

TWO-STEPPING AROUND A MINOR'S CONSTITUTIONAL RIGHT TO ABORTION

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A woman's constitutional right to abortion was first generally established in the U.S. Supreme Court decision in Roe v. Wade, and a female minor has the same right to abortion. In the majority of states, however, pregnant young women are required to either notify their parents or to get their parents' consent before obtaining a safe, legal abortion. These parental involvement laws do not infringe on a minor's constitutional right to abortion if a proper "judicial bypass" proceeding is available. But in Texas, the recently amended judicial bypass law imposes additional extensive—possibly unconstitutional—restrictions on a pregnant minor who seeks a judicial bypass. In step one, the Texas legislature amended the judicial bypass statutes, effective January 2016, that add onerous obstacles to a minor's constitutional right to abortion and compromise the minor's anonymity during the judicial bypass proceeding. In step two, the Supreme Court of Texas issued judicial bypass rules that establish a timing barrier to a pregnant minor accessing an abortion; now a minor's application is automatically denied when a judge fails to hold a hearing or refuses to rule on a minor's application within the five-day, statutory deadline. The result is that Texas is "two-stepping" around a minor's constitutional right to abortion as the amended judicial bypass law likely fails to meet the requirements of expediency and anonymity set forth in U.S. Supreme Court precedent. This Article addresses the judicial bypass procedure and explores the potential constitutional violations of the Texas judicial bypass law. It also provides general recommendations for all states to consider when reexamining their judicial bypass laws, noting that they should not take Texas's lead by two-stepping around a minor's constitutional right to abortion.

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INTRODUCTION

“Nicole” called the judicial bypass hotline in Texas near the end of the volunteer’s shift.¹ The volunteer vividly remembers “how well

¹ Emily Rooke-Ley, *Hopelessness and Fear of Family: Meet Nicole*, JANE’S DUE PROCESS (Aug. 27, 2015), <http://janesdueprocess.org/meet-nicole> [hereinafter JANE’S DUE PROCESS]. Jane’s Due Process is a non-profit organization dedicated to ensuring legal representation for pregnant minors in the State of Texas. JANE’S DUE PROCESS, <https://janesdueprocess.org> (last visited Mar. 24, 2016). In 2014, Jane’s Due Process fielded approximately 1000 phone calls from teens in Texas who sought information about their rights and pregnancy options. JANE’S DUE PROCESS, 2014 IMPACT REPORT 3 (2014), <http://janesdueprocess.org/wp-content/uploads/2015/04/2014-Impact-Report1.pdf> (reporting that thirty-nine percent of the judicial bypass clients did not live with either a parent or legal guardian, as their parents were incarcerated, deceased, deported, missing, or living abroad; sixteen percent had been pregnant before; and eleven percent were parenting one or more children already). In addition, in 2014, Jane’s Due Process screened 281 pregnant minors for judicial bypass, with the large majority of pregnant teens being either sixteen or seventeen years old. *Id.* And other states have similar organizations to assist pregnant minors who seek a judicial bypass. *See, e.g.*, ILL. JUD. BYPASS COORDINATION PROJECT, <http://ilbypasscoordinationproject.org> (last visited Apr. 7, 2016) (explaining that the Illinois Judicial Bypass Coordination Project has trained lawyers around the state to handle judicial bypass cases).

spoken and scared” Nicole sounded as she softly whispered into the phone.² In a few short sentences, she explained that she was only seventeen years old and approximately six weeks pregnant.³ She also explained that her mother would beat her if she found out about the pregnancy.⁴ When the volunteer asked Nicole if she had ever talked to her mom about sex or birth control, she explained that she came from a “strict Asian family.”⁵ She even had trouble opening up to her mom about making a B in school without getting punished or hit.⁶ When the volunteer asked her what she thought would happen if her mother found out about her pregnancy, the young woman started to cry.⁷ “She was convinced that her mother would disown her” because of the pregnancy and that she would not have the means to even finish high school, much less go to college.⁸

Despite teen pregnancy in the United States being at a historic low,⁹ a large number of minors, like Nicole, become pregnant.¹⁰ And in the United States, approximately eighty-two percent of teen pregnancies are unintended.¹¹ In a perfect world, a pregnant minor would seek the

² JANE’S DUE PROCESS, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Rebecca Wind, *U.S. Teen Pregnancy, Birth and Abortion Rates Reach Historic Lows*, GUTTMACHER INST. (May 5, 2014), <https://www.guttmacher.org/news-release/2014/us-teen-pregnancy-birth-and-abortion-rates-reach-historic-lows>.

¹⁰ Heather D. Boonstra, *What Is Behind the Declines in Teen Pregnancy Rates?*, GUTTMACHER INST. (Sept. 3, 2014), <https://www.guttmacher.org/about/gpr/2014/09/what-behind-declines-teen-pregnancy-rates> (reporting that in 2010, 614,000 U.S. teens became pregnant); *Fast Facts: Teen Pregnancy in the United States*, NAT’L CAMPAIGN (Apr. 2016), <https://thenationalcampaign.org/resource/fast-facts-teen-pregnancy-united-states> (reporting that in 2011, one in four young women between age fifteen and nineteen will get pregnant at least once before reaching age twenty, and that of the teen pregnancies among young women fifteen to nineteen, sixty percent resulted in a live birth and twenty-six percent resulted in an abortion). In Texas, in 2011, the number of pregnancies for teens between fifteen and nineteen was 59,570, ranking Texas forty-five out of fifty states, with a rank of fifty being the highest, for teen pregnancy rates. *Texas Data*, NAT’L CAMPAIGN, <https://thenationalcampaign.org/data/state/texas> (last visited Mar. 6, 2017).

¹¹ Boonstra, *supra* note 10; Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, 27 (1998), <https://www.guttmacher.org/journals/psrh/1998/01/unintended-pregnancy-united-states>; *Laws Restricting Teenagers’ Access to Abortion*, ACLU, <https://www.aclu.org/other/laws-restricting-teenagers-access-abortion> (last visited Mar. 11, 2017) (reporting that at one point eighty-two percent of pregnancies to young women under the age of eighteen were unintended). Of course, unintended teen pregnancy is most commonly experienced by the most disadvantaged young women, as one study indicates that poor women are more than five times more likely than higher-income-women to have an unplanned

advice and counsel of her parents in the event she found out she was pregnant; in fact, the majority of young women who are pregnant and seek abortion care voluntarily involve their parents in some way.¹² But when a minor chooses not to involve a parent in her decision to seek an abortion, she typically has very compelling reasons, such as having absent parents,¹³ the fear of being forced to leave home, the fear of physical violence, or the fear of being forced to carry an unwanted pregnancy to term.¹⁴

pregnancy. See Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities*, 2006, 84 *CONTRACEPTION* 478 (2011).

¹² AMANDA DENNIS ET AL., *THE IMPACT OF LAWS REQUIRING PARENTAL INVOLVEMENT FOR ABORTION: A LITERATURE REVIEW* 3 (2009), https://www.guttmacher.org/sites/default/files/report_pdf/parentalinvolvementlaws.pdf; see also Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 *FAM. PLAN. PERSP.* 196, 196 (1992) (reporting that of more than 1500 unmarried minors having an abortion, sixty-one percent said that one or both of their parents knew about the abortion).

¹³ A report by the National Partnership of Women & Families revealed “that a significant population of minors cannot consult their parents for logistical or personal reasons”; as a result, the judicial bypass procedure is not an option for many pregnant minors. Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 *HARV. J.L. & GENDER* 175, 177 (2011) (referring to NAT'L P'SHIP FOR WOMEN & FAMILIES, *BYPASSING JUSTICE: PREGNANT MINORS AND PARENTAL INVOLVEMENT LAWS* 6 (2010)). And, according to one study, almost one-third of the females in foster care have been pregnant by the time they turn seventeen years old, and by nineteen, nearly half will have been pregnant. LOIS THIESSEN LOVE ET AL., *THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, FOSTERING HOPE: PREVENTING TEEN PREGNANCY AMONG YOUTH IN FOSTER CARE* 6–7 (2005), https://thenationalcampaign.org/sites/default/files/resource-primary-download/FosteringHope_FINAL.pdf; Heather D. Boonstra, *Teen Pregnancy Among Young Women in Foster Care: A Primer*, 14 *GUTTMACHER POL'Y REV.*, Spring 2011, at 8, 8 (finding that young women in foster care are more than twice as likely to become pregnant by age nineteen); Katherine Moore, Note, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 *COLUM. J. GENDER & L.* 29 (2012) (arguing that existing laws leave young women who are in foster care without appropriate assistance and resources). Furthermore, when other circumstances exist in which parents are unavailable or missing, such as when parents are immigrants who may not have the necessary identification to establish parentage, parental involvement laws “penalize adolescents who would consult their parents, but whose parents cannot or will not comply with the requirements established under notice or consent statutes.” Rebouché, *supra*, at 194–95 (footnote omitted).

¹⁴ One study found that thirty percent of pregnant teens who do not tell their parents about their abortions make that decision because they experienced family violence, fear violence, or fear being kicked out of their homes. Martin Donohoe, *Parental Notification and Consent Laws for Teen Abortions: Overview and 2006 Ballot Measures*, MEDSCAPE (Feb. 9, 2007), <http://www.medscape.com/viewarticle/549316>; Henshaw & Kost, *supra* note 12. In fact, “[m]ere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 889 (1992) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990)); see also *ADVOCATES FOR YOUTH, ABORTION AND PARENTAL INVOLVEMENT LAWS* 1 (2013) <http://www.advocatesforyouth.org/storage/advfy/documents/abortion%20and%20parental%20involvement%20laws.pdf> (explaining that nearly half of pregnant teens who have a history of

Thirty-seven states, however, have parental involvement laws that require an unemancipated, pregnant minor to either get her parents' consent to the abortion or to notify them of the decision to seek an abortion.¹⁵ These parental involvement laws do not infringe on a minor's constitutional rights if a "judicial bypass" proceeding is available and the proceeding complies with the constitutional standards set forth by the U.S. Supreme Court in *Bellotti v. Baird*.¹⁶ This procedure is called a judicial bypass proceeding "because it provides an 'end run', or bypass, around parental consent or notice."¹⁷ In essence, a judicial bypass is the substitution of a court's permission for the requisite parental or guardian involvement.

But in Texas, a recently implemented judicial bypass law imposes extensive—possibly unconstitutional—restrictions on minors seeking a judicial bypass. The result is that Texas is "two-stepping" around a minor's right to abortion. Step one resulted in 2015, when the Texas legislature drastically amended the judicial bypass statutes by adding onerous obstacles to a minor's constitutional right to abortion.¹⁸ Step two came from the Supreme Court of Texas when it issued new judicial bypass rules that establish additional barriers to minors accessing a legal abortion.¹⁹ The legislation as well as the rules that the court

abuse report being assaulted during their pregnancy) (citing AM. PSYCHOLOGICAL ASS'N, PARENTAL CONSENT LAWS FOR ADOLESCENT REPRODUCTIVE HEALTH CARE: WHAT DOES THE PSYCHOLOGICAL RESEARCH SAY? (Feb. 2000)).

¹⁵ See *infra* Section I.B; see also Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 102–03 (2013) ("The real purpose of parental consent and notification statutes is not to promote informed decisionmaking by vulnerable minors, but to discourage abortion altogether—part of a larger strategy to end abortion.").

¹⁶ *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) (plurality opinion). In *Bellotti v. Baird (Bellotti I)*, the Court declined to rule on the merits of the statute. 428 U.S. 132 (1976). Instead, the Court held that the federal district court should have sought an interpretation of the statute from the Massachusetts Supreme Judicial Court. *Id.* at 146–47. Three years later, the Court held the statute unconstitutional. *Bellotti II*, 443 U.S. at 651. Furthermore, while *Bellotti II* is a plurality opinion, it has been endorsed by the full Court in various opinions, e.g., *Lambert v. Wicklund*, 520 U.S. 292, 294–95 (1997), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

¹⁷ Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L., POL'Y & FAM. 305, 306 (2004).

¹⁸ See Notice of and Consent to an Abortion for a Minor and Associated Requirements, ch. 436, sec. 5, § 33.003, 2015 Tex. Sess. Law. Serv. (West) (establishing new venue requirements, heightening the burden of proof, referring only to "confidential" proceedings, etc.); TEX. FAM. CODE ANN. § 33.003 (West, Westlaw through 2015 Reg. Sess.).

¹⁹ Order Amending the Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code at 72, No. 15-9246 (Dec. 29, 2015) [hereinafter *Judicial Bypass Rules*], <http://www.txcourts.gov/media/1225647/159246.pdf> (amending Rule 2.5(g)).

implemented (collectively referred to as the amended “judicial bypass law”) likely fail to meet the constitutional requirements of expediency and anonymity as established by U.S. Supreme Court precedent, and possibly amount to an absolute veto of a minor’s constitutional right to abortion.

In Part I, this Article provides comprehensive background information about a minor’s right to abortion, including the history of abortion jurisprudence, with a focus on a minor’s right to abortion, an overview of parental involvement laws across the nation, and the inherent problems with the standards in judicial bypass proceedings.²⁰ With this framework in place, Part II begins with a summary of the current anti-abortion sentiment in Texas and then shifts to focus on the new Texas judicial bypass law.²¹ After setting out the “two-step” process of implementing the new law—the legislature amending the statutory scheme and the Supreme Court of Texas implementing the new judicial bypass rules—the Article will explore the law’s potential constitutional violations. More specifically, the Article will examine the new Texas judicial bypass law in light of the “expeditious” and “anonymous” requirements set forth in *Bellotti*, concluding that the Texas law is two-stepping around a minor’s constitutional right to abortion.²² Finally, Part III provides general recommendations for all states to follow when reexamining their judicial bypass laws to ensure that the laws do not constitute a curtailment of a minor’s autonomy in reproductive matters or amount to an absolute, and possibly arbitrary, veto of her right to abortion.²³

I. BACKGROUND: MINOR’S RIGHT TO ABORTION

To fully comprehend the potential constitutional violations of the new Texas judicial bypass law, and for other states to avoid taking Texas’s lead on this issue, one should first understand the origins of a minor’s right to abortion, as well as parental involvement laws across the nation.

²⁰ See *infra* Part I.

²¹ See *infra* Part II.

²² See *infra* Part II.

²³ See *infra* Part III.

A. *Jurisprudence Regarding a Minor's Right to Abortion*

The origin of a minor's right to obtain an abortion traces back to 1973 when the U.S. Supreme Court, in *Roe v. Wade*, upheld a woman's decision-making rights in reproductive matters and extended a woman's right to privacy under the Fourteenth Amendment by giving her the right to choose an abortion.²⁴ The Court explained, however, that a woman's right to choose an abortion is not an absolute right, as the right must be balanced with a state's interest in the mother's health and the potential life.²⁵ After the decision in *Roe*, states began enacting parental notification and consent laws to limit the scope of a pregnant minor's right to choose an abortion.²⁶ These mandatory parental involvement laws brought a minor's right to an abortion into question; in a series of cases, the Supreme Court tried to clarify the potentially competing interests of the state and the rights of parents and the pregnant minor.²⁷

In *Planned Parenthood of Central Missouri v. Danforth*, the U.S. Supreme Court first examined a parental consent statute in the abortion context.²⁸ The parental consent statute at issue required an unmarried, minor female to obtain written consent from a parent or legal guardian before she could terminate her pregnancy.²⁹ The Court explained that while states have broader authority to regulate minors' activities more than those of adults, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."³⁰ Ultimately, the Court held that conditioning a young woman's access to an abortion on parental consent did not achieve the state's interests, and that any parental interest in the young woman's decision did not outweigh her right of privacy in the abortion context.³¹ In reaching its decision, the Court reasoned that a state "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient

²⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁵ *Id.* at 162–64.

