

“WHAT MAKES YOU THINK YOU CAN DO THAT?”:  
HOW VENUE RESTRICTIONS PREVENT ACCESS TO  
ABORTION FOR MINORS IN ARKANSAS

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## INTRODUCTION

A pregnant seventeen-year-old in Benton, Arkansas, has access to over a dozen doctors' offices, several charities, and an adoption agency.<sup>1</sup> Benton is a city of over 30,000 people, which likely makes good use of all these types of services.<sup>2</sup> As the county seat of Saline County, Benton also serves as a judicial district, with easy access to state courts.<sup>3</sup> A pregnant seventeen-year-old in Roland, Arkansas, has none of these services; and indeed, there is not much of anything in the town of about 800.<sup>4</sup> A small town in Pulaski County, Roland boasts mostly churches and farms; the town does not even have a courthouse.<sup>5</sup> Both these adolescents are a half-hour drive from Arkansas's major abortion clinic, Little Rock Family Planning Services.<sup>6</sup> In order for either of these minors to obtain an abortion without parental consent, they must file a petition for a judicial bypass in their county of residence.<sup>7</sup> The county

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<sup>1</sup> ABBA ADOPTION, <https://abbaadoption.com> [<https://perma.cc/RN86-MTTG>]; *Charitable Organizations*, BENTON AREA CHAMBER OF COM., <http://bentonchamber.chambermaster.com/list/category/charitable-organizations-285> [<https://perma.cc/9E3V-EPRP>]; *Primary Care Doctors in Benton*, AR, VITALS, <https://www.vitals.com/primary-care-doctors/ar/benton> [<https://perma.cc/F46M-QEKF>].

<sup>2</sup> Associated Press, *Arkansas Population by City*, ARK. ONLINE (Feb. 10, 2011, 4:56 PM), <https://www.arkansasonline.com/news/2011/feb/10/arkansas-population-city> [<https://perma.cc/6AM4-FUJ5>].

<sup>3</sup> *Circuit Court*, SALINE COUNTY, [https://www.salinecounty.org/circuit\\_court](https://www.salinecounty.org/circuit_court) [<https://perma.cc/X8EH-4N6W>].

<sup>4</sup> *Roland, Arkansas*, CITY DATA, <http://www.city-data.com/city/Roland-Arkansas.html> [<https://perma.cc/M8NM-25XE>].

<sup>5</sup> *Roland*, ARK., <https://www.arkansas.com/roland> [<https://perma.cc/ZXQ4-JPDK>]; *Roland, Arkansas Population 2020*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/us-cities/roland-ar-population> [<https://perma.cc/X4TU-8VKL>].

<sup>6</sup> *Contact Us*, LITTLE ROCK FAM. PLAN. SERVS., <https://lrfps.com/contact-us> [<https://perma.cc/EB6M-HRHT>].

<sup>7</sup> ARK. CODE ANN. § 20-16-808 (2019) (“The pregnant woman may petition a circuit court in the county in which she resides for a waiver of the consent requirement.”).

line between Benton and Roland means that the seventeen-year-old in Roland will have access to a judge who is familiar with the judicial bypass process, which allows a minor to consent to their own abortion, while the seventeen-year-old in Benton will either have to obtain parental consent or carry the pregnancy to term.<sup>8</sup>

The majority of states have a parental involvement statute for minors and adolescents seeking abortions.<sup>9</sup> Parental involvement statutes require minors to obtain parental consent in order to receive an abortion or require the clinic to notify the parents when minors are receiving an abortion.<sup>10</sup> For the most part, when faced with an unplanned pregnancy, a minor will involve their parents and the parental involvement statute will not create a problem.<sup>11</sup> For minors in abusive homes, survivors of incest, foster children, or those who do not trust their parents, the parental involvement statutes create a barrier to a constitutional right.<sup>12</sup> For this reason, the Constitution requires states to provide processes where minors can request that a court waive the parental consent requirement.<sup>13</sup> This process is called a judicial bypass.<sup>14</sup>

Fifteen states further regulate the judicial bypass process by limiting where a minor can file a petition for a judicial waiver of parental consent.<sup>15</sup> Six states require minors to file such a petition in

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<sup>8</sup> The county clerk of Saline County was unable to provide any information about the judicial bypass process while the clerk of Pulaski County had a wealth of information about how to access a judicial bypass. *See infra* Section II.D.

<sup>9</sup> *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> [<https://perma.cc/CY72-K3E6>]. The jurisprudence on parental consent refers to people of reproductive age under eighteen as minors, language which is mirrored in this Note. *See Bellotti v. Baird*, 443 U.S. 622 (1979). Minors, as used in this Note, does not refer to infants, toddlers, or anyone younger than reproductive age. When required, adolescent is used in place of minor, also defined in this Note as a person of reproductive age but under eighteen.

<sup>10</sup> *See Parental Involvement in Minors' Abortions, supra* note 9.

<sup>11</sup> *See, e.g., Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1043 (E.D. Ark. 2017).

<sup>12</sup> *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>13</sup> *See id.*

<sup>14</sup> *See, e.g., id.*

<sup>15</sup> ALA. CODE § 26-21-4(a) (2019); ARK. CODE ANN. § 20-16-808 (2019); FLA. STAT. § 390.01114(6)(a) (2019); IND. CODE ANN. § 16-34-2-4(b) (2019); LA. STAT. ANN.

either their county of residence or the county where the abortion is being performed.<sup>16</sup> Minors in North Carolina can file a petition in their home county or the county where they are physically present.<sup>17</sup> Minors in Ohio and Texas are able to file petitions in their home counties and any contiguous counties.<sup>18</sup> North Dakota allows minors to modify the venue restriction when a transfer of venue would be in the minor's best interest.<sup>19</sup> Five states, however, create no such exception in their venue restriction and only allow minors to file in their home county.<sup>20</sup>

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§ 40:1061.14(B)(1) (2019); MICH. COMP. LAWS SERV. § 722.904(2)(b) (2019); MISS. CODE ANN. § 41-41-53(3) (2019); N.C. GEN. STAT. § 90-21.7(b) (2019); N.D. CENT. CODE § 14-02.1-03.1(2) (2019); OHIO REV. CODE ANN. § 2151.85(A) (2019); OKLA. STAT. ANN. tit. 63, § 1-740.3(A) (2019); 18 PA. CONS. STAT. § 3206(c) (2019); TEX. FAM. CODE ANN. § 33.003(b) (West 2019); VA. CODE ANN. § 16.1-241(W) (2019); W. VA. CODE § 16-2F-4(a) (2019).

<sup>16</sup> ALA. CODE § 26-21-4(a) (2019) (“A minor . . . may petition, on her own behalf, the juvenile court, or the court of equal standing, in the county in which the minor resides or in the county in which the abortion is to be performed . . . .”); IND. CODE ANN. § 16-34-2-4(b) (2019) (“A minor . . . may petition . . . the juvenile court in the county in which the pregnant minor resides or in which the abortion is to be performed . . . .”); LA. STAT. ANN. § 40:1061.14(B)(1) (2019) (“Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.”); MISS. CODE ANN. § 41-41-53(3) (2019) (“A minor . . . may petition . . . the chancery court in the county in which the minor resides or in the county in which the abortion is to be performed . . . .”); 18 PA. CONS. STAT. § 3206(c) (2019) (stating that a minor can petition “the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought”); W. VA. CODE § 16-2F-4(a) (2019) (“An unemancipated minor who objects to the notice being given to her parent or legal guardian may petition for a waiver of the notice to the circuit court of the county in which the unemancipated minor resides or in which the abortion is to be performed, or to the judge of either of such courts.”).

