No. 20-1375

In The Supreme Court of the United States

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

Petitioners,

v.

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY,

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

KENNETH J. FALK
GAVIN M. ROSE
ACLU OF INDIANA
1031 E. Washington Street
Indianapolis, IN 46202
(317) 635-4059
kfalk@aclu-in.org
grose@aclu-in.org

JENNIFER SANDMAN
Counsel of Record
MELISSA ANN COHEN
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
(212) 261-4584
jennifer.sandman@ppfa.org
melissa.cohen@ppfa.org

ANDREW BECK
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 284-7318
abeck@aclu.org

Attorneys for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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"), the only law of its kind in the country, alters that requirement. It prevents minors who have deemed it necessary to seek a judicial bypass, and who have been found by a court to be mature enough to make the decision to have an abortion independently, 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). The extensive evidence credited by the District Court and not challenged by the State demonstrated that because most minors who suffer abuse or have other serious fears about the consequences of their parents' reaction would be unable to reveal such facts to a judge, the Act would in practice provide no safety valve. It would therefore impose a substantial obstacle by subjecting minors to a parental veto of their abortion decision and other harms. App. 58a, 26a. 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. App. 4a. The U.S. Court of Appeals for the Seventh Circuit twice affirmed, concluding that the District Court's findings were supported by the record and not clearly erroneous. App. 4a, 24a, 26a, 48a, 64a, 70a. The question presented is:

> Whether the District Court abused its discretion in granting a preliminary injunction

QUESTION PRESENTED—Continued

against a state law requiring minors who have felt compelled to seek judicial bypass of a parental consent requirement to nonetheless have their parents notified before obtaining the abortion, where the undisputed evidence in the record demonstrates that the law's likely effect would be to impose a substantial obstacle.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky hereby states that it is a private non-governmental party and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND STATEMENT OF THE CASE

The Petition for the second time seeks review of a fact-bound interlocutory order of the U.S. Court of Appeals for the Seventh Circuit finding that Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky ("Planned Parenthood") was likely to succeed in showing that a one-of-a-kind Indiana abortion restriction imposes an undue burden on the right to abortion. The law requires minors who a court has already determined are sufficiently mature to make the decision to have an abortion independently of their parents to nonetheless have a parent notified of their intent to have an abortion. The law affects only a small number of minors per year who feel the need to seek a judicial bypass and demonstrate the requisite maturity. The lower court reached the conclusion that this law imposes an undue burden based on "unchallenged testimony" that, because minors who fear abuse would be reluctant to reveal their fears in the court bypass process, they would be unable to meet the "best interests" standard required for waiver of the notice requirement. Therefore, as the Seventh Circuit ruled when first presented with the case, the Act's notice requirement would "giv[e] parents a practical veto over the abortion decision," App. 48a–51a, 67a–68a, 26a (incorporating findings from first opinion). "The State chose to introduce *no* evidence in response," "did not challenge the reliability or credibility of Planned Parenthood's evidence," *id.* at 48a (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." *Id.* at 65a. Given the undisputed record in this case, and the fact that no other state imposes such a requirement, this case does not warrant review on certiorari.

After it issued *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020), this Court granted the first petition in this case, vacated the decision below, and remanded the case ("GVR") for consideration in light of *June Medical*. The Seventh Circuit issued a second opinion affirming its preliminary injunction, concluding that *June Medical* did not alter the outcome, both because it did not overrule *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), App. 6a–26a, and because the outcome would be the same regardless of whether the Court applied the plurality or the concurrence in *June Medical* to the record here. As the court explained: given the "lopsided evidence of substantial burdens and little or no benefits," *id.* at 24a, "the debate over the role of balancing benefits and burdens of restrictions on abortion simply should not matter in the end." *Id.* at 24a–25a n.7. Rather, because the law would impose a "substantial obstacle," "the theoretical debate about the role of balancing should not affect our decision to affirm the preliminary injunction." *Id.* at 24a–25a n.7.

I. The Challenged Law

Indiana has for decades required parental consent for minors to obtain an abortion, subject to a judicial bypass scheme. That law, not challenged here, requires 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 *Casey*, 505 U.S. 833, this law contains a confidential 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).

