Case No. 17-2428

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Plaintiff-Appellee

v.

COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, *et al.*

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:17-cv-1636-SEB-DML

BRIEF OF KENTUCKY, ALABAMA, ALASKA, ARIZONA, ARKANSAS, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF GRANTING APPELLANTS' PETITION FOR REHEARING EN BANC

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INTERESTS OF *AMICI CURIAE*[1]

A divided panel of this Court 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. *See Planned Parenthood of Ind. & Ky. v. Adams*, 937 F.3d 973 (7th Cir. 2019). The panel majority 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.

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

[1] As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

ARGUMENT

This case raises an important question about the judiciary'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 *en banc* Court. So, it is surprising that the panel's decision contains no hint of the quandary at the heart of this case. To the panel, this case was simply a matter of applying the Supreme Court's undue-burden standard just as it would for any regulation governing pre-viability abortions for adults. While the *amici* States believe the panel applied that standard wrongly, it should not have applied it all.

This Court should grant rehearing *en banc* to address a matter of exceptional importance on which several circuits have already split: whether parental-notice statutes must include a judicial bypass similar to that required in *Bellotti v. Baird*, 443 U.S. 622 (1979). The panel decision deepened that circuit split by erroneously relying on the balancing test described in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to analyze the constitutionality of Indiana's statute. That test never should have been applied to this case—a fact made even

clearer by the Supreme Court's recent decision in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

I. The *en banc* Court should address the constitutional requirements of parental-notice statutes after *June Medical*.

In *Bellotti*, the Supreme Court recognized 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 prohibit minors from having abortions without the approval of their parents. *See Planned Parenthood of Se. 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 here, 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). "Unlike 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 notification, it does not allow parents 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 one requiring parental consent.

Before the panel opinion, neither the Supreme Court nor this Court had decided whether the bypass procedure outlined in *Bellotti* must be available to the same extent for a child seeking to avoid a parental-notice law. *See Akron*, 497 U.S. at 510. Other circuits, however, had addressed the issue—splitting in judgment.

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. 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.*

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*, *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 the difference between parental consent and notice statutes, the Fifth Circuit found the distinctions constitutionally meaningless. *Id.*

Despite disagreeing over whether parental-notice statutes must include a *Bellotti* judicial bypass, the circuit courts—until the panel's decision in this case—at least agreed on the question they were asking: Given that *Bellotti* recognized that States can regulate a minor's access to abortion in ways it cannot do for adults, does a parental-notice statute create the same kind of undue burden that a consent statute does?

The panel's decision took a sharp turn in another direction. Rather than confront *Bellotti*, the panel focused only on the undue-burden standard as articulated in *Whole Woman's Health v. Hellerstedt*—a case that had nothing to do with minors at all. After finding that Indiana's parental-notice statute did not satisfy *Hellerstedt*'s balancing test, the panel declared *Bellotti* irrelevant and declined to address it all.

That analysis was wrong when the panel first ruled, and it is unequivocally wrong after *June Medical*. At issue in *June Medical* was the constitutionality of a Louisiana statute regulating abortions similar

to that invalidated in *Hellerstedt*. And, like *June Medical*, the Supreme Court struck it down. *June Medical*, however, produced no majority opinion. Instead, Chief Justice Roberts provided the fifth vote for invalidating Louisiana's law in a concurrence that is the controlling opinion. *See Hopkins v. Jegley*, No. 17-2879, 2020 WL 4557687, at *2 (8th Cir. Aug. 7, 2020). The Chief Justice explained that the balancing test described in *Hellerstedt* is not the law. *See June Med.*, 140 S. Ct. at 2135–39 (Roberts, C.J., concurring in judgment). Thus, the only relevant question for a court is whether the challenged law imposes a substantial obstacle on the right to abortion—the same standard *Casey* articulated when it affirmed the holding of *Bellotti*.

June Medical indicates that the burden-and-benefit balancing act the panel relied upon no longer applies. That itself is a question that the circuits have already split on. *Compare Hopkins*, 2020 WL 4557687, at *2, *with Whole Woman's Health v. Paxton*, No 17-51060, 2020 WL 4998233, at *1–2 (5th Cir. Aug. 21, 2020). So this case presents a rare opportunity for the *en banc* Court to kill two birds with one stone: It can settle the meaning of *June Medical* for the circuit—a question with

widespread significance—while also resolving the constitutional requirements of a parental-notice statute like Indiana's.

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 panel gave short shrift to the States' interest in encouraging parental involvement in the abortion decision, those interests have deep roots.

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, the Supreme 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 the Supreme 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), 651 (1972) (internal citations and quotation marks omitted). It "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.*

On that basis, the Supreme 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. 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 that 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 a 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 act pursuant to legitimate regulatory authority when enacting 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). In fact, States 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. *See, e.g., Schall v. Martin*, 467 U.S. 253, 281 (1984); *Ginsberg*, 390 U.S. at 638–39; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

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 that States have an overwhelming interest in fostering environments that allow parental involvement to flourish, s*ee Bellotti*, 443 U.S. at 642. Laws that encourage parents to actively guide their children as they face consequential decisions inevitably promote the interests of the State. And perhaps no

circumstance demonstrates this more than when a child faces a decision as consequential as having an abortion.

States have a significant interest in regulating abortions, even for adults. *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.* Because of that, States may enact 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.

The reason for this needs little explanation. States 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.

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 such a profound decision, *see Gonzales*, 550 U.S. at 159–60. And that is true no matter how mature the pregnant minor is. *See Camblos*, 155 F.3d at 374.

Parental-notice statutes like Indiana's lie firmly at the intersection of a State's interest in promoting parental liberty and the well-being of its citizens. And 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.

CONCLUSION

The Court should grant Indiana's petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(b)(4) because it contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ S. Chad Meredith

CERTIFICATE OF SERVICE

I certify that on August 31, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

S. Chad Meredith