²⁶ Rachel Weissmann, Note, *What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions*, 1999 ANN. SURV. AM. L. 129, 133–34.

²⁷ See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

²⁸ *Id.*

²⁹ *Id.* at 58. The statute did provide for an exception in the event the abortion was necessary to preserve the young woman's life. *Id.*

³⁰ *Id.* at 74–75.

³¹ *Id.* at 74.

to terminate the patient's pregnancy, regardless of the reason for withholding the consent."³²

Then, in *Bellotti*, the Supreme Court was faced with another parental consent issue: whether a parental consent statute allowing a pregnant minor to obtain a judicial waiver of parental consent was precluded by *Danforth*.³³ In *Bellotti*, a plurality of the Court examined a statute in which a pregnant minor could obtain a judicial waiver of parental consent if she could establish "good cause" and considered whether this was enough to avoid the "absolute, and possibly arbitrary, veto" under *Danforth*.³⁴ The Court held the state statute unconstitutional.³⁵ It explained that if a state wants to require a minor female to obtain parental consent before obtaining an abortion, the state must also provide "an alternative procedure whereby authorization for the abortion can be obtained."³⁶ As part of this alternative procedure (i.e., judicial bypass procedure), the judge would need to determine whether the pregnant minor is "mature" enough to bypass parental involvement or whether the lack of parental involvement would be in her best interests.³⁷ The Court, however, did not set forth any specific guidance as to what constitutes "maturity."³⁸

More specifically, in *Bellotti*, the Court set forth the requirements for a constitutional judicial bypass procedure, explaining as follows:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.³⁹

³² *Id.* The Court, however, did not determine whether an abortion restriction that fell short of an absolute veto of an immature minor's decision to terminate a pregnancy could be constitutional. *See generally id.*

³³ *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion).

³⁴ *Id.* at 643–44.

³⁵ *Id.* at 651 (explaining that the statute permitted judicial authorization for an abortion to be withheld from a sufficiently mature minor, and it required parental involvement in all instances without allowing the minor to receive an independent judicial determination).

³⁶ *Id.* at 643 (footnote omitted).

³⁷ *Id.* at 643–44.

³⁸ *Id.* at 643 n.23 (recognizing maturity is "difficult to define, let alone determine").

³⁹ *Id.* at 643–44 (footnote omitted).

Thus, the Court made clear that the presence of a judicial bypass procedure is essential for the protection of a minor's constitutionally protected right to an abortion.⁴⁰

Since the Court's ruling in *Bellotti*, the judicial bypass procedure and the maturity standard have been affirmed in several cases. For example, in *City of Akron v. Akron Center for Reproductive Health (Akron I)*, the Court found a statute that prohibited doctors from performing abortions on certain minors without parental consent unconstitutional because it did not provide for a judicial consent alternative.⁴¹ Further, in *Planned Parenthood Association of Kansas City v. Ashcroft*, the Court decided on the same day that another statute—requiring evidence of a minor's emotional development, intellect, and maturity to be considered by the juvenile court for the minor to obtain judicial consent—was constitutional.⁴²

Less than a decade later, in 1990, the Court heard another case involving Akron Center for Reproductive Health. This case, *Ohio v. Akron Center for Reproductive Health (Akron II)*, involved a statute that prohibited physicians from performing an abortion on an unemancipated minor unless the doctor provided notice to one of her parents at least twenty-four hours before the abortion.⁴³ The judicial bypass procedure was challenged on several grounds, including that it could cause delays of up to twenty-two days,⁴⁴ that it required the minor to prove her maturity or best interests by clear and convincing evidence,⁴⁵ that its pleading requirements were “a trap for the unwary,”⁴⁶ and that it failed to protect the minor's anonymity.⁴⁷ The Court upheld the constitutionality of the statute, concluding that each of the judicial bypass provisions satisfied the *Bellotti* test.⁴⁸ The Court also explained that a judicial bypass procedure that will suffice for a parental consent law will also suffice for a parental notification law.⁴⁹ Moreover, it stated that a judicial bypass provision may require clear and convincing evidence to show the pregnant minor's maturity or to show

⁴⁰ *Id.* at 647–48; see also *H.L. v. Matheson*, 450 U.S. 398 (1981) (holding a parental notification statute permissible).

⁴¹ *City of Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416 (1983), *overruled on other grounds by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁴² *Planned Parenthood Ass'n of Kan. City v. Ashcroft*, 462 U.S. 476 (1983).

⁴³ *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502 (1990).

⁴⁴ *Id.* at 513–14.

⁴⁵ *Id.* at 515–16.

⁴⁶ *Id.* at 516.

⁴⁷ *Id.* at 512–13.

⁴⁸ *Id.* at 517–18.

⁴⁹ *Id.* at 510–11.

that an abortion is in the minor's best interests.⁵⁰ Further, in upholding the Ohio judicial bypass law, the Court first introduced the undue burden standard that still applies to abortion law today.⁵¹

On the same day the Court decided *Akron II* in 1990, the Supreme Court decided *Hodgson v. Minnesota*.⁵² In *Hodgson*, the Court examined a two-parent notification standard that required a forty-eight hour waiting period after notifying both parents.⁵³ The statute required notification to both parents, regardless of whether they were the custodial or non-custodial parent and regardless of whether the parents were separated or divorced.⁵⁴ The Court held that the two-parent notification requirement was unconstitutional, but that the rest of the statute was constitutional because of the judicial bypass procedure.⁵⁵

In 1992, the Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, established that the undue burden standard applies in all abortion cases.⁵⁶ Under the undue burden standard, a state must merely demonstrate that the means employed are not a substantial obstacle to a minor's right to terminate a pregnancy.⁵⁷ In other words, an abortion regulation will be unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁵⁸

The Court, in *Lambert v. Wicklund*, again considered a minor's right to an abortion and examined the question of which limitations on

⁵⁰ *Id.* at 517–18 (reasoning that requiring the pregnant minor to bear the higher burden of proof may help ensure that trial court judges take more care in deciding judicial bypass petitions).

⁵¹ *Id.* at 519–20; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

⁵² *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

⁵³ *Id.* at 423–24.

⁵⁴ *Id.* at 424–25.

⁵⁵ *Id.* at 423; *see also* *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 912 (9th Cir. 2004) (holding that the definition of "medical emergency" was unconstitutionally narrow); *Planned Parenthood of N. New Eng. v. Heed*, 390 F.3d 53, 63–64 (1st Cir. 2004) (holding that a statute providing for a medical exception only when a physician determined that the abortion was necessary to save the pregnant minor's life placed physicians in a bind, by either gambling with their patients' lives or risking criminal and civil liability by not providing parental notice); *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 585 (Alaska 2007) (holding that a medical emergency exception to the parental notification law was overly narrow, which violated the state constitution).

⁵⁶ *Casey*, 505 U.S. at 876 (replacing the strict scrutiny standard established in *Roe v. Wade* with an "undue burden" test for analysis of pre-viability restrictions on abortion, and eliminating *Roe*'s trimester framework by extending the state's interest in protecting potential life and maternal health to apply throughout pregnancy).

⁵⁷ *Id.* at 877; *see also* Weissmann, *supra* note 26, at 139–40.

⁵⁸ *Casey*, 505 U.S. at 877.

a minor's right to an abortion are permissible.⁵⁹ Specifically, the Court examined whether a Montana statute authorizing the judicial bypass of the state's parental notification law, including a showing that notification is not in the pregnant minor's best interests, was constitutional.⁶⁰ In reversing the Ninth Circuit Court of Appeals, the Court held that a requirement that an immature minor show that parental notification is not in her best interests is equivalent to a requirement that she show that abortion is in her best interests.⁶¹ And in 2006, the Supreme Court, in *Ayotte v. Planned Parenthood of Northern New England*, considered a law in New Hampshire that required minor females to provide notice to at least one parent and then wait forty-eight hours before having an abortion.⁶² Even though the Court agreed that the law was inherently a problem, the Court remanded the case without further evaluating the standard to be used in determining whether a pregnant minor can seek an abortion.⁶³ Thus, while *Ayotte* reaffirmed that "[s]tates unquestionably have the right to require parental involvement,"⁶⁴ it also signaled the Court's hesitation to strike down an entire parental involvement statute.⁶⁵ Indeed, state laws that "do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."⁶⁶

Most recently, in 2016, the U.S. Supreme Court considered a Texas abortion law.⁶⁷ The historic case of *Whole Woman's Health v. Hellerstedt* centered on two abortion provisions in Texas: (1) requiring abortion clinics in the state to meet the same building standards as

⁵⁹ *Lambert v. Wicklund*, 520 U.S. 292 (1997); see also Marjorie C. Jones, Case Note, *Lambert v. Wicklund: The Supreme Court's Final Word on Parental Notification of Abortion Statutes?*, 1 J.L. & FAM. STUD. 77 (1999).

⁶⁰ *Lambert*, 520 U.S. at 294.

⁶¹ *Id.* at 295-97.

⁶² *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006).

⁶³ *Id.* at 331.

⁶⁴ *Id.* at 326.

⁶⁵ *Id.* at 331.

⁶⁶ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

⁶⁷ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In general, a woman in Texas must do the following before getting an abortion: receive state-directed counseling, undergo an ultrasound, wait twenty-four hours after the ultrasound before obtaining an abortion, and make multiple trips to a provider. See Kinsey Hasstedt, *The State of Sexual and Reproductive Health and Rights in the State of Texas: A Cautionary Tale*, 17 GUTTMACHER POL'Y REV., Spring 2014, at 14, 19. Further, a woman cannot seek an abortion if she is more than twenty weeks after fertilization, and she cannot use public insurance to cover the abortion. *Id.*

ambulatory surgical centers, and (2) requiring abortion providers to have admitting privileges at local hospitals.⁶⁸ The Center for Reproductive Rights, which represented the group of abortion providers challenging the law, argued that House Bill 2 was unconstitutional, created an undue burden for Texas women who live far from an abortion clinic, and did not promote the state's interest in improving health.⁶⁹ The U.S. Supreme Court agreed.⁷⁰ It held that the admitting-privileges requirement and the surgical-center requirement violate the Constitution because they place a substantial obstacle in the path of women seeking a previability abortion and because they constitute an undue burden on abortion access.⁷¹ In doing so, the Court clarified the undue burden test and reaffirmed a woman's constitutional right to access legal abortion.⁷²

B. *Parental Involvement Laws in the United States*

With the precedent set by the Supreme Court as to a minor's constitutional right to abortion, states generally have two types of parental involvement laws requiring parents to play a role in a young woman's decision to obtain an abortion: parental notice laws and parental consent laws.⁷³ Parental notice laws require actual or constructive notification to parents before a physician can perform an abortion, with limited exceptions in some states, such as medical emergency, incest, or physical abuse.⁷⁴ Such notice laws typically mandate that physicians give notice to a parent by special delivery, which requires the recipient to present a valid identification upon

⁶⁸ *Whole Woman's Health*, 136 S. Ct. at 2300; see also TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1) (West 2010) (requiring a physician performing an abortion to have admitting privileges at a hospital within thirty miles of the location where the abortion is performed), *declared unconstitutional by Whole Woman's Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016); HEALTH & SAFETY § 245.010(a) (requiring all abortion clinics to comply with standards set for ambulatory surgical centers), *declared unconstitutional by Whole Woman's Health*, 833 F.3d 565.

⁶⁹ See *Whole Woman's Health v. Cole*, 790 F.3d 563, 584–99 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health*, 136 S. Ct. 2292.

⁷⁰ See *Whole Woman's Health*, 136 S. Ct. 2292.

⁷¹ *Id.* at 2309–20.

⁷² *Id.*

⁷³ See generally *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (last updated Apr. 1, 2017) [hereinafter *Minors' Abortions*].

⁷⁴ See *id.*

delivery.⁷⁵ Further, the amount of notice required varies from state to state, with most states requiring notice of between twenty-four and forty-eight hours before the minor can obtain an abortion.⁷⁶ Parental consent laws, on the other hand, require a pregnant minor to obtain the consent of one or both parents before she can act on the decision to terminate the pregnancy.⁷⁷ And in some states, the parental consent documents must be notarized.⁷⁸

As of April 1, 2017, thirty-seven states have some type of parental involvement law that applies when a minor female seeks an abortion.⁷⁹ These laws consist of either a parental consent statute or a parental notification statute.⁸⁰ The consequences of violating parental involvement laws range from fines and civil liability to imprisonment.⁸¹

⁷⁵ Rebouché, *supra* note 13, at 180. But see DEL. CODE ANN. tit. 24, § 1783 (West 2012) (requiring actual notice without the option of constructive notice).

⁷⁶ See *Minors' Abortions*, *supra* note 73.

⁷⁷ *Id.*

⁷⁸ See, e.g., ARK. CODE ANN. §§ 20-16-803(3), -805 (West 2011) (requiring notarized consent); OKLA. STAT. ANN. tit. 63, § 1-740.2(B)(3)(a) (West 2016); VA. CODE ANN. § 16.1-241(W) (West 2013) (requiring notarized consent by an “authorized person” who is present with the minor and provides authorization “witnessed by the physician or an agent thereof”).

⁷⁹ See *Minors' Abortions*, *supra* note 73. In Delaware, minors sixteen or older do not need to notify a parent, and in South Carolina, minors who are seventeen years old are exempt from the state’s consent law. DEL. CODE ANN. tit. 24, §§ 1782(6), 1783 (West 2012); S.C. CODE ANN. §§ 44-41-10(m), -31 (2002).

⁸⁰ *Minors' Abortions*, *supra* note 73. Twenty-one states require that at least one parent consent to a young woman’s decision to terminate the pregnancy, with three states requiring consent of both parents. *Id.* (listing Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin). Eleven states require the pregnant female to notify at least one parent prior to the abortion, with one state requiring notification to both parents. *Id.* (listing Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Minnesota, New Hampshire, South Dakota, and West Virginia). But see *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1128 (Alaska 2016) (holding that the notification law violates the Alaska Constitution’s guarantee for equal protection). Five states require both notification of and consent from a parent before the young woman can have an abortion. *Minors' Abortions*, *supra* note 73 (listing Oklahoma, Texas, Utah, Virginia, and Wyoming). Eight states add the additional requirement that parental consent forms be notarized; Kansas, for example, requires that both parents give their consent in front of a notary public. *Id.* In addition, seven states allow a grandparent, other family member, or a doctor to give permission in lieu of a parent. *Id.* (listing Delaware, Illinois, Iowa, North Carolina, South Carolina, Virginia, and Wisconsin). Interestingly, in the states that do not have parental involvement laws, sixty-one percent of parents were aware of their daughter’s decision to abort. Donohoe, *supra* note 14. And research indicates that parental involvement laws may have little effect on reducing abortion rates among teens. See generally Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi*, 27 FAM. PLAN. PERSP. 120, 120–21 (1995). But see Theodore Joyce et al., *Changes in Abortions and Births and the Texas Parental Notification Law*, 354 NEW ENG. J. MED. 1031 (2006).

