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 OF KENTUCKY, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Seventh Circuit has left intact an injunction against an Indiana statute requiring that the parents of an unemancipated minor receive notice when their child decides to have an abortion without parental consent. And the court did so without really considering the compelling interest that States have in encouraging parental involvement in these kinds of life-altering decisions. In other words, the court disregarded the important interest that States have in protecting minors' welfare—an interest that this Court has repeatedly affirmed.

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

The *amici* States also have an interest in the settlement of the ongoing dispute over the meaning of *June Medical*. The Seventh Circuit's decision created a circuit split on this issue by essentially holding that the Chief Justice's concurrence is not the controlling opinion from *June Medical*. Thus, the Seventh Circuit—in conflict with the Sixth and Eighth Circuits—uses a balancing test when applying the

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

undue-burden standard. The *amici* States do not believe that the undue-burden standard applies to the law in question in the same way that it does to a statute affecting an adult's choice to have an abortion, but if it does, the *amici* States have an interest in having the circuit split resolved. States need to know the standard by which their policymaking will be judged.

SUMMARY OF THE ARGUMENT

There is no question that States have a greater ability to regulate abortion access for minors than they do for adults. That is why this Court has upheld parental-consent statutes for minors that might not survive scrutiny if applied to adults. Yet, in the decision below, the Seventh Circuit affirmed an injunction against Indiana's parental-notice statute without meaningfully acknowledging the distinction between laws affecting minors and laws affecting adults. *See Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740 (7th Cir. 2021). By doing so, the Seventh Circuit ignored longstanding precedent from this Court that firmly establishes the States' heightened interest in protecting the well-being of children.

The Seventh Circuit has also deepened a pre-existing circuit split over how to apply *Bellotti v. Baird*, 443 U.S. 622 (1979), to parental-notice statutes. Several circuits have disagreed over whether the judicial-bypass requirements announced in *Bellotti* for parental-consent laws also apply when states only require parental notice. That was precisely the

question raised in the case below, and the Seventh Circuit answered it by declaring *Bellotti* irrelevant. This case now presents a perfect chance to resolve a decades-old split among the lower courts.

In resolving the circuit split, this Court should reaffirm the well-established principle that parents are entitled to shape the life and moral direction of their children. Nowhere does this matter more than when a child faces a decision as significant as whether to have an abortion. But rather than take seriously the importance of a parent's role in guiding his or her child through tumultuous moments, the Seventh Circuit treated the parent-child relationship like it was a medical procedure subject to testing for efficacy and cost. That approach must be rejected. States have an undeniable interest in fostering environments where parents can guide and nurture their children so that they can grow into mature and productive adults. As Judge Kanne observed in his first dissenting opinion in this case, that interest extends to ensuring a child receives guidance from her parents before she "makes an irrevocable and profoundly consequential decision." *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 992 (7th Cir. 2019) (Kanne, J., dissenting), *vacated by Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 187 (2020). Indiana's statute does just that.

Finally, the Seventh Circuit's application of *June Medical* created yet another circuit split. There is a debate raging across the country as to the meaning of *June Medical*, and, in particular, the

significance of the Chief Justice's concurring opinion. The Sixth and Eighth Circuits have correctly concluded that the Chief Justice's concurrence—as the controlling opinion—requires courts to apply the undue-burden standard according to the test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), rather than the balancing test in *Whole Woman's Health v. Hellerstedt*, 579 U.S. ---, 136 S. Ct. 2292 (2016). But the Seventh Circuit's decision below refuses to acknowledge that the Chief Justice's concurrence re-established the *Casey* test as the appropriate way of applying the undue-burden standard. The *amici* States do not believe that the undue-burden standard applies here in the same way it would to a statute affecting an adult's choice to have an abortion, but, if it does, this Court should resolve the circuit split by clarifying that the Sixth and Eighth Circuits are correct.

