No. 20-1375

IN THE
Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA 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

***Amicus Curiae* Brief of the American Center for Law and Justice in Support of Petitioners**

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Interests of the *Amicus*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before this Court as counsel for parties, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for *amici*, *e.g.*, *Carson v. Makin*, No. 20-1088, *Mahanoy Area School District v. B.L.*, No. 20-255, addressing a variety of issues.

The ACLJ is dedicated to, *inter alia*, the protection of parental rights and the defense of the unborn. The issues raised in this case, and the detrimental impact that the Seventh Circuit's decision could have upon the rights of parents and the well-being of unemancipated minors, are of significant interest to *amicus* and its supporters. This brief is submitted on behalf of over 239,000 ACLJ members.

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[1] Counsel of record for all of the parties have consented to the filing of this brief, and received notice of *amicus*'s intention to file this brief more than ten days prior to the filing deadline.

No counsel for any party authored this brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person, other than *amicus* or its members, made such a monetary contribution.

Summary of the Argument

The recognition and protection of parental rights is a staple of Anglo-American law that predates the existence of the United States Constitution, as well as the United States itself. Even as abortion jurisprudence developed within the past several decades, this Court has repeatedly held that government-endorsed "parental involvement when a minor considers terminating her pregnancy" is fully consistent with the Constitution given the "immaturity, inexperience, and lack of judgment" that is part and parcel of being a minor. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 326 (2006). Contrary to this Court's precedent, however, the Seventh Circuit concluded that the Constitution mandates that unemancipated minors be permitted to obtain an abortion without parental notice *even when a court, and her parents, would conclude that is not in her best interests to do so*.

Further, although the Seventh Circuit assumed (without evidence) that its decision would contribute to less abuse of minors by *parents*, the court never considered the extent to which keeping parents in the dark about their unemancipated teenaged daughters' pregnancies contributes to the concealment and perpetration of crimes by *non-parents*. The Constitution neither requires, nor permits, a federal court to usurp the Indiana General Assembly's authority to bolster parental involvement in their minor children's lives.

Argument

Few things are more commonplace within American courtrooms than judges determining what is, or is not, in an unemancipated minor child's best interests. This Court, and numerous states (including Indiana), have concluded that judges are capable of determining whether notifying an unemancipated minor's parents of a decision to have an abortion would be in the minor's best interests.

By contrast, the Seventh Circuit's decision in this case improperly and broadly characterized parents of unemancipated minors as potentially abusive foes, and assumed that courts would be incapable of accurately determining and protecting a minor's best interests. The Seventh Circuit effectively declared that unemancipated minors have an absolute constitutional right to obtain an abortion without parental notification even when both a court and her parents would conclude that is contrary to her best interests. As discussed herein, the lower courts' decisions directly conflict with this Court's precedent concerning parental rights, and ultimately harm unemancipated minors, their parents, and the State.

I. Contrary to this Court's precedent, the Seventh Circuit's decision disregarded the constitutional rights of parents of unemancipated minors due to an unfounded fear that, in rare cases, the judicial bypass provisions could be inadequate to prevent parental abuse of minors.

A. The Seventh Circuit's decision runs contrary to centuries of law recognizing the importance of parental rights, including the right to be involved in important decisions impacting unemancipated minors.

Given that abortion jurisprudence has been fractured and highly contentious for the past four decades, it is rare to find any point of consensus in this area of law. In *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), however, this Court stated in a *unanimous* opinion that "*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.'" *Id.* at 326 (citation omitted) (emphasis added); *cf. Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam) (unanimously holding that judicial bypass provisions of a parental notification law were constitutional).

Under the statute at issue in *Ayotte*, a judge was required to authorize a minor to obtain an abortion without parental notification "if he or she finds that the minor is mature and capable of giving informed consent, or that an abortion without notification is in the minor's best interests." *Id.* at 324. The unanimous Court stated that "we have long upheld state parental involvement statutes like the Act before us, and we cast no doubt on those holdings today." *Id.* at 326-27 (citations omitted). The *Ayotte* Court *was well aware* of "the sad reality . . . that young women sometimes lack a loving and supportive parent capable of aiding them 'to exercise their rights wisely,'" *id.* at 327, n.2, but the judicial bypass provisions allowed for such situations to be taken into account.