<sup>17</sup> N.C. GEN. STAT. § 90-21.7(b) (2019) (“The pregnant minor may petition . . . the district court where the minor resides or where she is physically present . . . .”).

<sup>18</sup> OHIO REV. CODE ANN. § 2151.85(A) (2019) (“A woman . . . may file a complaint in the juvenile court of the county in which she has a residence or legal settlement or in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement . . . .”); TEX. FAM. CODE ANN. § 33.003(b) (2019) (“The application must be filed in . . . a county court at law, court having probate jurisdiction, or district court, including a family district court, in the minor's county of residence” with exceptions for minors in counties of fewer than 10,000 people.).

<sup>19</sup> N.D. CENT. CODE § 14-02.1-03.1(2) (2019) (“All proceedings . . . must be conducted in the juvenile court of the county of the minor's residence . . . . A court may change the venue of proceedings under this section to another county only upon finding that a transfer is required in the best interests of the minor.”).

<sup>20</sup> ARK. CODE ANN. § 20-16-808 (2019) (“The pregnant woman may petition a circuit court in the county in which she resides for a waiver of the consent requirement.”); FLA. STAT. ANN.

This Note focuses on the Arkansas parental consent statute and the venue restriction included within the statute that requires minors to file for a judicial bypass only in their county of residence.<sup>21</sup> In light of the undue burden analysis announced in *Whole Woman's Health v. Hellerstedt*,<sup>22</sup> this Note argues the Arkansas venue restriction for minors seeking a judicial bypass creates an unconstitutional undue burden by putting an insurmountable obstacle in the path of a minor seeking an abortion.<sup>23</sup> To make this argument, this Note relies on existing evidence about the burdens of judicial bypass statutes,<sup>24</sup> and a telephone study I conducted, which demonstrated that only eight out of Arkansas's seventy-five circuit courts were able or willing to provide information about the judicial bypass procedure.<sup>25</sup> The pervasive lack of information from Arkansas circuit clerks demonstrates that the majority of minors in Arkansas are not able to access a judicial bypass, rendering Arkansas's parental consent statute unconstitutional.<sup>26</sup> This Note builds on similar studies which demonstrated that many local clerks are uninformed about the judicial bypass process.<sup>27</sup> The lack of information

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§ 390.01114(6)(a) (LexisNexis 2019) (“A minor may petition any circuit court in which the minor resides . . . .”); MICH. COMP. LAWS SERV. § 722.904(2)(b) (2019) (“A minor may file a petition for waiver of parental consent in the probate court of the county in which the minor resides.”); OKLA. STAT. ANN. tit. 63, § 1-740.3(A) (2019) (stating that a minor can petition “any judge of a district court in the county in which the pregnant unemancipated minor resides”); VA. CODE ANN. § 16.1-241 (2019) (“[E]ach juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction” over “[p]etitions filed by a juvenile seeking judicial authorization for a physician to perform an abortion . . . .”).

<sup>21</sup> ARK. CODE ANN. § 20-16-808 (2019).

<sup>22</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>23</sup> See *infra* Section II.D.

<sup>24</sup> See generally J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 140–45 (2003); see also *infra* Section II.C.

<sup>25</sup> See *infra* Section II.D.

<sup>26</sup> See *infra* Sections I.B and II.C.

<sup>27</sup> See e.g., Shelia Cheaney & Laura Smith, *Staying Open: How Restricting Venue in Texas's Judicial Bypass Cases Would Hurt Minors and Violate the Constitution*, 9 SCHOLAR 45, 55 (2006); Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 L. & SOC. INQUIRY 73, 81 (1999); Helena Silverstein & Leanne Speitel, “Honey, I Have No Idea”: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV. 75, 90 (2002); Helena Silverstein, Wayne Fishman, Emily Francis, &

from clerks can render a judicial bypass practically unavailable to many minors.<sup>28</sup> This Note adds another data point to the argument that, if the judicial bypass process is unavailable for many minors, the existence of a parental consent law, at least in states that have been studied, is unconstitutional.<sup>29</sup>

This Note proceeds in three parts: Part I provides background on the undue burden standard and parental involvement laws. This Part focuses on how the Supreme Court determines whether a parental involvement law serves as an unconstitutional third-party veto and lays out how the standard announced in *Whole Woman's Health v. Hellerstedt* has been applied to judicial bypass procedures across the nation. Part II applies the *Whole Woman's Health v. Hellerstedt* analysis to the Arkansas parental consent statute and venue restriction. Part II also discusses the results of a telephone study I conducted, which tested Arkansas circuit clerks' knowledge and willingness to provide information about the judicial bypass procedure. Part III proposes Arkansas repeal the existing venue restriction in order to ensure the constitutionality of the parental consent statute.

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Leanne Speitel, *Judicial Waivers of Parental Consent for Abortion: Tennessee's Troubles Putting Policy into Practice*, 27 L. & POL'Y 399, 408 (2005); AMANDA BLOCK, AUDREY EASTERWOOD, SAMANTHA KOHL, JULIE LE, CHARLOTTE MYERS, ERIN PAVACIK, & MEGAN SAUMIER-SMITH, JUDICIAL BYPASS IN FLORIDA: TESTING THE PRO-CHOICE COMPROMISE (2013), <https://lsa.umich.edu/content/dam/women-assets/women-documents/Florida%20Judicial%20Bypass%202012%20Final%20Report.pdf> [https://perma.cc/5SN2-A45Z].

<sup>28</sup> See *infra* Section II.D.

<sup>29</sup> See *infra* Section I.C for more information on how the lack of an available judicial bypass process renders a parental consent statute unconstitutional. The broader argument, namely that parental consent statutes are unconstitutional as a violation of a minor's right to privacy, or even that parental consent statutes with a venue restriction are unconstitutional under *Belotti v. Baird*, as discussed *infra*, is beyond the scope of this Note.

## I. BACKGROUND

A. *Minor Pregnancy Statistics and Abortion Rates*

As much as their parents hate to think about it, many minors are engaging in sexual activity and becoming pregnant as a result.<sup>30</sup> While many teenagers are excellent parents to their children, the extra work of parenting a child has demonstrable effects on educational advancement, with only 50% of teenage mothers in the United States graduating high school, compared to 90% of American girls who are not teen mothers.<sup>31</sup> Minors give birth to preterm infants at higher rates than adults, and preterm infants have greater risks of illnesses and delays in the first years of their lives.<sup>32</sup> The combination of teenage mothers not finishing high school and higher rates of sick infants can negatively impact a state's economy, particularly when the state has high rates of teen births.<sup>33</sup>

Arkansas has the highest rate of teen pregnancy and teen birth in the nation, with 32.8 teen births out of every one thousand births.<sup>34</sup> In Arkansas, 14 out of every one thousand females under eighteen gives birth, compared with the national rate of 8.8 teen births per one thousand females under eighteen.<sup>35</sup> Arkansas teenagers report slightly

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<sup>30</sup> See generally Joyce C. Abma & Gladys M. Martinez, *Sexual Activity and Contraceptive Use Among Teenagers in the United States, 2011–2015*, 104 NAT'L HEALTH STAT. REP. 1 (2017), <https://www.cdc.gov/nchs/data/nhsr/nhsr104.pdf> [<https://perma.cc/E6PZ-5MMR>]. For examples of parental discomfort with teen sexuality, see generally *Last Week Tonight with John Oliver: Sex Education* (HBO television broadcast Aug. 9, 2015).

