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

REPLY IN SUPPORT OF THE PETITION

Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

Theodore E. Rokita
Attorney General
Thomas M. Fisher
Solicitor General*
Kian Hudson
Deputy Solicitor General
Julia C. Payne
Deputy Attorney General

Counsel for Petitioners

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REPLY IN SUPPORT OF THE PETITION

Indiana's parental notice law has been on the books for four years but has not been enforced for even a single day, thanks to a district court injunction affirmed twice now by the Seventh Circuit. This Court once before GVR'd this case in light of *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), but the Seventh Circuit reaffirmed its original panel decision and exacerbated circuit conflicts over parental notice statutes, the meaning of *June Medical*, the standard for pre-enforcement challenges in abortion cases, and the large-fraction test. The need for plenary Supreme Court review is unmistakable and unavoidable: As Judge Easterbrook said of this case, "[o]nly the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute." Pet. App. 159a (Easterbrook, J., concurring in the denial of rehearing en banc). The Court should do so here.

ARGUMENT

I. The Circuit Conflict over Whether, and How, *Bellotti* Applies to Parental-Notice Statutes Is Real and Needs Resolution

Bellotti and *Casey* undeniably place the abortion rights of minors on a separate doctrinal track from those of adults. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (holding that parental notification or consent requirements "are based on the quite reasonable assumption that minors will benefit from consultation with their parents," but "we cannot adopt a parallel assumption about adult women");

Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."). The main issue here is whether the judicial bypass requirement for mature minors *Bellotti* applied to parental *consent* laws also applies to parental *notice* laws—an issue expressly left open by the Court. *See Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510 (1990).

This issue is the subject of a circuit conflict, as the decision below expressly acknowledged. Pet. App. 77a n.11; *compare Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 374–79 (4th Cir. 1998) (holding that judicial bypass is not needed for parental notice statutes) *with Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997) (holding that judicial bypass is required for parental notice laws) *and Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (same).

Planned Parenthood balks, claiming inaccurately that the statute at issue in *Camblos* contained a maturity exception. Br. in Opp. to Cert. 12. The *Camblos* statute *permitted,* but did not *require*, a court to bypass parental notice for a minor who, in the juvenile court's view, was mature enough to make the abortion decision. *Camblos*, 155 F.3d at 356. Such permissive judicial bypass falls short of what *Bellotti* required for parental consent requirements: "If [a

minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must* authorize her to act without parental consultation or consent." 443 U.S. at 647 (emphasis added). Thus, the statute in *Camblos* did not satisfy *Bellotti*, and the Fourth Circuit's holding that "the Constitution does not require for 'mere notice' statutes the full panoply of safeguards required by the Court in *Bellotti II* for parental consent statutes" was central to that case. *Camblos*, 155 F.3d at 367. That is why the Seventh Circuit explicitly recognized the circuit conflict over whether parental notice statutes require a maturity exception. Pet. App. 77a n.11.

This Court can, and should, resolve that conflict.

II. To Reach the Result It Did, the Decision Below Exacerbated the Circuit Split over *June Medical*, Making this Case a Perfect Vehicle To Address that Conflict

Planned Parenthood acknowledges the circuit split over the meaning of *June Medical*, Br. in Opp. to Cert. 13, but deems that conflict irrelevant because the Seventh Circuit "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." *Id.* Planned Parenthood, however, cites nothing in the decision below supporting that statement. What the Seventh Circuit said is that the State may not prevail "[u]nless and until [it] tries to offer evidence of benefits." Pet. App. 24a n.7. But Chief Justice Roberts's concurrence nowhere suggests an obligation

to prove benefits for any abortion regulation—indeed, he expressly disclaims such an obligation, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2138 (2020) (Roberts, C.J., concurring)—much less one affecting minors.

Critically, the only "test" laid out by the Chief Justice's *June Medical* concurrence is the *Casey* standard itself. *See id.* at 2138 (concluding the applicable test for abortion statutes is "the undue burden standard of *Casey*"). But *Casey* forecloses the Seventh Circuit's resolution of this case.

If the Seventh Circuit would have properly applied the *Casey* test, the State would have prevailed in this case. The Seventh Circuit panel on remand posited that any alternative to balancing under *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), would still ask whether the parental notice law imposes a substantial obstacle. Pet. App. 24a n.7. Yet here the Seventh Circuit's legal conclusion was based on the speculations of lawyers and social scientists, not (1) a manifest, dramatic reduction in abortion availability, as with the clinic closures in *Hellerstedt* and *June Medical*; (2) a categorical legal rule, as with the spousal notice rule invalidated in *Casey* because "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992); or (3) actual operational experience. To the contrary, in this case: (1) no clinics threaten to close; (2) a categorical rule requires resolution of the *Bellotti* question; and (3) the

lack of operational evidence will not change unless the Court intercedes and vacates the injunction.