⁸¹ See, e.g., S.C. CODE ANN. § 44-41-31(C) (stating that making false representation in a consent affidavit may lead to imprisonment); TEX. FAM. CODE ANN. § 33.012(a) (West,

Some rationale for allowing these parental involvement laws is that “the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors,”⁸² and parents have the constitutional right “to direct the upbringing and education of children under their control.”⁸³ Despite this rationale, some scholars maintain that “there seems to be no principled reason why minors are held mature enough to make all pregnancy-related decisions without parental consent besides having an abortion.”⁸⁴

As the court explained in *Bellotti*, minors are treated differently for three main reasons: “[T]he 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.”⁸⁵ Admittedly, minors cannot enter into a binding contract,⁸⁶ purchase alcohol or tobacco,⁸⁷ marry without parental consent,⁸⁸ or consent to sex with an adult.⁸⁹ The U.S. Supreme Court has also held that punishing minors with death or with life sentences without the possibility of parole is unconstitutional, recognizing that minors who commit crimes lack the level of culpability of adults.⁹⁰ In addition, restrictions also exist on

Westlaw current through 2015 Reg. Sess.) (as added by 2015 Tex. Sess. Law Serv. ch. 436 (West)) (“A person who is found to have intentionally, knowingly, recklessly, or with gross negligence violated this chapter is liable to this state for a civil penalty of not less than \$2,500 and not more than \$10,000.”).

⁸² *Bellotti v. Baird*, 443 U.S. 622, 637 (1979) (plurality opinion); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (“[C]hildren are constitutionally different from adults.”).

⁸³ *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534–35 (1925); see also *Seymore*, *supra* note 15, at 126 (explaining the justification for laws that limit a minor’s right to consent to or refuse medical treatment (citing Alicia Ouellette, *Shaping Parental Authority over Children’s Bodies*, 85 IND. L.J. 955, 956–57 (2010))).

⁸⁴ Paul Danielson, Note, *Judicial Recusal and a Minor’s Right to an Abortion*, 2 NW. J.L. & SOC. POL’Y 125, 138 (2007).

⁸⁵ *Bellotti*, 443 U.S. at 634, 637 (“The State commonly protects its youth from adverse governmental action and from their own immaturity.”); see also *Seymore*, *supra* note 15, at 140–41.

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981); 3 ARTHUR L. CORBIN & ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 9.18 (Joseph M. Perillo ed., 1996); see also Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 553 (2000).

⁸⁷ See National Minimum Drinking Age, 23 U.S.C. § 158 (2012) (explaining that states choosing to allow those under twenty-one years of age to purchase alcohol will lose federal funding, pushing all states to limit alcohol sales); see, e.g., TEX. HEALTH & SAFETY CODE ANN. § 161.082 (West 2010).

⁸⁸ See, e.g., TEX. FAM. CODE ANN. § 2.101 (West 2006).

⁸⁹ See, e.g., TEX. PENAL CODE ANN. § 22.011 (West 2011).

⁹⁰ *Roper v. Simmons*, 543 U.S. 551, 561, 570–71 (2005); Danielson, *supra* note 84, at 138 (noting a “disparity between the treatment of a minor’s autonomy when it comes to reproductive decisions and criminal offenses” and that it amounts to “no less than ‘legislative dissonance’” (quoting Maggie O’Shaughnessy, Note, *The Worst of Both Worlds?: Parental*

voting and jury service for minors, resting on a presumption that minors do not have the life experience necessary to make a meaningful decision.⁹¹

Minors, however, are indeed allowed to make other major decisions without having to notify their parents. For example, in the large majority of states, a pregnant minor can, under certain circumstances, obtain medical treatment during her pregnancy,⁹² and go through labor and delivery without her parents ever knowing.⁹³ She can also choose to voluntarily give up her parental rights, so that she can place the newborn for adoption without her parents knowing.⁹⁴ And all fifty states and the District of Columbia allow minors to consent to the diagnosis and treatment of sexually transmitted infections without any parental consent.⁹⁵ Furthermore, the U.S. Supreme Court has recognized that a minor's constitutional right to privacy includes confidential access to contraceptives, and federal law also requires confidentiality for minors who receive family-planning services through programs such as Medicaid and Title IX.⁹⁶

Some proponents of parental involvement laws justify the differential treatment of abortion and other reproductive decisions on the ground that the decision to have an abortion is less a medical choice

Involvement Requirements and the Privacy Rights of Mature Minors, 57 OHIO ST. L.J. 1731, 1742 (1996)).

⁹¹ Cf. Scott, *supra* note 86, at 562 (explaining that minors do not have the right to vote because of assumptions about developmental immaturity).

⁹² *An Overview of Minors' Consent Law*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law> (last updated Apr. 1, 2017) [hereinafter *Minors' Consent Law*] (listing states that allow minors to consent to medical treatment for their pregnancy); see also David M. Vukadinovich, *Minors' Rights to Consent to Treatment: Navigating the Complexity of State Laws*, 37 J. HEALTH L. 667, 688–90 (2004). But see Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769, 771 (2002).

⁹³ See *Minors' Consent Law*, *supra* note 92 (allowing minors to consent to medical treatment for their pregnancy inherently includes consent to labor and delivery treatment).

⁹⁴ *Id.* (listing states that permit a pregnant minor to place her child up for adoption without her parents' knowledge or permission); Anna C. Bonny, Article, *Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings*, 11 U.C. DAVIS J. JUV. L. & POL'Y 311, 331 (2007) ("Arguably, placing a child up for adoption or seeking medical care for one's child requires a parent to possess 'maturity.'").

⁹⁵ *Minors' Consent Law*, *supra* note 92. This includes the testing and treatment of HIV, with only one state requiring parental notification in the event a minor tests positive for HIV. *Minors' Access to STI Services*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/minors-access-sti-services> (last updated Apr. 1, 2017). In addition, a large number of states authorize minors who abuse alcohol or drugs to consent to counseling and medical care, and to consent to outpatient mental health services. Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, 3 GUTTMACHER POL'Y REV., Special Analysis, Aug. 2000, at 4, https://www.guttmacher.org/sites/default/files/article_files/gr030404.pdf.

⁹⁶ See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); 42 C.F.R. § 59.5(a)(4) (2016).

than an important life decision.⁹⁷ These proponents also point out that an unplanned teen pregnancy may have a significant long-term impact on a young woman's well-being.⁹⁸ In this regard, the Court, in *H.L. v. Matheson*, justified a parental notification law by reasoning that "[t]he . . . emotional[] and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature."⁹⁹ And while some studies support the proposition that young women may react differently from adults after an abortion,¹⁰⁰ other studies show no differences two years after an abortion.¹⁰¹ In addition, studies have shown that a minor's decision-making capacity for making medical and psychological decisions may be equivalent to that of adults.¹⁰²

Further, some argue in favor of parental notification and parental consent laws because parents should know about medical procedures being performed on their minor children.¹⁰³ Yet, the medical risks associated with abortion are lower than the risks associated with continued pregnancy and childbirth.¹⁰⁴ In fact, the American Academy

⁹⁷ Boonstra & Nash, *supra* note 95, at 5.

⁹⁸ *Id.*

⁹⁹ *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

¹⁰⁰ See Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 ADOLESCENCE 161, 163 (1992).

¹⁰¹ Wendy J. Quinton et al., *Adolescents and Adjustment to Abortion: Are Minors at Greater Risk?*, 7 PSYCHOL. PUB. POL'Y & L. 491, 496, 498–500 (2001) (testing women fifteen to forty years old for depression, decision satisfaction, benefit-harm appraisals, and other emotions related to the abortion).

¹⁰² Danielson, *supra* note 84, at 137 (citing O'Shaughnessy, *supra* note 90, at 1741); see also Jami L. Crews, Article, *When Mommy's a Minor: Balancing the Rights of Grandparents Raising Grandchildren Against Minors' Parental Rights*, 28 LAW & PSYCHOL. REV. 133, 138 (2004) (explaining that some studies have suggested that "adolescents have an 'inability to anticipate future outcomes, [or] to recognize possible risks of treatment'" (citing Franz & Reardon, *supra* note 100, at 162–63)); Daniel P. Keating, *Cognitive and Brain Development*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 45 (Richard M. Lerner & Laurence Steinberg eds., 2d ed. 2004) (explaining that in Jean Piaget's four stages of development, in the final operational stage, an adolescent becomes capable of introspection and by age fifteen adolescents become capable of reasoning like adults); Rosato, *supra* note 92, at 784–85 (explaining that some studies report that by the age of fourteen adolescents possess enough understanding and reasoning to make health care decisions); Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583, 592 (2009) ("By age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults . . ."). *But see* ROBERT S. SIEGLER, EMERGING MINDS: THE PROCESS OF CHANGE IN CHILDREN'S THINKING 11 (1996) (positing that models based on stages of development have proved to be inconsistent with other data).

¹⁰³ See *Bellotti v. Baird*, 443 U.S. 622, 637–38 (1979) (plurality opinion).

¹⁰⁴ Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 729 (2004) (explaining that between 1988 and 1997, "the overall death rate for women obtaining legally induced abortions was 0.7 per 100,000"); Cynthia J. Berg et al., *Pregnancy-Related Mortality in the United States, 1998 to 2000*,

of Pediatricians, the American Medical Association, and the American College of Obstetricians and Gynecologists all agree that the delay caused by the judicial bypass process is medically problematic,¹⁰⁵ which supports the conclusion that minors should be permitted to obtain an abortion without mandated parental consent.

In any event, even though logical arguments exist against requiring parental involvement in a minor's decision to terminate her pregnancy, the majority of states do have parental involvement laws and a judicial bypass procedure, which are described in more detail below.

C. Judicial Bypass Proceedings

The history of a minor's right to abortion as well as parental involvement laws in the United States provide context for the requirements of a judicial bypass proceeding. Pursuant to *Bellotti*, the thirty-seven states that have parental involvement laws offer young women an alternative judicial process to have an abortion without parental involvement.¹⁰⁶

Some exceptions, however, allow a minor to obtain an abortion without having to comply with parental involvement laws entirely. For instance, in most states an emancipated minor may decide to obtain an abortion without parental notice or consent.¹⁰⁷ And typically, married minors can also make abortion decisions without parental involvement.¹⁰⁸ Furthermore, in six states the parental involvement laws

116 OBSTETRICS & GYNECOLOGY 1302, 1302 (2010) (explaining that between 1998 and 2005, the aggregate pregnancy-related mortality ratio was 14.5 per 100,000 live births); Seymore, *supra* note 15, at 134 (“The risk of death and medical complications is greater with childbirth than with abortion . . .”); *id.* at 134 & n.246 (citing Willard Cates, Jr., *Abortion for Teenagers*, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 139, 147 (Jane E. Hodgson ed., 1981) (explaining that “the mortality rate for teen pregnancy is five times higher than the mortality rate for teen abortion”). *But see* David C. Reardon et al., *Deaths Associated with Abortion Compared to Childbirth—A Review of New and Old Data and the Medical and Legal Implications*, 20 J. CONTEMP. HEALTH L. & POL’Y 279, 287 (2004) (positing that statistics are not accurate because they do not capture all the deaths attributable to abortion).

¹⁰⁵ See Sanger, *supra* note 17, at 310–11 (explaining that numerous medical organizations agree that pregnant minors may suffer medically from problematic delays due to the judicial bypass system).

¹⁰⁶ *Minors’ Abortion*, *supra* note 73; see also Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85 (2014) (analyzing how parental involvement laws, despite inclusion of judicial bypass provisions, pose substantial obstacles on pregnant minors seeking to obtain abortions, and thus, are unconstitutional under *Casey’s* undue burden standard).

¹⁰⁷ Rebouché, *supra* note 13, at 181–82.

¹⁰⁸ See, e.g., FLA. STAT. ANN. § 390.01114(3)(b)(3) (West 2014).

are temporarily or permanently enjoined.¹⁰⁹ In seven other states, there are no laws to prevent a young woman from obtaining an abortion on her own without any parental notification or parental consent.¹¹⁰

Aside from the exceptions, to comport with the U.S. Constitution, states with parental involvement laws must also provide an appropriate judicial bypass procedure.¹¹¹ Such judicial bypass provisions are supposed to be “designed to preserve decisional privacy for minors and to prevent parental consent requirements from amounting to an absolute veto.”¹¹² Accordingly, a judicial bypass procedure generally must set forth grounds for granting a pregnant minor’s application for obtaining an abortion without parental notification or consent. To accomplish this requirement, parental involvement laws require courts to grant a minor’s judicial bypass application if she proves: (1) she is mature and well-informed enough to make her own abortion decision, or (2) an abortion would be in her best interests.¹¹³ Some states also include a third ground for granting a minor’s application for judicial bypass: when notification or consent may lead to physical, sexual, mental, or emotional abuse of the minor.¹¹⁴ In addition, the large

¹⁰⁹ *Minors’ Abortions*, *supra* note 73 (listing Alaska, California, Montana, Nevada, New Jersey, and New Mexico as states where the parental involvement laws are temporarily or permanently enjoined). For example, in *Planned Parenthood of Central New Jersey v. Farmer*, the New Jersey Supreme Court struck down a parental notification law because it violated the state’s equal protection clause. 762 A.2d 620, 642–43 (N.J. 2000). The court declared the statute unconstitutional because it permitted minors to make health care decisions during pregnancy, but the statute did not allow the same pregnant minor to have an abortion. *Id.* In making its decision, the court focused on the harsh reality of burdens placed on pregnant females who seek a judicial bypass and not the “maturity” standard. *Id.* at 635. The court recognized that even notification to parents placed emotional and financial burdens on pregnant minors, which could in turn prevent them from obtaining abortions. *Id.* at 634–35. More specifically, the court pointed to several burdens, including the threat of withdrawal of financial support, parental displeasure, or actual block of the decision to terminate the pregnancy. *Id.* at 635. Ultimately, the court held that any competing state interests to restrict a pregnant minor’s access to an abortion were not justified. *Id.* at 642–43; *see also* Bonny, *supra* note 94, at 328 (explaining how the *Farmer* court looked beyond the “maturity” requirement and operated by evaluating the best interests of the pregnant minor).

¹¹⁰ Bonny, *supra* note 94, at 320 n.49 (listing Connecticut, Hawaii, Maine, New York, Oregon, Vermont, and Washington).

¹¹¹ *Bellotti v. Baird*, 443 U.S. 622, 642–43 (1979) (plurality opinion); *see, e.g.*, ALASKA STAT. ANN. § 18.16.030 (West 2007), *declared unconstitutional by* Planned Parenthood of the Great Nw. v. State, 375 P.3d 1133 (Alaska 2016); FLA. STAT. ANN. § 390.01114(4); IOWA CODE ANN. § 135L.3(3) (West 2014).

¹¹² Seymore, *supra* note 15, at 128 (citing *Bellotti*, 443 U.S. at 642).

¹¹³ *Bellotti*, 443 U.S. at 643–44.

¹¹⁴ *Minors’ Abortions*, *supra* note 73 (listing fifteen states that include an exception for abuse, assault, incest, or neglect).

majority of states allow physicians to perform abortions without any parental involvement if the pregnant minor has a medical emergency.¹¹⁵

The U.S. Supreme Court in *Bellotti* and subsequent cases did not provide specific guidance as to the maturity standard or the best interests standard;¹¹⁶ thus, courts often struggle with the application of the judicial bypass law.¹¹⁷ As a result, some states have enacted legislation that specifies what courts should consider when determining if a minor is “mature” and “well-informed,”¹¹⁸ and what types of information may be considered when determining if an abortion is in the “best interests” of the pregnant minor.¹¹⁹ In addition, a small

¹¹⁵ *Id.* (listing thirty-four states that include a “medical emergency” exception).