<sup>31</sup> See *Teen Pregnancy in Arkansas*, ARK. CTR. FOR HEALTH IMPROVEMENT 3 (Mar. 2016), <https://achi.net/wp-content/uploads/2017/05/Teen-Pregnancy.pdf> [<https://perma.cc/648L-7QYH>].

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 1–3.

<sup>34</sup> Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman, Anne K. Driscoll, & Patrick Drake, *Births: Final Data for 2017*, NAT'L VITAL STAT. REP., Nov. 7, 2018, at 5, 23, [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_08-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf) [<https://perma.cc/2KJX-HEJ7>].

<sup>35</sup> *Arkansas Adolescent Reproductive Health Facts*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/ash/oah/facts-and-stats/national-and-state-data-sheets/adolescent-reproductive-health/arkansas/index.html> [<https://perma.cc/DX9Q-54PV>].

higher rates of sexual activity than the average American teenager and lower rates of birth control use.<sup>36</sup> The combination of lost revenue and the cost of public assistance to adolescent mothers means the public cost of teen births in Arkansas was \$129 million in 2010.<sup>37</sup>

The high rate of teen births is possibly due to Arkansas's lower than average abortion rate.<sup>38</sup> Three out of every one thousand minors received abortions in Arkansas, which is half of the American abortion rate for minors under eighteen.<sup>39</sup> Sixteen minors under the age of fifteen obtained abortions in Arkansas in 2015.<sup>40</sup> Two hundred and thirty-eight adolescents aged fifteen to eighteen obtained abortions in the same year.<sup>41</sup> Minors and nineteen-year-olds made up 10.8% of abortions in Arkansas in 2015.<sup>42</sup> In 2016, Little Rock Family Planning provided abortions to five minors who were under fourteen, all of whom had parental consent, and sixty-nine abortions to minors under seventeen, all but one of whom had parental consent.<sup>43</sup> Ninety-eight percent of

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<sup>36</sup> *Id.* Forty-four percent of Arkansas high school students report they have had sex, compared to 40% of students nationwide. The rates for minors who had sex before the age of thirteen are higher in Arkansas as well, with 5% of minors reporting they had sex before they were thirteen, compared to 3% nationwide. And while 10% of United States high school students report they have had sex with four or more partners, 13% of Arkansas students report the same. Meanwhile, only 49% of Arkansas teenagers are using condoms, compared to 54% of American teenagers. Arkansas teenagers do report higher rates of long-acting reversible contraceptives like IUDs. Even so, 20% of Arkansas high school students reported no birth control use, compared to 14% of American students. *Id.*

<sup>37</sup> See *Teen Pregnancy in Arkansas*, *supra* note 31, at 3.

<sup>38</sup> See *Arkansas Adolescent Reproductive Health Facts*, *supra* note 35.

<sup>39</sup> *Teen Pregnancy in Arkansas*, *supra* note 31, at 2. Six out of every one thousand minors under eighteen receive abortions in America as a whole. See *Arkansas Adolescent Reproductive Health Facts*, *supra* note 35.

<sup>40</sup> Tara C. Jatlaoui, Maegan E. Boutot, Michele G. Mandel, Maura K. Whiteman, Angeline Ti, Emily Petersen, & Karen Pazol, *Abortion Surveillance—United States, 2015*, 67 MMWR SURVEILLANCE SUMMARIES 1, 23 (Nov. 23, 2018), <https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6713a1-H.pdf> [<https://perma.cc/H9CE-4KV9>].

<sup>41</sup> *Id.* at 26.

<sup>42</sup> *Id.* at 23.

<sup>43</sup> *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1035, 1043 (E.D. Ark. 2017) (“There are only two entities providing abortion care in Arkansas: Little Rock Family Planning Services, which provides abortions through 21.6 weeks LMP, and Planned Parenthood Great Plains, which provides only medication abortion through 10 weeks LMP in Little Rock and Fayetteville, Arkansas.”).



Arkansas counties had no abortion clinic, and eighty-seven percent of people in Arkansas lived in a county without an abortion clinic.<sup>44</sup>

### B. *Undue Burden Standard*

Under existing case law, the right to abortion is not an absolute right.<sup>45</sup> States have an interest in maternal health and human life which allows states to limit when a person can obtain an abortion.<sup>46</sup> States may pass regulations to limit abortion methods or require clinics to comply with certain standards, in an effort to protect the health and well-being of patients obtaining abortions.<sup>47</sup> In order to determine whether these regulations are constitutional, the Supreme Court analyzes restrictions under the undue burden standard, which has evolved since early decisions on abortion.<sup>48</sup>

Abortion is a protected right under the Due Process Clause of the Fourteenth Amendment.<sup>49</sup> Under the standard announced in *Roe v. Wade*, the right to abortion in a first trimester was absolute, and the state could only intervene to protect human life in the third trimester.<sup>50</sup> States could only pass abortion regulations in the second trimester if those regulations protected maternal health.<sup>51</sup> The Supreme Court abandoned the trimester framework less than twenty years after it was introduced with their decision in *Planned Parenthood v. Casey*.<sup>52</sup> Following the abandonment of this framework, states could pass laws

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<sup>44</sup> *Id.* Both Little Rock Family Planning and Planned Parenthood Great Plains are both in Pulaski county, which leaves 74 of Arkansas's counties without a clinic, which works out to 98% of counties having no clinic. Pulaski county has 391,911 people, which is 12.9% of Arkansas's population, working out to 87.1% of people living in a county without a clinic.

<sup>45</sup> *E.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>46</sup> *See id.* at 162.

<sup>47</sup> *See id.* at 163.

<sup>48</sup> *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>49</sup> *See generally Roe*, 410 U.S. 113.

<sup>50</sup> *See id.* at 163–64.

<sup>51</sup> *See id.* at 163.

<sup>52</sup> *See Casey*, 505 U.S. 833; *Roe*, 410 U.S. 113.

that regulated abortion at any time during a patient's pregnancy.<sup>53</sup> These regulations were constitutional if the regulations had a legitimate purpose and did not impose an undue burden on a person's ability to make an abortion decision.<sup>54</sup>

An undue burden is any law or regulation that places a substantial obstacle in the path of a person who wants to abort a nonviable fetus.<sup>55</sup> To be found unconstitutional, a regulation must create an undue burden for a large fraction of the controlling class.<sup>56</sup> In a challenge to the Arkansas parental consent statute or venue restriction, the class is not all women, all minors, or even all minors who want abortions.<sup>57</sup> The class in this challenge would be minors who seek abortions but do not want to or cannot obtain parental consent.<sup>58</sup> If the venue restriction is an undue burden for a large fraction of this particular class, the restriction is an unconstitutional undue burden.<sup>59</sup>

In order to be constitutional, an abortion regulation must further a valid state interest, and the benefits of the regulation must outweigh the burdens the regulation creates.<sup>60</sup> If the regulation does not further a valid state interest, or if the burdens outweigh the benefits, the regulation is an unconstitutional undue burden.<sup>61</sup> In determining the benefits and burdens of a regulation, courts are allowed to consider the evidence in the record and are not required to defer to the findings of the legislature.<sup>62</sup> This is the standard courts use to determine if newly-

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<sup>53</sup> See *Casey*, 505 U.S. at 872.

<sup>54</sup> *Id.* at 874.

<sup>55</sup> *Id.* at 877. A nonviable fetus is defined as a fetus "not capable of living, growing, or developing and functioning successfully, the antithesis of viable, which is defined as having attained such form and development of organs as to be normally capable of living outside the uterus." See *Wolfe v. Isbell*, 291 Ala. 327, 329 (1973) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

<sup>56</sup> See, e.g., *Casey*, 505 U.S. at 895 (1992).

