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 OF INDIANA AND KENTUCKY, INC.,
Respondent.

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as an *amicus curiae* in this Court on many occasions.

Judicial Watch seeks to participate as an *amicus curiae* in this matter for two reasons. First, Judicial Watch is concerned about the erosion of the principles of separation of powers and federalism. These principles are imperative for the proper functioning of our republic. Second, as an organization that litigates frequently in federal court, the doctrine of stare decisis is particularly important to Judicial Watch. The Seventh Circuit's opinions in this case demonstrate the difficulty lower courts have encountered in trying to apply this Court's inconsonant jurisprudence regarding abortion.

SUMMARY OF ARGUMENT

In 2017, the Indiana General Assembly enacted Public Law 173-2017, the Senate Enrolled Act. The Act added a parental notification requirement for

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[1] Petitioners and Respondent granted consent for the filing of *amicus curiae* briefs in this matter. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than Judicial Watch, Inc. made a monetary contribution intended to fund the preparation and submission of this brief.

minors seeking a judicial bypass to have an abortion. Ind. Code § 16-34-2-4(e). The requirement included a *Bellotti* "best interest" exception to the parental notice requirement but did not include an exception for maturity. Before the new law could take effect, Plaintiff, an abortion clinic, filed suit seeking a pre-enforcement injunction. The District Court granted the injunction, and the Seventh Circuit affirmed. Both courts determined that without a maturity exception to the parental notification requirement, the law presented an undue burden to minors seeking an abortion. This holding adds to the already fractured realm of parental notification laws.

The Seventh Circuit's decision creates a presumption in favor of pre-enforcement injunctions, undermines this Court's holding in *Casey* recognizing a state's "legitimate and substantial" interest in regulating abortions, and frustrates the principles of federalism and separation of powers.

This Court's intervention is needed.

ARGUMENT

A. The Seventh Circuit Decision Further Splits the Courts Regarding Parental Notification Laws.

Abortion jurisprudence in general is a fractured field of confusion and uncertainty. The specific legal principles governing judicial bypass for minors is no different. In light of this Court's silence on whether *Bellotti v. Baird* requires parental notification

procedures to include both a "best interest" and maturity standard, federal courts have made their own, independent determinations on the issue.[2] In addition to the Seventh Circuit, the Fifth, Eighth, and Nine Circuits have held that a maturity exception is required.[3] By contrast, the Fourth Circuit has differentiated between parental consent laws and parental notification laws and upheld notification laws that do not contain an exception for maturity.[4] Courts in the Tenth and Eleventh Circuits have refused to rule explicitly on the issue absent clear direction from this Court.[5]

The split among the circuits also extends to courts' various readings of *Bellotti*. The Eighth Circuit has affirmatively held that *Bellotti*'s parental consent exception requirements extend to parental

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[2] *Bellotti v. Baird*, 443 U.S. 622 (1979).

[3] *See Planned Parenthood of Ind. & Ky., Inc. v. Box*, 2021 U.S. App. LEXIS 7291, *26-27 (7th Cir. March 12, 2021); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997), overruled on other grounds, *Okpalobi v. Foster*, 244 F.3d 405, 427, n. 35 (5th Cir. 2001); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1460 (8th Cir. 1995); *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F. Supp. 2d 1012, 1019-20 (D. Idaho 2005).

[4] *See Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 373 (4th Cir. 1998).

[5] *See H.B. v. Wilkinson,* 639 F. Supp. 952, 953 (D. Utah 1986) (passing on a general holding about a maturity exception because the plaintiff was deemed not mature); *Planned Parenthood Ass'n v. Miller*, 934 F.2d 1462, 1476, n.21 (11th Cir. 1991) (holding that the law satisfied *Bellotti*'s requirements regardless of whether the maturity exception was required).

notification laws.[6] The District Court of Idaho relied on the Eighth Circuit's determination but did not explicitly refer to *Bellotti*.[7] The Fifth Circuit acknowledged that this Court had not yet addressed the applicability of *Bellotti*'s exception requirements to notification laws but held that doing so validated the "thrust" of *Bellotti*'s holding.[8] And below, the Seventh Circuit carefully avoided *Bellotti*'s applicability by instead relying on *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016).[9]

The question of whether a parental notification law requires an exception for mature minors must be answered. *Bellotti* cannot simultaneously (1) require such an exception; (2) not require such an exception; and (3) be irrelevant. Only this Court can speak to which answer is correct and end the division and confusion among the lower courts.

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6 *See Miller*, 63 F.3d at 1460. This is not the first time an appellate court has affirmatively declared that *Bellotti* requirements pertain to parental notification laws. For example, in *Lambert v. Wicklund*, the Court reversed the Ninth Circuit's similarly erroneous application of *Bellotti*. 520 U.S. 292, 294-96 (1997) (per curiam). In a rather stinging refutation of the Ninth Circuit's legal analysis, the Court held that striking down the law requiring notification was "inconsistent with our precedents." *Id.* at 299.

7 *Wasden*, 376 F. Supp. 2d at 1019-20.

8 *Causeway Medical Suite,* 109 F.3d at 1112.

