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

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Americans United for Life (AUL) was founded in 1971 before this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). AUL attorneys are often consulted on various bills, amendments, and ongoing state and federal litigation on abortion across the country. AUL publishes comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including model bills aimed at encouraging parental involvement in the crucial decision of abortion that many young women will face. See AUL, DEFENDING LIFE (2021 ed.) (state policy guide providing model bills).

SUMMARY OF ARGUMENT

Indiana's petition presents to the Court for the second time the urgent need to review the *unsettled* law of parental involvement in a minor's abortion decision twenty-nine years after many assumed it was settled in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). That unsettled law effectively denies parents in Indiana their right to be informed about the immediate medical condition, and the long-term health risks and needs, of their minor, unemancipated daughters, and threatens the enforceability of

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties were provided notice of the filing of this *amicus* brief pursuant to Sup. Ct. R. 37.2(a), and have granted written consent to its filing.

parental notice and consent laws in more than forty states. Like much abortion litigation since *Roe v. Wade,* the Indiana law has been on hold for several years, caused by the unsettled status of the law on parental notice, the adequacy of judicial bypass mechanisms, the standards for pre-enforcement challenges to parental laws, and the definition of "undue burden."

The district court issued a preliminary injunction against the law in a pre-enforcement, facial challenge. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d 929 (S.D. Ind. 2017). The Seventh Circuit panel in this case acknowledged that the Court's abortion jurisprudence was "not stable," *Planned Parenthood of Ind. & Ky., Inc. v. Box*, No. 17-2428, slip op. at 2 (7th Cir. Mar. 12, 2021) and was "challenging and fluid." *Id.* at 22 n.7. But it "relied heavily on *Whole Woman's Health* [*v. Hellerstedt*, 136 S. Ct. 2292 (2016)]" and on "*Whole Woman's Health*'s approval of a pre-enforcement injunction against challenged laws likely to impose an undue burden." *Id.* at 4. Judge Kanne observed that *June Medical* was "a fractured case that produced six different opinions." *Id*. at 25. (Kanne, J., dissenting). Legal scholars have warned of the *unsettled* state of abortion law after *Casey*,[2] *Stenberg v. Carhart,* 530 U.S. 914 (2000),[3] *Gonzales v. Carhart,* 550 U.S. 124

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[2] Linda J. Wharton & Kathryn Kolbert, *Preserving* Roe v. Wade . . . *When You Win Only Half the Loaf*, 24 Stan. L. & Pol'y Rev. 143 (2013).

[3] Linda J. Wharton, et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey*,* 18 Yale J. L. & Feminism 317 (2006).

(2007),[4] *Whole Woman's Health*,[5] and *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).[6] The Eighth Circuit, the Fifth Circuit and other courts have written recently on the unsettled state of the *basic* standard of review in abortion law after *June Medical*.

The immediate need is to reassure state legislatures that parental notice laws can be enforced

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[4] David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 Sup. Ct. Rev. (2007); Peter M. Ladwein, *Discerning the Meaning of* Gonzales v. Carhart*: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 Notre Dame L. Rev. 1847 (2008); David L. Rosenthal, *Refocusing the Undue Burden Test: Inconsistent Interpretations Pose a Substantial Obstacle to Constitutional Legislation*, 31 Issues in Law & Med. 3 (2016); Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 Okla. L. Rev. 177, 193 n.120 (2013) ("Some commentators do not seem to appreciate the instability of current abortion jurisprudence . . . .").

[5] Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v. Hellerstedt *and the Future of Abortion Law,* 2016 Sup. Ct. Rev. 77 (2016); Stephen G. Gilles, *Restoring* Casey*'s Undue-Burden Standard After* Whole Woman's Health v. Hellerstedt, 35 Quinnipiac L. Rev. 701 (2017).

[6] Marc Spindelman, *Embracing* Casey: June Medical Services L.L.C. v. Russo *and the Constitutionality of Reason-Based Abortion Bans*, 109 Geo L. J. 115, 116 n.1 (2020) (collecting commentary); William Baude, *Precedent and Discretion*, 2019 Sup. Ct. Rev. 313, 332 (2020) ("Consider the most salient precedent in the country, *Roe v. Wade*. In response to growing calls to overrule the controversial decision, the Supreme Court famously relied on precedent to reaffirm its core holding in *Planned Parenthood v. Casey*. But the Court did not succeed at its goal of 'call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.' The future of the decision remains unsettled.").

and that the laws protecting parental authority will be stable and reliable so that parents are informed about the immediate and long-term health needs of their unemancipated minor daughters. Deference must be restored to state legislatures in this area so that every new or existing parental notice law is not challenged and tied up in litigation for years. See, *e.g.*, Paul Benjamin Linton, *Long Road to Justice: The Illinois Supreme Court, the Illinois Attorney General and the Illinois Parental Notice of Abortion Act of 1995*, 41 Loy. U. Chi. L. J. 753 (2010) (recounting in detail the 25 years of state and federal litigation challenging a series of parental notice laws in Illinois). Indiana's petition should be granted.