Ayotte's recognition of the importance of parental involvement in key decisions impacting their minor children's lives broke no new ground. As discussed in the Petition, this Court has long recognized the constitutional right of parents to direct the upbringing of their unemancipated minor children. Pet. 13-19. The law's time-honored recognition of the importance of parental rights dates back to common law, and predates the Constitution itself.[2] In sum, it is settled law that parental notice

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[2] *See, e.g.*, Linda Wang, Note, *Who Knows Best? The Appropriate Level of Judicial Scrutiny on Compulsory Education Laws Regarding Home Schooling*, 25 J. Civ. Rts. & Econ. Dev. 413, 424-25 (Winter 2011) ("The parental right to direct his or her child is a natural right. . . . [It] is not a newly created liberty interest by the Court, but rather a common law right older than

laws such as Indiana's properly take the rights and interests of minors, their parents, and the State into account, and are constitutionally sound.

The Seventh Circuit's skeptical view of parental involvement in a minor's abortion decision is diametrically opposed to this Court's precedent. The lower courts improperly characterized parents of unemancipated minors as intermeddling and abusive, and thereby gave short shrift to their fundamental constitutional rights.

To illustrate, the lower courts gave considerable weight to the fact that, unfortunately, some minors have abusive parents, and notifying those parents about a pregnancy can "precipitate additional abuse." App. 88a-91a. The district court went as far as to state that "[t]he Court need not sit idly by while those most vulnerable among us are

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the state constitutions."); Erik M. Zimmerman, Note, *Defending the Parental Right to Direct Education:* Meyer *and* Pierce *as Bulwarks Against State Indoctrination*, 17 Regent U.L. Rev. 311, 313-16 (2004-05) (discussing various state court decisions dating back to the 1800s that illustrate that this Court's parental rights decisions in the 1920s—*Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)—"simply affirmed that the long-standing, common law parental right" was a constitutional right); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing The Individual and Social Interests*, 81 Mich. L. Rev. 463, 572 (1983) ("When the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was [constitutionally protected] . . . it did not create a new legal right out of whole constitutional cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution.").

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." App. 114a. As noted in the dissenting Seventh Circuit Judge's opinion, however, the statute's

> "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.

App. 91a (emphasis added).

The lower courts wholly disregarded the constitutional rights of the vast majority of parents (*i.e.*, those who do not abuse their children)—as well as the broad authority of the State of Indiana to foster and support healthy parent-child relationships—out of a misplaced, hypothetical fear of what abusive parents might do. Indiana was not required to prove the self-evident fact that including parents in highly significant life decisions involving their unemancipated minor children is a good thing; rather, as the dissenting opinion noted, the State's "interest in involving parents in consequential decisions by their children" is "*manifest*." App. 98a (emphasis added); *see also* App. 92a ("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.").

B. The Seventh Circuit's decision conflicts with *Casey*'s recognition of the important differences between married adult women and unemancipated teenagers and pre-teens.

The Seventh Circuit's attempt to reconcile its decision with *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), illustrates the conflict between the decisions. In *Casey*, the Court repeatedly distinguished a parental involvement requirement for unemancipated minors (which was upheld) from a spousal notification requirement (which was struck down). As the Court put it, "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Id.* at 898. Nevertheless, the Seventh Circuit repeatedly and erroneously relied on this Court's discussion of the *spousal* notice requirement to hold that Indiana's *parental* notice requirement is unconstitutional. App. 46a, 57a-61a, 65a, 67a-74a.

In *Casey*, seven Justices agreed (for varying reasons) that a parental consent requirement for unemancipated minors that allowed a court to "authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent . . . or that an

abortion would be in her best interests" was constitutional. 505 U.S. at 899 (O'Connor, J., plurality). It was a virtue, not a vice, that the statute "may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family." *Id.* at 899-900.