ARGUMENT

In the decision below, a divided panel of the Seventh Circuit once again affirmed the injunction against an Indiana statute requiring that the parents of an unemancipated minor receive notice when their child decides to have an abortion without parental consent. This is the second time the Seventh Circuit has done so. After the first decision, this Court vacated and remanded the matter for further consideration in light of *June Medical Services L.L.C. v. Russo*, --- U.S. ---, 140 S. Ct. 2103 (2020). But the Seventh Circuit did not alter its analysis in any material way on remand. *See Box*, 991 F.3d at 752. In

fact, it essentially adopted its previous reasoning without further consideration or explanation. *See id.* Thus, just as it did the first time around, the Seventh Circuit left the injunction intact without seriously considering the compelling interest that States have in encouraging parental involvement in these kinds of life-altering decisions.

Indiana's Petition once again asks an important question about a court's ability to nullify a parent's interest in shaping the life and moral direction of his or her child. That alone deserves the attention of the Court. So it is surprising that the Seventh Circuit's decisions here contain no hint of the deep quandary lying at the heart of this case. To the Court of Appeals, this case was simply a matter of applying the Court's undue-burden standard the same as it would for any other regulation governing pre-viability abortions for adults. But as this case involves minors and parental interests, the *amici* States believe that approach was erroneous.

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

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

In *Bellotti*, the Court recognized that States have far 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 show an extraordinary level of maturity *or* for whom parental consent is not in their best interest. Otherwise, States may constitutionally prohibit minors from having abortions without the approval of their parents. *See Planned Parenthood of 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 still require that her parents be notified?

Under the Indiana statute at issue, 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(d)-(e). Ordinarily, notice must come from

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

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

Yet this Court has never decided whether the bypass procedure outlined in *Bellotti* must also be available to the same extent for a child seeking to avoid a parental-notice law. *See Akron*, 497 U.S. at 510 ("[A]lthough our cases have required bypass

procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures."). This left an opening for the circuits, which have since split in answering the question. But until the Seventh Circuit's decision below, that split in judgment followed a relatively coherent path.

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

The Fifth and Eighth Circuits have disagreed. In *Planned Parenthood, Sioux Falls Clinic v. Miller*,

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. 63 F.3d 1452, 1460 (8th Cir. 1995). 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. *See 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 conflicted with the confidentiality requirements of *Bellotti*. *See id.* at 1101, 1112. So even after acknowledging that this Court had distinguished between parental consent and notice statutes in prior decisions, the Fifth Circuit found the distinctions meaningless for constitutional purposes. *Id.*

Despite disagreeing over whether parental-notice statutes must include a *Bellotti* judicial bypass, the lower courts—until the decision below—agreed on the question they were asking. *Bellotti* is built on the premise that States may treat minors differently than adults when regulating their access to abortion. *See Bellotti*, 443 U.S. at 649. So when faced with a law requiring parental notice, the first step is

acknowledging that States have more authority over a minor's access to abortion than over an adult. *See Miller*, 63 F.3d at 1460 ("The answer, of course, is that they are minors, and States may impose requirements on immature minors that it may not impose on adults."). *Bellotti*, after all, permitted parental-consent statutes as "the general rule," so long as they contained a judicial bypass for exceptional cases. *Bellotti*, 443 U.S. at 649. That is why the question for the courts below had traditionally been whether, under *Bellotti*, a notice statute creates the same kind of burden that a consent statute does. And though the Eighth and Fifth Circuits answered this question wrongly, they at least gave a wrong answer to the right question.

2. Then came the Seventh Circuit. Rather than confront *Bellotti* (and the several decisions that followed), the Court of Appeals focused only on the undue-burden standard as articulated in *Whole Woman's Health v. Hellerstedt*—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 Seventh Circuit expressly declined to address *Bellotti*. *See Box*, 991 F.3d at 752.

That might not matter if this Court's jurisprudence treated adults and minors the same when it comes to abortion access. But it does not. *Bellotti* holds that States have a greater right to regulate abortion access for minors than they might have for adults. *See Bellotti*, 443 U.S. at 649. That

includes *prohibiting* pre-viability abortions for some minors who cannot obtain parental consent.

By applying the undue-burden standard as articulated in *Hellerstedt*, the Seventh Circuit deepened a pre-existing circuit split that this Court should resolve. And it did so by directly undermining the Court's decision in *Bellotti*, which has been repeatedly reaffirmed in the years since.