ARGUMENT

I. THE COURT SHOULD HEAR THIS CASE TO RESOLVE UNSETTLED LAW.

This appeal is about the *unsettled* standard of review for parental *notice* of abortion laws forty-two years after *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979), was decided. Are *Bellotti, H.L. v. Matheson*, 450 U.S. 398 (1981), *Ohio v. Akron Center for Reproductive Health* (*Akron II*), 497 U.S. 502 (1990), and *Lambert v. Wicklund*, 520 U.S. 292 (1997) good law? Or has *Casey*'s undue burden test or the balancing of benefits and burdens test of *Whole Woman's Health unsettled* that line of cases? As Judges Easterbrook and Sykes sized up the judicial challenge:

> How much burden is "undue" is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute, such as the one Indiana has enacted. Three circuit judges already have guessed how that inquiry would come out; they did not agree. 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.

Planned Parenthood of Ind. & Ky. v. Box, (*Box I*) 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., with Sykes, J., concurring in the denial of rehearing en banc).

The first Seventh Circuit panel, in a 2-1 decision, held that the balancing of benefits and burdens test of *Whole Woman's Health*, and not the *Bellotti II*, *Matheson*, and *Akron II* line of cases, governed the constitutionality of Indiana's parental notice law. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019). *Bellotti II*, *Matheson* and *Akron II* are unsettled because of at least two lines of conflicting precedent with contradictory standards of

review: *Casey-Stenberg-Whole Woman's Health* versus *Casey-Gonzales-June Medical*.

The general standard for abortion laws was still unsettled when *June Medical* was decided. *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) ("A threshold question in this case concerns the proper standard for evaluating state abortion laws."). A substantial number of Seventh Circuit judges expressed concern about the unsettled standards for pre-enforcement challenges in abortion cases:

> This case implicates an important and recurring issue of federalism: Under what circumstances, and with what evidence, may a state be prevented from enforcing its law before it goes into effect? Given the existing unsettled status of pre-enforcement challenges in the abortion context, I believe this issue should be decided by our full court. Preventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.

Box, 949 F.3d at 999 (Kanne, J., with Flaum, Barrett, Brennan, and Scudder, JJ., dissenting from the denial of rehearing en banc).

A. The Essential Purpose of *Stare Decisis Et Non Quieta Movere* is Settling the Law.

Settled law and stare decisis are inextricably intertwined. The truncated shorthand, *stare decisis*, obscures the essential purpose of the complete common law maxim, *stare decisis et non quieta movere,* which means "to stand by the decisions and

not to disturb settled points."[7] The essential principle of *stare decisis et non quieta movere* is the importance of settled law, whether constitutional, statutory, or common law.

The virtues of *stare decisis et non quieta movere* are often stated as reliability, consistency, predictability, and dependability.[8] But what usually goes unstated is that those virtues assume settled law. Because *unsettled* law cannot provide reliability, consistency, predictability, or dependability, unsettled precedent is due less stare decisis respect, if any.[9] Unsettled

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[7] John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 1 nn. 1–2 (1983) (citing numerous authorities for the complete Latin maxim and translation). See also Black's Law Dictionary 1443 (8th ed. 2004); Henry Campbell Black, *The Principle of Stare Decisis*, 34 Am. L. Reg. 745 (1886). Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) ("The legal doctrine of *stare decisis* derives from the Latin maxim '*stare decisis et non quieta movere*,' which means to stand by the thing decided and not disturb the calm.").

[8] *CSX Transportation, Inc. v. McBride*, 564 U.S. 685, 699 (2011) ("the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure"); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("evenhanded, predictable, and consistent development of legal principles"); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("tending to consistency and uniformity of decision").

[9] *Am. Legion v. Am. Humanist Ass'n.*, 139 S. Ct. 2067, 2080–81 (2019) (stating the *Lemon* test is unsettled because the Court has "declined to apply the test or has simply ignored it"); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) ("Standing by *James* and *Sykes* would undermine, rather than promote, the goals that stare decisis is meant to serve [predictability and consistency]); *Fed. Election Comm'n v. Wisc. Right to Life*, 551 US 449, 502 (2007) (Scalia, J., dissenting) ("*McConnell unsettled* a body of law."); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 104 (1993)

precedents are weak or defective in one way or another.

This Court has affirmed this indirectly by stating that "settled" or "well-settled" precedent needs a "special justification" to reconsider or overrule it.[10] *Unsettled* precedents do not need such a special justification to be reconsidered. For these reasons, the starting point for stare decisis is whether the precedent in question is settled.