By contrast, the Court struck down a requirement that a married woman certify either that she had notified her husband, or that a particular exception applied to her situation, before she could obtain an abortion. *Id.* at 896-98 (opinion of the Court). The Court found it significant that many instances of past or likely future physical, psychological, or sexual abuse against women by their husbands did not fall within the few exceptions. *Id.* at 892-94. Importantly, the Court *expressly rejected* a comparison between parental involvement laws and spousal involvement laws:

> [Invalidating the spousal notice requirement] is in no way inconsistent with our decisions upholding parental notification or consent requirements. . . . Those enactments, and our judgment that they are constitutional, 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. *We cannot adopt a parallel assumption about adult women.*

Id. at 895 (emphasis added); *see also Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("The state's authority over children's activities is broader than over like actions of adults.").

Directly contrary to the holding and logic of *Casey*, the Seventh Circuit repeatedly compared the parent-unemancipated minor relationship to a marriage relationship, and analogized Indiana's parental notice requirement (which includes a judicial bypass option) to the spousal involvement requirement in *Casey* (which had no judicial bypass option). Relying upon *Casey*'s observation that abused wives may not report a spousal rape to authorities for several years after the incident, 505 U.S. at 890, the Seventh Circuit asserted that "the trauma of even attempting to prove abuse would deter young women from pursuing bypass." App. 74a. The Seventh Circuit failed to note, however, that the sexual assault exception to the spousal notice requirement in *Casey only applied if law enforcement authorities had been notified within 90 days of the assault*, which meant that "a great many spousal rape victims will not be exempt from the notification requirement." 505 U.S. at 893. Here, by contrast, neither the record nor the statute's text indicates that any minor would be required "to prove abuse" by a parent, App. 74a, or provide proof that law enforcement authorities had already been contacted, in order to show that the best-interests exception should apply.

Moreover, although the Seventh Circuit concluded that *Casey*'s assumption that "minors will benefit from consultation with their parents" is not

true in some instances, App. 72a-73a (citing 505 U.S. at 895), this Court was fully aware of that fact when it repeatedly held—in *Casey* and in other cases before and since—that *a judicial bypass option is sufficient to take those instances into account*. In effect, the Seventh Circuit held that courts are free to disregard this Court's holdings whenever they conclude that the assumptions underlying those holdings are not accurate in every situation, App. 72a-73a, which is a clear error of law that should be corrected.

Furthermore, under the holding and rationale of the Seventh Circuit's decision, *any and all parental notice requirements would be unconstitutional*, contrary to this Court's consistent holdings. The decision heavily relied upon a hypothetical scenario in which (1) a bypass court concludes that providing the minor's parents with notice would be in her best interests, (2) the minor's parents receive notice and conclude that an abortion would not be in the minor's best interests, and (3) the minor's parents exercise "a practical veto" over the abortion decision (even though the law does not actually require their consent for the abortion to take place). App. 62a-64a. In other words, according to the Seventh Circuit, unemancipated minors have an absolute constitutional right to obtain an abortion without parental notification—even when both a judge and her parents would conclude that is not in her best interests, and even when there is no parental abuse—because the government cannot conclusively eliminate the hypothetical possibility that some parents might take steps to make it more difficult for their minor child to do something that they believe is

not in her best interests. No parental notification law could survive this impossible (and absurd) standard.

Finally, if the Seventh Circuit's decision is allowed to stand, a variety of other laws that require parental consent or notification before an unemancipated minor can do something (*e.g.*, get married, join the military, engage in potentially dangerous activities) would be rendered suspect under the same reasoning. Certiorari should be granted, and the Seventh Circuit's decision should be reversed.

II. The Seventh Circuit's decision builds a wall of secrecy between parents and their minor children, which will have significant negative effects such as encouraging the concealment of crimes committed against minors.