<sup>57</sup> See *id.*

<sup>58</sup> See, e.g., *id.*

<sup>59</sup> See, e.g., *id.*

<sup>60</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

<sup>61</sup> See *id.* at 2292.

<sup>62</sup> See *id.* at 2310.

passed regulations are an undue burden. Courts have additional standards when determining the constitutionality of parental involvement laws.

### C. Parental Involvement Standard

The lives of minors are more frequently regulated by law than the lives of adults, and abortion is no exception.<sup>63</sup> Advocates of parental involvement argue that minors benefit from parental involvement because all medical procedures are generally safer when parents know their children have received treatment.<sup>64</sup> When parents are aware of the medical treatment, they can ensure that dangerous complications or side effects from abortions do not cause harm to minors.<sup>65</sup> In addition to ensuring safety, parents can also provide emotional or moral support to minors making abortion decisions.<sup>66</sup>

The argument that parental involvement makes abortions safer is predicated on the idea that abortions lead to dangerous complications, which available evidence does not support.<sup>67</sup> Of the 652,639 abortions performed in 2014, six had complications resulting in death.<sup>68</sup> The case-fatality rate, or the proportion of people with a particular condition who die from that condition,<sup>69</sup> for abortions between 2008 and 2014 was 0.79

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<sup>63</sup> See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

<sup>64</sup> See *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F. Supp. 2d 1012, 1019-20 (D. Idaho 2005); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 622-23 (2000).

<sup>65</sup> See *Wasden*, 376 F. Supp. 2d at 1019-20; *Farmer*, 762 A.2d at 622-23.

<sup>66</sup> See *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 660 (Miss. 1998).

<sup>67</sup> See *Induced Abortion*, AM. C. OBSTETRICS & GYNECOLOGY (May 2015), <https://www.acog.org/Patients/FAQs/Induced-Abortion?IsMobileSet=false#complications> [<https://perma.cc/Z73J-ZN8L>]. Death occurs in less than one out of every 100,000 abortions, and the risk of injury to other organs is less than one in 1,000. *Id.* As of 2015, the maternal mortality rate was just over seventeen deaths per 100,000 live births. *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 4, 2020), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm> (last updated Nov 25, 2020) [<https://perma.cc/4782-WMST>].

<sup>68</sup> Jatlaoui et al., *supra* note 40, at 67.

<sup>69</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *Lesson 3*, in *PRINCIPLES OF EPIDEMIOLOGY IN PUB. HEALTH PRACTICE* 188 (2012).

fatalities per 100,000 legal abortions.<sup>70</sup> Comparatively, the maternal mortality rate in 2015 was 26.4 deaths per 100,000 live births.<sup>71</sup> Another study found that a person is fourteen times more likely to die from giving birth than they are to die from having an abortion.<sup>72</sup> Despite the danger of birth, minors are allowed to carry a fetus to term and deliver without parental consent.<sup>73</sup>

Even though abortion is a safe procedure, the Supreme Court has consistently upheld a parent's right to consent or have notice when their minor child obtains an abortion.<sup>74</sup> The Court has also held that no third-party can have absolute veto power over another person's abortion, whether that third-party is a spouse or a parent.<sup>75</sup> If a state requires a pregnant minor to obtain consent from a parent, the state must also provide a procedure for a minor to obtain alternative authorization for an abortion.<sup>76</sup> Without this procedure, any parental involvement statute is unconstitutional, as it would give a third party complete control over a minor's abortion.<sup>77</sup>

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<sup>70</sup> Jatlaoui et al., *supra* note 40, at 23.

<sup>71</sup> Nina Martin & Renee Montagne, *U.S. Has The Worst Rate Of Maternal Deaths in the Developed World*, NPR (May 12, 2017, 10:28 AM), <https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world> [<https://perma.cc/2VFG-W7RQ>].

<sup>72</sup> *Induced Abortion*, *supra* note 67; Bonnie Rochman, *Why Abortion is Less Risky than Childbirth*, TIME (Jan. 25, 2012), <http://healthland.time.com/2012/01/25/why-abortion-is-less-risky-than-childbirth> [<https://perma.cc/VM3A-ZHY3>]; Geneva Pittman, *Abortion Safer than Giving Birth: Study*, REUTERS (Jan. 23, 2012, 5:20 PM), <https://www.reuters.com/article/us-abortion/abortion-safer-than-giving-birth-study-idUSTRE80M2BS20120123> [<https://perma.cc/56LH-JPTQ>].

<sup>73</sup> ARK. CODE ANN. § 20-9-602(4) (2019) ("Any female, regardless of age or marital status, [can give consent] for herself when given in connection with pregnancy or childbirth, except the unnatural interruption of a pregnancy.").

<sup>74</sup> See *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

<sup>75</sup> See *Danforth*, 428 U.S. at 74.

<sup>76</sup> See *Bellotti v. Baird*, 443 U.S. at 643.

<sup>77</sup> See *Danforth*, 428 U.S. at 74.

The constitutionality of any parental involvement statute depends on the adequacy of the judicial bypass proceeding.<sup>78</sup> The judicial bypass procedure must allow the minor to show that they are mature and well informed enough to make an abortion decision independently of parental involvement, or if the minor is not able to make the decision independently, the abortion would still be in the minor's best interest.<sup>79</sup> The proceeding must be carried out with anonymity and sufficient expedition to ensure the minor has enough time to obtain the abortion.<sup>80</sup> If the judicial bypass procedure is too restrictive or does not meet these standards, the parental involvement provision burdens a minor's right to an abortion and is unconstitutional.<sup>81</sup>

### 1. Mature and Well-Informed

In order to be constitutional, a judicial bypass procedure must give a minor the opportunity to show that they are mature enough to make their abortion decision without parental involvement.<sup>82</sup> Despite this constitutional requirement, the Supreme Court has not articulated standards for state courts to rely on in determining a minor's maturity, beyond stating that the minor must be well-informed enough to make the decision on their own.<sup>83</sup> As a result, many states require simply that

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<sup>78</sup> See *Ashcroft*, 462 U.S. at 491–93. The Supreme Court has not yet ruled about the constitutionality of a judicial bypass to a parental notification statute, as opposed to a parental consent statute. Courts around the country treat parental notification statutes the same as parental consent statutes for the purpose of judicial bypasses and constitutionality, and any provisions required for a parental consent statute are generally required for a parental notification statute. See *Planned Parenthood Ass'n of the Atlanta Area v. Harris*, 670 F. Supp. 971, 984 (N.D. Ga. 1987).

<sup>79</sup> See *Bellotti v. Baird*, 443 U.S. at 643. A judicial bypass procedure that requires a minor to show that parental consent is not in her best interests is the same as a procedure that requires a minor to show that an abortion without consent is in her best interests. See *Lambert*, 520 U.S. at 297. Thus, if a minor can prove they are at risk of abuse if their parents find out the minor is seeking an abortion, the court can find that an abortion without consent is in their best interest, as it would be in the minor's best interest to not disclose her abortion to her parents.

<sup>80</sup> See *Bellotti v. Baird*, 443 U.S. at 644.

<sup>81</sup> See *Lambert*, 520 U.S. at 295.

<sup>82</sup> See *Bellotti v. Baird*, 443 U.S. at 643.

