

No. 19-816

In the **Supreme Court of the United States**

KRISTINA BOX, 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**

**BRIEF OF KENTUCKY, ALABAMA, ALASKA,
ARIZONA, ARKANSAS, IDAHO, KANSAS,
LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA,
OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA,
TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI*
CURIAE SUPPORTING PETITIONERS**

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January 27, 2020

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INTERESTS OF *AMICI CURIAE*¹

In the decision below, a divided panel of the United States Court of Appeals for the Seventh Circuit enjoined an Indiana statute requiring that the parents of an unemancipated minor receive notice when their child decides to have an abortion without parental consent. The Court of Appeals did so without any discussion of the compelling interest that States have in encouraging parental involvement in these kinds of life-altering decisions. And it disregarded the important interest that States have in promoting parental liberty—an interest that this Court has repeatedly affirmed.

The *amici* States seek to protect the most vulnerable members of society—children—as they face consequential decisions like whether to have an abortion. And as part of that, the *amici* States have an interest in ensuring they can use every regulatory tool available to protect the health and well-being of children, including requiring parental notice for minors obtaining an abortion without parental consent.

SUMMARY OF THE ARGUMENT

Without question, States have a greater ability to regulate abortion access for minors than they do for adults. That is why this Court has upheld parental-consent statutes for minors, which may not survive scrutiny if applied to adults. Yet in the decision below, the Seventh Circuit analyzed Indiana’s parental-notice

¹ *Amici* have notified counsel for all parties of their intention to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

statute by using the benefits-and-burdens analysis that it would use for resolving the constitutionality of a law intended to provide medical benefits for adult women. By doing so, the Seventh Circuit ignored longstanding precedent from this Court that firmly establishes the States' heightened interest in protecting the well-being of children.

Moreover, by engaging in its benefits-and-burdens analysis, the Seventh Circuit deepened a pre-existing circuit split over how to apply *Bellotti v. Baird*, 443 U.S. 622 (1979), to parental-notice statutes. Several circuits have disagreed over whether the judicial-bypass requirements announced in *Bellotti* for parental-consent laws also apply when states require parental notice. That was precisely the question raised in the case below, and the Seventh Circuit answered it by declaring *Bellotti* irrelevant. This case now presents a perfect opportunity to resolve a decades-old split among the lower courts.

Finally, in resolving the circuit split, this Court should reaffirm the well-established principle that parents are entitled to shape the life and moral direction of their children. Nowhere does this matter more than when a child faces a decision as significant as whether to have an abortion. But rather than take seriously the importance of a parent's role in guiding his or her child through tumultuous moments, the Seventh Circuit treated the parent-child relationship like it was a medical procedure subject to testing for efficacy and cost. That approach must be rejected. States have an undeniable interest in fostering environments where parents can guide and nurture

their children so that they can grow into mature and productive adults. As Judge Kanne observed in his dissenting opinion below, that interest extends to ensuring a child receives guidance from her parents before she “makes an irrevocable and profoundly consequential decision.” Pet. App. 41a–42a. Indiana’s statute does just that.

ARGUMENT

In its Petition, Indiana asks an important question about a court’s ability to nullify a parent’s interest in shaping the life and moral direction of his or her child. That alone deserves the attention of the Court. So, it is surprising that the Seventh Circuit’s decision contains no hint of the deep quandary lying at the heart of this case. To the Court of Appeals, this case was simply a matter of applying the Court’s undue-burden standard the same as it would for any other regulation governing pre-viability abortions for adults. While the *amici* States believe the Seventh Circuit applied that standard wrongly, it should not have applied it all.

This Court should grant certiorari to resolve a longstanding circuit split over whether parental-notice statutes must include a judicial bypass similar to what the Court required in *Bellotti*—a split deepened by the Seventh Circuit’s decision. And in granting certiorari, the Court should reaffirm the profound respect for parental liberty that it has repeatedly shown before.

I. This case is a good vehicle to resolve a longstanding circuit split over parental-notice statutes.

In *Bellotti*, the Court recognized that States have significantly more leeway to regulate abortions for minors than they might have over adults. *See Bellotti*, 443 U.S. at 649. It held that “as a general rule,” States may require parental consent before a minor obtains an abortion. *Id.* But because this will often place the ultimate decision about whether to have an abortion in the hands of someone other than the pregnant mother, the Court mandated a couple of exceptions to the general rule. Specifically, when a State requires parental consent, it must provide a procedural bypass for minors who can demonstrate an extraordinary level of maturity *or* for whom parental consent is not in their best interest. Otherwise, States may constitutionally prohibit minors from having abortions without the approval of their parents. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (affirming the holding in *Bellotti* that “a State may require a minor seeking an abortion to obtain the consent of a parent or guardian”).

