No. 17-2428

In the 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, in his official capacity, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana
Case No. 17-cv-01636-SEB-DML

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, LOUISIANA, OHIO, OKLAHOMA, TEXAS, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici curiae, the States of Arizona, Arkansas, Louisiana, Ohio, Oklahoma, Texas, West Virginia, and Wisconsin, file this brief in support of Defendant-Appellant pursuant to Federal Rule of Appellate Procedure 29(a).

Thirty-seven States require some parental involvement in a minor's decision to have an abortion, and thirty-six of those States include a judicial bypass procedure to circumvent parental input. Guttmacher Institute, "*Parental Involvement in Minors' Abortions*," (last updated August 1, 2017): https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

The *amici* States seek to preserve the ability of the political branches of government to account for minors' liberty interests while advancing important state interests. In particular, every State has an interest in protecting children by encouraging parental involvement in one of the most serious decisions a child may make. Indiana's recent enactment strikes a permissible balance in accommodating privacy rights, parental rights, and the State's interests. Should the views of Indiana citizens change over time, future lawmakers should retain the

ability to revise the current rule. This Court, however, should decline the invitation to wade further into a State's reasonable policymaking for the simple reason that the policy in question concerns abortion.

ARGUMENT

For decades the Supreme Court has treated parental consent and parental notification laws differently. The district court in this case failed to recognize this distinction. That failure permeates the decision below and cries out for reversal.

The Supreme Court's 1973 identification of abortion as a right falling within the zone of constitutionally protected privacy interests limited the ability of state legislatures to regulate in this area. *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring). But the mere fact that a state law concerns abortion does not doom it to unconstitutionality. Within the bounds of the Supreme Court's jurisprudential guidance, state lawmakers retain significant authority in furthering States' interests in protecting their citizens—especially children—and ensuring parents' right to rear and inform their minor children in matters of physical and psychological importance.

In 2017, Indiana lawmakers amended the State's parental consent statute to require that one parent of a child seeking an abortion be notified in a limited set of circumstances. Specifically, when a judge determines that a child is sufficiently mature to choose an abortion, but does not find that it is in that child's best interest to keep the medical procedure secret from her parents, then one parent must be notified. Stated differently, the law sets forth two related "best interests" inquiries: first, to bypass the consent requirement, an abortion must be in the minor's best interest (or she must be sufficiently mature to make the decision independently), IND. CODE § 16-34-2-4(e) (eff. July 1, 2017; enjoined), and, second, to bypass the notification requirement, it must be in the minor's best interest to obtain the abortion without parental notification, IND. CODE. § 16-34-2-4(d),(e) (eff. July 1, 2017, enjoined). While a minor deemed sufficiently mature by a court can bypass the consent requirement, the amended law does not include a "maturity bypass" for the *notification* requirement.

The district court improperly enjoined enforcement of Indiana's amended law by expanding Supreme Court precedent from the parental consent context into the area of mere notification. This Court should

reject this further encroachment on States' role as beyond the scope of Supreme Court precedent and needlessly burdensome to parents' fundamental rights.

I. Indiana's Law Appropriately Accounts for Both a Child's Privacy Interests and Parents' Fundamental Rights to Raise and Protect Their Children

States have an interest in protecting the health and safety of their citizens. States also have an interest in advancing the fundamental rights of parents to raise and protect their children. These interests are particularly acute in the case of vulnerable citizens, including minor children. *Ginsberg v. State of N.Y.*, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.") (internal quotation marks and citation omitted); *see also New York v. Ferber*, 458 U.S. 747, 756 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.") (internal quotation marks and citation omitted)

States thus have a strong interest in encouraging parental involvement in their children's decision to have an abortion. *See H.L. v.*

Matheson, 450 U.S. 398, 411 (1981) ("The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences."). Because the State's interest is not *only* about health and safety, but also about advancing parents' fundamental rights in their child's upbringing, the balancing test of *Whole Women's Health v. Hellerstadt*, 136 S.Ct. 2292 (2016) is inapplicable.[1] Rather, the court should simply ask whether the State has a legitimate interest supporting its law and, if it does, whether the regulation causes a substantial obstacle to women's right to choose a pre-viability abortion in a substantial faction of cases. *See Gonzales v. Carhart*, 550 U.S. 124, 163, (2007).