9 *Box*, 2021 U.S. App. LEXIS at 26-27.

B. The Seventh Circuit's Decision Creates a Presumption for Pre-enforcement Injunctions and Contradicts this Court's *Casey* Holding.

> Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion – that the government has a legitimate and substantial interest in preserving and promoting fetal life – would be repudiated were the Court now to affirm the judgment of the Court of Appeals.

Gonzalez v. Carhart, 550 U.S. 124, 145 (2007).

Although the Seventh Circuit makes repeated references to *Casey*, its holding relegates states' "legitimate and substantial interest" to a hollow, unattainable illusion. Unless this Court acts, the opinion will handcuff Illinois, Indiana, and Wisconsin from ever successfully fending off pre-enforcement applications to enjoin abortion restrictions regardless of a law's ultimate constitutionality.[10]

In affirming the District Court's pre-enforcement injunction, the Seventh Circuit upended pre-enforcement standards. First, the court credited a handful of declarations submitted by Plaintiff as adequate evidence of the "likely effects" of the law. *Planned Parenthood of Ind. & Ky. v. Adams*, 937 F.3d

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[10] In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327 (2006), this Court held that "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy."

973, 977-78 (7th Cir. 2019). Second, the court demanded that the State offer "actual evidence" of the benefits of the law but prevented the State from gathering such evidence by enjoining the law's enforcement. *Id.* at 984. By granting a pre-enforcement injunction, the court precluded the State from gathering the evidence required of it to demonstrate the law's ultimate constitutionality. The result of these inequitable evidentiary burdens is a green light for abortion providers to negate states' legitimate and substantial interest in enacting lawful abortion regulations and the undermining of principles of federalism and separation of powers.

Pre-enforcement injunctions are not favored. *See e.g., Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."); *Orr v. Shicker*, 953 F.3d 490, 501 (7th Cir. 2020) ("In fact, a 'preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.'" (*quoting Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008)). The party seeking the injunction bears the burden of proof. *See Winter*, 555 U.S at 7. For purposes of this brief, Judicial Watch will focus on one component of the pre-enforcement injunction analysis: the balance of equities.

The Seventh Circuit failed to properly balance the equities by permitting Plaintiff to provide non-substantial, biased evidence in the form of seven declarations meant to address the burdens minor

girls would face if Indiana's parental notification law were to take effect.[11] Despite the high threshold for pre-enforcement injunctions, neither the District Court nor the Seventh Circuit undertook any meaningful analysis of *who* the declarants were. A convincing, probative declaration would present relevant, admissible, and unbiased evidence and would lay a foundation for that evidence. Plaintiff's declarations fell far short of this standard.

Suzanne Pinto, a psychologist licensed to practice in the state of Colorado, not Indiana, provided no evidence specific to Indiana's parental notification law.[12] Rita Lucido, an attorney licensed in the State of Texas, also failed to provide evidence specific to Indiana's parental notification law.[13] Forest Beeley,

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[11] Plaintiff submitted seven sworn declarations with its motion for preliminary injunction including the declaration of Carol Dellinger, M.D., an abortionist at one of Plaintiff's clinics. Neither the District Court nor the Seventh Circuit referred to Dr. Dellinger's declaration. *See e.g., Adams*, 937 F.3d at 977.

[12] *Planned Parenthood of Ind. & Ky v. Box, Court of Appeals* Docket No. 17-2428, ECF No. 12, Appendix by Appellant ("App") (Sept. 5, 2017) at page 20, *et seq*. In addition to not possessing any personal knowledge of how Indiana's parental notification law will operate, Pinto does not offer any testimony as to how the parental notification laws in her own state of Colorado have affected minors.

[13] In addition to having a personal connection to an abortion advocacy organization and not possessing personal knowledge as to how Indiana's parental notification law will operate, Lucido's declaration weaves stories regarding clients she has represented in judicial bypass cases as well as in family court on unrelated issues. It is nearly impossible to ascertain which clients were

the Director of Surgical Services for Plaintiff, has a clear bias and offered no evidence from his own, personal knowledge but instead relied on hearsay.[14] Kathryn Smith, a former employee of Plaintiff, also had a clear bias and offered only generalized assertions of harm.[15] Jane Glynn, an Indiana attorney, has assisted roughly 13-15 minors in judicial bypass cases since 2012 and could only assert that in one of these cases a minor "may" have been prevented by a parent from obtaining an abortion.[16]

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allegedly harmed by Texas' own parental notification law. Lucido Declaration, App at 37, *et seq*.

[14] Beeley Declaration, App. at 1, *et seq*.

[15] Smith was employed by Plaintiff for 13 years. Smith Declaration, App. at 8, ¶ 3. While no longer receiving a paycheck from Plaintiff, it appears her connection to Plaintiff and abortion remains an active one. Smith is the "Indiana bypass coordinator." *Id*. A search for "Indiana bypass coordinator" identifies the website: Indiana Judicial Bypass Project. *See* https://www.indianajbproject.org/. On that page it states that the Indiana Bypass Project is a project of "All-Options." *Id*. All-Options purports to provide support for all pregnancy options, but its Twitter feed is almost entirely geared toward raising abortion funds and fighting "anti-abortion" legislation. *See* https://www.all-options.org/find-support/. The "Hoosier Practical Support Network" listed takes you straight to the "Hoosier Abortion Fund" and a link for abortion clinics, including Plaintiff's clinics. *See* https://alloptionsprc.org/our-services/hoosier-abortion-fund/.