<sup>83</sup> See *id.* at 647.

courts determine if a minor is mature and well-informed, without providing guidance within the legislation for how courts can make that determination.<sup>84</sup>

Other states provide factors courts must consider when determining a minor's maturity.<sup>85</sup> Across the country, courts consider a minor's handling of their finances,<sup>86</sup> knowledge of the abortion procedure,<sup>87</sup> consideration of alternatives to abortion,<sup>88</sup> experience

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<sup>84</sup> See, e.g., IDAHO CODE § 18-609A(2) (2019); IND. CODE § 16-34-2-4(e) (2019); KY. REV. STAT. ANN. § 311.732(4) (West 2019); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2019); MICH. COMP. LAWS SERV. § 722.904(3)(a) (LexisNexis 2019); MISS. CODE ANN. § 41-41-55(4)(a) (2019); MO. REV. STAT. § 188.028(2)(1) (2019); N.C. GEN. STAT. § 90-21.8(e)(1) (2019); OHIO REV. CODE ANN. § 2151.85(A)(4) (West 2019); VA. CODE ANN. § 16.1-241(W) (2019); W. VA. CODE § 16-2F-4(f)(1) (2019).

<sup>85</sup> See, e.g., ALA. CODE § 26-21-4(h) (2019); ARIZ. REV. STAT. § 36-2152(C) (LexisNexis 2019); ARK. CODE ANN. § 20-16-809(d) (2019); FLA. STAT. § 390.01114(4)(c)(1) (2019); KAN. STAT. ANN. § 65-6705(n) (2019); LA. STAT. ANN. § 40:1061.14(B)(3)(b)(ii) (2019); N.D. CENT. CODE § 14-02.1-03.1(2) (2019); OKLA. STAT. tit. 63, § 1-740.3(A) (2019); 18 PA. CONS. STAT. § 3206(f)(4) (2019); TEX. FAM. CODE ANN. § 33.003(i-1) (West 2019); WIS. STAT. § 48.375(7)(b) (2019).

<sup>86</sup> See, e.g., ARK. CODE ANN. § 20-16-809(d)(2)(E) (2019); ARIZ. REV. STAT. § 36-2152(C) (LexisNexis 2019); KAN. STAT. ANN. § 65-6705(n) (2019); OKLA. STAT. tit. 63, § 1-740.3(A) (2019); TEX. FAM. CODE ANN. § 33.003(i-1)(1)(B) (West 2019).

<sup>87</sup> See, e.g., ALA. CODE § 26-21-4(h) (2019); FLA. STAT. § 390.01114(4)(c)(1)(g) (2019); LA. STAT. ANN. § 40:1061.14(B)(3)(b)(ii) (2019); N.D. CENT. CODE § 14-02.1-03.1(2)(a) (2019); 18 PA. CONS. STAT. § 3206(f)(4) (2019); TEX. FAM. CODE ANN. § 33.003(i-1)(1)(C) (West 2019); WIS. STAT. § 48.375(7)(b)(2) (2019). There are many issues with judicial bypass procedures, not the least of which is the requirement that minors demonstrate awareness of "risks" associated with abortion, when many of those risks, including breast cancer, depression, and loss of fertility have been disproved by reputable researchers. See Julia R. Steinberg, Thomas M. Laursen, Nancy E. Adler, Christine Gasse, Esben Agerbo, & Trine Munk-Olsen, *Examining the Association of Antidepressant Prescriptions with First Abortion and First Childbirth*, JAMA PSYCHIATRY (Aug. 2018), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2681170> [<https://perma.cc/FRL2-GBZS>]; *Abortion and Breast Cancer Risk*, SUSAN G. KOMEN FOUND. (Sept. 17, 2019), <https://ww5.komen.org/BreastCancer/Table25Abortionandbreastcancerrisk.html> [<https://perma.cc/KL3P-KMZW>]; Jen Gunter, *Can an Abortion Affect Your Fertility?*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/well/can-an-abortion-affect-your-fertility.html> [<https://perma.cc/4L5U-HQC4>].

<sup>88</sup> See, e.g., ALA. CODE § 26-21-4(h) (2019); ARIZ. REV. STAT. § 36-2152(C) (LexisNexis 2019); ARK. CODE ANN. § 20-16-809(d)(3) (2019); KAN. STAT. ANN. § 65-6705(n) (2019); LA. STAT. ANN. § 40:1061.14(B)(3)(b)(ii) (2019); N.D. CENT. CODE § 14-02.1-03.1(2)(a) (2019); OKLA. STAT. tit. 63, § 1-740.3(A) (2019); 18 PA. CONS. STAT. § 3206(f)(4) (2019); TEX. FAM. CODE ANN. § 33.003(i-1)(1)(C) (West 2019); WIS. STAT. § 48.375(7)(b)(2) (2019).

living alone,<sup>89</sup> experience working outside the home,<sup>90</sup> and experience making similar life decisions.<sup>91</sup>

The Supreme Court has determined that courts must consider petitions from minors on an individual, case-by-case basis.<sup>92</sup> The state cannot presume that minors under a certain age are categorically immature, and courts must give all minors a chance to utilize the judicial bypass process to determine their maturity, no matter their age.<sup>93</sup> Minors have been granted abortions when they are articulate about future plans and possible risks to abortion, had part-time jobs, and were clear that abortion was the best option at that point in their lives.<sup>94</sup> In different states, however, courts deny minors waivers of consent, despite those minors sharing similar backgrounds and experiences with minors in other states who have been granted waivers.<sup>95</sup> Whether or not a minor is mature or well-informed, therefore, depends as much upon the judge as it does upon the minor.<sup>96</sup>

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<sup>89</sup> See, e.g., ARIZ. REV. STAT. § 36-2152(C) (LexisNexis 2019); ARK. CODE ANN. § 20-16-809(d)(2)(C) (2019); KAN. STAT. ANN. § 65-6705(n) (2019); OKLA. STAT. tit. 63, § 1-740.3(A) (2019); TEX. FAM. CODE ANN. § 33.003(i-1)(1)(B) (West 2019).

<sup>90</sup> See e.g., ARIZ. REV. STAT. § 36-2152(C) (LexisNexis 2019); ARK. CODE ANN. § 20-16-809(d)(2)(B) (2019); KAN. STAT. ANN. § 65-6705(n) (2019); OKLA. STAT. tit. 63, § 1-740.3(A) (2019); TEX. FAM. CODE ANN. § 33.003(i-1)(1)(B) (West 2019).

<sup>91</sup> See e.g., ALA. CODE § 26-21-4(h) (2019); ARIZ. REV. STAT. § 36-2152(C) (LexisNexis 2019); ARK. CODE ANN. § 20-16-809(d)(2)(F) (2019); KAN. STAT. ANN. § 65-6705(n) (2019); OKLA. STAT. tit. 63, § 1-740.3(A) (2019).

<sup>92</sup> See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440 (1983).

<sup>93</sup> See *id.*

<sup>94</sup> See *In re Doe*, 485 S.E.2d 354 (1997); *In re Doe*, 2011-Ohio-6373 (Ohio Ct. App. 2011).

<sup>95</sup> See *Ex parte Anonymous*, 803 So. 2d 542, 545 (Ala. 2011) (petition denied for a college-bound minor with a part-time job because the minor had not been allowed by two medical facilities to speak with a physician prior to appearing in court); *In re Anonymous*, 833 So. 2d 75, 79 (Ala. Civ. App. 2002) (petition denied for a straight-A student who planned to study medicine who was unable to articulate to the court's desire the possible medical, emotional, and psychological consequences of an abortion); *State ex rel. A.V.P.*, 108 So. 3d 1204, 1207 (La. Ct. App. 2013) (petition denied for a college-bound minor who was unclear about how having a child would affect her future plans, and who provided inconsistent statements about how supportive her parents would be); *R.B. v. State*, 790 So. 2d 830, 831 (Miss. 2001) (petition denied for an orphan whose grandmother stated she would not help her care for the child as the minor was not aware of the possible risks, the name of the physician, or the physician's qualifications).