Even if the *Hellerstadt* balancing test were applicable, Indiana's law would pass constitutional muster. Against the State's strong interests identified above, a court should "weigh" the minor's interest in maintaining secrecy in the sad circumstance in which a parent's

[1] The *Hellerstadt* balancing test addressed the medical benefits and medical burdens of a law. *See Hellerstadt*, 136 S. Ct. at 2299. It was comparing apples to apples. Use of that test here would make no sense because the court cannot compare the benefit of protecting a parent's fundamental right to participate in his or her child's upbringing with a woman's right to choose a pre-viability abortion.

awareness of an abortion threatens to harm the minor. Unless the law's burdens *substantially outweigh* its benefits, the law must be upheld. *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017) (interpreting and applying the *Hellerstadt* test). Indiana has permissibly balanced these interests in a manner consistent with Supreme Court precedent.

The Supreme Court has never dictated that parental notification statutes must include a judicial bypass based on maturity rather than the best interests of the minor. Indeed, the Court has not addressed whether any specific bypass procedures are required for parental notification statutes. *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990); *see also Zbaraz v. Madigan*, 572 F.3d 370, 379-80 (7th Cir. 2009); Appellants' Br. at 16-19.

In fact, the Supreme Court's only commentary on judicial bypass of parental involvement concerns parental *consent* rather than parental *notification*. This distinction is both controlling and logical: the parents of mature but unemancipated minors have a fundamental right, indeed, an obligation to care for their child during and after the process of

deciding whether to have an abortion. Moreover, notification laws do not give parents the same veto power that consent laws create. Logically, then, the bypasses required for the more potent form of parental involvement are not required for the weaker medicine of one-parent notification. The lower court's rejection of this distinction demands reversal.

A. Parents Have a Fundamental Right to Raise Their Children, and States Have an Interest in Protecting that Right.

Parents' interest in the "care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court of the United States. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Matheson*, 450 U.S. at 410 ("constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society") (internal quotation marks and citation omitted).

The Supreme Court in *Matheson* confirmed the various interests at stake in a parental notification statute. Concerning parents, the Court observed that the notification statute "plainly serves the

important considerations of family integrity and protecting adolescents which we identified in *Bellotti II*." 450 U.S. at 411 (citing *Bellotti v. Baird*, 443 U.S. 622, 634-39 (1979) (hereinafter *Bellotti II*)). The *Matheson* Court also explicitly recognized States' "legitimate governmental objective of protecting potential life." *Matheson*, 450 U.S. at 413. Due to that interest, States are not required to make it as easy as possible for anyone, much less a minor, to access abortion services. *Id.* "That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute." *Id.* Moreover, the State's interest extends to protecting the rights of parents: "The State, aside from the interest it has in encouraging childbirth rather than abortion, has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible." *Matheson* at 419 (Powell, J., concurring) (citations omitted).

In contrast, parental consent laws that have failed at the Supreme Court for lack of adequate judicial bypass provisions involve a completely different question. *Bellotti II* concerned a consent law without bypasses for either maturity or the minor's best interests. 443 U.S. at 643-44. That approach to consent, the Court reasoned, gave "a

third party [*i.e.*, the parent] an absolute, and possibly arbitrary, veto" over a minor's decision to obtain an abortion. *Id.* at 643 (internal quotation marks and citation omitted).

Indiana's notification requirement implicates rights much closer to *Matheson* than the "veto" found problematic in *Bellotti II*. At the most basic level, Indiana's law requires notification, not consent. Additionally, it allows a judicial bypass for the best interests of the minor, something missing in *Bellotti II*. It also allows notification of only one parent, a further example of States' ability to adapt legislation in search of the optimal balancing of parties' interests.