Indiana Code § 16-34-2-4, enacted in 2017, requires minors who have deemed it necessary to seek judicial bypass rather than seek their parents' consent, and who the court has determined to be sufficiently mature to make this abortion decision without parental consent, to nonetheless have their parents notified of their intent to have an abortion. The only exception to this notice requirement is if the juvenile court makes a separate finding that notification is not in the minor's best interest. Ind. Code. § 16-34-2-4(d)–(e).

II. The Proceedings Below

Planned Parenthood filed a pre-enforcement action alleging, *inter alia*, that the Act imposes an undue

burden on its minor patients' right to access abortion and sought a preliminary injunction. In support of that motion, Planned Parenthood proffered evidence from seven fact and expert witnesses, including from the Indiana judicial bypass coordinator (a volunteer who maintains a pool of attorneys who 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. *See* App. 4a, 131a–33a. The State introduced no evidence to rebut Planned Parenthood's showing of the burdens the Act would impose, nor did it seek discovery or otherwise attempt to undercut any of Planned Parenthood's evidence. *Id.* at 4a, 48a.

The District Court analyzed the record before it in a "careful" opinion and made "thorough" factual findings regarding the Act based on the evidence. *Id.* at 48a; *see also id.* at 4a. The court found that the vast majority of minors served by Planned Parenthood consult their parents regarding their abortion decision and obtain parental consent, as Planned Parenthood encourages them to do. *Id.* at 106a. 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. *Id.* at 107a. The District Court found, based on the undisputed record evidence, that these minors are generally granted bypasses on the ground that the

minor was sufficiently mature to make the abortion decision independent of her parents. *Id*. The District Court also found that these minors typically 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." *Id.* at 108a.

The District Court determined 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 court found, minors are extremely reluctant to disclose their abuse, particularly to strangers and government officials. Indeed, relying on the unrebutted evidence of Respondent'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." *Id.* at 133a; *see also id*. (quoting *Casey*, 505 U.S. at 893, for the proposition that "[i]f anything in this field is certain, it is that victims of [domestic abuse] are extremely reluctant to report the abuse to the government").

Therefore, 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.* at 114a. 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, *id.* at 130a–31a, 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, *id.* at 131a. 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, prompting some pregnant minors to engage in hazardous self-help measures such as attempting to self-induce miscarriage. *Id.* at 132a. Based on all the evidence, the District Court found that the Act "unquestionably burdens the right of abortion-seeking minors in Indiana." *Id.* at 133a.

The State made no attempt to introduce any evidence about the Act's effects or that it conferred any benefit beyond that afforded by the preexisting parental consent requirement. Based on the undisputed evidence, the Court found that the Act likely placed an "unjustifiable burden on mature minors in violation of the Fourteenth Amendment," *id.* at 134a–35a, and granted a preliminary injunction.

In its first opinion on this interlocutory appeal, the Seventh Circuit affirmed, concluding based on the one-sided factual record at the preliminary injunction stage that the District Court did not abuse its discretion in concluding that the Act was likely unconstitutional because it would impose an undue burden on a large fraction of the small class of mature minors it would affect. *Id.* at 58a. The court carefully reviewed the District Court's "thorough" fact-finding, *id.* at 48a,

and held that "[n]one of the district court's findings are clearly erroneous," *id.* at 70a. 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 minors who are victims of abuse to disclose the abuse to a stranger like a judge. *Id.* at 74a (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 State did not challenge these findings on appeal,

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." *Id.* at 58a. The court explained that not only would the Act's notice requirement subject affected minors to the risk of abuse, but giving "notice to parents could result in actual obstruction of the abortion itself." *Id.* at 68a. The court emphasized that the evidence raised concerns about minors similar to those the *Casey* Court identified in striking down Pennsylvania's spousal notice law, namely that notice could give a spouse a practical veto over his wife's decision. *Id.* at 60a. In addition, the Seventh Circuit agreed with the District Court that, based on the unrefuted record evidence, "[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." *Id.* at 69a; *see also id.* at 70a

("Planned Parenthood'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."). The court further noted that "the State has made no effort to support with evidence its claimed justifications [for the Act] or to undermine with evidence Planned Parenthood's showing about the likely effects of the law." *Id.* at 58a.