<sup>96</sup> The minor in question in *Doe* expressed interest in attending college; the minor in *A.V.P.* had been accepted to college. *In re Doe*, 485 S.E.2d at 355; *State ex rel. A.V.P.*, 108 So. 3d at 1207.

## 2. Abortion in Best Interests

If a minor is not mature, they can still obtain judicial consent for an abortion if a judge decides that the abortion is in their best interests, notwithstanding the minor's immaturity.<sup>97</sup> Much like a finding of maturity, there are no standards from the Supreme Court to guide state courts in determining when an abortion is in the best interests of a minor.<sup>98</sup> States decide what evidence they can consider when determining if an abortion is in the best interest of a minor.<sup>99</sup>

The best interest provision of the judicial bypass process benefits minors who do not have parents or guardians who can provide consent.<sup>100</sup> When a minor is a ward of the state, a judicial bypass process may be the only way the minor could obtain an abortion.<sup>101</sup> The best interests standard is particularly vital in the cases of young minors who are pregnant as a result of statutory rape or other sexual assault.<sup>102</sup>

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The minor in *Doe* did not want to cause strife with divorced parents, the minor in *A.V.P.* had seen her mother throw her sister out of the house when her sister was pregnant and worried the same would happen to her. *In re Doe*, 485 S.E.2d at 355; *State ex rel. A.V.P.*, 108 So. 3d at 1207. The minor in *Doe* was granted an abortion, while the minor in *A.V.P.* was not. *In re Doe*, 485 S.E.2d at 355; *State ex rel. A.V.P.*, 108 So. 3d at 1207. While the statutes of North Carolina and Louisiana are different, both require minors to be mature and well-informed. LA. STAT. ANN. § 40:1061.14(B)(4)(b) (2019); N.C. GEN. STAT. § 90-21.8(e)(1) (2019). The courts in *Doe* and *A.V.P.* were confronted with very similar evidence, while coming to different conclusions.

<sup>97</sup> See *Scheinberg v. Smith*, 659 F.2d 476, 480 (5th Cir. 1981); see also *Orr v. Knowles*, 337 N.W.2d 699, 706 (1983).

<sup>98</sup> See *Bellotti v. Baird*, 443 U.S. 622, 648 (1979).

<sup>99</sup> See, e.g., OKLA. STAT. tit. 63, § 1-740.3(A) (2019) ("In assessing whether, by clear and convincing evidence, obtaining the written informed consent of the parent of the pregnant unemancipated minor is not in her best interest, a court may not consider the potential financial impact on the pregnant unemancipated minor or the family of the pregnant unemancipated minor if she does not have an abortion."); TEX. FAM. CODE ANN. § 33.003(i-2) (West 2019) ("In determining whether the notification and the attempt to obtain consent would not be in the best interest of the minor, the court may inquire as to: (1) the minor's reasons for not wanting to notify and obtain consent from a parent, managing conservator, or guardian; (2) whether notification or the attempt to obtain consent may lead to physical or sexual abuse; (3) whether the pregnancy was the result of sexual abuse by a parent, managing conservator, or guardian; and (4) any history of physical or sexual abuse from a parent, managing conservator, or guardian.").

<sup>100</sup> See *Ex parte Anonymous*, 531 So. 2d 901, 905 (Ala. 1988).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*



When immature minors are at risk of emotional or physical abuse if their parents or guardians discover their plan to obtain an abortion, the court can waive notification of an abortion, as it is in the best interests of the minor to obtain an abortion without their parents' knowledge.<sup>103</sup>

A generalized fear of telling a parent does not, in itself, allow the court to find that a waiver of parental consent or notification is in a minor's best interest.<sup>104</sup> The minor must prove they are at risk of physical or emotional injury should their parent discover their abortion.<sup>105</sup> When a minor is at risk of ejection from the home, or loss of financial support due to their parents' beliefs against abortion of pre-marital sex, courts can find that an abortion without notification or parental consent is in the minor's best interest.<sup>106</sup>

If an abortion is in the best interests of the minor, the court cannot withhold permission on the basis that it would be in the minor's better interest to also consult with their parents.<sup>107</sup> While a court can encourage the minor to talk to their parents, the court cannot insist a minor speak with their parents if an abortion without notification or consent is in the minor's best interests.<sup>108</sup> When a minor proves either that they are mature enough to make their own abortion decision, or that the abortion is in their best interest, the court must issue a judicial bypass.<sup>109</sup> Failure to issue a bypass in either case renders the bypass procedure constitutionally invalid.<sup>110</sup>

### 3. Anonymous

There are certain procedural requirements a court must follow in a judicial bypass proceeding, mainly that the bypass be anonymous and

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<sup>103</sup> See *In re Jane Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000).

<sup>104</sup> See *In re Jane Doe 2*, 166 P.3d 293, 296 (Colo. App. 2007).

<sup>105</sup> See *id.*

<sup>106</sup> See *In re Doe*, 932 So. 2d 278, 286 (Fla. Dist. Ct. App. 2005).

<sup>107</sup> See *In re Moe*, 423 N.E.2d 1038, 1042 (Mass. App. Ct. 1981).

<sup>108</sup> See *id.*

<sup>109</sup> See *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 369 (6th Cir. 2006).

<sup>110</sup> See *id.*

sufficiently expeditious.<sup>111</sup> In order for a judicial bypass to be constitutional, the procedure the statute creates must be practically available to minors.<sup>112</sup> The legislature and courts must do more than rely on statements or promises of the availability and confidentiality of the procedure.<sup>113</sup> The legislature or courts must develop specific practices to ensure the procedure is anonymous and available to minors.<sup>114</sup> The court must take steps to prevent the minor's identity from becoming public, though this requirement does not mean states have to allow a minor to file with a pseudonym or ensure complete anonymity.<sup>115</sup> A statute meets the anonymity requirement if the statute requires reasonable steps by the court to prevent the public from learning the minor's identity.<sup>116</sup> In order to achieve this, the statute must include provisions for confidentiality and anonymity in sufficient detail.<sup>117</sup>

When the court does require a minor's full name and social security number, the court must require that the records of the bypass be sealed in order to ensure the minor's anonymity.<sup>118</sup> This obligation is even more vital when the minor is subject to a venue restriction that forces them to file in their home county.<sup>119</sup> A minor's identity may need to be shared with court personnel for administrative purposes, but this exception to confidentiality is limited.<sup>120</sup> A court cannot reveal the minor's identity to people who the court feels need to know about aspects of the bypass procedure, like witnesses the state may call to

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<sup>111</sup> See *Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

<sup>112</sup> See *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 737 F.2d 283, 297 (3d Cir. 1984).

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990).

<sup>116</sup> See *id.*

<sup>117</sup> See *Jacksonville Clergy Consultation Serv., Inc. v. Martinez*, 696 F. Supp. 1445, 1448 (M.D. Fla. 1988).

<sup>118</sup> See *Planned Parenthood Ass'n of Atlanta Area v. Harris*, 670 F. Supp. 971, 994 (N.D. Ga. 1987).

<sup>119</sup> See *id.* at 992.