As the Supreme Court has long held, "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 326 (2006). The rationale for States "unquestionably" retaining this right is "their 'strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'" *Id.* (alteration in original) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444-45 (1990)); *see also Miller v. Alabama*, 567 U.S. 460, 476

(2012) (stating that youth "is a time of immaturity, irresponsibility, impetuousness, and recklessness") (internal quotation marks and brackets omitted). Both *Ayotte* and *Hodgson* recognize that minors, by definition, have not matured to adulthood. States and parents are therefore responsible—and necessarily empowered—to look out for minors' wellbeing. While this fact might be insufficient to require a "best interests" showing to bypass parental consent, it suffices to preserve States' "right to require parental involvement" in some form.

B. Children Obtaining Abortions Risk Significant Negative Impacts, and States Have an Interest in Protecting Against Those Effects.

Choosing to end a pregnancy through abortion involves a "difficult and painful moral decision, which some women come to regret." *Gonzales*, 550 U.S. at 128-29 (citation omitted). Indeed, in *McCorvey v. Hill* the Fifth Circuit received "about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision." 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring) ("Studies . . . suggest that women may be affected emotionally and physically for years afterward

and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions.").

The potential negative impacts of this difficult decision on a pregnant minor are even more acute. *Id.* at 851 n. 3 (citing numerous studies, including W. Franz & D. Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27(105) Adolescence 161-72 (1992); *see also* D.M. Fergusson, et al., *Abortion in young women and subsequent mental health*, 47:1 J. Child Psychol. & Psychiatry 16 (2006) (finding as many as 50% of post-abortion minors experience suicidal ideation or in fact commit suicide); D.C. Reardon & P.K. Coleman, *Relative Treatment Rates for Sleep Disorders and Sleep Disturbances Following Abortion and Childbirth: A Prospective Record-Based Study*, 29 J. Sleep 105-06 (2006) (post-abortion adolescents were three times more likely to experience trouble sleeping).

Faced with aftereffects as serious as a 50% chance of a minor becoming suicidal, States have a strong interest in ensuring that parents are aware an abortion has occurred. Parents who are unaware cannot provide additional support or be on guard for signs of depression. Because States have a recognized and important interest in protecting

the lives and health of their residents, the requirement of parental notification with only a "best interests" exception fits comfortably within the space for parental involvement marked by *Hodgson*, *Ayotte*, and *Matheson*.

In addition to the documented psychological risks to adolescents, abortion is a medical procedure that carries with it physical health risks, as virtually all medical procedures do. Shadigian, Elizabeth, "Reviewing the Medical Evidence: Short and Long-Term Physical Consequences of Induced Abortion," testimony before the South Dakota Task Force to Study Abortion, Pierre, South Dakota, Sept. 21, 2005.[2] Under Indiana law, a dependent minor cannot consent to health care services. IND. CODE § 16-36-1-3(a). There is no maturity exception to this general rule. The dependent, mature minor who chooses an abortion and subsequently requires health care must have parental consent for later care. Preventing a parent from being sufficiently informed so as to properly seek and consent to necessary post-abortion health care for her child is inconsistent with the State's interest in

[2] Avail. at: http://docplayer.net/17189476-South-dakota-task-force-to-study-abortion-pierre-south-dakota-september-21-2005.html (visited 9/1/17).

promoting public health and safety and infringes on the parent's fundamental rights.

Parental notification of a child's abortion furthers the State's interest in the health and welfare of its citizens by ensuring parents are equipped to properly identify and resolve subsequent physical, emotional, and psychological difficulties.

C. The Best Interests Bypass Appropriately Protects the Child's Privacy Interests.

The district court found that Indiana's notification requirement poses an undue burden as either a practical obstruction to the minor's access to abortion or by causing an increased risk of abuse by a parent notified of the abortion. [Doc 26 at 29]. The district court's finding was premised on a series of hypotheticals and the assumption that minors who credibly face potential abuse will be either unable to meet the best interests standard or unwilling to attempt it on the theory that a failed attempt will result in notification. [Doc. 26 at 29-31]. These inferences misunderstand the potency of the best interests bypass.