¹¹⁶ Even the Court in *Bellotti* acknowledged that a minor’s maturity is “difficult to define, let alone determine . . . the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.” *Bellotti*, 443 U.S. at 643–44 n.23; see also Stephen P. Rosenberg, Note, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent? The Ex Parte Anonymous Cases (Alabama 2001)*, 34 CONN. L. REV. 1109, 1117–18 (2002) (explaining that state courts evaluate a pregnant minor’s “maturity” in a variety of ways because the U.S. Supreme Court has never provided a specific standard for the judicial bypass procedure).

¹¹⁷ See, e.g., *In re B.S.*, 74 P.3d 285, 291 (Ariz. Ct. App. 2003) (holding that evidence that the pregnant minor had received counseling from Planned Parenthood on all medical and emotional aspects of her decision and that she was a good student was not enough to establish that she was “sufficiently mature to give informed consent”); *In re* Petition of Anonymous 5, 838 N.W.2d 226 (Neb. 2013) (holding that a sixteen-year-old female, who was forced to file for a judicial bypass because she was in foster care, was not “mature” enough to decide to have an abortion, even though she was unable to turn to her parents even if she had felt comfortable involving them, and she raised her own siblings after her mother left); see also Jessica Mason Pieklo, *In Denying a 16-Year-Old Judicial Bypass, Nebraska Supreme Court Creates Ban on Abortions for Minors in State Custody*, REWIRE (Oct. 6, 2013, 9:18 AM), <https://rewire.news/article/2013/10/06/in-denying-a-16-year-old-judicial-bypass-nebraska-supreme-court-creates-ban-on-abortions-for-minors-in-state-custody> (reporting that the trial court judge told the young woman, “when you have the abortion it’s going to kill the child inside you”); *Ex Parte Anonymous*, 812 So. 2d 1234 (Ala. 2001) (upholding the trial court’s denial of the petition because the minor’s testimony at the hearing appeared “rehearsed” and she did not show “any expression of emotion,” despite the fact that the seventeen-year-old had a 3.0 G.P.A., had been accepted to college, discussed her options with the father, and spoken to a number of adults, including a doctor, a counselor, and her godmother); *In re Doe*, 2011-Ohio-6373, No. 11 CO 34, 2011 WL 6164526, at ¶ 6 (Ct. App. Dec. 7, 2011) (overturning the trial court judge who denied a young woman’s application for a judicial bypass because “[i]n a somewhat circular argument . . . she did not have enough life experience to take care of a child [and therefore] she was not mature enough to decide whether to have an abortion”).

¹¹⁸ See, e.g., ARIZ. REV. STAT. ANN. § 36-2152(B) (2014); KAN. STAT. ANN. § 65-6705(e)(1) (West 2008); KY. REV. STAT. ANN. § 311.732(3) (West 2011) (explaining that courts shall hear evidence “relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful”). Other states with specific judicial bypass criteria include Arkansas, Ohio, and Texas. *Minors’ Abortions*, *supra* note 73.

¹¹⁹ See, e.g., FLA. STAT. ANN. § 390.01114(4)(d) (West 2014); OHIO REV. CODE ANN. § 2151.85(C)(2) (West 2014); TEX. FAM. CODE ANN. § 33.003(i) (West, Westlaw through 2015 Reg. Sess.).

number of states require the petitioning minor to undergo counseling or receive state materials on abortion before the judge will hear the judicial bypass application.¹²⁰ And while the majority of states have adopted the “preponderance of the evidence” burden of proof for judicial bypass hearings, which is typically used in civil cases, fifteen states currently require that the court find “maturity” or “best interests” by clear and convincing evidence.¹²¹ Furthermore, as explained below, the new judicial bypass procedure in Texas now contains some constitutionally suspect provisions and may approach the level of an impermissible undue burden on the minor seeking to exercise her right to abortion.

D. *Current State and Federal Anti-Abortion Efforts*

The current anti-abortion sentiment that is expressed in the judicial bypass legislation in Texas as well as in the rules implemented by the Supreme Court of Texas permeates across the nation. Such effect is evidenced by state and federal laws that have been recently proposed or enacted. Understanding this anti-abortion climate helps set the stage for explaining and analyzing the new Texas judicial bypass law.

In 2015, forty-eight states considered approximately 315 legislative measures related to the issue of abortion,¹²² including required

¹²⁰ See, e.g., IOWA CODE ANN. § 135L.2 (West 2014) (establishing a program that includes a decision-making video and workbook); LA. STAT. ANN. § 1061.14(B)(3)(b)(i) (2016) (requiring an evaluation and counseling session with a mental health professional or a staff member from the Department of Children and Family Services, or both); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(c), 171.014 (West 2010) (requiring doctors to distribute state materials).

¹²¹ *Minors' Abortions*, *supra* note 73 (listing the states that require “preponderance of the evidence” and the states that require the higher standard of “clear and convincing” evidence); see also *Akron II*, 497 U.S. 502 (1990) (upholding the use of a “clear and convincing” standard); *In re B.S.*, 74 P.3d at 289–90 (explaining that because pregnant minors are represented by counsel and unopposed, the clear and convincing burden of proof “avoid[s] making judicial bypass a mere pass-through proceeding” and that “the magnitude of the presented issue” justified using a higher standard).

¹²² AMS. UNITED FOR LIFE, 2015 FINAL STATE LEGISLATIVE SESSION REPORT 8 (2015) [hereinafter 2015 LEGISLATIVE REPORT], <http://www.aul.org/wp-content/uploads/2015/10/Final-Session-Report-2015.pdf>. Such legislation is often referred to as Targeted Regulation of Abortion Providers (TRAP). *Targeted Regulation of Abortion Providers (TRAP)*, CTR. FOR REPROD. RTS. (Aug. 28, 2015), <https://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap>. For example, Alaska enacted a Medicaid-related bill, which provides that no appropriated funds may be used for an abortion that is not a “mandatory service.” 2015 LEGISLATIVE REPORT, *supra*, at 9. “Conversely, New York enacted [legislation] explicitly funding Planned Parenthood affiliates.” *Id.* at 26. Some states also passed resolutions dealing with the abortion issue, e.g., South Dakota amended a resolution that calls for the reversal of *Roe v. Wade*. *Id.* at 12. And these legislative efforts continued in 2016, as forty-three states considered over 360 abortion-related measures. AMS. UNITED FOR LIFE, 2016 STATE

reflection periods,¹²³ abortion facility regulations,¹²⁴ twenty-week abortion limitations,¹²⁵ regulations related to the administration of certain drugs,¹²⁶ and requirements for admitting privileges.¹²⁷ In addition, approximately twenty-eight states considered legislation to provide legal recognition of and protection for newborn infants and unborn fetuses in contexts other than abortion.¹²⁸ Sixteen states even considered legislation related to fetal homicide or assault.¹²⁹ And, specifically related to the issue of judicial bypass, Texas was one of nineteen states that considered parental involvement laws or sought to amend current laws.¹³⁰

Also related to parental involvement laws, the restrictive judicial bypass law that passed in Alabama in 2014 is the subject of current litigation that challenges the constitutionality of the law.¹³¹ Under the amended law, when a female requests a judicial bypass, the district attorney is automatically notified and may defend the interest of the fetus.¹³² The judge may also appoint an advocate directly for the fetus.¹³³ If the minor's parents know of the bypass proceeding, the court must allow them to participate.¹³⁴ During the procedure, the district attorney, the fetus's advocate, and the parents may call any witnesses they want to

LEGISLATIVE SESSION REPORT 4 (2016), <http://www.aul.org/wp-content/uploads/2016/08/AUL2016StateSessionReport.pdf>.

¹²³ 2015 LEGISLATIVE REPORT, *supra* note 122, at 21 (listing Arkansas, Florida, Iowa, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oklahoma, and Tennessee).

¹²⁴ *Id.* at 17 (listing Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, North Carolina, Ohio, Oregon, Tennessee, and Texas as states that considered measures to regulate abortion facilities).

¹²⁵ *Id.* at 16 (reporting that Illinois, Iowa, Kentucky, Maryland, Massachusetts, New York, Ohio, Oregon, South Carolina, Texas, Virginia, West Virginia, and Wisconsin considered legislative measures to limit abortion at twenty weeks).

¹²⁶ *Id.* at 19 (listing Arkansas, Idaho, Iowa, Kansas, Minnesota, Montana, and South Carolina).

¹²⁷ *Id.* at 18 (listing Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, New Mexico, Oregon, and South Carolina).

¹²⁸ *Id.* at 8. The Oklahoma House passed a pro-life resolution, declaring "Rose Day" to signify the fight to save the unborn. *Id.* at 12.

¹²⁹ *Id.* at 9.

¹³⁰ *Id.* at 24 (listing Arkansas, Connecticut, Florida, Indiana, Maine, Massachusetts, Maryland, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Oklahoma, Texas, Vermont, Washington, West Virginia, and Wyoming).

¹³¹ Complaint at 5, *Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300 (M.D. Ala. 2016) (No. 2:14-cv-01014) [hereinafter *Complaint*], https://www.aclu.org/sites/default/files/assets/alabama_minors_complaint_final.pdf; *see also* ALA. CODE §§ 26-21-3, 26-21-4 (2009).

¹³² *See* ALA. CODE § 26-21-4.

¹³³ *Id.*

¹³⁴ *Id.*

testify against the young woman's decision.¹³⁵ This means that some witnesses who participate in the proceeding may be the reason the pregnant minor has requested a judicial bypass in the first place. The plaintiff alleges that the new judicial bypass law, in effect, "transforms the judicial bypass proceeding from an *ex parte* hearing into an adversarial one," thus failing to meet the requirements set forth in *Bellotti* and violating a minor's constitutional right to an abortion.¹³⁶ The court ruled that it has subject matter jurisdiction over the lawsuit, but has yet to issue a final ruling in the case.¹³⁷

Moreover, in addition to the amended judicial bypass law, Texas has taken other steps to limit women's access to abortion, family planning services, and health services. For example, in 2011, the Texas legislature cut funding for family planning services by two-thirds and dismantled the network of family planning providers in the state.¹³⁸ The legislature also implemented a tiered funding allocation, in which specialty family planning clinics like Planned Parenthood and other abortion providers were relegated to the lowest eligibility tier and were, in fact, often denied funding.¹³⁹ Indeed, according to a report by the Texas Policy Evaluation Project, since this change to the state's family

¹³⁵ *Id.*

¹³⁶ Complaint, *supra* note 131, at 5–6; Tara Culp-Ressler, *Alabama's Abortion Law Puts Minors on Trial and Gives Their Fetuses a Lawyer*, THINKPROGRESS (Oct. 2, 2014), <http://thinkprogress.org/health/2014/10/02/3575252/alabama-abortion-parental-consent>.

¹³⁷ *Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300 (M.D. Ala. 2016); *see also* Danny Cevallos, *Does Alabama Law Put Minors Seeking Abortion on Trial?*, CNN (Mar. 23, 2015, 10:54 AM), <http://www.cnn.com/2015/03/23/opinions/cevallos-alabama-abortion-trial>.

¹³⁸ Tara Culp-Ressler, *The Family Planning Cuts that the Texas Legislature Forced Through Are Having Dire Consequences*, THINKPROGRESS (May 12, 2015), <http://thinkprogress.org/health/2015/05/12/3657728/texas-reproductive-health-report>.

¹³⁹ Irin Carmon, *Texas Defunds Planned Parenthood; Louisiana Doesn't (Yet)*, MSNBC (Oct. 19, 2015, 5:14 PM), <http://www.msnbc.com/msnbc/texas-defunds-planned-parenthood-louisiana-doesnt-yet> (mentioning that in 2011 Texas put Planned Parenthood at the bottom of a tiered system). One recent funding example occurred in December 2015 when the Texas Department of State Health Services notified Planned Parenthood Gulf Coast, which provided HIV health care services to individuals in five counties around the Houston area, that it would not renew its long-standing contract for HIV preventions after its services expired on December 31. Alex Ura, *Texas Drops Planned Parenthood from HIV Prevention Program*, TEX. TRIB. (Dec. 22, 2015, 2:24 PM), <https://www.texastribune.org/2015/12/22/texas-drops-planned-parenthood-hiv-prevention-prog>. As a result, the Planned Parenthood Gulf Coast lost approximately \$600,000 in annual grant funding, which was used to distribute condoms, consult on referrals, and provide HIV testing and counseling. *Id.* The decision follows the state's recent actions to terminate Planned Parenthood's Medicaid provider agreement and remove any clinics affiliated with abortion providers from the state-federal Breast and Cervical Cancer Services program. *Id.*

planning services in 2011 “[m]ore than half of Texas women faced at least one barrier to accessing reproductive health care.”¹⁴⁰

In 2012, Texas also implemented rules to keep Planned Parenthood from participating in the Women’s Health Program and as a result, lost federal funding for the program.¹⁴¹ Then, in 2015, as part of House Bill 1 in an attempt to rebuild the family planning and women’s health infrastructure that had been dismantled in 2011, the state’s budget allocated funds to the Texas Women’s Health Program, the Family Planning Program, the Expanded Primary Health Care Program, and the state’s Breast and Cervical Cancer Screening program.¹⁴² It remains to be seen if these programs can provide the necessary services without the resources of the clinics that were closed due to the drastic cuts in 2011.¹⁴³

At the federal level, abortion is also at the forefront. For instance, Congress has attempted to pass two pieces of federal legislation that require parental involvement laws in every state. Under a proposed amendment to Title 18, titled the Child Custody Protection Act, adults who accompany a pregnant teen out of state for an abortion when the home state parental involvement law has not been met would be subject to criminal penalties.¹⁴⁴ Additionally, a proposed amendment to Title 18, titled the Child Interstate Abortion Notification Act would impose parental involvement laws on women and physicians, and would restrict a pregnant minor’s access to abortion services in another state.¹⁴⁵ Other federal laws have been introduced that would “force abortion coverage out of all insurance plans (public or private), ban all abortions in the United States at or after 20 weeks from fertilization, or prohibit federal

¹⁴⁰ Alexa Ura, *Study: Half of Texas Women Face Barriers to Reproductive Health Care*, TEX. TRIB. (May 12, 2015, 6:00 AM), <http://www.texastribune.org/2015/05/12/more-half-women-face-barriers-reproductive-service> (focusing on access to reproductive services, such as family planning, contraception, and cervical cancer screenings); see also Kari White et al., *The Impact of Reproductive Health Legislation on Family Planning Clinic Services in Texas*, 105 AM. J. PUB. HEALTH 851 (2015).

¹⁴¹ Laura Bassett, *Texas Loses Entire Women’s Health Program over Planned Parenthood Law*, HUFFINGTON POST (Mar. 15, 2012, 5:39 PM), http://www.huffingtonpost.com/2012/03/15/texas-loses-entire-womens_n_1349431.html; see also Culp-Ressler, *supra* note 138.

¹⁴² See Emma Kristina Sveen, *Uproar in Texas over New Budget Bill and Women’s Health*, DAILY CALLER (June 12, 2015, 2:28 PM), <http://dailycaller.com/2015/06/12/uproar-in-texas-over-new-budget-bill-and-womens-health>.