(Scalia, J., concurring) ("[T]he well-settled proposition that *stare decisis* has less force where intervening decisions 'have removed or weakened the conceptual underpinnings from the prior decision.'" (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47–48 (1977) ("*Schwinn* itself was an abrupt and largely unexplained departure from [*White Motor*], where only four years earlier the Court had refused to endorse a *per se* rule for vertical restrictions. Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts."); *Graham v. Collins*, 506 U.S. 461, 497 (1993) (Thomas, J., concurring) ("When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of *stare decisis*."); *Leegin Creative Leather Products, Inc. v. PSKS*, *Inc.,* 551 U.S. 877, 924 (2007) (Breyer, J., with Stevens, Souter, and Ginsburg, JJ., dissenting) ("[T]he fact that a decision 'unsettles' the law may argue in favor of overruling.").

[10] *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) ("numerous 'major decisions of this Court' spanning *170 years*"); *Kimble v. Marvel Ent., L.L.C.*, 135 S. Ct. 2401, 2411 (2015) ("long-settled"); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 350 (2014) ("long-settled"); *Dickerson v. United States*, 530 U.S. 428, 461 (2000) (Scalia, J., with Thomas, J., dissenting) ("longstanding precedent"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234 (1995) ("well-settled").

B. The Court Has Looked to Several Factors to Determine Whether Precedent is Settled or Unsettled.

While there appears to be no leading case which identifies when precedent is settled or unsettled, the Court has historically looked at several factors. In *Payne v. Tennessee*, the Court observed of the two precedents overturned:

> *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts.

501 U.S. 808, 828–830 (1991). The Court has looked to the "acquiescence" by the Justices, such as whether there is a divided court or dissents,[11] or whether the precedent has been questioned in later decisions.[12] It has looked to whether the precedent was well-reasoned,[13] whether there has been a series of consistent precedents or a series of conflicting

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[11] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996) (noting "confusion among the lower courts that have sought to understand and apply the deeply fractured decision"); *Nichols v. United States*, 511 U.S. 738, 746 (1994) (noting the "splintered decision" of the U.S. Supreme Court).

[12] *Pearson v. Callahan*, 555 U.S. 223, 235 (2009); *Payne*, 501 U.S. at 829–30.

[13] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) ("*Abood* was poorly reasoned.").

precedents,[14] or whether the precedent has "defied consistent application" by lower courts.[15] The Court has looked to lower court criticism and to scholarly criticism (or criticism by the Bar).[16] As Judge Sutton recently wrote about the Court's abortion caselaw:

> What have been the effects of this centralization of power? Has it left the competing sides to the debate content or more fearful of what's next? Has judicial authority over the issue been healthy for the federal courts? More than all that, has it worked? Has our jurisprudence facilitated more compromise and thus more settled law? Today's case, it

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[14] *District of Columbia v. Wesley*, 138 S. Ct. 577 (2018) ("robust 'consensus of cases of persuasive authority'"); *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942) ("[I]f appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the *Wachovia* case must be overruled."); *Heath v. Wallace*, 138 U.S. 573, 585 (1891) ("settled by an unbroken line of decisions"); *Thurlow v. Massachusetts,* 46 U.S. 504 (1847) (sorting out conflicting precedents); *Cook v. Moffat*, 46 U.S. 295 (1847) (same); *Gordon v. Ogden*, 28 U.S. (3 Pet.) 33 (1830) (overruling *Wilson v. Daniel*, 3 U.S. (3 Dall.) 401 (1798) due to the intervening decision in *Wise & Lynn v. The Columbian Turnpike Co.*, 11 U.S. (7 Cranch) 276 (1812)).

[15] *Pearson*, 555 U.S. at 235; *Payne*, 501 U.S. at 830; *South Carolina v. Gathers*, 490 U.S. 805, 813 (1989) (O'Connor, J., with Rehnquist, C.J. and Kennedy, J., dissenting) ("considerable confusion in the lower courts").

[16] *Pearson*, 555 U.S. at 234 (surveying lower court criticism); *Adarand*, 515 U.S. at 221, 223; *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) ("[T]he rule of *Saucier* has generated considerable criticism from both commentators and judges."); *Continental T.V.,* 433 U.S. at 47–48, 58.

> seems to me, is Exhibit A in a proof that federal judicial authority over the [abortion] issue has not been good for the federal courts or for increased stability over this difficult area of law.

Preterm-Cleveland v. McCloud, No. 18-3329, slip op. at 31–32 (6th Cir. Apr. 13, 2021) (Sutton, J., concurring). Intervening doctrinal developments may unsettle a precedent.[17] The constant search for a new rationale also unsettles a precedent.[18]

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[17] *Janus*, 138 S. Ct. at 2460 (*Abood* "is inconsistent with other First Amendment cases and has been undermined by more recent decisions."); *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., with Roberts, C.J. and Kennedy and Breyer, JJ., dissenting) (considering "whether there has been an important change in circumstances in the outside world"); *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) ("*[S]tare decisis* does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law.").