Bellotti led to a second question: When a child has an abortion *without* parental consent, can a State nevertheless require that her parents be notified?

Under the Indiana statute at issue in this case, parents have the right to receive notice when their unemancipated child obtains judicial approval for an abortion without her parent’s consent. *See* Ind. Code § 16-34-2-4(e). Ordinarily, notice must come from the attorney representing the minor. But if the court finds

that notice would not be in the child's best interests, such as when the child comes from an abusive home, it may waive the requirement. *Id.* This allows for meaningful exceptions to the notice requirement, but it does not include an exception for an extraordinarily mature minor, as required by *Bellotti* in the parental-consent context.

Of course, a statute requiring notice differs in kind from a statute requiring consent. *See Hodgson v. Minnesota*, 497 U.S. 417, 496 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part). That's because, as Justice Kennedy observed, "[u]nlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her." *Id.* So when a State requires that parents be notified of their child's decision to obtain an abortion, it does not allow them to "exercise an absolute, and possibly arbitrary, veto over [the abortion] decision." *Hodgson*, 497 U.S. at 445 (op. of Stevens, J.) (internal quotation marks omitted); *see also Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 511 (1990). Whatever burden a parental-notice statute imposes on a minor's ability to obtain an abortion, it is markedly less than a statute requiring parental consent.

Yet this Court has never decided whether the bypass procedure outlined in *Bellotti* must also be available to the same extent for a child seeking to avoid a parental-notice law. *See Akron*, 497 U.S. at 510 ("[A]lthough our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such

procedures.”). This left an opening for the circuits, which have since split in answering the question. But until the Seventh Circuit’s decision below, that split in judgment followed a relatively coherent path.

1. The Fourth Circuit rejected the argument that parental-notice statutes must have “the full panoply of safeguards required by the Court in *Bellotti*.” *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998). It gave two primary reasons for reaching this conclusion. First, requiring notice simply does not create the kind of obstacle that the *Bellotti* Court worried about because it does not prevent a minor from making her own decision. Second, there are compelling reasons for States to encourage parental involvement in these decisions—reasons that this Court has repeatedly recognized in rejecting other attempts at circumventing parental authority. So the Fourth Circuit reached a common-sense answer to the problem. It held that so long as “a parental notice statute does not condition the minor’s access to abortion upon notice to abusive or neglectful parents, absent parents who have not assumed their parental responsibilities, or parents with similar relationships to their daughters, we do not believe that more is required.” *Id.* at 367.

The Fifth and Eighth Circuits have disagreed. In *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), the Eighth Circuit held that “the State has no legitimate interest in imposing a parental-notice requirement” for mature minors or those for whom it would not be in their best interest, thus mandating a *Bellotti*-style judicial bypass. *Id.* at

1460. Though the court acknowledged that there are differences between parental consent and notice, it concluded that States *only* have an interest in requiring parental notice for immature minors. Thus, any restriction on a mature minor’s ability to obtain an abortion—or a minor who otherwise fits in the “best interests” exception—would amount to an undue burden. *Id.* The Fifth Circuit reached a similar conclusion for a slightly different reason. In *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), the court held that requiring parental notification was contrary to the confidentiality requirements of *Bellotti*. *Id.* at 1112. So even after acknowledging that this Court had distinguished between parental consent and notice statutes in prior decisions, the Fifth Circuit found the distinctions meaningless for constitutional purposes. *Id.*

Despite disagreeing over whether parental-notice statutes must include a *Bellotti* judicial bypass, the lower courts—until the decision below—agreed on the question they were asking. *Bellotti* is built on the premise that States are permitted to treat minors differently than adults when regulating their access to abortion. *See Bellotti*, 443 U.S. at 649. So when faced with a law requiring parental notice, the first step is acknowledging that States have more authority over a minor’s access to abortion than over an adult. *See Miller*, 63 F.3d at 1460 (“The answer, of course, is that they are minors, and States may impose requirements on immature minors that it may not impose on adults.”). *Bellotti*, after all, permitted parental-consent statutes as “the general rule,” so long as they contained

a judicial bypass for exceptional cases. *Bellotti*, 443 U.S. at 649. That is why the question for the courts below had traditionally been whether, under *Bellotti*, a notice statute creates the same kind of burden that a consent statute does. And though the Eighth and Fifth Circuits answered this question wrongly, they at least gave a wrong answer to the right question.