¹⁴³ As a result of drastic funding cuts, as of early June 2016, “Harris County’s health department has yet to perform a single HIV test with the money.” Alexa Garcia-Ditta, *After Texas Booted Planned Parenthood from HIV Program, County Replacement Hasn’t Performed a Single Test*, TEX. OBSERVER (June 8, 2016, 3:26 PM), <https://www.texasobserver.org/hiv-planned-parenthood-harris-county>.

¹⁴⁴ S. 32, 113th Cong. (2013).

¹⁴⁵ S. 404, 114th Cong. (2015).

grants from going to medical facilities that prescribe medication abortion via telemedicine.”¹⁴⁶ In late March 2016, the Food and Drug Administration (FDA), however, relaxed the guidelines for taking mifepristone, a pill that induces abortion, including reducing the dosage, reducing the number of times a patient needs to visit a doctor, and extending the period when a woman can take the pill.¹⁴⁷ This recent administrative move will likely cause some states like Texas to take measures to counteract the new requirements because in their view, the FDA’s decision undercuts anti-abortion legislation.

II. TEXAS JUDICIAL BYPASS LAW

A. *New Judicial Bypass Statutes and Supreme Court of Texas Rules*

The anti-abortion sentiment at both the state and federal level is reflected all too well in Texas’s new judicial bypass law. Before taking a look at the new requirements, a brief overview of judicial bypass in Texas is relevant. In 1999, Texas first enacted a parental notification law that required a parent to be notified before a physician could perform an abortion on a minor.¹⁴⁸ To comply with the requirements of *Bellotti*, Texas also enacted a judicial bypass provision to allow minors to seek a judicial waiver of the parental notification law.¹⁴⁹ Additionally, the Supreme Court of Texas approved the first set of judicial bypass rules and forms.¹⁵⁰ Then, in 2005, the Texas legislature passed a law that required physicians to obtain the written consent of a parent before they could perform an abortion on a minor.¹⁵¹ As a result, Texas became one of only five states to require both parental notification and parental

¹⁴⁶ Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL’Y REV., Winter 2014, at 9, 13, <https://www.guttmacher.org/about/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs>.

¹⁴⁷ GUTTMACHER INST., FACT SHEET: INDUCED ABORTION IN THE UNITED STATES 2 (2016), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion_3.pdf. Medication-induced abortion made up as much as a quarter of all non-hospital abortions in 2011. *Id.*

¹⁴⁸ S.B. 30, 76th Leg., Reg. Sess. (Tex. 1999).

¹⁴⁹ *Id.*

¹⁵⁰ See Order Promulgating Parental Notification Rules and Forms at 1, Misc. Docket No. 99-9247 (Tex. Dec. 22, 1999).

¹⁵¹ TEX. OCC. CODE ANN. § 164.052(a)(19) (West 2012) (obtaining this consent also satisfies the parental notification requirement); S.B. 419, 79th Leg., Reg. Sess. (Tex. 2005).

consent before a minor may act on her decision to terminate her pregnancy.¹⁵²

The Texas judicial bypass law remained untouched for ten years before Representative Geanie Morrison introduced House Bill 3994 (H.B. 3994) to make significant amendments to the state's judicial bypass law in Chapter 33 of the Texas Family Code.¹⁵³ In general, the amended Texas judicial bypass law—signed by Governor Greg Abbott in June 2015—imposes additional restrictions on young women seeking a court's permission to receive abortion care instead of obtaining the required parental involvement for the procedure.¹⁵⁴

First, the 2015 amendments establish new venue requirements as well as a new requirement for attorneys who assist pregnant minors.¹⁵⁵ The judicial bypass venue provision changed from allowing open venue to creating requirements based on the population of the pregnant minor's resident county.¹⁵⁶ In counties of at least 10,000 in population, the pregnant minor must file in her county of residence.¹⁵⁷ In counties that have fewer than 10,000 residents, the pregnant minor may file in one of three places: (1) in her county of residence, (2) in an adjacent county, or (3) in the county in which she plans to have the abortion procedure.¹⁵⁸ The amended statute also requires all attorneys, paid or pro bono, who file a judicial bypass case or assist a pregnant minor "in any way" to file an application swearing to the truth of the minor's statements in the application regarding venue and application history.¹⁵⁹

¹⁵² *Minors' Abortions*, *supra* note 73.

¹⁵³ H.B. 3994, 84th Leg., Reg. Sess. (Tex. 2015). Other state representatives introduced judicial bypass legislation, and H.B. 3994 substantially incorporated other proposed legislation. *See, e.g.*, H.B. 2531, 84th Leg., Reg. Session (Tex. 2015).

¹⁵⁴ *See* TEX. FAM. CODE ANN. §§ 33.001–33.014 (West, Westlaw through 2015 Reg. Sess.).

¹⁵⁵ FAM. § 33.003(b), (c)(3), (r).

¹⁵⁶ FAM. § 33.003(b).

¹⁵⁷ FAM. § 33.003(b)(1); *cf.* FAM. § 33.003(b) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)) (requiring that the minor's application for judicial bypass "be filed in any county court at law, court having probate jurisdiction, or district court, including a family district court, in this state" as this provision existed in 2011).

¹⁵⁸ FAM. § 33.003(b)(3) (West, Westlaw through 2015 Reg. Sess.). Another exception to the venue provision exists if the pregnant minor's parent is a judge. Under that circumstance, she may file in a contiguous county or in the county where the abortion facility is located. FAM. § 33.003(b)(2). Finally, if the pregnant minor is not a Texas resident, she must file in the county where the abortion facility is located. FAM. § 33.003(b)(4).

¹⁵⁹ FAM. § 33.003(c)(3), (r). Another provision now declares *res judicata* to bar the refiling of a case, and allows an applicant to refile only if there is a "material change in circumstances since the time the court denied the application," in which case the minor may refile her application in the same court. FAM. § 33.003(p)–(q).

Second, Chapter 33 of the Texas Family Code now refers only to the confidential nature of the judicial bypass proceeding.¹⁶⁰ Previously, the statute required all judicial bypass proceedings to protect the “anonymity of the minor” and for judicial bypass documents to be “confidential and privileged.”¹⁶¹ The 2015 amendments, however, removed all references to anonymity¹⁶² and removed a provision that expressly allowed a pregnant minor to use initials or a pseudonym in judicial bypass filings.¹⁶³ In addition, a judge is now prohibited from allowing a pregnant minor to appear by videoconferencing or other technological means, such as telephone conferencing or remote electronic means.¹⁶⁴

The amended law also increases the burden of proof from preponderance of the evidence to clear and convincing evidence.¹⁶⁵ Moreover, it requires physicians to assume pregnant women are minors and request they show proof of identification.¹⁶⁶ Physicians, however, are allowed to provide abortion care without a woman providing proof of identification, and they are then required to provide a report to the state on the abortion.¹⁶⁷ The amended law also allows for a civil penalty of up to \$10,000 for any individual found to have “intentionally,

¹⁶⁰ See generally FAM. §§ 33.001–33.014.

¹⁶¹ FAM. § 33.003(k) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)).

¹⁶² FAM. § 33.003(k) (West, Westlaw through 2015 Reg. Sess.); cf. FAM. § 33.003(k) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)).

¹⁶³ FAM. § 33.003(k) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)) (showing that the following language was deleted from the current version of section 33.003: “The minor may file the application using a pseudonym or using only her initials”).

¹⁶⁴ FAM. § 33.003(g-1) (West, Westlaw through 2015 Reg. Sess.). The court, however, is still required to give a bypass case precedence over other matters regardless of whether the pregnant minor obtained a continuance. FAM. §§ 33.003(h), 33.004(b).

¹⁶⁵ FAM. § 33.003(i). The Texas Family Code uses clear and convincing evidence in a number of other circumstances, but this burden is generally used only when the state is attempting to take away a constitutional right. See, e.g., FAM. § 55.55 (referring to the state’s burden to prove a child in a juvenile proceeding is mentally ill and subject to commitment); FAM. §§ 160.001, 161.206 (referring to the burden when terminating a parental right, in general, or for parental mental illness or deficiency that will last until the young person is eighteen); FAM. §§ 159.401, 160.624 (referring to the burden to establish paternity and child support obligations in a petition for child support or a motion for temporary order). Thus, arguably, the heightened burden should not be used as an additional hurdle for a young woman to exercise a constitutional right she already has: the right to choose when and whether to become a parent.

¹⁶⁶ As enacted, an amendment to the bill requires physicians to use “due diligence” to determine a pregnant woman’s age, but allows the physician to proceed with an abortion if the woman does not have any identification. FAM. § 33.002(j), (k).

¹⁶⁷ FAM. § 33.002(l).

knowingly, recklessly, or with gross negligence” violated the measure, and the state’s attorney general is charged with collecting the penalty.¹⁶⁸

Additionally, the 2015 amendments provide specific criteria for both the “maturity” standard and alternatively, the “best interests” standard.¹⁶⁹ The “mature and sufficiently well informed” basis for judicial bypass requires the court to consider the “experience, perspective, and judgment” of the young woman and guides the court to consider specific criteria.¹⁷⁰ The factors listed in the judicial bypass provision include her age, her life experiences, her reasons for seeking to terminate the pregnancy, and the degree to which she is informed by the “Women’s Right to Know” state-published pamphlet; her mental health may even be evaluated by a licensed mental health counselor.¹⁷¹ Under the “best interests” alternative, the court is allowed to inquire as to a number of specific criteria, including her reasons for not involving a parent, whether notification may lead to physical or sexual abuse, whether the pregnancy was the result of sexual abuse by a parent, and whether there is a history of physical or sexual abuse by the parents.¹⁷² While the judicial bypass provision retains the “medical emergency” exception,¹⁷³ the 2015 amendments removed the physical, sexual, or emotional abuse exception entirely.¹⁷⁴

The amended judicial bypass law also establishes a new time period for a court to rule on a pregnant minor’s application.¹⁷⁵ Under the amended statute, a judge “shall” rule on a pregnant minor’s application for judicial bypass within five days.¹⁷⁶ Under the previous law, judges

¹⁶⁸ FAM. § 33.012.

¹⁶⁹ FAM. § 33.003(i)–(i-2).

¹⁷⁰ FAM. § 33.003(i), (i-1).

¹⁷¹ FAM. § 33.003(i-1)(1)–(4).

¹⁷² FAM. § 33.003(i-2)(1)–(4). The amended statute does not address sexual abuse by someone other than the parent, managing conservator, or guardian, and the reference to emotional abuse was eliminated in the statute. *Id.*

¹⁷³ See TEX. HEALTH & SAFETY CODE ANN. § 171.002 (West, Westlaw through 2015 Reg. Sess.) (defining “medical emergency”); FAM. § 33.002 (setting forth the “medical emergency” exception); see also FAM. § 33.0022; TEX. OCC. CODE ANN. § 164.052(a)(19)–(20) (West 2012).

¹⁷⁴ See FAM. § 33.002; see also Mary Tuma, *Senate Approves Judicial Bypass Restrictions*, AUSTIN CHRON. (May 29, 2015), <http://www.austinchronicle.com/news/2015-05-29/senate-approves-judicial-bypass-restrictions> (reporting that after four hours of debate, the Texas Senate voted 21-10 to push H.B. 3994 forward, without any exceptions for rape or incest survivors); cf. FAM. § 33.003(i) (West 2011, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)) (allowing for the court to determine if the notification may lead to physical, sexual, or emotional abuse).

¹⁷⁵ FAM. § 33.003(h) (West, Westlaw through 2015 Reg. Sess.).

¹⁷⁶ *Id.* Furthermore, the time for a court of appeals in Texas to rule was extended from two to five business days. FAM. § 33.004(b). In addition, a court of appeals may publish an opinion if written in a way to preserve confidentiality. FAM. § 33.004(c-1).

were required to enter judgment on the application immediately after the hearing and to rule on applications within two days, at which time the request was “deemed to be granted” absent a judge’s ruling.¹⁷⁷ The amended statute, however, does not provide any guidance on whether a request is granted or denied if a judge does not issue a ruling in the new five-day timeframe.¹⁷⁸

After the amended judicial bypass provisions were signed into law, the Supreme Court of Texas charged its Advisory Committee—mostly comprised of judges and attorneys—with proposing rules for the implementation of H.B. 3994.¹⁷⁹ In early October 2015, a judicial bypass subcommittee provided its recommendations to the Advisory Committee.¹⁸⁰ Then, in mid-October 2015, the Advisory Committee voted on amendments to the judicial bypass rules and recommended rules that would minimize potential violations of the Constitution.¹⁸¹

Disregarding some of its own Advisory Committee’s recommendations, the Supreme Court of Texas implemented its own rules. One rule the court issued that raises constitutional concerns involves the timeframe in which the trial court is to make a decision on the judicial bypass application. Under this new rule, if a judge does not rule on a minor’s request within five days, the request is automatically denied.¹⁸² The court added this automatic denial language even though the Advisory Committee did not recommend a “deemed denial” provision and even though the Texas legislature removed that language from the bill.¹⁸³ The court also promulgated a rule requiring pregnant minors to affirm by oath or under threat of perjury that they have not

¹⁷⁷ FAM. § 33.003(g)–(h) (West 2011, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)).

¹⁷⁸ Tuma, *supra* note 174 (reporting that the original amendment included deeming an application denied, but the final language left the provision without a mechanism for the pregnant minor to obtain an expeditious ruling).

¹⁷⁹ Alexa Garcia-Ditta, *Court Committee Puzzled by New Abortion Restrictions*, TEX. OBSERVER (Oct. 17, 2015, 11:31 AM), <http://www.texasobserver.org/court-committee-puzzled-by-new-abortion-restrictions>; *see also* Letter from the Supreme Court of Texas to the Supreme Court Advisory Committee (Aug. 4, 2015) (requesting that the Advisory Committee study and make recommendations on the parental notification rules and forms) (on file with author).

¹⁸⁰ *See* Memorandum from the Judicial Bypass Subcommittee to the Supreme Court Advisory Committee (Oct. 9, 2015) [hereinafter *Judicial Bypass Memorandum*] (on file with author).

¹⁸¹ Transcript of Meeting of the Supreme Court Advisory Comm. 26958, 27037–54 (Oct. 16, 2015) [hereinafter *Advisory Committee Transcript*] (on file with author); Angela Morris, *Committee Votes on Judicial Bypass Abortion Rules*, TEX. LAW. (Oct. 20, 2015), <http://www.texaslawyer.com/id=1202740291941/Committee-Votes-on-Judicial-Bypass-Abortion-Rules>.

¹⁸² *See* *Judicial Bypass Rules*, *supra* note 19, at 28.

¹⁸³ H.B. 3994, 84th Leg., Reg. Sess. (Tex. 2015).

previously been denied a judicial bypass for the same pregnancy, unless they demonstrate a “material change in [their] circumstances.”¹⁸⁴ These rules implementing the judicial bypass law took effect January 1, 2016 and place limitations on pregnant minors seeking court access for legal permission to make their own reproductive decisions. In other words, the rules, coupled with the statutory amendments, result in significant changes to the judicial bypass procedure in Texas; arguably, this change no longer provides an effective, confidential, and expeditious alternative to parental involvement, in violation of a minor’s constitutional right to abortion.¹⁸⁵

B. *Constitutionality of the Texas Judicial Bypass Law*

As a result of H.B. 3994 as well as the Supreme Court of Texas’s failure to follow its Advisory Committee’s recommendations, the bypass procedure in Texas has become unreasonably burdensome. The process now functions so poorly that in reality it imposes additional barriers unrelated to legitimate state interests. In this regard, the implementation of the amended judicial bypass law in Texas is arguably unconstitutional as applied on at least two counts.¹⁸⁶ First, the “deemed denied” rule imposed by the Supreme Court of Texas potentially fails to comport with the Constitution because, under *Bellotti*, the process is no longer expeditious as it no longer provides pregnant minors with an effective opportunity to obtain an abortion. Second, the cumulative effect of several provisions in the amended judicial bypass statutes possibly render the law unconstitutional because some pregnant minors lose all reasonable means to remain anonymous. In other words, under *Bellotti*, a judicial bypass process “must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.”¹⁸⁷ The amended judicial bypass law in Texas ignores

¹⁸⁴ Judicial Bypass Rules, *supra* note 19, at Rule 2.1(c)(1)–(2).