Accordingly, the Court of Appeals agreed with the District Court that the Act likely imposed an undue burden. *Id.* at 64a. And given this conclusion, the Court of Appeals concluded that it was unnecessary to reach the State's contention that *Bellotti* did not require a judicial bypass from its novel notice law. *Id.* at 75a.

The State sought rehearing en banc, which was denied. The State then petitioned for certiorari. After this Court decided *June Medical*, it granted the petition, vacated, and remanded to the Seventh Circuit for further proceedings consistent with that decision. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020). After considering the parties' submissions on that opinion's potential impact on this case, the Court of Appeals issued a second panel opinion affirming the preliminary injunction.[1] In this second opinion, the

[1] Before the panel issued its decision on remand from this Court, the State filed a second petition for en banc consideration, which it submitted simultaneously with its post-remand panel briefing. No member of the Seventh Circuit requested an answer to the petition, and the petition was denied. App. 6a n.1. The State did not seek en banc review of the panel's second decision.

court again emphasized the District Court's thorough and well-supported factual findings on the burdens the law would impose on those minors for whom it would be relevant. The court likewise highlighted the "lopsided" record left by the substantial evidence submitted by Respondent and the State's decision not to submit evidence or contest Respondent's evidence, App. 4a, and incorporated by reference the analysis in its first opinion, *id.* at 25a–26a. It observed that "it may be that the evidence in a trial on the merits will show" that the burdens here are not undue, but that at this early stage of the case, the evidence required affirming the preliminary injunction. *Id.* at 24a.

As to the impact of *June Medical* on its prior analysis, the Seventh Circuit applied the "narrowest ground" rule in *Marks v. United States*, 430 U.S. 188 (1977), and held that "the split decision in *June Medical* did not overrule the precedential effect of *Whole Women's Health* and *Casey.*" App. 26a. Moreover, the panel explained, because the record demonstrated that the Act imposed a substantial obstacle to abortion, the outcome would be no different regardless of whether it applied the test applied by the *June Medical* plurality opinion or Chief Justice Roberts's concurrence. *Id.* at 24a n.7 ("[O]n 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*." (emphasis added)). This was so because the District Court found that the notification requirement would impose

a substantial obstacle on a large fraction of the minors it would affect. *Id*.

REASONS FOR DENYING THE WRIT

There is no basis for granting certiorari here. The outcome below conflicts with no other courts of appeals' decision; indeed, the law at issue is the only one of its kind. To the extent there is a circuit split regarding the impact of the *June Medical* plurality and concurring opinions on the undue burden analysis articulated in *Casey* and *Whole Woman's Health*, this case would be an extremely poor vehicle because the Circuit Court expressly held that the lopsided record required affirmance under both the *June Medical* plurality and concurring opinions. And the State's attempts to identify circuit splits as to the standards applicable to pre-enforcement challenges or the proper application of the *Casey* "large fraction" test for facial relief are equally unavailing.

Moreover, the decision rests on an unrebutted factual record showing that Indiana's parental notice requirement would give parents a practical veto over their mature minors' abortion decisions, even after a court has determined that parental consent was unnecessary. App. 24a. Because the case is only at the preliminary injunction stage it would be premature to grant review, and the State retains the option of seeking review from a final judgment on a full record. And finally, the decision below is correct: the record at this

stage fully supports the conclusion that Planned Parenthood is likely to succeed in showing that requiring mature minors who have been found exempt from a parental consent requirement to nonetheless notify their parents will impose a substantial obstacle on those minors affected by the law. The State is free to make a different record as the case proceeds, but there is no basis for this Court to intervene at this stage.[2]

I. There Is No Circuit Split Justifying Certiorari.

A. There Is No Split Regarding Whether Parental Notice Requirements Must Provide for Judicial Bypass.

The State maintains that the decision below conflicts with two decisions from more than twenty years ago on parental notification laws, and that the Court should grant review to decide whether *Bellotti*'s judicial bypass protections for parental consent laws "apply to parental notice requirements as well as to parental consent requirements." App. 26a. As an initial matter, this case would be an extremely poor vehicle to decide this question because the Court of Appeals explicitly decided *not* to address it because it found that

[2] The State claims that it "is now out of meaningful lower-court options for defending its parental-notice law." Pet. for Cert. 4. To the contrary, before petitioning twice for en banc review and twice for certiorari, in the ordinary course a state defending a statute's constitutionality would be expected to develop fact and expert evidence in the trial court, or at least challenge the plaintiff's evidence in some way.