[18] *Janus*, 138 S. Ct. at 2481 n.25 ("[T]hat '[t]he rationale of [*Abood*] does not withstand careful analysis' *is* a reason to overrule it. . .And that is even truer when, as here, the defenders of the precedent do not attempt to 'defend [its actual] reasoning.'") (citations omitted) (fourth alteration in original); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, CJ., with Alito, J., concurring) ("[W]hen the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake."); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies.").

II. *BELLOTTI V. BAIRD* IS UNSETTLED BY CONFLICTING PRECEDENTS.

Bellotti v. Baird was a facial challenge to Massachusetts' parental *consent* law. Though the Court struck down the Massachusetts law, it established the *basic* framework for parental notice and consent laws that the states have followed but is now unsettled by a line of decisions, including *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013 (1993), and *Whole Woman's Health*.

Justice Powell's plurality opinion articulated several legal principles "deeply rooted in our Nation's history and tradition," *Bellotti II*, 443 U.S. at 638 (plurality op.). These included "the status of minors under the law is unique in many respects," *id.* at 633; "[t]he unique role in our society of the family," *id.* at 634; and the fact that "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *Id.* at 635 (omissions in original). Justice Powell explained:

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.

Id. at 640.[19] The Court articulated three reasons why "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." *Id.* at 634. They are still supported by the majority of Americans, reflected in the passage of parental consent or notice laws in 44 states. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 326 n.1 (2006).

Nevertheless, *Bellotti II* was a splintered decision, as then-Justice Rehnquist highlighted.[20] Justice Powell's plurality opinion was joined by just three Justices. Four others concurred in the judgment which invalidated the Massachusetts law as unconstitutional. 443 U.S. at 645–651. Justice Stevens emphasized in *Bellotti* that parental *notice* did not involve an "absolute veto." *Id.* at 654 n.1 (Stevens, J., with Brennan, Marshall, and Blackmun, JJ., concurring).

The decisions on parental involvement that followed *Bellotti II* have likewise been splintered. *H.L.*

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[19] The plurality in *Bellotti* employed an "undue burden" standard, but the plurality in *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) noted that the "undue burden" standard had been employed before *Casey* "in ways that could be considered inconsistent."

[20] *Bellotti II*, 443 U.S. at 651–52 (Rehnquist, J., concurring) ("At such time as this Court is willing to reconsider its earlier decision in [*Danforth*] . . . I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court.").

v. Matheson, an as-applied challenge to Utah's two parent *notice* law, was 3-2-1-3, with Justices Powell and Stewart joining the Court's opinion "on the understanding that it leaves open the question whether [Utah's law] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." 450 U.S. at 414.

Hodgson v. Minnesota, 497 U.S. 417 (1990) was also a splintered decision, as Justice Scalia highlighted.[21] Four justices would have upheld two-parent notification with or without judicial bypass, but Justice O'Connor provided the fifth vote to uphold *two-parent notice* only if judicial bypass was included. *Id*. at 461 (O'Connor, J., concurring in part and concurring in the judgment in part).

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[21]

> As I understand the various opinions today: One Justice holds that two-parent notification is unconstitutional (at least in the present circumstances) without judicial bypass, but constitutional with bypass . . . four Justices would hold that two-parent notification is constitutional with or without bypass . . . four Justices would hold that two-parent notification is unconstitutional with or without bypass, though the four apply two different standards . . . six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons . . . and three Justices would hold that one-parent notification with bypass is unconstitutional. . . .

497 U.S. 479–480 (Scalia, J., concurring in the judgment in part and dissenting in part) (citations omitted). See also *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 364 (4th Cir. 1998) (describing the Court's opinion in *Hodgson* as "so fractured as to render its opinions collectively all but impenetrable").

The companion decision to *Hodgson*, *Ohio v. Akron Center for Reproductive Health* (*Akron II*), involved a facial challenge to Ohio's *one-parent notice* law, in which the court upheld 5-4 "the adequacy of [Ohio's] judicial bypass procedure." 497 U.S. at 510. The *Akron II* majority applied the facial challenge standard of *United States v. Salerno*, 481 U.S. 739 (1987), that the Court had applied in *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989). 497 U.S. at 514. In *Akron II*, the Court "le[ft] the question open" as to whether a one-parent notice required judicial bypass because Ohio's "bypass procedure meets the requirements identified for parental consent statutes." *Id*. at 510–11. However, the Court concluded that "[t]he Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." *Id*. at 514.[22]

The Court upheld Pennsylvania's parental *consent* law in *Casey*, 505 U.S. at 899. Emphasizing that "[w]e have been over most of this ground before," the Court relied heavily on precedent to reaffirm that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id*. at 899.