The Seventh Circuit's *assumption*, which was not based on actual evidence, that striking down the challenged provisions would lead to an overall decrease in the abuse of unemancipated minors is highly suspect. The court looked at only *one side* of the equation—a hypothetical decrease in parental abuse of minors if the notice provisions are struck down—*while completely ignoring the other side of the equation*: depriving parents of knowledge that their teenaged (or pre-teen) daughter has become pregnant and is seeking an abortion *contributes to the concealment of crimes committed against minors by non-parents*. The Seventh Circuit gave no weight whatsoever to the significant interest—and unique

role and responsibility—that parents have in protecting their unemancipated minor children from becoming victims of crimes, discovering that such crimes have already occurred, and reporting such crimes to law enforcement authorities.

In many (although not all) instances, the fact that an unemancipated minor is pregnant and is seeking an abortion is evidence of possible criminal activity. Under Indiana law, whether—and the extent to which—sexual activity with an unemancipated minor is a criminal act is highly dependent on the circumstances, such as the age of the minor, the age of the other individual, the nature of the minor's relationship with that individual, and whether coercion, violence, threats, or inducements were involved. Adult perpetrators of such crimes often rely on encouraging, or coercing, their teenaged victims to obtain an abortion in secret so that their crimes will remain hidden. Parents are often in the best position—and are sometimes the *only* adult in a position—to determine whether their unemancipated minor daughters have been the victims of a crime.

Since some Indiana statutes provide special protections for minors aged fifteen and under, it is commonly stated that Indiana's age of consent is sixteen. *See, e.g.*, Ind. Code. Ann. § 35-42-4-9 (sexual misconduct with a minor under the age of sixteen); Ind. Code. Ann. § 35-42-4-6(c) (solicitation of minors under the age of sixteen); Ind. Code. Ann. § 35-42-4-5(b) (inducement of sexual activity between minors under the age of sixteen). Other statutes, however, *expressly protect minors aged sixteen and seventeen*

from various forms of sexual misconduct. *See, e.g.*, Ind. Code. Ann. § 35-42-4-7 (outlining a variety of circumstances in which sexual activity with a minor under the age of eighteen constitutes unlawful child seduction); Ind. Code. Ann. § 35-42-4-4 (prohibiting sexual exploitation of children under the age of eighteen). Although the Seventh Circuit *assumed* that a reluctance to notify parents of an abortion decision indicates a likelihood of abuse *by parents*, the court ignored the reality that some teenaged victims of crimes committed *by non-parents* have an initial reluctance to disclose those crimes to their parents, which serves to isolate them and enables criminals to continue to victimize that minor, *and often other minors as well*.

To illustrate, the FBI has emphasized that conversations and information-sharing between minors and their parents *is a key component in preventing, reporting, and stopping the sexual exploitation of minors*. For instance, concerning the "sextortion" of minors, the FBI has explained that the victims often do not tell someone or ask for help "because the child is afraid—afraid of the repercussions threatened by the criminal and afraid they will be in trouble with their parents, guardians, or law enforcement." FBI, *Sextortion: An Online Threat to Kids and Teens*, https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/sextortion. Since "[t]he shame, fear, and confusion children feel when they are caught in this cycle often prevents them from asking for help or reporting the abuse," "[i]nformation-sharing and open lines of communication [between minors and parents] are the

best defense." *Id.* The Seventh Circuit completely ignored the fact that parental notice laws further the compelling interest in preventing the criminal exploitation of minors.

Furthermore, increasing the involvement of judges and parents in abortion decisions of unemancipated minors may contribute to a decrease in the prevalence of sex trafficking. A study of over one hundred survivors of sex trafficking in the United States that was published in a Loyola University Chicago School of Law policy and law review found that abortion was a "common experience[] for survivors," as 55.2% of those who answered questions about abortion reported having at least one abortion, with 29.9% reporting multiple abortions.[3] "The survivors . . . reported that they often did not freely choose the abortions they had while being trafficked." *Id.* at 73.