<sup>120</sup> See *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1280–81 (M.D. Ala. 2017).

determine whether the minor is mature.<sup>121</sup> The court does not have discretion to reveal the minor's identity beyond what is necessary for the administrative functions of the court.<sup>122</sup> All reasonable efforts must be taken to ensure anonymity for the minor.<sup>123</sup>

#### 4. Sufficient Expedition

Judicial proceedings must guarantee speedy proceedings and expedited review, not just because of the fundamental nature of the rights involved, but also because of the urgency of the abortion decision.<sup>124</sup> Delay in judicial bypass proceedings could force minors into second trimester abortions, which are more expensive and burdensome than first trimester abortions.<sup>125</sup> Statutes must create procedures or direct other agencies to promulgate rules to ensure an expedited hearing and appeal process.<sup>126</sup> State legislatures do not have to lay out all the necessary provisions to create a judicial bypass.<sup>127</sup> It is enough that the legislature creates a framework for a judicial bypass that is constitutional; existing court procedure can address issues of expedition and anonymity.<sup>128</sup> If the state demonstrates awareness of the importance of anonymity and expedition, the judicial bypass will be constitutional, provided there is nothing on the face of the act that contradicts the provisions laid out in *Bellotti*.<sup>129</sup>

Most judicial bypass hearings take fewer than twenty-two days.<sup>130</sup> The Supreme Court stated that a twenty-two-day procedure was not

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<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* at 1281.

<sup>124</sup> See *Wynn v. Carey*, 582 F.2d 1375, 1389 (7th Cir. 1978).

<sup>125</sup> See *id.*

<sup>126</sup> See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440–41 (1983); *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1135 (7th Cir. 1983).

<sup>127</sup> See *Manning v. Hunt*, 119 F.3d 254, 269 (4th Cir. 1997).

<sup>128</sup> See *id.* at 269–70.

<sup>129</sup> See *id.*

<sup>130</sup> See *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 379–80 (4th Cir. 1998) (holding that a procedure was constitutional when petitions had to be heard within four days of

enough to render a statute unconstitutional for lack of expedition.<sup>131</sup> District and circuit courts have used this holding to find nineteen-day procedures constitutional<sup>132</sup> and find twenty-three-day procedures unconstitutional.<sup>133</sup> However, the Supreme Court did not specifically state that twenty-two days was the maximum time a judicial bypass and appeal could take, merely that twenty-two days did not automatically render the statute unconstitutionally slow.<sup>134</sup> Courts must ensure that not only is the original bypass procedure conducted expeditiously, but also that the court hears appeals in a timely manner.<sup>135</sup>

#### D. *Venue Restriction Background*

A court has never struck down a parental consent statute or found a judicial bypass provision unconstitutional specifically because minors have been limited to filing the petition only in their county of residence, nor has the Supreme Court ever ruled on a venue restriction within a judicial bypass.<sup>136</sup> District and circuit courts find venue restrictions

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being filed, and appeals heard within five days of being filed); *Planned Parenthood Ass'n of Atlanta Area v. Miller*, 934 F.2d 1462, 1482 (11th Cir. 1991) (holding that nineteen days was not long enough to invalidate the statute); *T.L.J. v. Webster*, 792 F.2d 734, 736 (8th Cir. 1986) (providing for a notice of appeal within twenty-four hours of the lower court decision, and an expedited appeal within five days after the notice of appeal is filed); *Zbaraz v. Hartigan*, 776 F. Supp. 375, 380 (N.D. Ill. 1991) (ensuring that an appeal could be filed within two days of a lower court denial).

<sup>131</sup> See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513–14 (1990).

<sup>132</sup> See *Miller*, 934 F.2d at 1482.

<sup>133</sup> See *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887–88 (E.D. Pa. 1987).

<sup>134</sup> See *Akron Ctr. for Reprod. Health*, 497 U.S. at 508–09, 514.

<sup>135</sup> See *id.* at 508.

<sup>136</sup> See generally *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) (striking down an Idaho parental consent statute due to an inadequate medical emergency exception but declining to rule on the venue provision that had been enjoined by the district court); *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir. 1999) (upholding a parental consent statute and venue restriction as the venue restriction was promulgated by the state supreme court and did not supersede a more expansive venue provision in the original act creating the parental consent requirement); *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (striking down a parental notice statute for failing to provide expedited appeals, counsel for minors, and for requiring that courts notify parents when

unconstitutional if those venue restrictions prevent out-of-state minors from obtaining an abortion within the state without the consent of their parents.<sup>137</sup> If a venue restriction prevents out-of-state minors from seeking a judicial bypass, the court can strike the restriction down.<sup>138</sup>

The Seventh Circuit found an Indiana venue restriction constitutional if the minor, the minor's next friend, or the minor's physician could bring the judicial bypass petition.<sup>139</sup> If a minor has a choice as to who can bring the petition seeking a judicial bypass, and if any of those chosen people can bring the petition in the county where they reside, even if it is not the county where the minor resides, the venue restriction is constitutional.<sup>140</sup> The Sixth Circuit laid aside a Tennessee venue restriction, not because the restriction burdened minors, but because the court improperly created the restriction.<sup>141</sup> The act that created the parental consent law in Tennessee had a more expansive venue rule that allowed a minor to file for a judicial bypass anywhere in the state.<sup>142</sup> The court declined to rule on the constitutionality of a venue restriction which limits a minor to filing a judicial bypass petition in their home county or the county where the abortion is taking place, and instead ruled the venue provision in the original law superseded any court-created venue restriction.<sup>143</sup> The practical result of this decision was that minors were able to file a

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judicial bypass petitions were denied. The venue restriction in the statute was found constitutional because the petition for judicial bypass could be brought by a physician or next friend in the county where they reside, thereby giving the minor considerable flexibility about where to bring their petition); *Womancare of Orlando, Inc. v. Agwunobi*, 448 F. Supp. 2d 1309 (N.D. Fla. 2006) (upholding a parental consent statute while declining to rule on the venue restriction as neither party addressed the issue, rendering it not ripe for review); *Planned Parenthood Ass'n of Atlanta Area v. Harris*, 670 F. Supp. 971, 992 (N.D. Ga. 1987) (striking down a parental notification statute due to a lack of anonymity in court proceedings and burdensome notification procedures but stating that the venue restriction was not unconstitutionally restrictive on its own).

<sup>137</sup> See *Pearson*, 716 F.2d at 1141–42.

<sup>138</sup> See *id.*

<sup>139</sup> *Id.* at 1142.

<sup>140</sup> See *id.*

<sup>141</sup> *Sundquist*, 175 F.3d at 464.

<sup>142</sup> *Id.*

<sup>143</sup> See *id.*

judicial bypass petition in any county in the state.<sup>144</sup> The United States District Court for the District of Idaho found a venue restriction to be an undue burden, as the state admitted there was no state interest served by limiting the venue for minors seeking a judicial bypass, but the Ninth Circuit declined to rule on the venue restrictions, and struck the parental consent statute down for other reasons.<sup>145</sup>

E. *Judicial Bypass Under Whole Woman's Health Standard*

*Whole Woman's Health v. Hellerstedt* announced a new standard to determine whether or not an abortion regulation constituted an undue burden.<sup>146</sup> Under the new standard, a regulation is unconstitutional if the law creates burdens that outweigh any benefits from the law.<sup>147</sup> Judicial bypass cases since *Whole Woman's Health v. Hellerstedt* rely on evidence from doctors and the state when making legal decisions on the constitutionality of abortion regulations.<sup>148</sup>

An Indiana law required courts to notify parents if their minor child was seeking a judicial bypass in order to obtain an abortion, meaning courts had to notify parents of the minor's abortion even if the court later determined the minor was mature enough to make the abortion decision on their own.<sup>149</sup> The District Court for the Southern District of Indiana held this notification provision to be an undue burden, since the government intervention to protect the rights of parents had a far greater impact on the minor's bodily autonomy than it did on parental authority.<sup>150</sup> In making this decision, the court relied

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<sup>144</sup> See *id.*

<sup>145</sup> *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 915, 935 (9th Cir. 2004).