However, the "purpose prong" of *Casey*'s "undue burden" test added a requirement that *Bellotti* never mentioned. The purpose prong makes parental

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[22] For a thorough examination of the enforcement of Texas's bypass process, see Teresa Stanton Collett, *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, 52 Baylor L. Rev. 513 (2000).

involvement laws vulnerable to a lawsuit because no matter how much good they may achieve in securing parental involvement with their minor daughter at a time when a critical, life-changing decision is being made, plaintiffs can always claim that parental involvement laws diminish abortions or that the bypass procedure is a "substantial obstacle."

In addition to being splintered, *Bellotti* and *Hodgson* have been unsettled by *Casey*, *Fargo*, *Stenberg*, *Whole Woman's Health*, and *June Medical*, which have altered the undue burden standard and sown confusion.[23] Months after the *Casey* decision, *Fargo* changed the burden on legislatures by imposing a "large fraction test" which has confused many courts with its *three* elements: large fraction, relevant group, substantial obstacle. 507 U.S. at 1014 (O'Connor, J., with Souter, J., concurring).[24] In the context of parental involvement laws, judicial identification of the "relevant" group is highly subjective and troublesome, particularly where the law has never taken effect. Citing *Casey* and *Whole Woman's Health*,

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[23] See, *e.g.*, Ruth Burdick, Note, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered and the Split Over the* Salerno *Test*, 23 Hastings Const. L.Q. 825 (1996) (surveying federal court confusion after *Casey*); Sandra Lynne Tholen & Lisa Baird, *Con Law is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 Loy. L.A. L. Rev. 971 (1995) (same).

[24] See, *e.g.*, *Preterm-Cleveland v. McCloud*, No. 18-3329, slip op. at 28–29 (6th Cir. Apr. 13, 2021), ("The Court, however, has not been clear about how to define the numerator and denominator for the fraction, about what qualifies as a fraction that is 'large,' or about whether it is a percentage or a fractional number possibly larger than one.") (collecting Supreme Court and other federal circuit opinions expressing confusion).

the district court, in this facial challenge, defined the relevant group very narrowly as "those who face the possibility of interference, obstruction, or physical, psychological, or mental abuse by their parents if they were required to disclose their pregnancy" and concluded, pre-enforcement, that the law would be an "undue burden for a *sufficiently* large fraction of mature, abortion-seeking minors in Indiana." *Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d at 939–940 (emphasis added). However, a peer-reviewed statistical study suggested that the relevant group in a State with a parental notice law is *all minors who can become pregnant*, finding that parental notice laws decrease adolescent abortions *and* births, with the implication that they do so *by decreasing adolescent pregnancies*. James L. Rogers, et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am. J. Pub. Health 294 (1991).

In 2000, *Stenberg v. Carhart* was understood to have overturned the deference that *Casey* restored to state legislatures. 530 U.S. at 956 (Kennedy, J., with Rehnquist, C.J., dissenting). *Stenberg* changed the *Casey* calculus, including the "large fraction" test of *Fargo*, and imposed a greater burden on state legislatures.[25] However, *Gonzales v. Carhart* is understood to have restored greater deference to the

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[25] See *e.g.*, *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 294 (2d Cir. 2006) (Walker, C.J., concurring) ("As it stands now, however, the Supreme Court appears to have adopted the 'large fraction' standard (perhaps modified by *Stenberg* to mean a 'not-so-large-fraction' standard). . . .").

States[26] and to have overturned *Stenberg sub silentio*.[27]

The large fraction test approved in *Fargo* has unsettled *Casey* and *Bellotti*. *Casey* did not apply the large fraction test to Pennsylvania's parental *consent* law, stating instead that the states may require parental consent "provided that there is an adequate judicial bypass procedure." 505 U.S. at 899. Nor has it been applied by the Court to any parental *notice* law. The division between *Casey* and *Salerno* has unsettled facial challenge analysis in the abortion context. *A Woman's Choice–E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002) (noting confusion in whether to apply *Casey*, *Fargo* or *Salerno* to abortion laws). Twenty-five years after the confusion in facial challenge analysis was openly debated in *Janklow v. Planned Parenthood*, 517 U.S. 1174 116 S. Ct. 1582, 1583 (1996) (Stevens, J., concurring), *Id*. at 1584 (Scalia, J., with Rehnquist, C.J. and Thomas, J., dissenting)—a case involving South Dakota's one-parent notification law—a majority of the Court has yet to resolve that confusion. *Whole Woman's Health*, 136 S. Ct. at 2343 (Alito, J., with Roberts, C.J. and Thomas, J., dissenting) (disputing the large fraction

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[26] Jill Hamers, Note, *Reeling in the Outlier:* Gonzales v. Carhart *and the End of Facial Challenges to Abortion Statutes*, 89 Bos. U. L. Rev. 1069 (2009); Peter M. Ladwein, *supra* note 4.