¹⁸⁵ Tuma, *supra* note 174 (reporting that Senator Kirk Watson and others argued that this judicial bypass law “could open up the potential for such a [constitutional] challenge”); Alexa Ura, *Senator: Abortion Bill Could Prompt Lawsuit Against State*, TEX. TRIB. (May 18, 2015, 12:29 PM), <https://www.texastribune.org/2015/05/18/abortion-restrictions-minors-met-legal-concerns> (reporting that Senator José Rodríguez also expressed concern about passing H.B. 3994, cautioning that the state might be setting itself “up for a legal challenge in the courts”).

¹⁸⁶ The scope of this Article is limited to only two potentially unconstitutional aspects of the judicial bypass law in Texas: the deemed denied rule and the lack of anonymity.

¹⁸⁷ *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (plurality opinion).

these requirements, and other states should take notice and ensure that they do not follow Texas's lead on the judicial bypass procedure.¹⁸⁸

1. "Deemed Denied" Rule Violates the Expeditious Requirement

The requirement set forth in *Bellotti* that a judicial bypass procedure be expeditious is critical. The needed assurance of speed derives from the time-sensitive issue of these cases; without this assurance, a pregnant minor could essentially be "timed out of the safest methods of early abortion or perhaps lose the right altogether."¹⁸⁹ In Texas, the implementation of a Supreme Court of Texas rule that automatically denies a pregnant minor's judicial bypass application if the court fails to rule within five business days runs afoul of the requirement for expediency, and as a result, could amount to an absolute veto of her decision to terminate her pregnancy. Consequently, the deemed denied rule is likely unconstitutional under U.S. Supreme Court precedent; a pregnant minor in Texas is entitled to obtain a fair and unbiased ruling in a judicial bypass proceeding.

In general, all judicial bypass proceedings require a timely process that will ensure that the court reaches a decision promptly and without delay in order to serve the best interests of the pregnant minor.¹⁹⁰ States vary on the length of time to comply with this requirement. Some states require courts to hear or decide a judicial bypass application within forty-eight hours or seventy-two hours, while other states give courts four or five business days to rule.¹⁹¹ States may also require courts to give priority to judicial bypass proceedings,¹⁹² and in many states, in the event a judge fails to rule within the prescribed time period, the result is

¹⁸⁸ Admittedly, successfully challenging any abortion law may be difficult, as the Court in *Casey* suggested, it "will in fact set a high threshold and perhaps only find a substantial obstacle when a regulation serves as the equivalent of outlawing abortion for those women it affects." Danielson, *supra* note 84, at 141 (quoting Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2033 (1994)).

¹⁸⁹ Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 426 (2009) (citing *Bellotti*, 443 U.S. at 651 n.31).

¹⁹⁰ *Bellotti*, 443 U.S. at 643-44.

¹⁹¹ See, e.g., MISS. CODE ANN. § 41-41-55(3) (West 2007) (requiring the court to rule no more than seventy-two hours after a minor files a judicial bypass petition); N.C. GEN. STAT. ANN. § 90-21.8(d) (West 2008) (requiring the court to rule on the petition no more than seven days after its filing).

¹⁹² Sanger, *supra* note 189, at 428; see, e.g., TEX. FAM. CODE ANN. § 33.003(h) (West, Westlaw through 2015 Reg. Sess.).

the granting of the minor's application.¹⁹³ Indeed, the result of the petition being automatically granted "can be tremendously important in counties where judges are reluctant to be associated with successful bypass petitions."¹⁹⁴ In any event, with these statutory deadlines in place, it might take a pregnant minor up to three full weeks from the filing of her judicial bypass application to obtain a final ruling, and this additional time may have both psychological and medical consequences for her.¹⁹⁵

In Texas, one of the most significant changes to the amended judicial bypass law was the removal of the enforcement deadlines for the judge to rule on a minor's application to obtain an abortion without parental involvement. As explained above, under the previous law, judges were required to enter judgment on the minor's application immediately after the hearing and to rule on the application within two business days after filing; if the judge failed to rule, the request was deemed granted.¹⁹⁶ Now, under the amended statute, a "court *shall* rule on an application and *shall* issue written findings of fact and conclusions of law not later than 5 p.m. on the fifth business day after the date the minor states she is ready to proceed to hearing."¹⁹⁷ The amended statute, however, fails to include any explanation as to what happens in the event a judge does not hold a hearing or make a ruling within the prescribed time period. In fact, during the legislative debate, lawmakers expressed concerns that removing such a provision may be unconstitutional because the judicial bypass process might not be expeditious.¹⁹⁸ But, ultimately, the Texas legislature decided to delete the deemed denied language in H.B. 3994, thus leaving a significant gap in the judicial bypass procedure. Consequently, the judge could hold a

¹⁹³ See, e.g., ARIZ. REV. STAT. ANN. § 36-2152(F) (2014); GA. CODE ANN. § 15-11-684(d) (West 2015); KAN. STAT. ANN. § 65-6705(f) (West 2008); N.H. REV. STAT. ANN. § 132:34(II)(b) (2015).

¹⁹⁴ Sanger, *supra* note 189, at 429 (citing NAT'L P'SHIP FOR WOMEN & FAMILIES, THE JUDICIAL BYPASS: REPORT ON A MEETING 15 (2008)).

¹⁹⁵ *Id.*

¹⁹⁶ TEX. FAM. CODE ANN. § 33.003(g), (h) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)).

¹⁹⁷ FAM. § 33.003(h) (West, Westlaw through 2015 Reg. Sess.) (emphasis added). Furthermore, the time for a court of appeals in Texas to rule was extended from two to five business days. FAM. § 33.004(b).

¹⁹⁸ See generally H.B. 3994, 84th Leg., Reg. Sess. (Tex. 2015); Alexa Garcia-Ditta, *Restrictive Abortion Bill Targeting Teens One Step Closer to Law After Senate Approval*, TEX. OBSERVER (May 26, 2015, 10:14 PM), <https://www.texasobserver.org/restrictive-abortion-bill-targeting-teens-one-step-closer-to-law-after-senate-approval> (explaining that during the debate some lawmakers raised concerns that the bill may violate the requirement that a judicial bypass proceeding be confidential and expeditious).

hearing but refuse to rule, or the judge could refuse to hold a hearing at all.¹⁹⁹

The judicial bypass subcommittee considered several proposals on how to address the potential problems caused by a judicial bypass statute that does not provide a consequence for the failure to rule on the minor's application.²⁰⁰ These options included the following: (1) deeming the application denied upon the passing of the five-day, statutory deadline; (2) allowing the regional presiding judge to appoint a different judge to hear the case, in the event a trial court refused to set a hearing; and (3) requiring the clerk to certify the lack of decision and then allowing the minor to show by affidavit what would have been presented, thus creating a certification that would be an appealable order.²⁰¹

The judicial bypass subcommittee proposed the adoption of an expedited motion procedure to be filed directly with the Supreme Court of Texas,²⁰² and the Advisory Committee ultimately recommended that the court or a regional presiding judge appoint a new judge.²⁰³ The rationale for an expedited review is that the highest civil court in the state is in a better position to act if the non-compliance results from the refusal to hold a hearing or to rule after a hearing.²⁰⁴ This expedited review would also ensure an expeditious appellate writ for non-compliance.²⁰⁵ In this regard, the subcommittee recognized the potential burden on the highest civil court, but believed that the expedited procedure would rarely need to be used because refusing to set a hearing or refusing to rule is a potential violation of the Code of Judicial Conduct Canon 3B(1).²⁰⁶ Under this judicial conduct provision, "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate."²⁰⁷

The Supreme Court of Texas, however, chose not to adopt any committee recommendation and instead implemented a rule that

¹⁹⁹ Ura, *supra* note 185 (reporting that the executive director of the Texas Alliance for Life, who endorsed H.B. 3994, advised legislators to strike the automatic denial provision because it "invites a constitutional challenge").

²⁰⁰ See Judicial Bypass Memorandum, *supra* note 180, at 3.

²⁰¹ *Id.*

²⁰² In doing so, the committee agreed with the legislature and concluded that a deemed denied provision would not be a constitutional option for the judicial bypass procedure.

²⁰³ See Advisory Committee Transcript, *supra* note 181, at 27037-54. In its discussion, an Advisory Committee member acknowledged a potential constitutional problem with an automatic denial rule. *Id.* at 27039.

²⁰⁴ Judicial Bypass Memorandum, *supra* note 180, at 3.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

includes an automatic denial provision.²⁰⁸ This decision means Texas is now the only state with a rule issued by the highest court that dictates that a judicial bypass application will be automatically denied if the court fails to hold a hearing or refuses to make a ruling within the statutory time period.²⁰⁹ Moreover, the court issued a rule that if a pregnant minor fails to appear at a hearing *for any reason*, the judge must automatically deny her judicial bypass application.²¹⁰

Acknowledging the importance of expediency, in 2000, the Supreme Court of Texas itself granted a minor female's application for judicial bypass after her second series of appeals, a full month after her first attempt at a judicial bypass.²¹¹ The court noted that the length of time that had passed from the filing of her judicial bypass application potentially forced her to undergo a more complicated and expensive second trimester abortion.²¹² In reversing the trial court's denial of the minor's judicial bypass application, the court sided with the minor's safety and explained that she "was entitled to a [judicial] bypass and . . . that any further delay might expose her to greater [medical] risk."²¹³

Ironically, the new deemed denied rule goes against the court's previous reasoning and is problematic; the provision may effectively allow a judge to "stall out" a minor until she can no longer obtain a safe,

²⁰⁸ Although outside the scope of this Article, arguably the Supreme Court of Texas's inclusion of the automatic denial language in its rules amounts to creating substantive law, which is not what the court's rules are intended to do.

²⁰⁹ Tennessee, for example, has a deemed denied statute, not a court rule. TENN. CODE ANN. § 37-10-304(d) (West 2013). But in the event an application is deemed denied because a court fails to rule within forty-eight hours after the application is filed, the pregnant minor may seek an expedited, anonymous appeal to the "circuit court for the county in which the juvenile court is located." *Id.* § 37-10-304(g). The circuit court's decision can then be appealed in an expedited and anonymous manner to Tennessee's highest court. *Id.*

²¹⁰ Judicial Bypass Rules, *supra* note 19, at Rule 2.5(e)(2); *see also* Kimberly Reeves, *Potential Court Battle Simmering over Judicial Bypass Rules*, CHRON. (Hous.) (Jan. 4, 2016, 10:08 AM), <http://www.chron.com/local/texas-politics/quorum-report/article/Potential-court-battle-simmering-over-judicial-6735306.php> (reporting that if a pregnant minor fails to appear at the hearing for any reason, then the judicial bypass application is deemed denied, even though, in most cases, such a failure to appear would only result in a nonsuit or dismissal for want of prosecution).

²¹¹ *In re Jane Doe*, 19 S.W.3d 346 (Tex. 2000). The minor in *In re Doe* was a seventeen-year-old who was just weeks away from turning eighteen, and she applied for judicial bypass so she could obtain an abortion at the earliest stage of her pregnancy. *Id.* at 356 n.11.

²¹² *Id.* at 354. One justice also explained that "[o]nce a minor becomes aware of what she must go through to obtain a judicial bypass, she will choose for herself to involve her parents." *Id.* at 364 (Enoch, J., concurring).

²¹³ *Id.* at 354 (majority opinion).

legal abortion.²¹⁴ As the Ninth Circuit in *Glick v. McKay* explained: “[I]f the abortion decision is hindered or burdened during the earlier stages of pregnancy, the performance of an abortion may be delayed until such time as the state can more extensively regulate the exercise of a woman’s constitutional right.”²¹⁵ More specifically, in Texas, if a judge fails to rule within five business days and the application is automatically denied, the young woman will have to resort to the appellate process in hopes of resolving her judicial bypass application.²¹⁶ And when the court fails to rule within the prescribed time period, there will obviously be no findings of fact for the appellate court to review, further complicating the judicial bypass process.

Furthermore, judges in Texas may simply refuse to rule instead of recusing themselves from a judicial bypass case.²¹⁷ As we know,

²¹⁴ In Texas, a physician is not allowed to perform an abortion after twenty weeks post-fertilization. See TEX. HEALTH & SAFETY CODE ANN. § 171.044 (West, Westlaw through 2015 Reg. Sess.). And the problem of delay, of course, is intensified by the operation of the judicial bypass process, as there may also be a delay associated with gaining access to an abortion facility. Danielson, *supra* note 84, at 134 (explaining that “having to obtain judicial consent before finding an abortion provider may serve as a double-delay that could severely increase the health risks to the minor seeking an abortion”). Additionally, the constitutional requirement for the judicial bypass process to be sufficiently expeditious “should serve to protect against the use of bypass hearings in counties where they are, or become, practically unavailable.” Rex, *supra* note 106, at 120–21.

²¹⁵ *Glick v. McKay*, 937 F.2d 434, 441–42 (9th Cir. 1991) (holding that Nevada’s parental notification statute failed to meet the expediency element under *Bellotti* and *Akron II* because it did not include a fixed time period), *overruled on other grounds by* Lambert v. Wicklund, 520 U.S. 292 (1997). And in some instances, judicial bypass provisions have failed to provide an expeditious proceeding. For example, in *Causeway Medical Suite v. Ieyoub*, a Louisiana judicial bypass provision failed to set a time limit for the court’s ruling or to provide constructive authorization in the absence of a timely ruling, and thus the provision lacked being expeditious. 109 F.3d 1096, 1110–11 (5th Cir. 1997), *overruled on other grounds by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001). Similarly, in *Indiana Planned Parenthood Affiliates Association v. Pearson*, an Indiana statute governing judicial bypass wholly failed to mention the appellate process, and as a result, the expeditious aspect of appeals was not assured as required by *Bellotti*. 716 F.2d 1127 (7th Cir. 1983).

²¹⁶ Thus, in refusing to make a ruling within the statutory time period, “the penalty for such a decision would fall to the pregnant girl, not the judge.” Reeves, *supra* note 210. And, of course, a judge’s failure to rule also means that pregnant minors must deal with the possibility of forum exclusion.