[16] The District Court and Seventh Circuit both state that Glynn's declaration gives evidence of a minor being prevented from obtaining a judicially approved abortion by a parent. *P.P.I.N.K.*, 258 F. Supp. 3d at 936, n.2; *Adams*, 937 F.3d at 977-78. However, the Glynn declaration makes no such pointed statement. Rather, Glynn's sworn statement is that it is her

And Katherine Flood, an Indiana attorney, has only assisted three minors in judicial bypass cases since 2012.[17]

Discounting the out-of-state and clearly biased declarants who offered only generalized assertions of harm or hearsay, Plaintiff is left with two sworn declarations involving less than 20 minors in nearly a decade. *See* fn. 15, 16. Assuming of course that these declarations are true, the best that Plaintiff can offer in support of its application is that, of this handful of minors, only one minor *may have been* prevented from obtaining an abortion because of parental involvement and two minors expressed concerns about abuse. Three minors in nine years is hardly evidence of "likely harm." Yet, both the District Court and the Seventh Circuit credited all of Plaintiff's declarations. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, ("*P.P.I.N.K.*"), 258 F. Supp. 3d 929, 946-47 (S.D. Ind. 2017); *Adams*, 937 F.3d at 977-78. For example, the District Court credited the Smith and Flood declarations as evidence that "many" of the minors would face "this type of

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"understanding" that the minor was prevented from obtaining the abortion because the minor did not complete the judicial bypass process. Glynn Declaration, App. at 14-15, ¶ 13. Glynn's carefully worded statement permits an equally plausible possibility: the minor changed her mind. The lower courts either fail to recognize this possibility or ignored it to arrive at the conclusion they desired.

[17] In nine years, Flood has assisted three minors. Flood Declaration, App. at 17, ¶5. This simply is not the amount of experience needed to provide insight into the actual effects of a parental notification law.

obstruction or abuse [physical, sexual, or emotional]." *P.P.I.N.K.*, 258 F. Supp. 3d at 946. Smith's declaration identified generalized fears about minors being thrown out or punished by a parent or non-specific injury to the parent-child relationship.[18] Flood's declaration identified two minors who were concerned about abuse. No additional details were given.[19] Two cases are not "many," nor are they evidence of "serious risk." The lower courts' findings are fatally flawed.

While Plaintiff was held to a low if not farcical evidentiary standard, Indiana was held to a standard nearly impossible to meet in a pre-enforcement context. The Seventh Circuit found fault with Indiana's failure to offer "evidence that any actual benefit is likely or that there is a real problem that a notice requirement would reasonably be expected to solve." *Adams*, 937 F.3d at 984. But it was the court that circumvented Indiana's ability to provide actual evidence by granting the pre-enforcement injunction. Preventing the parental notification law from ever being enforced inevitably creates a vacuum of actual evidence. And because *Casey* recognized a state's interest in promoting and preserving human fetal life, Indiana does not need a "problem to solve" to pass laws regulating abortion. *See Casey*, 505 U.S. at 846. Both lower courts disregarded *Winter* and the basic legal burdens of proof governing pre-enforcement injunctions. By holding Plaintiff to a *de minimis* standard while imposing on Indiana a nearly

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18 Smith Declaration, App. at 10, ¶¶ 16-17.

19 Flood Declaration, App. at 18, ¶ 9.

impossible burden, the Seventh Circuit created a presumption in favor of granting pre-enforcement injunctions against abortion restrictions.

Finally, if left to stand, the Seventh Circuit's holding will adversely affect the principles of federalism and separation of powers. By gutting *Casey*'s clearly articulated holding that the states have a "legitimate and substantial interest" in promoting and preserving human fetal life, the Seventh Circuit debases the rights of states to engage in meaningful abortion legislation. This Court never intended for the federal judiciary to have a stranglehold on abortion law.[20] Such an outcome would destroy federalism. It also would permit state courts to prevent abortion laws from taking effect as well.[21] State legislatures spend considerable time debating issues like parental notification. These elected officials consider the legal ramifications of their enactments as well as the practical ones. Witnesses are called. Testimony is taken. Evidence is presented. Debates are held. The constitutional role of the legislature is exercised. Courts should not perfunctorily shackle their enactments.

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[20] This Court has already recognized the constitutionality of parental notification laws. *See e.g., Hodgson v. Minnesota*, 497 U.S. 417, 445-49 (1990); *Casey*, 505 U.S. at 895; *Lambert*, 520 U.S. at 294-95; *Ayotte*, 546 U.S. at 326.

[21] This is particularly unsettling when the law is prevented not by those whose constitutional rights are purportedly in danger, but by those who have a financial interest in defeating any and all restrictions on abortion. This distortion of standing should be rejected.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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