The Seventh Circuit's reliance on speculation as to operational impact conflicts with the Eighth Circuit's decision in *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, which upheld Missouri's physical plant requirements "[b]ecause the record [wa]s practically devoid of any information" about the burdens imposed by Missouri's law, such that the court "lack[ed] sufficient information to make a constitutional determination." 903 F.3d 750, 756–57 (8th Cir. 2018). Planned Parenthood argues that *Hawley* is irrelevant because it is not a pre-enforcement challenge. Br. in Opp. to Cert. 16 n.4. The critical question, however, is not whether the requirement has technically been in force (and in *Hawley* the law had largely been suspended by waivers), but whether a court may enjoin an abortion regulation based on speculation as to effects absent actual evidence of operational impact. Here, the Seventh Circuit said yes, but in *Hawley*, the court said no. 903 F.3d at 755. As in *Hawley*, Indiana cannot produce evidence concerning the effects of its parental notice law because the law has never been allowed to go into effect. That circumstance will not change between now and final judgment unless the Court intercedes and vacates the injunction.

Finally on this point, the Seventh Circuit's "substantial obstacle" determination required assessment of the "relevant group of pregnant minors," Pet. App. 24a n.7, *i.e.*, the denominator of the *Casey* fraction. Planned Parenthood says that the

original panel opinion deemed the denominator to be "all unemancipated minors seeking judicial bypasses," Br. in Opp. to Cert. 17, which, if accurate, would comport with the approach of other circuits. But the paragraph of the Seventh Circuit's opinion that Planned Parenthood cites recounts *Planned Parenthood's* argument, not the court's holding. Pet. App. 61a. In the following paragraph, the Seventh Circuit defines what it considers to be the "correct . . . denominator": "young women who could be deemed mature in a judicial bypass of the consent requirement" and "young women who are likely to be deterred from even attempting judicial bypass because of the possibility of parental notice." Pet. App. 61a–62a.

That definition is so narrow that it both guarantees a 1:1 ratio (that is, it defines the relevant group—the denominator—using the same terms as the group for whom the law is purportedly a substantial obstacle—the numerator) and creates yet another circuit conflict, *contra Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959-60 (8th Cir. 2017) (holding that the numerator and denominator cannot be defined by the same terms); *Planned Parenthood of Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514 (2012) (comparing the number of women for whom medication abortion would be available without the law prohibiting it after 50 days post LMP, versus the portion of that set who would have an abortion regardless of that law).

What matters is not a court's use of the words "numerator" and "denominator" (as Planned Parenthood

suggests, Br. in Opp. to Cert. 19), but whether a court defines the relevant group and the affected group using the same terms. The Seventh Circuit does (effectively guaranteeing a 1:1 fraction in every case), but the Sixth and Eighth Circuits do not.

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In short, far from negating the relevance of the *June Medical* conflict, the Seventh Circuit's decision underscores the questions Indiana urges the Court to resolve: Should lower courts resolve constitutional challenges to abortion regulations by identifying "substantial obstacles" and balancing benefits and burdens, or should they resolve them by categorical rules? If the former, how? And if the latter, what is the rule here? The outcome of this case entirely depends on the answers to those questions, which in turn depend on the meanings of *June Medical*, *Hellerstedt*, *Casey*, and *Bellotti*. Perhaps more than any other, this case represents the multi-dimensional train wreck abortion doctrine has become. It cries out for review.

III. The Court Should Grant Plenary Review and Consider this Case Alongside *Dobbs v. Jackson Women's Health Organization*

This Court recently granted certiorari in *Dobbs v. Jackson Women's Health Organization*, which concerns Mississippi's ban on all abortions after fifteen weeks. No. 19-1392, 2021 WL 1951792 (May 17, 2021). The question presented by that case is "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Writ of Cert.

i, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2020 WL 3317135 (June 15, 2020).

Planned Parenthood does not even mention *Dobbs* in its brief, perhaps because any decision in *Dobbs* short of overruling of *Roe* and *Casey* will not resolve the issues in this case. Indeed, the Court in *Dobbs* did not grant certiorari as to the second question presented by the petition, "whether the validity of a pre-viability law . . . should be analyzed under *Casey*'s 'undue burden' standard or *Hellerstedt*'s balancing of benefits and burdens." Pet. for Writ of Cert. i, *Dobbs v. Jackson Women's Healh Org.*, No. 19-1392, 2020 WL 3317135 (June 15, 2020); *Dobbs*, 2021 WL 1951792 (May 17, 2021).

But the precise test to be applied to pre-viability abortion regulations is exactly the question upon which this case turns. And the Seventh Circuit has already shown that it will not change its decision absent resolution of that question by this Court. *See* Pet. App. 26a (reinstating its original opinion after remand), 159a ("The quality of our work cannot be improved by having eight more circuit judges try the same exercise. It is better to send this dispute on its way to the only institution that can give an authoritative answer."). Therefore, unless the Court plans to use *Dobbs* to overrule *Roe* and *Casey* and return plenary authority over abortion regulation to state legislatures, it should consider this case alongside *Dobbs* to provide an "authoritative answer" to the question presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER
Solicitor General*
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General

Counsel for Petitioners

Dated: June 7, 2021