In the

United States Court of Appeals

For the Seventh Circuit

No. 17-2428

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC.,

Plaintiff-Appellee,

v.

KRISTINA BOX, Commissioner,
Indiana State Department of Health, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:17-cv-01636-SEB-DML — **Sarah Evans Barker**, *Judge*.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
DECIDED MARCH 12, 2021

Before KANNE, ROVNER, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. This appeal returns to us on remand from the Supreme Court of the United States. In 2019, we affirmed the district court's grant of a preliminary injunction against enforcement of a new Indiana statutory restriction on minors' access to abortions. See *Planned*

Parenthood of Indiana & Kentucky, Inc. v. Adams, 258 F. Supp. 3d 929 (S.D. Ind. 2017), *aff'd*, 937 F.3d 973 (7th Cir. 2019), *reh'g denied*, 949 F.3d 997 (7th Cir. 2019). The State defendants petitioned for a writ of certiorari. The Supreme Court granted the petition, vacated our decision, and remanded for further consideration in light of *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), which struck down a Louisiana law regulating abortion providers, but without a single majority opinion.

We apply the predominant and most sound approach to the "narrowest ground" rule in *Marks v. United States*, 430 U.S. 188 (1977), for assessing the precedential force of Supreme Court decisions issued without a majority opinion. The opinions in *June Medical* show that constitutional standards for state regulations affecting a woman's right to choose to terminate a pregnancy are not stable, but they have not been changed, at least not yet, in a way that would change the outcome here.

The Chief Justice's concurring opinion in *June Medical* offered the narrowest basis for the judgment in that case, giving stare decisis effect to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), on the essentially identical facts in *June Medical*. The *Marks* rule does not, however, turn everything the concurrence said—including its stated reasons for disagreeing with portions of the plurality opinion—into binding precedent that effectively overruled *Whole Woman's Health*. That is not how *Marks* works. It does not allow dicta in a non-majority opinion to overrule an otherwise binding precedent. We applied those binding standards from *Whole Woman's Health* in our earlier decision, and that decision has not been overruled by a majority decision of the Supreme Court. We therefore again affirm the district court's preliminary injunction

barring enforcement of the challenged law pending full review in the district court.

I. *Factual and Procedural Background*

Given the lengthy opinions already issued in this case, we summarize the issues leading up to this point. Indiana's Senate Enrolled Act 404, enacted in 2017, included amendments to Indiana's judicial-bypass process. That process, required by *Bellotti v. Baird*, 443 U.S. 622 (1979), creates a narrow legal path for an unemancipated minor to obtain an abortion without parental consent. The minor must first find her way to a state trial court. She must then obtain a court order finding either that the abortion would be in her best interests or that she is sufficiently mature to make her own decision. Ind. Code § 16-34-2-4(e). Senate Enrolled Act 404 amended the process in several ways, some of which the district court preliminarily enjoined. Only one amendment is at issue in this appeal: a new requirement that a minor's parents be notified that she is seeking an abortion through the bypass procedure—unless the judge finds that such parental notice, as distinct from requiring parental consent, is not in the minor's best interests. Ind. Code § 16-34-2-4(d). Maturity does not affect the new notice requirement.

To support its motion for preliminary injunction, plaintiff offered evidence on the likely effects of the new notice requirement. The evidence took the form of affidavits from seven witnesses familiar with the actual workings of the judicial bypass process and the situations of and stresses upon minors seeking abortions or advice on abortions. The State defendants chose not to offer evidence at that stage of the case. They also did not challenge the reliability or credibility of plaintiff's evidence.

The district court issued detailed findings of fact and conclusions of law finding that the new notice requirement was likely to impose an undue burden on the right to obtain an abortion for a significant fraction of minors for whom the requirement would be relevant. 258 F. Supp. 3d 929, 939–40. We affirmed, emphasizing the lopsided evidence showing both the likely burden and the absence of appreciable benefit from the new notice requirement. 937 F.3d at 989–90. We relied heavily on *Whole Woman's Health*, guided by its application of the "undue burden" standard adopted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). We also relied on *Whole Woman's Health*'s approval of a pre-enforcement injunction against challenged laws likely to impose an undue burden. 937 F.3d at 979–80.

In *Whole Woman's Health*, the Supreme Court affirmed a district court decision striking down a so-called admitting privileges requirement. The challenged Texas law required a physician who performed an abortion to have admitting privileges at a hospital within thirty miles of the abortion site. The Supreme Court based its decision on detailed factual findings showing both the burdens imposed by that requirement and the lack of accompanying benefits. 136 S. Ct. at 2310–14.

In *June Medical* in 2020, the Court held unconstitutional a Louisiana admitting-privileges law that tracked nearly word-for-word the Texas law struck down in *Whole Woman's Health*. A plurality of four Justices examined the detailed evidence and findings on the likely burdens and benefits of the Louisiana admitting privileges law, and, following the reasoning and holding of *Whole Woman's Health*, the plurality voted to strike down the new law. 140 S. Ct. at 2122–32 (plurality opinion of Breyer, J.). Four Justices dissented in four opinions.

Chief Justice Roberts also voted to strike down the Louisiana law, concurring in the judgment in a separate opinion that is the focus here on remand. He had dissented in *Whole Woman's Health*. He wrote that he still disagreed with that decision, but he explained that principles of stare decisis called for the Court to adhere to that earlier result on the essentially identical facts. 140 S. Ct. at 2134, 2139 (Roberts, C.J., concurring in judgment). He then explained that he believed *Whole Woman's Health* had erred by balancing the challenged law's benefits against its burdens in evaluating its constitutionality. *Id.* at 2135–36. Both the plurality and the Chief Justice agreed, however, that enforcement of the Louisiana law was properly enjoined before it took effect.

Shortly after issuing *June Medical*, the Court issued its order in this case granting the State defendants' petition for a writ of certiorari, vacating our decision, and remanding for further consideration in light of *June Medical*. See *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 141 S. Ct. 187, 188 (2020). Such a "GVR" order calls for further thought but does not necessarily imply that the lower court's previous result should be changed. *Klikno v. United States*, 928 F.3d 539, 544 (7th Cir. 2019). Pursuant to Circuit Rule 54, the parties submitted their views on the remand.[1]

[1] The State defendants at the same time petitioned for immediate en banc consideration of this case. No member of this court has requested an answer to or a vote on that petition. This decision on remand is being issued by the panel that heard this appeal originally. The pending petition is denied.

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