2. Then came the Seventh Circuit. Rather than confront *Bellotti* (and the several decisions that followed), the Court of Appeals focused only on the undue-burden standard as articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)—a case that, as Indiana correctly points out in its Petition, had nothing to do with minors at all. After finding that Indiana's parental-notice statute did not satisfy *Hellerstedt's* balancing test, the Seventh Circuit declared *Bellotti* irrelevant and declined to address it at all. *See* Pet. App. 34a.

Indiana's Petition thoroughly describes the problems with the Seventh Circuit's application of *Hellerstedt*, *see* Pet. 15–22, and the *amici* States need not address those in more detail. Suffice it to say that there are serious problems with how the Court of Appeals went about balancing the benefits and burdens of the statute at issue in this case—problems that this Court could address by granting certiorari and clarifying the meaning of *Hellerstedt*.

But more problematic is that the Seventh Circuit applied *Hellerstedt* at all. *Hellerstedt* dealt with a challenge to state law regulating the qualifications for performing abortions, such as requirements that physicians obtain admitting privileges at nearby

hospitals. See *Hellerstedt*, 136 S. Ct. at 2291. The question for the Court was whether the burden imposed outweighed the medical benefits of the regulation. *Id.* No part of the state law challenged in *Hellerstedt* governed minors *as minors*, nor did the case involve any discussion of the State's interest in regulating minors differently than adults. Those issues simply had nothing to do with the case.

That might not matter if this Court's jurisprudence treated adults and minors the same when it came to abortion access. But it does not. *Bellotti* clearly holds that States have a greater right to regulate abortion access for minors than they might have for adults. See *Bellotti*, 443 U.S. at 649. That includes *prohibiting* pre-visibility abortions for some minors who cannot obtain parental consent—an act that would presumably not survive balancing under *Hellerstedt*, with or without a judicial bypass.

By engaging in a *Hellerstedt* balancing analysis to assess the constitutionality of Indiana's parental-notice statute, the Seventh Circuit deepened a pre-existing circuit split that this Court should resolve. And it did so by directly undermining the Court's decision in *Bellotti*, which has been repeatedly reaffirmed in the years since.

II. States have a compelling interest in encouraging parental involvement in a child's decision to have an abortion.

Bellotti did not arise in a vacuum. While the Seventh Circuit gave short shrift to the States' interest in encouraging parental involvement in the abortion decision, those interests have deep roots that this Court has long recognized. By granting Indiana's Petition, the Court can once again reaffirm the States' strong interest in fostering familial relationships that allow parents to play an active role in guiding the lives and moral directions of their children.

1. Parents play a unique role in our society. “[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (citing *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925)). In fact, this Court has described a parent’s role in nurturing his or her children as an *obligation*—a “high duty”—not simply a right to be respected if a parent so chooses. *Pierce*, 268 U.S. at 535.

It comes as no surprise then that this Court has long recognized the importance of protecting strong relationships between parents and children. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)). As the Court explained in *Stanley v. Illinois*, the ability “to raise one’s children [has] been deemed essential.” 405 U.S. 645, 651 (1972) (internal citations and quotation marks omitted). It “undeniably warrants deference

and, absent a powerful countervailing interest, protection.” *Id.*

On that basis, this Court has found several governmental attempts at interfering with parent-child relationships invalid. Those include mandatory-public-school laws, which prevent parents from directing the education and moral upbringing of their children. *See Pierce*, 268 U.S. at 534–36; *Yoder*, 406 U.S. at 214 (“[A] State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on . . . the traditional interest of parents with respect to the religious upbringing of their children . . .”). And they also include state laws that arbitrarily pass judgment on the fitness of a child’s parent. *See Stanley*, 405 U.S. at 657–58. These laws diminish the ability of parents to raise their children, replacing their judgment with the judgment of the state. They are repugnant to a free society.