²¹⁷ Judges’ anti-abortion sentiment is also sometimes expressed during a judicial bypass hearing when they infuse a case with their personal beliefs by making inappropriate comments. *In re Anonymous*, 905 So. 2d 845, 850 (Ala. Civ. App. 2005) (“This is a capital case. It involves the question whether [the minor’s] unborn child should live or die.”); T.L.J. v. Webster, 792 F.2d 734, 738–39 n.4 (8th Cir. 1986) (citing the transcript from the St. Charles County Juvenile Court below where, in denying a petition, a Missouri judge stated: “[D]epending upon what ruling I make I hold in my hands the power to kill an unborn child. In our society it’s a lot easier to kill an unborn child than the most vicious murderer. . . . I don’t believe that this particular juvenile has sufficient intellectual capacity to make a determination that she is willing to kill her own child.”); see also Sanger, *supra* note 189, at 492 (“Judicial opposition to abortion

“[j]udicial impartiality and the right of a party to a trial before an impartial and disinterested judge have been bedrock principles of our country since its inception.”²¹⁸ And while traditional grounds for recusal relate to the specific case before the judge—for example, when the judge has a fiduciary interest in the outcome of the case²¹⁹—some commentators have suggested that recusal is necessary when the judge has a moral conflict with a particular law that may prevent him from applying the law objectively.²²⁰ In a judicial bypass proceeding, the rationale for recusal would be a personal, moral objection and a refusal to issue a ruling that would lead to a pregnant minor obtaining an abortion.²²¹ In other words,

[i]f a judge feels a strong moral conviction that no minor would ever be mature enough to make the decision to obtain an abortion, or is morally convinced that it is never in a minor’s best interest to obtain one, this bias would go beyond the appearance of impartiality and into the realm of prejudging cases.²²²

And although a judge’s moral background is not a ground for mandatory disqualification, recusal would be appropriate when a judge’s moral beliefs are so strong that it would be virtually impossible for the judge to decide a judicial bypass application fairly.²²³

has also colored how the hearings are conducted. Judges have questioned petitioners as though abortion’s legality was unresolved, as though the only measure of a petitioner’s maturity was the decision not to abort, and as though the hearing offered a chance to remonstrate against it.”).

²¹⁸ Danielson, *supra* note 84, at 128 (citing Hon. D. Duff McKee, *Disqualification of Trial Judge for Cause*, in 50 AM. JUR. PROOF OF FACTS 3D 499, § 3 (1999)).

²¹⁹ *Id.*

²²⁰ *Id.* (citing *Webster*, 792 F.2d at 739 n.4). Yet, “[r]ecusal by judges in many instances may effectively deny a pregnant minor access to the courts, effectively denying her the opportunity to exercise her constitutional rights.” *Id.* at 131; see also Eric Parker Babbs, Note, *Pro-Life Judges and Judicial Bypass Cases*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 473, 497–98 (2008) (examining recusal from judicial bypass cases as an option for judges to avoid complicity in abortion while remaining true to their judicial duties); Rebekah L. Osborn, Current Development, *Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct*, 19 GEO. J. LEGAL ETHICS 895, 903 (2006) (concluding that morally conflicted judges probably can recuse themselves from judicial bypass cases and therefore should); Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors’ Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 877 (2007).

²²¹ Adam Liptak, *On Moral Grounds, Some Judges Are Opting out of Abortion Cases*, N.Y. TIMES (Sept. 4, 2005), http://www.nytimes.com/2005/09/04/us/on-moral-grounds-some-judges-are-opting-out-of-abortion-cases.html?_r=0.

²²² Danielson, *supra* note 84, at 129.

²²³ *Id.* at 129–30 (concluding that “it is unclear whether a judge should sit or recuse herself when it comes to bypass cases”).

Of course, a judge has an obligation to uphold the judicial oath,²²⁴ and if he fails to rule on a judicial bypass case due to a moral conflict, then the situation presents a conundrum for judicial ethics.²²⁵ Essentially, a Texas state judge would be demonstrating a lack of respect for constitutional law and to the oath he swore upon taking the office if he enforces the law by refusing to hold a hearing or failing to rule within the prescribed deadline. Additionally, a concern exists that some judges in Texas may not participate in a judicial bypass procedure because they fear jeopardizing their re-election prospects.²²⁶ In fact, approximately eighty-seven percent of all state and local judges are elected into office in some form,²²⁷ and abortion has continued to be an important issue in judicial campaigns.²²⁸

In sum, the automatic denial rule implemented by the Supreme Court of Texas helps a potentially biased decision-maker postpone a pregnant minor's decision to terminate the pregnancy.²²⁹ This rule, in turn, builds a procedural hurdle that likely violates the expediency requirement under *Bellotti*. When a minor cannot get a hearing or a court ruling in time, the end result is that the state is making the decision for her, which amounts to an unconstitutional, absolute veto of her decision.

²²⁴ See, e.g., TEX. SEC'Y OF STATE, TEXAS OATH OF OFFICE (2011) <http://www.sos.state.tx.us/statdoc/forms/2204.pdf> ("I, ____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of ____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.").

²²⁵ Danielson, *supra* note 84, at 134 (positing that if a judge has a "severe moral conflict" with judicial bypass cases, whether the judge should recuse himself results in a paradox).

²²⁶ See Caroline A. Placey, Comment, *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech: Throwing Pregnant Minors Under the Campaign Bus*, 56 EMORY L.J. 693, 695, 719–20, 727–28 (2006). Of course, judges in elected positions may be under pressure to oppose a woman's right to choose an abortion and thus, may make a public commitment to deny judicial bypass petitions. See Sanger, *supra* note 189, at 494 (quoting REPUBLICAN PARTY OF TEX., 2006 STATE REPUBLICAN PARTY PLATFORM 15 (June 1, 2006), <http://www.texasgop.org>) (explaining that in 2006 the Texas Republican Party called for the "electoral defeat of all judges who through raw judicial activism seek to nullify the Parental Consent Law by wantonly granting bypasses to minor girls seeking abortion").

²²⁷ Sanger, *supra* note 189, at 493 (citing Richard Briffault, *Judicial Campaign Codes After Republican Party Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004)).

²²⁸ *Id.* (citing Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 31–33). Furthermore, in Texas, judges have successfully fought to keep their names off of bypass decisions. *Id.* at 493–94.

²²⁹ See *Bellotti v. Baird*, 443 U.S. 622, 642–43 (1979) (plurality opinion) ("[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.").

2. Pregnant Minor's Anonymity Is Compromised

Another aspect of the amended judicial bypass law in Texas that raises constitutional concern is the lack of protection of the pregnant minor's anonymity throughout the judicial bypass process. As explained in *Bellotti*, a constitutional bypass law must include a requirement that the proceeding "be completed with anonymity."²³⁰ Indeed, without the guarantee of anonymity, the pregnant minor's parents might find out about her decision and as a result, the minor may be prevented from completing a judicial bypass application or from even visiting a physician.²³¹ In other words, the result might be a de facto veto of a pregnant minor's right to decide whether to obtain an abortion or to become a parent.²³²

First, this argument necessitates examining the difference between anonymity and confidentiality because the majority of states often use both terms in their judicial bypass provisions. Fundamentally, the terms have different meanings. "Anonymous" typically refers to an individual and means the individual is "not named or identified,"²³³ while "confidential" refers to information that is "meant to be kept secret; imparted in confidence."²³⁴ In this regard, in *Akron II*, the U.S. Supreme Court considered the constitutionality of the Ohio judicial bypass law, including the requirement for the procedure to be conducted in a manner that preserves the pregnant minor's anonymity.²³⁵ The judicial bypass provision stated that "[e]ach hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records."²³⁶ Appellees in the case argued that the judicial bypass forms implemented by the Ohio Supreme Court required the minor to disclose her identity; thus, they preferred the judicial bypass protections similar to those in *Bellotti* and *Ashcroft*, i.e., permitting use of a pseudonym and allowing the minor to sign the

²³⁰ *Id.* at 644; *see also* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 766 (1986), *overruled on other grounds by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) ("The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity.").

²³¹ Sanger, *supra* note 189, at 426.

²³² *Id.*

²³³ *Anonymous*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²³⁴ *Confidential*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²³⁵ *Akron II*, 497 U.S. 502, 512 (1990). And violation of this provision would result in a criminal offense. *See* OHIO REV. CODE ANN. §§ 102.03(B), 102.99(B) (West 2015).

²³⁶ *Akron II*, 497 U.S. at 512.

petition with her initials.²³⁷ They also argued that the right to anonymity is broader than the right to not have officials reveal the pregnant minor's identity to the public at large, and therefore, the judicial bypass provision requiring court employees not to disclose public documents would be irrelevant.²³⁸

On this point, the Supreme Court held that the judicial bypass law in Ohio did not violate the anonymity requirement set forth in *Bellotti*.²³⁹ The Court acknowledged that “[c]onfidentiality differs from anonymity,” but in this particular context, did not acknowledge that the distinction had constitutional significance.²⁴⁰ The Court further explained that it did not find “complete anonymity critical” because the Ohio law took reasonable steps to prevent the public from learning of the pregnant minor's identity.²⁴¹ Accordingly, the Court refused to base its decision “on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees.”²⁴²

The dissent, however, concluded that the judicial bypass law in Ohio failed to reflect “the sensitivity necessary when dealing with a minor making this deeply intimate decision.”²⁴³ The dissent also stated that the law created a “tortuous maze. . . [by] deliberately placing its pattern of obstacles in the path of the pregnant minor seeking to exercise her constitutional right to terminate a pregnancy.”²⁴⁴ Specific to the issue of anonymity, Justice Blackmun recognized that the Ohio judicial bypass statute was not reconcilable with the *Bellotti* anonymity requirement, as complete anonymity is technically the only anonymity that a person could have.²⁴⁵ Furthermore, “[t]rue anonymity is essential to an effective, meaningful [judicial] bypass.”²⁴⁶

It appears that like the U.S. Supreme Court, states struggle with the meaning of confidentiality and anonymity as applied in judicial bypass laws.²⁴⁷ An analysis of the thirty-seven judicial bypass laws nationwide reveals that some states use the terms according to their dictionary

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 513.

²⁴⁰ *Id.* (mentioning that the distinction did not play a part in their previous decisions as well).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 525 (Blackmun, J., dissenting).

²⁴⁴ *Id.* at 525–26.

²⁴⁵ *Id.* at 529–30.

²⁴⁶ *Id.* at 531.

²⁴⁷ See generally Rebouché, *supra* note 13, at 183 (explaining that some states include general mandates that the court must keep the proceedings confidential, while other states include provisions on details as to how the court must protect the pregnant minor's anonymity).

meanings, while other states basically use the terms interchangeably.²⁴⁸ For example, Arkansas uses the terms according to their plain meanings, i.e., the judicial bypass law explains that “court proceedings . . . shall be confidential and shall ensure the anonymity of the minor.”²⁴⁹ Other states use similar statutory language to distinguish between the confidentiality of the proceedings²⁵⁰ and the need to protect the anonymity of the pregnant minor.²⁵¹ On the other hand, some states use the term “anonymous” to refer to the overall judicial bypass proceeding and the term “confidential” to refer to the pregnant minor’s identity, thus blurring the line between the protection afforded to the proceeding and the protection afforded to the person.²⁵²

Admittedly, the practical distinction between confidential and anonymous is not clear, but when a female minor decides to have an abortion without parental involvement, the ability to maintain her utmost privacy throughout the process is vital. Some young women are fearful that others will find out about their decision, and their safety may turn on whether or not they can pursue judicial bypass confidentially and with anonymity. Furthermore, a pregnant minor could go to extreme lengths to maintain privacy when it comes to her personal decision to terminate the pregnancy,²⁵³ including obtaining an illegal abortion or self-inducing an abortion.²⁵⁴

²⁴⁸ This survey is on file with the author.

²⁴⁹ ARK. CODE ANN. § 20-16-809(b)(4)(A) (West, Westlaw through 2015 Act 934).

²⁵⁰ While the minor’s petition may be “confidential,” some states alert minors that an exception exists requiring judges to report rape or incest to the appropriate party. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(H)(1) (2014); N.C. GEN. STAT. ANN. § 90-21.8(f) (West 2008).

²⁵¹ *See, e.g.*, NEB. REV. STAT. ANN. § 71-6903(8) (West 2009) (“Proceedings in court pursuant to this section shall be confidential and shall ensure the anonymity of the pregnant woman.”); N.H. REV. STAT. ANN. § 132:34(II)(b) (2015) (“Proceedings under this section shall be held in closed court, shall be confidential and shall ensure the anonymity of the minor.”); *see also* Barbara Brotman, *How Young Women in Illinois Get Abortions Without Parental Notification*, CHI. TRIB. (Oct. 9, 2015, 9:57 AM), <http://www.chicagotribune.com/news/ct-abortion-judicial-bypass-met-20151009-story.html> (reporting that petitions are filed anonymously and the pregnant minor meets with a judge, knowing her only as Jane Doe, and the court records are sealed).

²⁵² *See, e.g.*, KAN. STAT. ANN. § 65-6705(c) (West 2008) (“Court proceedings under this section shall be anonymous and the court shall ensure that the minor’s identity is kept confidential.”); KY. REV. STAT. ANN. § 311.732(3)(d) (West 2011) (“All proceedings under this section shall be anonymous and shall be given preference”); LA. STAT. ANN. § 40:1061.14(B)(3)(a) (2016) (“Each application shall be heard in chambers, anonymously, in a summary manner”).

²⁵³ Sanger, *supra* note 189, at 440–41. Even a minor who involves her parents in her decision to obtain an abortion compromises familial privacy; for example, a small number of states require notarization of parental signatures on forms. *Id.* (citing ARK. CODE ANN. § 20-16-803 (2009); KAN. STAT. ANN. § 65-6705 (2008); LA. STAT. ANN. § 40:1299.35.5 (2009); OKLA. STAT.

Moreover, the issue of whether a state judicial bypass statute fails to adequately protect the pregnant minor's anonymity pursuant to *Bellotti* and *Akron II* does not hinge solely on the examination of the terms confidential and anonymous. This is because in many states multiple statutory provisions work together to form the judicial bypass law. Thus, one should examine all of the judicial bypass provisions to ascertain whether or not a judicial bypass law ensures the integrity of the anonymity requirement and comports with constitutional standards.

In Texas, the constitutionality of the 2015 amendments to the judicial bypass law is questionable; as a whole, this new law threatens to reveal the identity of the pregnant minor who is seeking a judicial bypass.²⁵⁵ Consider the laundry list of suspect changes made to the Texas judicial bypass law that may affect the ability to maintain anonymity of the young woman's identity:

1. Deletes the term anonymity, now referring only to confidentiality;²⁵⁶
2. adds a requirement that the minor's application must contain a statement about her current residence, including

ANN. tit. 63, § 1-740.2 (2009); S.D. CODIFIED LAWS § 34-23A-7 (2009); VA. CODE ANN. § 16.1-241 (2009)).

²⁵⁴ COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, MANDATORY PARENTAL CONSENT TO ABORTION, 269 JAMA 82, 83 (1993).

²⁵⁵ See Advisory Committee Transcript, *supra* note 181, at 26983–27037 (discussing the issue of confidentiality versus anonymity at great length).