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

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

1. Parents play a unique role in our society. "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925)). In fact, this Court has described a parent's role in nurturing his or her children as an *obligation*—a "high duty"—not simply a right to be

respected if a parent so chooses. *Pierce*, 268 U.S. at 535.

It comes as no surprise then that "the relationship between parent and child is constitutionally protected." *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 right "to raise one's children [has] been deemed essential," a "basic civil right[] of man." 405 U.S. 645, 651 (1972) (internal citations and quotation marks omitted). It is a right that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id*.

On that basis, this Court has found several governmental attempts at interfering with parent-child relationships invalid. Those include mandatory-public-school laws, which prevent parents from directing the education and moral upbringing of their children. *See Pierce*, 268 U.S. at 534–36; *Yoder*, 406 U.S. at 214 ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children . . . ."). And they also include state laws that arbitrarily pass judgment on the fitness of a child's parent. *See Stanley*, 405 U.S. at 657–58 ("[The State] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to

justify refusing a father a hearing when the issue at stake is the dismemberment of his family."). These laws diminish the rights of parents to raise their children, replacing them with the judgment of the state. They are repugnant to a free society.

That is not to say that States have no interest in taking care of their citizen-children as well. States have their own compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (quoting *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982)). To that end, states unquestionably act pursuant to legitimate regulatory authority when they pass laws intended to promote the well-being of children within their borders. *See Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate . . . ."). And on top of that, states typically have a stronger right to regulate "the conduct of children" than they might have "over adults." *Prince*, 321 U.S. at 170. So in many cases—not just abortion—States can act for the benefit of children in ways that might be unconstitutional if applied against adults.

This Court has confirmed as much. The Court has upheld a number of state actions intended to safeguard minors that could not pass constitutional scrutiny if applied to adults. Included in the group are pretrial detention proceedings for juveniles, *see Schall v. Martin*, 467 U.S. 253, 281 (1984), obscenity laws

that apply only to minors, *see Ginsberg*, 390 U.S. at 638–39, random drug-testing for student athletes, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995), and of course, parental-consent laws for obtaining an abortion, *see Bellotti*, 443 U.S. at 640–41. In all of these cases, the Court has been guided by the States' important role in protecting the "well-being of its children." *Ginsberg*, 390 U.S. at 639.

The State's interest in protecting children dovetails perfectly with "[t]he unique role in our society of the family." *Bellotti*, 443 U.S. at 634. If States have a compelling interest in "safeguarding the physical and psychological well-being of a minor," *Ferber*, 458 U.S. at 756–57, and parents are best equipped to provide the kind of "care and nurture" that a State cannot, *Prince*, 321 U.S. at 166, it follows—perhaps uncontroversially—that States have an overwhelming interest in fostering environments that allow parental involvement to flourish. *See Bellotti*, 443 U.S. at 642. Laws that encourage parents to take an active role in guiding their children as they face consequential decisions inevitably promote the interests of the State.

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

No one would deny that, even for adults, States have a significant interest in regulating abortions. *See Casey*, 505 U.S. at 846. Those interests include both "protecting the health of the woman and the life of the fetus that may become a child." *Id.* In fact, as this

Court has explained, States act pursuant to their legitimate interests when enacting laws that ensure a woman's decision "is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Id.* at 883. States, in other words, may permissibly discourage abortion to promote the well-being of both the woman and her unborn child.

The reason that States have such a compelling interest in regulating abortion needs little explanation. States have an interest in regulating the medical profession in general. *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). And "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). It is a "unique act" that is "fraught with consequences." *Casey*, 505 U.S. at 852. "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting . . . ." *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). And those consequences affect not only the unborn child, but also "the woman who must live with the implications of her decision." *Casey*, 505 U.S. at 852. "[I]t seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." *Gonzales*, 550 U.S. at 159 (internal citations omitted). States plainly have an interest when their citizens face such

potential consequences. That is true whether the pregnant mother is a child or an adult.