[27] Cong. Res. Serv., *The Constitution of the United States: Analysis and Interpretation* 2584 (Centennial ed. 2016) (listing *Stenberg* as an overruled decision); Barry Friedman, *The Wages of Stealth Overruling*, 99 Geo. L. J. 1, 6 (2010) (citing *Gonzales* as example)); L.A. Powe, Jr., *Intergenerational Constitutional Overruling*, 89 Notre Dame L. Rev. 2093, 2100 (2014) (same).

test); *June Med. Servs.*, 140 S. Ct. 2175–76 (Gorsuch, J., dissenting).

III. *WHOLE WOMAN'S HEALTH* UNSETTLED *BELLOTTI* AND *CASEY*.

Before *Whole Woman's Health*, courts applied *Casey* with the understanding that "review of regulatory *purposes* (including means-ends fit) was to be deferential, and . . . that a regulation's *effects* would constitute an undue burden only if they imposed a 'substantial obstacle' on women's access to abortion." Stephen G. Gilles, *Restoring* Casey*'s Undue-Burden Standard After* Whole Woman's Health v. Hellerstedt, 35 Quinnipiac L. Rev. 701, 709 (2017) (emphasis added).

Whole Woman's Health overturned a number of elements in *Gonzales v. Carhart* which had extended the proper deference to state legislatures that *Casey* purported to restore. *Bellotti* and *Casey* are unsettled by *Whole Woman's Health*'s benefits and burdens balancing test. *Whole Woman's Health* has spurred dozens of court challenges to state abortion regulations. There are approximately forty-five abortion cases in the lower federal courts as of April 2021. See Appendix A. Some challenges are attempts to overturn laws that this Court and other courts have previously upheld.[28]

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[28] See *e.g.*, Marlow Svatek, *Seeing the Forest for the Trees: Why Courts Should Consider Cumulative Effects in the Undue Burden Analysis*, 41 N.Y.U. Rev. L. & Soc. Change 121 (2017) (citing

Whole Woman's Health altered *Casey* by replacing the undue burden test with "something much more akin to strict scrutiny." 136 S. Ct. at 2324 (Thomas J., dissenting). Instead of conducting a *Casey* inquiry into whether a law creates a "substantial obstacle," *Whole Woman's Health* directs courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer" and by increasing the burden on states to prove the "means-ends fit." *Id.* at 2309. Instead of asking whether the regulation imposed a substantial obstacle, *Whole Woman's Health* requires states to prove that the law advances the state's valid interests *before the law goes into effect*, subverting the advocacy process and promoting the use of "social science data" created by abortion advocacy groups and offered in amicus briefs instead of data about the actual impact of the law as applied.

Under *Whole Woman's Health*, the undue burden inquiry "requires scrutiny that is less deferential than rational-basis review, and made use of several heightened-scrutiny techniques in evaluating [the Texas law]" (such as "least restrictive alternative analysis and narrow tailoring"). Gilles, *supra*, at 705. "On both counts, the Court's one and only argument [in *Whole Woman's Health*] was that it was applying the controlling law set forth in *Casey*." *Id.* (emphasis

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cases). For example, in *Planned Parenthood of Wisconsin v. Kaul*, No. 3:19-cv-00038-wmc (W.D. Wis. argued Dec. 14, 2020), plaintiffs have cited *Whole Woman's Health* and the Seventh Circuit's decision in this case, *Planned Parenthood of Ind. and Ky., Inc. v. Box*, No. 17-2428, slip op. (7th Cir. Mar. 12, 2021), to support the proposition that Wisconsin's physician-only law is unconstitutional under the benefits and burdens balancing test of *Whole Woman's Health*.

omitted). But *Casey* "applied the 'substantial obstacle' criterion to evaluate regulatory effects, to the exclusion of balancing." *Id*. at 705–706. *Casey* clearly did not apply balancing to all provisions of the Pennsylvania law. *Whole Woman's Health* "radically" rewrote *Casey*'s undue burden test. 136 S. Ct. at 2324 (Thomas, J., dissenting).

IV. *WHOLE WOMAN'S HEALTH* WAS UNSETTLED BY *JUNE MEDICAL*.

June Medical was decided 4-1-4. The plurality opinion applied only to the Louisiana statute. Concurring only in the judgment, Chief Justice Roberts was critical of *Whole Woman's Health* and applied the unique stare decisis doctrine of Justice Frankfurter applicable to *unsettled* precedent in *Helvering v. Hallock*, 309 U.S. 106 (1940):

> *[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Id. at 119. In the case of *unsettled* precedent, the Court may return to "prior doctrine" that is "more embracing in its scope, intrinsically sounder, and verified by experience." *Id*.