The study provided substantial firsthand evidence that abortion providers intentionally declined to inquire into the circumstances of trafficking victims' repeated pregnancies and repeated forced abortions. The study found that 29.6% of the survivors had visited Planned Parenthood clinics. *Id.* at 77. One survivor explained:

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[3] Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, Annals of Health Law and Life Sciences, Vol. 23, Issue 1 (Winter 2014), at 72-73, https://www.annalsofhealthlaw.com/annalsofhealthlaw/vol_23_issue_1?pg=69#pg69.

> "I got pregnant six times and had six abortions during this time. Several of them were from a doctor who was a client. . . . I came in the back door after hours and paid him off the books. This kept my name off any records. . . . *At least one of my abortions was from Planned Parenthood because they didn't ask any questions*. But they were expensive. . . ."

Id. at 79 (emphasis added).

Minors who had been trafficked in the United States, and had multiple abortions, were included in the study. One girl who began being trafficked at age thirteen said that she "'had two abortions at [a clinic]. Afterward, I was back out on the street again.'" *Id.* at 61. Another girl said:

> "During the time I was on the street, I went to hospitals, urgent care clinics, women's health clinics, and private doctors. *No one ever asked me anything anytime I ever went to a clinic*. . . . I was on birth control during the 10 years I was on the streets mostly Depo-Provera shots which I got at the Planned Parenthood and other neighborhood clinics. I also got the morning-after pill from them. *I was young*. . . ."

Id. at 76-77 (emphasis added).

In light of the repeated failure of Planned Parenthood and other abortion providers to inquire about the circumstances surrounding the trafficked minors' pregnancies, the article admonished abortion

clinics to "be especially attentive to warning signs particularly with regard to younger patients." *Id.* at 82. In other words, abortion providers are not legally obligated to conduct a best interests analysis before providing a minor with an abortion, nor do they do so in practice, and that clearly contributes to the commission and concealment of crimes against minors.

Notification laws such as Indiana's ensure that one or more adults *other than the abortion provider* (*i.e.*, a bypass judge, the minor's parents) will have the opportunity to assess the unemancipated minor's best interests. Judges routinely interact with crime victims, including minors and including those who are reluctant to discuss what happened to them, and can encourage minors who have been victimized to disclose the crimes to their parents and law enforcement. Additionally, parents of minors who have been victimized are in the best position to comfort and advocate for their children.

By contrast, striking down all parental notification laws (as the Seventh Circuit's rationale would require) would be a windfall for those who prey on minors given that "[i]nformation-sharing and open lines of communication [between minors and parents] are the *best* defense" against their crimes. FBI, *Sextortion*, *supra* (emphasis added). The Constitution of the United States does not require this absurd result. To the contrary, this Court has recognized that

> the States validly may limit the freedom of children to choose for themselves in the making

> of important, affirmative choices with potentially serious consequences. . . . [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 v. Baird, 443 U.S. 622, 635 (1979). This reasoning applies not only to the decision whether to have an abortion, but also the decision whether to report possible criminal activities to law enforcement authorities. The State of Indiana has the authority to decide that parents should be involved, whenever possible, in such weighty decisions with respect to their unemancipated minor children.

Finally, the Seventh Circuit's decision violates constitutional separation-of-powers and federalism principles by usurping the legislative role of the Indiana General Assembly. Conducting a crime prevention and child welfare cost-benefit analysis as an exercise of police powers, while taking a variety of interests and rights into account, *is a quintessentially legislative function*. It was for the Indiana General Assembly, not the federal courts, to determine whether a general rule of notifying parents of an unemancipated minor's abortion decision—with a judicial bypass exception for occasional special cases—will do more good than harm.

Conclusion

The Seventh Circuit's decision squarely conflicts with this Court's decisions that recognize that parental notification laws that include judicial bypass provisions are constitutionally sound, and properly take into account the interests of the unemancipated minor, her parents, and the State. The decision also undermines the authority of parents, and the State, by contributing to the concealment of crimes committed against minors by non-parents. The Court should grant certiorari and reverse the Seventh Circuit's decision.

Respectfully submitted on May 3, 2021.

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