Indiana's law likely imposes an undue burden by giving parents veto power over mature minors' abortion decisions. *Id.* at 75a; *see City of San Francisco v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below.").

There is no circuit split on this question in any event. As the State correctly notes, three circuits did opine on the *Bellotti* question, more than twenty years ago. Two 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) ("[P]arental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass."). The final circuit, the Fourth, did not rule to the contrary, as the State claims. The law at issue in *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352 (4th Cir. 1998) (en banc), contained a confidential bypass of the notice requirement for both mature and best-interest minors. Therefore, that court's suggestion that a judicial bypass is not needed for parental notice statutes is merely dicta. There is nothing about those three decades-old cases that conflicts with the Seventh Circuit's decision here regarding Indiana's unique law.

B. This Case Is a Poor Vehicle to Resolve Any Split Regarding *June Medical* Because the Seventh Circuit Concluded That It Would Reach the Same Decision Under Either the Plurality or Concurring Opinion in That Case.

Nor is this case an appropriate vehicle to address any nascent dispute among the lower courts as to the controlling legal standard for evaluating the constitutionality of laws restricting abortion following *June Medical*. Pet. for Cert. 22–25. The Court of Appeals made clear that it would have affirmed the preliminary injunction under either the balancing test articulated by the *June Medical* plurality or the test laid out in Chief Justice Roberts's concurrence. Because the District Court found that the Act "would impose a substantial obstacle for the relevant group of pregnant minors," the Court of Appeals reasoned that any "debate over the role of balancing benefits and burdens of restrictions on abortion simply should not matter in the end." App. 24a–25a n.7.

Indeed, in its first opinion in this case (which it incorporated into its second), the Seventh Circuit 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." *Id.* at 68a. The court emphasized that the evidence raised concerns about minors similar to those the *Casey* Court expressed in striking down Pennsylvania's spousal notice law—namely, that notice could give a spouse a practical veto over his wife's

decision. *Id.* at 60a; *see also id.* at 69a (agreeing 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)"; *id.* at 70a ("[U]nchallenged 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."). These findings are independent of any assessment of the law's benefits. Therefore, because the Act would impose an undue burden under either the *June Medical* plurality or concurrence, resolution of the question underlying the State's asserted circuit split would be "theoretical," not outcome-affecting. *Id.* at 24a n.7.

In order to present a circuit split worthy of this Court's consideration, the State must establish that the outcome of this case would have been different under another circuit's articulation of the undue burden standard. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(F) (11th ed. 2019) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *cf., e.g.*, *DeBacker v. Brainard*, 396 U.S. 28, 31 (1969) (per curiam) (holding that case was not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings where counsel admitted that the evidence was sufficient even under a more stringent, reasonable doubt standard). The State has wholly failed to do so here.

C. The State's Remaining Attempts to Manufacture Circuit Splits Are Equally Unavailing.

The State's remaining, scattershot efforts to manufacture circuit splits it claims should be resolved by granting certiorari on this fact-bound preliminary injunction of a unique law are equally unavailing.

First, while 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. for Cert. 25–27, no such conflict exists. To the contrary, this Court has repeatedly made clear that pre-enforcement challenges are permissible and are not subject to any heightened evidentiary requirement. *Casey* struck down a spousal notice law before it took effect, and did so based on testimony that, like the unrebutted record testimony here, predicted the law's effects. *Casey*, 505 U.S. at 888–93 (holding that the spousal notice law was "likely to prevent a significant number of women from obtaining an abortion" based on "testimony of numerous expert witnesses" and other research).