To some, this indicated that, while Chief Justice Roberts would apply *Whole Woman's Health* to the

Louisiana statute, he would no longer apply *Whole Woman's Health* to future laws with different facts, and would henceforth apply *Casey*'s undue burden standard. Dissenting in *June Medical*, Justice Kavanaugh emphasized, "Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard." 140 S. Ct. at 2182. In the wake of *June Medical*, numerous courts have grappled with the legal significance of the Chief Justice's concurring opinion.[29]

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[29] *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020); *Whole Woman's Health v. Paxton*, No. 17-51060, slip op. at 36 (5th Cir. Oct. 13, 2020), (Willett, J., dissenting) ("Legal clashes have erupted nationally over the vexing interplay between *Marks* and *June Medical*."); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020) ("Because no opinion in *June Medical Services* garnered a majority we . . . have the 'vexing task' of deciding which opinion controls."); *Preterm-Cleveland*, slip op.; *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, No. 20-6267 (6th Cir. Feb. 19, 2021); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, slip op.; *Whole Woman's Health v. Paxton*, 972 F.3d 649 (5th Cir. 2020); *Hopkins v. Jegley*, No. 4:17-cv-00404-KGB (E.D. Ark. Dec. 22, 2020); *Planned Parenthood v. Slatery*, No. 3:20-cv-00740 (M.D. Tenn. Feb. 26, 2021); *June Med. Servs. v. Phillips*, No. 14-525-JWD-RLB (M.D. La. Jan. 28, 2021); *Planned Parenthood S. Atlantic v. Wilson,* No. 3:21-00508-MGL (D.S.C. Mar. 19, 2021); *Memphis Ctr. for Reprod. Health v. Slatery,* No. 3:20-cv-00501 (M.D. Tenn. July 24, 2020); *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists,* No. 20A34 (U.S. Jan. 12, 2021); *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020); *Whole Woman's Health All. v. Rokita,* No. 1:18-cv-01904-SEB-MJD (S.D. Ind. Feb. 19, 2021); *Leal v. Azar*, No. 2:20-CV-185-Z (N.D. Tex. Dec. 23, 2020); *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Oct. 14, 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 20-1630 (JEB) (D.D.C. Sept. 2, 2020).

Bellotti II has been unsettled beyond recognition by the confusion in the standards for pre-enforcement challenges, uncertainty in the requirements for judicial bypass, and by the fluctuations in the standard of review in *Fargo*, *Janklow*, *Stenberg*, *Gonzales*, *Whole Woman's Health*, and *June Medical*. This unsettled doctrine, which has existed since *Bellotti II*, and has been extended by *Fargo*, *Janklow*, and *Whole Woman's Health*, needs to be resolved.

CONCLUSION

Indiana's petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

RELEVANT CASES PENDING IN FEDERAL COURTS

Besides the three cases involving substantive abortion regulations pending in this Court, there are at least 41 cases challenging abortion laws in the lower federal courts.

Supreme Court of the United States:

Dobbs v. Jackson Women's Health Organization and *Jackson Women's Health Organization v. Dobbs*, No. 19-1392 (consolidated; reset for conference Apr. 30, 2021) (15-week limit)

Box v. Planned Parenthood of Indiana & Kentucky, No. 20-1375 (petition for cert. filed Mar. 29, 2021) (application of *Hellerstedt* analysis to parental involvement law)

Little Rock Family Planning Services v. Rutledge, No. 20-1434 (petition for cert. filed Apr. 9, 2021) (18-week limit, Down syndrome; cert. filed for Down syndrome only)

Federal Circuit Courts:

Reproductive Health Services v. Bailey, No. 17-13561 (11th Cir. argued Apr. 10, 2018) (parental notice)

Hopkins v. Jegley, 968 F.3d 912 (8th Cir. 2020) (gestational limits, fetal remains, prenatal non-discrimination)

SisterSong Women of Color Reproductive Justice Collective v. Kemp, No. 20-13024 (11th Cir.) (heartbeat, gestational limits)

Planned Parenthood of Indiana & Kentucky v. Commissioner, Indiana State Department of Health, No. 20-2407 (7th Cir. argued Jan. 12, 2021) (abortion data reporting)

EMW Women's Surgical Center v. Friedlander, 978 F.3d 418 (6th Cir. 2020) (transfer agreement)

Planned Parenthood Gulf Coast v. Phillips, No. 18-30699 (5th Cir.argued Jan. 9, 2019) (clinic licensing)

Planned Parenthood of Maryland, Inc. v. Becerra, No. 20-2006 (4th Cir.) (abortion funding, separate insurance billing) (held in abeyance)

American College of Obstetricians and Gynecologists v. U.S. Food and Drug Administration, No. 20-1824 (4th Cir. appeal docketed July 29, 2020) (held in abeyance) (chemical abortion)

Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson, No. 19-2882 (8th Cir. argued Sept. 24, 2020) (gestational limits)

Bryant v. Woodall, No. 19-1685 (4th Cir. argued Mar. 23, 2021) (20-week limit)

Preterm-Cleveland v. McCloud, No. 18-3329, slip op. (6th Cir. Apr. 13, 2021) (Down syndrome)

Planned Parenthood South Atlantic v. Wilson, No. 21-1369 (4th Cir. appeal docketed Apr. 5, 2021) (early gestational limit)

Memphis Center for Reproductive Health v. Slatery, No. 20-5969 (6th Cir. argued Apr. 29, 2021) (gestational limit, discrimination based on sex, race, and Down syndrome)

Bristol Regional Women's Center v. Slatery, No. 20-6267 (6th Cir. pet. for *en banc* review granted Apr. 9, 2021) (informed consent reflection period)

Whole Woman's Health v. Paxton, No. 17-51060 (5th Cir.argued Jan. 21, 2021) (dismemberment)

Planned Parenthood of Greater Texas Family Planning & Preventative Health Services v. Kauffman, 981 F.3d 347 (5th Cir. 2020) (Medicaid funding)

Whole Woman's Health v. Young No. 18-50730 (5th Cir. argued Sep. 5, 2019) (fetal remains)

Federal District Courts:

Robinson v. Marshall, No. 19-365 (M.D. Ala. amended complaint filed Mar. 30, 2020) (prohibition with narrow exceptions, gestational limits)

Planned Parenthood v. Gillespie, No. 15-566 (E.D. Ark. stayed Mar. 22, 2021; (joint update due May 23, 2021) (Medicaid funding)

Chelius v. Wright, No. 17-493 (D. Haw. filed Oct. 3, 2021) (chemical abortion)

Planned Parenthood of the Great Northwest & the Hawaiian Islands v. Wasden, No. 18-555 (D. Idaho amended complaint filed Dec. 2, 2020) (physician-only)

Whole Woman's Health Alliance v. Rokita, No. 18-1904 (S.D. Ind. argued Mar. 18, 2021) (clinic license denial)

EMW Women's Surgical Center v. Meier, No. 19-178 (W.D. Ky.remanded pending the Sixth Circuit's resolution of *Preterm-Cleveland v. McCloud*, No. 18-3329, slip op. (6th Cir. Apr. 13, 2021)

Planned Parenthood Gulf Coast v. Phillips, No. 15-565 (M.D. La. stayed pending outcome of Fifth Circuit rehearing *en banc* of *Planned Parenthood of Greater Texas v. Kauffman* 981 F.3d 347 (5th Cir. 2020) and *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2018)) (Medicaid funding)

June Medical Services. v. Phillips, No. 14-525-JWD-RLB, (M.D. La. order grating extension of time Apr. 19, 2021)) (omnibus)

Jackson Women's Health Organization v. Dobbs, No. 18-171 (S.D. M.S. argued May 21, 2019) (omnibus)

GenBioPro, Inc. v. Dobbs, No. 3:20-cv652-HTW-LRA (S.D of M.S. filed Oct. 9, 2020) (chemical abortion)

American Medical Association v. Stenehjem, No. 19-125 (D. N.D. filed June 25, 2019) (abortion pill reversal)

Planned Parenthood Southwest Ohio Region v. Yost, No. 19-118 (S.D. Ohio filed Feb. 14, 2019) (15-week limit)

Preterm-Cleveland v. Himes, No. 19-360 (S.D. Ohio stayed Mar. 3, 2021 pending final disposition of all appeals and petitions for certiorari in *Preterm-Cleveland v. McCloud*, No. 18-3329, slip op. (6th Cir.) and *Memphis Center for Reproductive Health v. Slatery*, No. 20-5969 (6th Cir.) (heartbeat)

Yost v. Planned Parenthood Southwest Ohio Region, No. 1:04-cv-00493-SJD (S.D. Oh. notice of appeal filed July 8, 2020) (chemical abortion)

Planned Parenthood Minnesota, North Dakota, South Dakota v. Noem, No. 11-4071 (D.S.D. amended complaint filed Aug. 7, 2018) (informed consent)

Planned Parenthood of Tennessee and North Mississippi v. Slatery, No. 3:20-cv-00740 (M.D. Tenn. Feb. 26, 2021) (abortion pill reversal, informed consent)

Whole Woman's Health v. Paxton, No. 18-500 (W.D. Tex. argued Jan. 7, 2019) (omnibus)

Planned Parenthood Association of Utah v. Miner, No. 19-238 (D. Utah argued Apr. 18, 2019) (18-week limit)

Planned Parenthood of Wisconsin v. Kaul, No. 3:19-cv-00038-wmc (W.D. Wis. argued Dec. 14, 2020) (physician-only, chemical abortion, telemedicine ban)