Given the stakes, there is obvious value in laws designed to "enhanc[e] the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences." *Matheson*, 450 U.S. at 412. "[P]arents naturally take an interest in the welfare of their children," *Bellotti*, 443 U.S. at 648, so States are well-served by encouraging parental involvement with their children as they face the ramifications of such a profound decision. *See Gonzales*, 550 U.S. at 159–60 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know . . . ."). And that is true no matter how mature the pregnant minor is. While a court might find her mature enough to make the decision on her own, "even the most mature teenager will benefit from the experienced advice of a parent, and, as a consequence of that dialogue, make a more informed, better considered, abortion choice." *Camblos*, 155 F.3d at 374 (citing *Bellotti*, 443 U.S. at 643 n.23).

Parental-notice statutes like the one passed by Indiana's legislature lie firmly at the intersection of a State's interest in promoting parental liberty and the well-being of its citizens. In granting certiorari here, the Court can reset the balance between the family and the State, giving parents the room needed for "teaching, guiding, and inspiring" our children so that

they may grow "into mature, socially responsible citizens." *Bellotti*, 443 U.S. at 638. This Court has rightly recognized those noble goals before. It should do so again in this case.[2]

III. If the undue-burden standard applies here in the same way it does with adult abortion rights, this Court should clarify *June Medical*'s impact on that standard.

As explained above, the *amici* States do not believe that the undue-burden standard applies here in the same manner that it applies to laws affecting an adult's choice to have an abortion. But even if it does, the decision below still warrants review from this Court. Why? Because the decision below created a circuit split in how that standard is applied.

This Court vacated the Seventh Circuit's initial decision here and remanded the case expressly for the purpose of "further consideration in light of *June Medical Services L.L.C. v. Russo*, 591 U.S. ---, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020)." *Box*, 141 S. Ct. at 188. The Court's vacatur and remand surely was not an invitation for the Seventh Circuit to apply exactly the same reasoning that it did the first time around. As Judge Kanne observed in his dissent below:

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[2] In fact, for the reasons explained in Arkansas's petition for a writ of certiorari in *Rutledge v. Little Rock Family Planning Services*, No. 20-1434, a State's compelling interest in an abortion regulation can be sufficient on its own to justify the law regardless of whether the law imposes a substantial burden on abortion access. *See* Pet. for Writ of Certiorari, *Rutledge* (No. 20-1434), at 16–17, 20–21.

> [W]hile we cannot presume from the Supreme Court's remand order that our prior decision in this case was wrong, surely *June Medical* had some effect on the legal landscape. Else, why didn't the Supreme Court simply deny cert instead? I do not believe that the Supreme Court is directing us to reassess our prior decision "in light of" a case that sheds no light on the matter whatsoever.

Box, 991 F.3d at 753 (Kanne, J., dissenting) (footnote omitted).

Yet the Seventh Circuit proceeded as if this Court had done precisely that. Thus, rather than recognize "that *June Medical* does have a real effect," *id.* (Kanne, J., dissenting), the Seventh Circuit continued adhering to the *Hellerstedt* balancing test as if nothing had happened. In doing so, it created a circuit split.

Contrary to the Seventh Circuit, the Sixth and Eighth Circuits have correctly concluded that the Chief Justice's concurrence is not only the controlling opinion from *June Medical*, but that it re-establishes the *Casey* test—instead of the *Hellerstedt* balancing test—as the correct way to apply the undue-burden standard. *See Preterm-Cleveland v. McCloud*, --- F.3d ---, 2021 WL 1377279, at *8 (6th Cir. Apr. 13, 2021) (en banc); *EMW Women's Surgical Ctr. P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam). There is a substantial possibility

that this circuit split is only going to deepen, as evidenced by the fact that a now-vacated opinion of the Fifth Circuit agreed with the Seventh Circuit's assessment of *June Medical*. *See Whole Woman's Health v. Paxton*, 978 F.3d 896, 903–04 (5th Cir. 2020), *vacated by* 978 F.3d 974 (5th Cir. 2020). And the en banc court of the Fifth Circuit is likely to weigh in as well.

This circuit split creates uncertainty for States in crafting their public policy—uncertainly that only this Court can resolve. And, as Indiana's Petition explains, it should do so by clarifying that the Sixth and Eighth Circuits are correct.

CONCLUSION

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

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