Whole Woman's Health included a pre-enforcement facial challenge to one statute and a post-enforcement challenge to another and applied an identical standard to both, striking down the pre-enforcement statute based on evidence predicting the law's effect. 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.[3] 136 S. Ct. at 2317. And in *June Medical*, the district court forbade the state from ever enforcing the challenged restriction. *See June Medical*, 140 S. Ct. at 2114 (plurality opinion); *see also* App. 25a ("[T]he *June Medical* plurality and concurrence agreed that the new Louisiana law was properly enjoined before it could take effect.").[4]

Second, no circuit conflict exists with respect to the proper denominator in *Casey*'s "large fraction" test for facial relief. 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." *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

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[3] The State now attempts to distinguish the record in *Whole Woman's Health* as "rest[ing] on actual evidence," in contrast (it claims) to the record the Seventh Circuit relied on here. Pet. for Cert. 27. But the records in both cases relied on pre-enforcement evidence of a challenged law's likely effects.

[4] Contrary to the State's assertion, Pet. for Cert. 25, 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 and could not have, as the laws challenged in that case had both been in effect for over a decade at the time the lawsuit was commenced. 903 F.3d at 753 ("The roots of this case can be traced to 2007.").

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. for Cert. 27 (quoting App. 62a). 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. App. 61a, 26a (incorporating findings from first opinion). This is precisely the group for whom the Act is "an actual rather than an irrelevant restriction." *Casey*, 505 U.S. at 895. As the Seventh Circuit explained, 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 altogether because of the possibility of notice. App. 61a–62a.

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 required 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 *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017), 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." *Id.* at 958.[5]

The State also claims a conflict regarding the large fraction test with the Sixth Circuit's decision in *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012). But the Sixth Circuit in

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[5] The State argues 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. for Cert. 28. 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.

DeWine did not even address the relevant denominator for purposes of the "large fraction" test.

Finally, as discussed below, 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 Planned Parenthood'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*. App. 67a.

II. 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. Mil. Inst. v. United States*, 508 U.S. 946, 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. Mil. Inst.*, 508

U.S. 946 (Scalia, J., concurring). The Petition does not even attempt to demonstrate a reason to depart from the Court's practices in this case.

In both of its opinions, the Court of Appeals 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. App. 24a, 58a; *see also id.* at 75a ("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. *Id.* at 24a, 66a n.6. But rather than follow the Seventh Circuit's suggestion, the State has twice 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, but "did not challenge the reliability or credibility of [Planned Parenthood's] evidence" demonstrating that the law posed a substantial obstacle. *Id.* at 4a.

Moreover, the question presented has importance only to Indiana, because no other state imposes a similar requirement on minors who have been adjudicated mature enough to bypass a parental consent requirement.[6]

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[6] 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

III. The Court of Appeals' Ruling Is Correct.

Certiorari is not warranted for the additional reason that the decision below is a straightforward application of the undue burden test to a unique law. The Court of Appeals examined the record regarding the likely effects of the notification requirement and correctly concluded that the District Court did not abuse its discretion in issuing a preliminary injunction. It is hardly surprising that requiring minors who are afraid to seek parental consent to nonetheless notify their parents of their decision, even where they have been deemed mature enough to make the decision

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mature or that notification would be contrary to her best interests. *Id.* 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, App. 45a n.3, 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: 2002-2018 Summary Report* 19, 34 (2019), https://www.ok.gov/health2/documents/2018%20ITOP%20Report.pdf (reporting the number of abortions performed after receiving judicial authorization to do 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).

independently, would impose a substantial obstacle on their ability to seek an abortion. The undisputed record established as much, and the State has never sought to rebut the evidence presented.

The Seventh Circuit correctly 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." App. 68a; *see also id.* at 25a–26a (incorporating analysis in first opinion); *id.* at 24a (noting "evidence of substantial burdens"); *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"); *Casey*, 505 U.S. at 889, 893 (noting district court's finding that "secrecy typically shrouds abusive families" and that patients are "extremely reluctant" to report abuse); *June Medical*, 140 S. Ct. at 2141 (Roberts, C.J., concurring) (noting in relying upon district court findings that they "entail[ ] primarily . . . factual work" and are reviewed only for clear error due to "the comparative advantages of trial courts and appellate courts").