Plaintiff submitted affidavits from Katherine Flood, a volunteer attorney who has assisted three minors through the judicial bypass process, and Kathryn Smith, the volunteer "Indiana bypass coordinator"

who has had contact with about 60 minors regarding the process. [Exs. 3, 5 to Doc. 14]. Neither Flood nor Smith provided any testimony to establish how often, if ever, Indiana courts reject minors' best interests arguments. Indeed, neither affiant provided a concrete example of a minor who satisfied "maturity" but failed (or would fail) to meet the best interests standard, and neither purported to be an expert armed with statistical evidence on how minors might behave in response to a single bypass option rather than two bypasses, both of which require appearing in court. Their silence on any actual evidence of deterrence speaks volumes. The district court also relied on anecdotal evidence provided in Dr. Suzanne Pinto's Declaration regarding minors she encountered in Colorado and their fears of physical abuse resulting from parental notification. [Doc. 26 at 30; Ex. 6 to Doc. 14]. Notably, Dr. Pinto's anecdotes do not contemplate the impact of Indiana's best interests bypass. Ultimately, Plaintiff's declarations and the district court merely speculate that, hypothetically, minors will fear potential failure under the best interests bypass—but somehow not under the maturity bypass—and thus be deterred from exercising this option.

This assumption ignores Supreme Court guidance for evaluating best interests in the notification context. The Court has suggested a lenient standard for finding notification to be contrary to a minor's best interests: "if a judge finds . . . that notifying her parents is both opposed by the young woman and would likely cause her to be deterred from pursuing the [abortion], then parental notification is assuredly not in her best interest." *Lambert*, 520 U.S. at 301 n. * (Stevens, J., concurring). This standard is remarkably simple. It does not require a showing of physical or psychological threat in order to find bypass to be in the minor's best interest. Rather, it demands only a "likely" deterrence from obtaining the abortion. Applying this guidance, the deterrence described in Plaintiff's affidavits is itself sufficient to trigger judicial bypass. In fact, there is no reason to think that the availability of such an easy option would be less appealing than proving maturity—at the very least, there is no evidence in the record to that effect.

Properly understood, Indiana's inclusion of the best interests bypass addresses all of the concerns that the district court raised. Plaintiff presented no evidence to support a conclusion that minors fearful of harm resulting from parental notification nonetheless face a

likelihood of failure in pursuing a notification bypass. Absent such evidence, and given that the relevant evaluation must include consideration of the same concerns that Plaintiff and the district court raised (including the child's fear of emotional or physical trauma or abuse), there is no justification for finding the best interests standard constitutionally insufficient.

The best interests standard also respects the State's "right to require parental involvement" in appropriate cases. *Ayotte*, 546 U.S. at 326. Even in cases of a "mature" minor, the parent-child relationship "enhance[s] the probability that a pregnant young woman exercise[s] as wisely as possible her right to make the abortion decision." *Matheson*, 405 U.S. at 424 (Stevens, J., concurring) (noting that "[t]he possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her" does not weaken the legitimacy of the State's interest). Because parents and the State have an interest in unemancipated minors' welfare, the best interests bypass is an appropriate and wholly adequate mechanism for identifying the cases in which notification would be unconstitutional.

II. In Any Event, Plaintiff's Evidence Falls Short of Justifying the Extreme Remedy of Facial Unconstitutionality.

The work of enacting legislation is difficult and reflects the will of voters acting through their elected representatives. As a result, States have an interest in preserving as much of their duly-enacted legislation as possible. The district court's approach to facial unconstitutionality upsets this balance in favor of judicial intervention. It does so in reliance on precedent that is out-of-date and in contravention of this Court's strong inclination against facial invalidity.

To prevail on a claim of facial unconstitutionality, a party challenging a law generally "must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This "heavy burden" requires upholding a law even if the challengers identify one or more applications that would raise constitutional concerns. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987). As a result, a facial challenge "is, of course, the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745.

The demanding standard for facial challenges makes sense considering the upheaval a finding of facial unconstitutionality works among the branches of government. When a court pronounces a duly-enacted law facially unconstitutional, its negation of the legislative process is total. Thus, the Supreme Court has explained that it disfavors facial challenges because they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *see also id.* at 450 ("Facial challenges also run contrary to the fundamental principle of judicial restraint . . . ."). *Salerno*, *Washington State Grange*, and the hundreds of cases following them reflect the judicial humility to invalidate only those applications necessary to obtain compliance with the Constitution while leaving in place as much of a legislature's work as possible.

