court struck down that law based on evidence very similar to the evidence here: fact and expert testimony predicting the law's effects. The Fifth Circuit in *Whole Woman's Health* had rejected predictive expert testimony as "ipse dixit," but this Court disagreed, explaining that district courts are free to credit expert testimony concerning a law's impact, especially where the testimony is consistent with common sense and unrebutted. 136 S. Ct. at 2317. Far from containing mere "speculation" about the Act's burdens, Pet. 20, the record below contained ample "unchallenged testimony" in the form of fact and expert affidavits that established that the Act "will likely operate as an undue burden by giving parents a practical veto over the abortion decision." Pet. App. 26a. Moreover, while *Whole Woman's Health* involved a pre-enforcement challenge to one statute and a post-enforcement challenge to another, the Court applied an identical standard to both.

The State's argument that the record here is insufficient for a pre-enforcement challenge is particularly inapt in the preliminary injunction context, where, by definition, courts are tasked with determining only a *likelihood* of success on the merits. Pet. App. 15a–16a ("Motions for preliminary injunctions call upon courts to make judgments despite uncertainties."). As the district court recognized, pre-enforcement preliminary injunctions play a crucial role in preventing devastating harms such as the potential for physical abuse. Pet. App. 73a ("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 also* Pet. App. 27a (noting the district court's finding 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' ").

There is no circuit split regarding pre-enforcement challenges. Contrary to the State's assertion, Pet. 19–20, the Eighth Circuit's decision in *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018) is not in conflict with the Seventh Circuit's decision here; *Hawley* did not reject a pre-enforcement injunction, nor could it have, as the laws challenged in that case had both been in effect for over a decade. *Hawley*, 903 F.3d at 753 ("The roots of this case can be traced to 2007.").

The Fifth Circuit's decision in *June Medical* similarly does not conflict with the Seventh Circuit's decision here. *June Medical* did not reject pre-enforcement challenges as a general matter. Nor did it hold, as the State claims, that the plaintiffs in that case would only be able to show evidence of an undue burden if the law at issue were allowed to go into effect. Instead, the Fifth Circuit conducted a "fact-bound" analysis, *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 793 (5th Cir. 2018), reviewing a final judgment that was based on full development of an evidentiary record, and found that there was insufficient evidence of the law's burdens to support an injunction. *Id.* at 810 ("there is no evidence that Louisiana facilities will close from [the] Act"). The district court and the Seventh Circuit here also assessed the facts in the unchallenged record, but determined that, on this record, there *was* sufficient evidence of burden to support a preliminary injunction. The courts' differing outcomes based on fact-based analyses of very different records do not present a conflict regarding the propriety of pre-enforcement challenges or the evidentiary requirements thereof.

IV. No Circuit Conflict Exists with Respect to the Proper Denominator in *Casey*'s "Large Fraction" Test

This case similarly does not raise a conflict regarding the proper application of *Casey*'s large fraction test for facial relief, nor is there any preexisting circuit split regarding how to define the denominator in that

test. This Court has been clear that the test requires courts to identify "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Whole Woman's Health*, 136 S. Ct. at 2320 (alterations in original) (quoting *Casey*, 505 U.S. at 895). The court below did just that.

The State misrepresents the lower court's application of the large fraction test, stating that the court of appeals defined the relevant denominator as "young women *who are likely to be deterred* from even attempting a judicial bypass because of the possibility of parental notice," thereby guaranteeing a fraction of 1:1. Pet. 17. In fact, the court defined the denominator as all unemancipated minors seeking judicial bypasses, as all such minors could be granted a bypass from parental consent requirement on maturity grounds and therefore be subject to parental notice. Pet. App. 20a. This is precisely the group for whom the Act is "an actual rather than an irrelevant restriction." *Whole Woman's Health*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895). The court explained that, because the record shows that most bypasses granted in Indiana have been based on a maturity finding, a large fraction of those minors for whom the Act is relevant would be burdened. The court then went on to note that the correct numerator and denominator are actually larger, because they would both also include any minors deterred from seeking a bypass because of the possibility of notice. Pet. App. 20a–21a.

Casey's application of the large fraction test illustrates that the lower court's approach was correct: The

Court in *Casey* defined the relevant denominator for a spousal notice requirement 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." 505 U.S. at 895. It did not make the denominator all women, or all married women, but only those for whom the law posed a relevant restriction. Because the Court found that a large fraction of them would be unduly burdened by having to notify their spouses, it invalidated the requirement on its face. The Seventh Circuit did exactly what the *Casey* Court did: (1) it identified as the denominator those minors for whom the law would be a relevant restriction; and (2) it assessed whether a "large fraction" of them would face an undue burden.