That is not to say that States have no interest in taking care of their citizen-children as well. States have their own compelling interest in “safeguarding the physical and psychological well-being of a minor.” *New York v. Ferber*, 458 U.S. 747, 756 (1982) (quoting *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 607 (1982)). To that end, states unquestionably act pursuant to legitimate regulatory authority when they pass laws intended to promote the well-being of children within their borders. *See Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968) (“The well-being of its children is of course a subject within the State’s constitutional power to regulate . . .”). And on top of that, states typically

have a stronger right to regulate “the conduct of children” than they might have “over adults.” *Prince*, 321 U.S. at 170. So in many cases—not just abortion—states can act for the benefit of children in ways that might be unconstitutional if applied against adults.

This Court has confirmed as much. The Court has upheld a number of state actions intended to safeguard minors that could not pass constitutional scrutiny if applied to adults. Included in the group are pretrial detention proceedings for juveniles, *see Schall v. Martin*, 467 U.S. 253, 281 (1984), obscenity laws that apply only to minors, *see Ginsberg*, 390 U.S. at 638–39, random drug-testing for student athletes, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995), and of course, parental-consent laws for obtaining an abortion, *see Bellotti*, 443 U.S. at 640–41. In all of these cases, the Court has been guided by the states’ important role in protecting the “well-being of its children.” *Ginsberg*, 390 U.S. at 639.

The State’s interest in protecting children dovetails perfectly with “[t]he unique role in our society of the family.” *Bellotti*, 443 U.S. at 634. If States have a compelling interest in “safeguarding the physical and psychological well-being of a minor,” *Ferber*, 458 U.S. at 758, and parents are best equipped to provide the kind of “care and nurture” that a State cannot, *Prince*, 321 U.S. at 166, it follows (perhaps uncontroversially) that States have an overwhelming interest in fostering environments that allow parental involvement to flourish. *See Bellotti*, 443 U.S. at 642. Laws that encourage parents to take an active role in guiding

their children as they face consequential decisions inevitably promote the interests of the State.

2. Perhaps no circumstance demonstrates this more than when a child faces a decision as consequential as having an abortion.

No one would deny that, even for adults, States have a significant interest in regulating abortions. *See Casey*, 505 U.S. at 846. Those interests include both “protecting the health of the woman and the life of the fetus that may become a child.” *Id.* In fact, as this Court has explained, States act pursuant to their legitimate interests when enacting laws that ensure a woman’s decision “is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.” *Id.* at 883. States, in other words, may permissibly discourage abortion as a means to promote the well-being of both the woman and her unborn child.

The reason that States have such a compelling interest in regulating abortion needs little explanation. States certainly have an interest in regulating the medical profession in general. *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). And “[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.” *Harris v. McRae*, 448 U.S. 297, 325 (1980). It is a “unique act” that is “fraught with consequences.” *Casey*, 505 U.S. at 852. “The medical, emotional, and psychological consequences of an abortion are serious and can be lasting” *H.L. v. Matheson*, 450 U.S. 398, 411

(1981). And those consequences affect not only the unborn child, but also “the woman who must live with the implications of her decision.” *Casey*, 505 U.S. at 852. “[I]t seems unexceptional to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” *Gonzales*, 550 U.S. at 159 (internal citations omitted). States plainly have an interest when their citizens face such potential consequences. That is true whether the pregnant mother is a child or an adult.

Given the stakes, there is obvious value in laws designed to “enhance[e] the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.” *Matheson*, 450 U.S. at 412. “[P]arents naturally take an interest in the welfare of their children,” *Bellotti*, 443 U.S. at 648, so States are well-served by encouraging parental involvement with their children as they face the ramifications of such a profound decision. *See Gonzales*, 550 U.S. at 159–60 (“It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know . . .”). And that is true no matter how mature the pregnant minor is. While a court might find her mature enough to make the decision on her own, “even the most mature teenager will benefit from the experienced advice of a parent, and, as a consequence of that dialogue, make a more informed, better considered, abortion choice.” *Camblos*, 155 F.3d at 374.

Parental-notice statutes like the one passed by Indiana’s legislature lie firmly at the intersection of a State’s interest in promoting parental liberty and the well-being of its citizens. They do so without depriving minors of the ultimate decision to obtain an abortion when a court determines they have the maturity to make that choice. In granting certiorari here, the Court can reset the balance between the family and the State, giving parents the room needed for “teaching, guiding, and inspiring” our children so that they may grow “into mature, socially responsible citizens.” *Bellotti*, 443 U.S. at 638. This Court has rightfully recognized those noble goals before. It should do so again in this case.

CONCLUSION

The Court should grant Indiana’s Petition for Writ of Certiorari and reverse the Seventh Circuit’s decision below.

Respectfully submitted,

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