In the present case, the district court too readily dispatched with an entire law. It did so in reliance on this Court's 2002 statement in *A Woman's Choice—East Side Women's Clinic v. Newman*, that the abortion context calls for a special rule, rejecting the *Salerno* standard

for facial invalidity. [Doc. 26 at 13-14] (citing *Newman*, 305 F.3d 684, 687 (7th Cir. 2002), ("Given the incompatibility between *Salerno*'s language and *Stenberg*'s holding, it is the language of *Salerno* that must give way.")). The *Newman* court did not have the benefit of the Supreme Court's subsequent jurisprudence, which reversed *Stenberg* and confirmed that the Court has not endorsed a special rule in abortion cases. *Gonzales*, 550 U.S at 167. To the contrary, *Gonzalez* noted that the standard in abortion cases is an open question, but that it lies closer to *Salerno* than the most generous standard for facial challenges, which is reserved for First Amendment claims. *Id.* at 167-68 (rejecting "latitude" of First Amendment context claims and declining to resolve the debate as unnecessary given the plaintiffs could not prevail even under the more generous test). Thus, as recently as 2007, a majority of the Court continued to view as open the question whether *Salerno* should apply to facial challenges to abortion-related laws.[3]

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[3] The Court's 2006 ruling in *Ayotte* more strongly indicates a reticence to entertain facial challenges, even in the abortion context. 546 U.S. at 328-29 ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while

In addressing the open question of which standard should govern this facial challenge, the district court should have looked to more recent precedent from this Court. Unlike some of its sister circuits, this Court has examined the logic of facial challenges—and the remedy they implicate—to conclude that *Salerno*'s no-set-of-circumstances test is the only appropriate standard. In 2011, this Court explained, that "[t]he remedy is necessarily directed at the statute itself and *must* be injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied to *anyone*." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011); *see also United States v. Skoien*, 614 F.3d 638, 345 (7th Cir. 2010) (en banc) (citing *Salerno*)). The articulation in *Ezell* explains why the party leveling "the most difficult challenge to mount successfully," *Salerno*, 481 U.S. at 745, must show that the contested law is unconstitutional in every case.

There is no logical reason for creating a different test simply because the statute in question concerns abortion. The *Salerno* test controls even in cases concerning express constitutional rights: the

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leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.") (citations omitted).

Court in *Salerno* addressed pretrial detention concerns, and *Ezell* involved a challenge based on the plaintiffs' Second Amendment rights. *Ezell*, 651 F.3d at 690; *see also GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012) (applying *Salerno* in facial challenge to state law regulating possession of weapons in places of worship, and describing the right to bear arms as "fundamental"). The only context providing for a different rule occurs in First Amendment vagueness challenges, where the very nature of the challenge is unique: vagueness infests the law in its entirety. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015) ("It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all but a tautology: If we hold a statute to be vague, it is vague in all its applications."). Neither the district court nor Plaintiff provides any reasoned justification for treating facial challenges to abortion statutes differently from other claims of facial unconstitutionality.

Plaintiff did not attempt to meet the *Salerno* standard—and indeed cannot. Further, even under the more generous standard the district court applied, Plaintiff did not actually present evidence of unconstitutionality in "a large fraction of the cases in which [the

statute] is relevant." *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992); *see supra* Part I. Rather the evidence presented is nothing more than hypothetical speculation that minors seeking abortions might fear pursuing the best interests bypass under Indiana's law but would somehow react differently if they could appear before the same courts and make an argument based on maturity. *See* Ex. 3 to Doc. 14, Smith Decl. at ¶¶ 18-20. This reed is too thin to support a claim that the entire legislative process must be nullified without any better evidence.

In bringing a facial challenge, Plaintiff seeks to invalidate on constitutional grounds all applications of Indiana's law; it is only logical to require a showing that the law is actually unconstitutional in all of its applications.

CONCLUSION

The decision of the district court should be reversed.

September 12, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on September 12, 2017. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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