²⁵⁶ TEX. FAM. CODE ANN. § 33.003(k) (West, Westlaw through 2015 Reg. Sess.); *cf.* FAM. § 33.003(k) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)). The Texas Supreme Court has an emphasis on (and deference to) statutory text as the primary guide to legislative intent. See *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (“[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen.”). In this regard, the judicial bypass subcommittee recognized it could be significant that the legislature replaced a former requirement that judicial bypass proceedings “be conducted in a manner that protects the *anonymity* of the minor,” accompanied by an express authorization to use pseudonyms or initials, with a provision requiring that proceedings “be conducted in a manner that protects [only] the *confidentiality of the identity* of the minor” and deleting the express authorization to use pseudonyms or initials. Judicial Bypass Memorandum, *supra* note 180, at 2. In addition, while the term “confidential” was previously used elsewhere in regard to the judicial bypass procedure, the 2015 legislation added the term in other provisions, e.g., a new, required quarterly report regarding judicial bypass proceedings to the Office of Court Administration (OCA) is confidential, privileged, and not subject to disclosure, and the report to OCA must protect confidentiality of identity of minors and judges. FAM. § 33.003(l-1)–(l-2) (West, Westlaw through 2015 Reg. Sess.). *But see Support HB 3994: Judicial Bypass Reform—HB 3994*, TEX. ALLIANCE FOR LIFE, <https://www.texasallianceforlife.org/pro-life-agenda/judicial-bypass-reform/support-hb-3994> (last visited Apr. 6, 2016) (acknowledging that “the [judicial bypass] procedure must ensure the minor’s *anonymity*” (emphasis added)).

- her physical address, mailing address, and telephone number;²⁵⁷
3. adds a requirement that the pregnant minor's attorney must swear to the contents of the judicial bypass application;²⁵⁸
 4. deletes the language expressly allowing a pregnant minor to use a pseudonym or initials in the judicial bypass petition;²⁵⁹
 5. expressly prohibits the use of "videoconferencing, telephone conferencing, or other remote electronic means";²⁶⁰ and
 6. adds restrictive venue provisions that require a pregnant pseudonym minor to file her judicial bypass application in the county where she resides, with limited exceptions.²⁶¹

In addition to these statutory changes, the Supreme Court of Texas added a requirement to the judicial bypass application that the pregnant

²⁵⁷ FAM. § 33.003(c)(2)(E) (West, Westlaw through 2015 Reg. Sess.). The statute does not require a statement of the minor's name, but the rules implemented by the Supreme Court of Texas require a verification page with the pregnant minor's full name and signature. Judicial Bypass Rules, *supra* note 19, at Rule 2.1(c)(2).

²⁵⁸ FAM. § 33.003(c)(3). It would be virtually impossible, however, for an attorney to comply with this statutory requirement given that a record concerning a prior application would be sealed and inaccessible to the attorney. *See* Judicial Bypass Memorandum, *supra* note 180, at 4–5. Accordingly, the judicial bypass subcommittee proposed that the rule require the attorney to swear that the underlying facts are true "to the best of their knowledge, information, and belief formed after reasonable inquiry," which would be consistent with Texas Rule of Civil Procedure 13. *Id.* at 4–5. The subcommittee also proposed incorporating an alternative for a declaration made under penalty of perjury pursuant to Texas Civil Practice and Remedies Code § 132.001. *Id.* at 5 ("[A]n unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute . . .").

²⁵⁹ *See* FAM. § 33.003(k) (West, Westlaw through 2011 Reg. Sess.) (as amended by 1999 Tex. Sess. Law. Serv. ch. 395 (West)). Admittedly, Chapter 33 of the Texas Family Code does not require, and has never required, the minor's name to be included in any judicial bypass filing, nor does the current statute expressly prohibit the use of pseudonyms or initials. In general, under a state civil procedure rule, a minor who finds herself the subject of a judicial proceeding may use a pseudonym or initials, whenever possible. *See, e.g.,* TEX. R. CIV. P. 21c(a), (b) (explaining that unless required by statute, a minor's name should not be included in court case records); TEX. R. APP. P. 9.8 (adopting procedures to protect minor's identity in all appeals). Accordingly, the judicial bypass subcommittee proposed continuing to allow a pregnant minor to use initials or pseudonyms, and the Supreme Court of Texas included the use of "Jane Doe" in a judicial bypass rule. Judicial Bypass Rules, *supra* note 19, at Rule 1.3(b).

²⁶⁰ FAM. § 33.003(g-1) (West, Westlaw through 2015 Reg. Sess.).

²⁶¹ FAM. § 33.003(b).

minor actually sign a separate verification page under oath or under penalty of perjury.²⁶²

The change from anonymity to confidentiality and the additional statutory amendments relate to other 2015 amendments in Chapter 33 of the Texas Family Code, and part of the reasoning for this change is to allow for cohesiveness. For example, the amendments included “provisions calculated to combat ‘forum shopping,’” including a prohibition against strategic nonsuiting and refiling as well as a new res judicata provision.²⁶³ As the subcommittee explained, “[a]dministration and enforcement of these new requirements would seemingly be undermined, the reasoning goes, if minors were identified only as ‘Jane Doe’ in the files and even courts could not ascertain or verify a minor’s application history from those records.”²⁶⁴ Thus, as some supporters of the law submit, providing full anonymity could make it more difficult to comply with other parts of the new judicial bypass law.²⁶⁵ For instance, a judge or attorney would not be able to check to see if the pregnant minor is refiling a rejected judicial bypass application in a different county or court.²⁶⁶

These difficulties with the Texas approach, in reality, support the notion that the cumulative effect of the judicial bypass law possibly fails to meet the anonymity component of *Bellotti* and *Akron II*.²⁶⁷ Of course, “[d]espite the constitutional significance of anonymity, a minor’s physical participation in the bypass process puts her at risk of exposure.”²⁶⁸ While the availability of electronic forms and instructions may help ease the potential discovery of the identity of the minor, as noted above, a pregnant minor in Texas is expressly prohibited from participating in the hearing by the use of videoconferencing, telephone conferencing, or any other remote electronic means.²⁶⁹ As a result, the state is requiring the young, pregnant woman to make a physical appearance at the courthouse, which is especially problematic in less

²⁶² See Judicial Bypass Rules, *supra* note 19, at Rule 2.1(c)(2) (requiring a verification page with the minor’s actual name).

²⁶³ See Judicial Bypass Memorandum, *supra* note 180, at 2.

²⁶⁴ *Id.*

²⁶⁵ Garcia-Ditta, *supra* note 179.

²⁶⁶ See Judicial Bypass Memorandum, *supra* note 180, at 2.

²⁶⁷ *Akron II*, 497 U.S. 502 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion).

²⁶⁸ Sanger, *supra* note 189, at 440; see also *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 636 (N.J. 2000) (noting that the pregnant minor’s anonymity may be compromised due to the logistics surrounding the judicial bypass process, e.g., traveling to court, attending the hearing at the courthouse, etc.).

²⁶⁹ TEX. FAM. CODE ANN. § 33.003(g-1) (West, Westlaw through 2015 Reg. Sess.).

populous counties in the state where she is likely to be recognized.²⁷⁰ In other words, the requirement that a pregnant minor is always required to appear in person in court may compromise the anonymity of her identity as well as the confidentiality of her application in general.

Furthermore, if the pregnant minor's identity is not compromised at the trial court level in Texas, there might be a "revelation [of the minor's identity] through appeal."²⁷¹ Such revelation occurs "when an appellate opinion incorporates so much factual information from the trial record that despite the Jane Doe alias, the petitioner's identity is susceptible to discovery."²⁷² This concern was addressed by Justice Enoch of the Supreme Court of Texas when he challenged Justice Hecht's decision to "publish chapter and verse [of] the minor's confidential testimony."²⁷³ According to Justice Enoch, revealing such information shows that Justice Hecht "intends nothing more than to punish, as best he personally can, minors for seeking a judicial bypass."²⁷⁴ But some continued form of anonymity protection is necessary to comply with the requirement of anonymity in the event the judicial bypass proceeding is made public for any reason, such as in a Supreme Court of Texas opinion. The mere use of initials or a pseudonym becomes useless when any court reveals personal, detailed facts about the young woman's life and her decision to terminate the pregnancy.

Consequently, while a pregnant minor's anonymity can potentially be protected by using initials or a pseudonym in the judicial bypass application, by the court sealing records, and by the court limiting those who may participate in the proceeding, these identity safeguards lose their stature when coupled with other suspect provisions. Taken all together, the judicial bypass provisions in Texas do not satisfy the dictates of minimal due process and essentially eliminate any meaningful right of a minor female in Texas to maintain anonymity during the judicial bypass procedure.

²⁷⁰ Sanger, *supra* note 189, at 442. And if a pregnant minor's identity is discovered, she also might be subject to reputational injury, and the pregnancy as well as her decision to seek a judicial bypass could easily be revealed to friends, neighbors, church members, and others. *Id.* at 442.

²⁷¹ *Id.* at 441.

²⁷² *Id.*

²⁷³ *In re* Jane Doe, 19 S.W.3d 346, 363 (Tex. 2000) (Enoch, J., concurring).

²⁷⁴ *Id.* ("Although the law promises them confidentiality, [Justice Hecht] promises them notoriety.").

III. RECOMMENDATIONS

The resulting effect of the new judicial bypass law in Texas is that Texas has “two-stepped” around the constitutional right of a minor seeking an abortion. Looking broadly at this constitutional right,²⁷⁵ some argue that “there is both a theoretical and practical case to be made for abolishing parental consent statutes entirely.”²⁷⁶ But this approach is unlikely to ever occur “due to certain realities of our political system.”²⁷⁷ A more realistic suggestion is for states that have parental involvement laws to take affirmative steps to ensure that pregnant minors can seek a judicial bypass in a manner that is constitutionally sound. This means that Texas and all other states with parental involvement laws should reexamine their judicial bypass statutes and rules to ensure expediency and to protect the minor’s anonymity.

A. *Correcting the Automatic Denial of a Minor’s Application*

First, in regard to the deemed denied rule in Texas, the simplest solution would be for the Supreme Court of Texas to amend its judicial bypass rules; in amending these rules, the court must not create a substantial obstacle for a minor choosing to exercise her abortion rights. The court should adopt the recommendations of its own Advisory Committee, who acknowledged the potential constitutional violations.²⁷⁸ In doing so, the court should implement a rule that if a trial judge fails to comply with its obligation to promptly hold a hearing or to rule within five business days, the judicial bypass case will either receive expedited review by the court, or the court or a regional presiding judge would appoint a new judge. The court should also remedy the automatic denial problem by shifting back to the automatic granting of the pregnant minor’s application, which was previously the law in Texas for fifteen years.²⁷⁹ Changing back to a deemed granted approach would also be consistent with a number of other states that have parental involvement laws. If the Supreme Court of Texas chooses

²⁷⁵ See *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion) (establishing a minor’s right to an abortion).

²⁷⁶ Danielson, *supra* note 84, at 140.

²⁷⁷ *Id.*

²⁷⁸ See Advisory Committee Transcript, *supra* note 181, at 27039.

²⁷⁹ See TEX. FAM. CODE ANN. § 33.003(h) (West, Westlaw through 2001 Reg. Sess.) (as amended by 1999 Tex. Sess. Law Serv. ch. 395 (West)).

not to amend its deemed denied judicial bypass rule, then the legislature should correct its initial error in leaving a significant gap in the law by amending the statutory provision during its next legislative session. The Supreme Court of Texas will then be required to issue new judicial bypass rules that will align with the amended statute. And in general, all states should reconsider the statutory deadlines for a judge to rule, as well as the consequences for not ruling within the prescribed time. In other words, all states need to consider the time sensitive nature of the judicial bypass proceeding and enact statutes that provide an expedient outcome.

B. *Protecting the Pregnant Minor's Anonymity*

Second, Texas and all other states with parental involvement laws should evaluate the overall scheme of their judicial bypass law to provide for true anonymity. To accomplish this goal, states should use the terms anonymous and confidential according to their plain meaning: anonymous when referring to the pregnant minor's identity and confidential when referring to the overall judicial bypass procedure.²⁸⁰ Thus, states should consider the following language: "The proceeding shall ensure the anonymity of the minor *and* the confidentiality of the proceeding."

States should then consider other statutory changes that would protect the pregnant minor's identity. For example, a judicial bypass provision should expressly allow a pregnant young woman to use her initials or a pseudonym, and she should be allowed to use the initials or pseudonym when completing any required verification. Additionally, states should reconsider the following: (1) the effect of restrictive venue provisions; (2) what information is required as part of the application, e.g., inclusion of a pregnant minor's street address allows her identity to be easily located; and (3) prohibitions against the use of videoconferencing and other ways to appear, which force the pregnant minor to physically appear in the courthouse.²⁸¹

On a larger scale, all states should also reconsider the age at which a young woman can make the decision to terminate her pregnancy. As explained earlier in this Article, research supports the conclusion that minors have decision-making ability before reaching the age of

²⁸⁰ See *supra* notes 233–34.

²⁸¹ See FAM. § 33.0085 (West, Westlaw through 2015 Reg. Sess.) (requiring a judge or justice to report "suspected" abuse of a minor if he "has reason to believe that a minor has been or may be physically or sexually abused," but not requiring any claim or allegation of abuse).

eighteen, and minors also have the right to make other important decisions.²⁸² By way of example, in Texas, the age of sexual consent is seventeen,²⁸³ and at sixteen or seventeen a minor may petition a court to be emancipated.²⁸⁴ Moreover, unemancipated minors have other decision-making rights in Texas; for instance, a pregnant minor can consent to all other medical treatment during her pregnancy and can even consent to the infant's adoption.²⁸⁵ Thus, one logical change to the judicial bypass law in Texas would be to follow the Delaware approach or the South Carolina approach, meaning that a pregnant minor could make her own abortion decision at age sixteen or age seventeen.²⁸⁶ Of course, for those minors under the age of sixteen, Texas would still need to make the previously suggested amendments so that a pregnant minor who files an application for judicial bypass would be ensured expediency and anonymity, and the procedure would not constitute undue state interference as to her right to abortion.

CONCLUSION

Abortion is a contentious issue across the nation. The divisive issue becomes even more contentious when discussing a minor's right to abortion. In Texas, a two-step process has resulted in a potentially unconstitutional judicial bypass law because the law no longer provides expediency or anonymity, both of which are required under U.S. Supreme Court precedent. First, the legislature's misstep occurred when it amended Chapter 33 of the Texas Family Code and changed numerous aspects of the judicial bypass law, thereby compromising the anonymity of the pregnant minor's identity.²⁸⁷ The second misstep occurred when the Supreme Court of Texas implemented its rules governing the judicial bypass law—refusing to follow its own Advisory Committee—and allowing a judicial bypass application to be deemed denied if a trial court judge fails to rule within five business days.²⁸⁸ This automatic denial of a pregnant minor's application jeopardizes the

²⁸² See *supra* Section I.B.

²⁸³ See TEX. PENAL CODE ANN. § 22.011 (West 2011).

²⁸⁴ FAM. § 31.001 (West, Westlaw through 2015 Reg. Sess.).

²⁸⁵ See *id.* § 32.003(a)(4).

²⁸⁶ See DEL. CODE ANN. tit. 24, §§ 1782(6), 1783 (West 2012) (classifying minors as younger than sixteen and requiring only parental notice); S.C. CODE ANN. §§ 44-41-10(m), -31 (2002) (stating that at the age of seventeen a pregnant woman does not need parental consent because, by definition, she is no longer a minor).

²⁸⁷ See *supra* Section II.B.2.

²⁸⁸ See *supra* Section II.B.1.

expediency requirement. As a result, the new judicial bypass law in Texas is now constitutionally suspect under the standards set forth in *Bellotti v. Baird* and subsequent jurisprudence. To ensure both expediency and anonymity, Texas and all other states with parental involvement laws should reconsider their judicial bypass procedure. Minors, like Nicole, seeking judicial bypass need to be given a functional process that comports with constitutional requirements.²⁸⁹

²⁸⁹ See *supra* Part III.