Far from containing mere "speculation" about the Act's burdens, Pet. for Cert. 26–27, 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." App. 67a; *see also id.* at 25a–26a (incorporating analysis in

first opinion). Indeed, as is clear from Chief Justice Roberts's concurring opinion in *June Medical*, this evidence closely parallels that relied on in *Casey* to strike down, pre-enforcement, the spousal notice requirement. *See June Medical*, 140 S. Ct. at 2137 (Roberts, C.J., concurring) (noting with approval that *Casey* struck down spousal notice requirement based on evidence that if the law were allowed to go into effect fear 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" would "likely . . . deter[]" affected patients from obtaining abortions, thereby imposing a substantial obstacle (quoting *Casey*, 505 U.S. at 893–94)); App. 66a–74a (detailing parallels between the District Court's findings regarding how notice requirement can act as a practical veto and those relied on in *Casey*).[7]

The State argues that the court below erred in determining that *Bellotti* "is irrelevant to evaluating regulation of minors' access to abortion." Pet. for Cert. 16–17. But the Seventh Circuit properly applied the undue burden test to Indiana's novel statute, and nothing in *Bellotti* suggests it was wrong to do so. *See Casey*, 505 U.S. at 899 ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an

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[7] 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. App. 56a–57a ("Motions for preliminary injunctions call upon courts to make judgments despite uncertainties."); *id.* at 24a–25a & n.7.

abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."); *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) ("The upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restrictions that did impose a substantial obstacle was unconstitutional.").

In *Bellotti*, this Court considered whether a state may require parental consent for abortion and determined that, because of "the constitutional right and the unique nature of the abortion decision," such laws must contain a confidential and expeditious mechanism enabling minors to bypass the parental involvement requirement. *See Bellotti*, 443 U.S. at 647–48 (holding that notwithstanding the state's interests, the law would "impose an *undue burden* upon the exercise by minors of the right to seek an abortion" because it 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," *id.* at 877. Nowhere did the Court suggest that the undue burden standard applies only to laws that affect adult women.

The State appears to suggest that minors "are on a separate abortion-rights track from adults" and that

accordingly, challenges to such restrictions are governed solely by *Bellotti* and not by the "undue burden" test. *See* Pet. for Cert. 16–17, 14. In the same breath, however, the State contends that the protections this Court articulated in *Bellotti* are limited to parental consent laws and inapplicable in the closely related context of laws requiring parental notice. If the State were correct, it would mean that any statute restricting minors' access to abortion outside of a parental consent requirement is insulated from constitutional scrutiny. *See id.* at 19–20. Not surprisingly, nowhere in this Court's jurisprudence does it suggest that states are free to restrict (or in this case, impose a practical veto upon) minors' abortion access with immunity from constitutional challenge so long as they do so through a requirement other than parental consent.

Like this Court in *Bellotti*, 443 U.S. at 633–39; App. 63a–65a, the Court of Appeals considered the State's interest in parental awareness of a minor's abortion decision, and determined that for the small subset of minors who cannot obtain parental consent but who 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." App. 65a; *see also id.* at 24a, 4a (noting State failed to offer evidence of law's benefits). Critically, however, the court was clear that regardless of the Act's benefits, the Act was likely to impose an undue burden because "the district court found that the new parental notice requirements would impose a

substantial obstacle for the relevant group of pregnant minors." *Id.* at 24a n.7.

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 897–98 (striking down spousal consent requirement because it would give husbands veto power over their wives' abortion decision); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510–11 (1990) (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); *June Medical*, 140 S. Ct. at 2137 (Roberts, C.J., concurring) (noting approvingly that *Casey* relied on precedent establishing that judicial bypass procedures prevent parental veto power).

In short, the court's routine application of the undue burden test to the limited evidentiary record at this preliminary stage of the litigation concerning a *sui generis* statute is wholly consistent with this Court's precedent, and does not merit review.

CONCLUSION

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

Respectfully submitted,

JENNIFER SANDMAN
Counsel of Record
MELISSA COHEN
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
(212) 261-4584
jennifer.sandman@ppfa.org
melissa.cohen@ppfa.org

KENNETH J. FALK
GAVIN M. ROSE
ACLU OF INDIANA
1031 E. Washington Street
Indianapolis, IN 46202
(317) 635-4059
kfalk@aclu-in.org
grose@aclu-in.org

ANDREW BECK
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 284-7318
abeck@aclu.org

Attorneys for Respondent