The same is true of *Jegley*, 864 F.3d 953, which challenged a requirement that health centers have a back-up doctor with local admitting privileges in order to provide medication abortions. There, the Eighth Circuit concluded that the relevant denominator was "women seeking medication abortions in Arkansas." 864 F.3d at 958. Indiana states that the court did not define the denominator more narrowly as "women seeking medication abortions specifically from providers that did not have hospital admitting privileges." Pet. 18. But the district court in *Jegley* "found that medication abortion would no longer exist in Arkansas" were the challenged requirement to stand. 864 F.3d at 956–57. Therefore, the class of "women seeking medication abortions" and "women seeking medication

abortions specifically from providers that did not have hospital admitting privileges" were one and the same—and perfectly in line with this Court's instructions in *Casey* that the denominator include those women for whom a restriction is relevant.[4]

Indiana also claims a conflict regarding the large fraction test between the Sixth Circuit's decision in *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490, 515–16 (6th Cir. 2012) and the Ninth Circuit's in *Humble*, 753 F.3d at 914, both of which concerned restrictions on medication abortion regimens. But the conflict between those decisions had nothing to do with how to determine the relevant denominator in the large fraction test, and in any event does not survive *Whole Woman's Health*. The only conflict between those two cases concerned whether the undue burden test considers only the burden imposed by an abortion regulation, or whether it also should consider evidence of whether the law actually advances the

[4] The State also cites the Fifth Circuit's decision in *June Medical*, Pet. 18, which similarly defined the relevant denominator in a challenge to an admitting-privileges requirement as "all women seeking abortions in Louisiana," 905 F.3d at 802, a definition the State characterizes as "broad." Pet. 18. But the district court in *June Medical* explained that approximately seventy percent of women seeking abortion in Louisiana would be precluded from obtaining an abortion if the admitting privileges law at issue there went into effect, and all remaining women seeking abortion in the state would be burdened by lack of capacity, overcrowding, and longer wait times. *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 81 (M.D. La. 2017). Therefore, the law at issue was "relevant" for all women in the state seeking abortion. This is entirely consistent with *Casey* and with the instant case, and there is no split warranting certiorari.

state's asserted benefits. The Sixth Circuit in *DeWine* did not even address the relevant denominator for purposes of the "large fraction" test; it simply held that, because a law restricting medication abortions did not affect a woman's ability to obtain a surgical abortion, the statute did not represent "a substantial obstacle to the ultimate abortion decision." 696 F.3d at 515–16. When the Ninth Circuit addressed a materially identical statute in *Humble*, it reached a different result, not because it offered a different definition of the relevant denominator, but because it examined both the benefits and burdens, as this Court in *Whole Woman's Health* has since made clear is required. *See* 753 F.3d at 914–17. *DeWine*'s conclusion that a statute's benefits should not be weighed does not survive *Whole Woman's Health*, and the circuit conflict described by Indiana has already been resolved.

Even if there were a circuit conflict regarding the large fraction test, this case would not be an appropriate vehicle for resolving it, given the interlocutory posture of the case and the limited, lopsided record, which includes no evidence at all from the State to rebut PPINK's evidence regarding the "serious potential" for minors to suffer "the kind of harms" the Court noted in invalidating Pennsylvania's spousal notice requirement in *Casey*. Pet. App. 26a.

V. Certiorari is Not Warranted to Address Third-Party Standing

Finally, there is no basis for the Court to grant certiorari to address whether abortion providers have third-party standing to assert the abortion rights of their minor patients. As the State notes, the Court is currently considering the third-party standing question in *June Medical*. As an initial matter, as the *June Medical* Petitioners-Cross-Respondents make clear in their briefing, limitations on third-party standing " 'are not constitutionally mandated,' but rather are 'prudential' in nature." Response and Reply Brief for Petitioners-Cross-Respondents at *28, *June Med. Servs.*, Nos. 18-1323, 18-1460 (Jan. 21, 2020), 2020 WL 373291 (quoting *Craig v. Boren*, 429 U.S. 190, 193 (1976)). Therefore, given that the State has never before even questioned PPINK's standing to bring its patients' claims, it has waived the issue. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Moreover, it has been well-established for decades that abortion providers have third-party standing to vindicate their patients' rights. *Id.* at 117; *see also Boren*, 429 U.S. at 195 & n.4. The State suggests that PPINK has a conflict of interest, Pet. 22–23 (stating abortion providers do not inherently have an interest in parental rights and familial harmony), but the State does not argue, nor could it, that PPINK's interests conflict with those of its mature minor patients who seek to obtain an abortion without parental

involvement. The United States Solicitor General just last month argued that "abortion providers' interests [a]re largely parallel with the interests of their 'minor patients' who wish[] to obtain an abortion without involving their parents in the decision." Brief for the United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits at *12–13, *June Med. Servs.*, Nos. 18-1323, 18-1460 (Jan. 2, 2020), 2020 WL 58244 (discussing *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983)). Nor is the State correct that minors can easily assert their own rights by challenging the Act in the context of a judicial bypass proceeding. Pet. 23. As the district court and Seventh Circuit emphasized, the unrebutted evidence here shows that the Act will deter minors from participating in judicial bypass proceedings at all. *Supra*, Counterstatement of the Case, II.

In any event, given that *June Medical* is currently before the Court, there is no reason to grant certiorari in this case to address this issue.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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