<sup>146</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>147</sup> See *id.* at 2300.

<sup>148</sup> See generally *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 988 (7th Cir. 2019); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d 929, 953–54 (S.D. Ind. 2017); *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1282 (M.D. Ala. 2017); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1101–04 (E.D. Ark. 2017).

<sup>149</sup> See *Comm'r*, 258 F. Supp. 3d at 933–34.

<sup>150</sup> *Id.* at 948.

on sworn affidavits from doctors and bypass coordinators, testifying to the abuse minors faced and the reality for minors in Indiana and Kentucky who were seeking bypasses to avoid parental abuse.<sup>151</sup> The Seventh Circuit upheld this decision, finding the state provided no evidence of a problem that the new notice requirement would solve, nor was there evidence the notice requirement would confer a benefit to minors and their parents.<sup>152</sup> The court relied on evidence from bypass coordinators to determine that notifying all parents of a minor's intention to seek a judicial bypass would have dangerous effects, and the court held the burdens this notice provision would create outweighed any benefits.<sup>153</sup>

An amendment to the Alabama judicial bypass statute required the court to notify the District Attorney (DA), who would be immediately added as a party to the proceedings.<sup>154</sup> A minor's parents or guardians would also be added to the proceedings if the guardians happened to learn the proceedings were taking place.<sup>155</sup> Reviewing courts could appoint a guardian ad litem (GAL) for the unborn child, and the DA and GAL could examine the petitioner and any witnesses at the proceeding.<sup>156</sup> The United States District Court for the Middle District of Alabama found the state provided no evidence for how these extra parties would provide guidance to the pregnant minor that would serve the state interest of providing sufficient evidence for minors to make informed decisions.<sup>157</sup> The court relied on statutes from other states to determine that these procedures, which were unique to Alabama, were unnecessary to achieve the stated goals and only served to burden minors seeking an abortion.<sup>158</sup>

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<sup>151</sup> *Id.* at 946–47.

<sup>152</sup> *Adams*, 937 F.3d at 984.

<sup>153</sup> *Id.* at 989; *see Comm'r*, 258 F. Supp. 3d at 946–48.

<sup>154</sup> *See* *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1269 (M.D. Ala. 2017).

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *Id.* at 1282.

<sup>158</sup> *Id.* at 1284–88.

The United States District Court for the Eastern District of Arkansas enjoined several anti-abortion provisions, including a tissue disposal mandate,<sup>159</sup> in part on the theory that requiring consent of a parent to dispose of the tissue following a minor's abortion, even if the minor obtained a judicial bypass, would violate the minor's right to an abortion free from parental influence.<sup>160</sup> To enjoin this provision, the court relied on copious amounts of evidence from Dr. Hopkins, of Little Rock Family Planning, including his assertion that forced disclosures from physicians severely interfere with abortion care.<sup>161</sup> The court noted that the state of Arkansas provided no evidence to contradict the doctor's assertions.<sup>162</sup>

The above cases demonstrate the *Whole Woman's Health* standard in action. The state must produce actual evidence to show the contested provisions are furthering a state interest.<sup>163</sup> In analyzing amendments to existing statutes, courts require evidence from states to prove the existence of a new problem that requires a change in provisions, and what actual benefits these amendments create.<sup>164</sup> If the state cannot provide this evidence, and minors or abortion providers can show evidence of burdens, courts have found for minors and abortion providers over the state, as they are required to do under *Whole Woman's Health v. Hellerstedt*.<sup>165</sup>

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<sup>159</sup> Ordinarily, doctors dispose of byproducts of an abortion, including fetal tissue, the same way as other medical waste. Tissue was collected by a contractor and incinerated out of state unless patients wanted the tissue cremated or studied by pathology labs. The Arkansas Tissue Disposal Mandate gave family members the right to control the tissue of a deceased person, which the statute defines to include fetal tissues from a lawful abortion. These remains must be disposed of through burial, cremation or "other authorized disposition," which is not defined in the act. *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1096–98 (E.D. Ark. 2017). The Tissue Disposal Mandate was enjoined by the Arkansas district court. *Id.* at 1105–08.

<sup>160</sup> *Id.* at 1101–04.

<sup>161</sup> *Id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See Reprod. Health Servs.*, 268 F. Supp. 3d at 1282; *Hopkins*, 267 F. Supp. 3d at 1105.

<sup>164</sup> *See Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 988–989 (7th Cir. 2019).

<sup>165</sup> *See id.* at 984; *Reprod. Health Servs.*, 268 F. Supp. 3d at 1280–81; *Hopkins*, 267 F. Supp. 3d at 1101.



## II. ANALYSIS

This Part analyzes the Arkansas venue restriction in much the same way a court would under the *Whole Woman's Health* standard.<sup>166</sup> The state's interest in the new parental consent law and venue restriction was to ensure that minors are making informed choices about their abortion decision by involving their parents.<sup>167</sup> The venue restriction was an amendment to the original parental consent law, which would require the state to produce evidence of a new problem that the venue restriction seeks to cure.<sup>168</sup> The state has no such evidence that would require a change in the parental consent law.

The state can provide evidence of the benefits of parental consent laws more generally and point to studies that demonstrate that minors can benefit from having parental involvement in their decisions.<sup>169</sup> Arkansas could argue that because minors' brains are not fully developed, minors require oversight when making potentially life-changing decisions.<sup>170</sup> These benefits, however, are outweighed by the burdens created by the venue restriction.<sup>171</sup> A telephone study of clerks demonstrated that only eight out of Arkansas's seventy-five circuit courts are prepared or able to provide information about the judicial bypass procedure.<sup>172</sup> This pervasive lack of information means that only 17.22% of Arkansas's population lives in a county with access to a judicial bypass.<sup>173</sup> This leaves over 82% of minors in Arkansas unable to

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<sup>166</sup> See *infra* Part II.

<sup>167</sup> See Parental Involvement Enhancement Act, 2015 Ark. Acts 934, § 1 (codified at ARK. CODE ANN. § 20-16-8 (2016)).

<sup>168</sup> See *Adams*, 937 F.3d at 988–89.

<sup>169</sup> See *infra* Section II.B.

<sup>170</sup> See *infra* Section II.B.

<sup>171</sup> See *infra* Section II.C.

<sup>172</sup> See *infra* Section II.D.

<sup>173</sup> Arkansas is 23.2% minors, which out of its 3,017,804 people is 700,130 minors. *Quick Facts Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/AR/PST045219> [<https://perma.cc/25AU-ZQBD>]. The combined population of minors in Pulaski, Madison, Crawford, Grant, Calhoun, Lafayette, and Poinsett counties is 120,568. *Quick Facts Calhoun County, Arkansas; Crawford County, Arkansas; Madison County, Arkansas; Grant County, Arkansas; Pulaski County, Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/>

obtain a judicial bypass, due to intransigence of lack of knowledge from local clerks.<sup>174</sup> The inability or unwillingness of local clerks to provide information renders the venue restriction of the Arkansas parental consent law an unconstitutional undue burden.

#### A. *State Interest*

In Arkansas, a physician cannot perform an abortion on a minor without obtaining written consent of a parent, legal guardian, or custodian.<sup>175</sup> A judicial bypass from a court can be used in lieu of consent from a parent, legal guardian, or custodian.<sup>176</sup> The court must grant the petition for an abortion without parental consent if the court finds through clear and convincing evidence that the minor is sufficiently mature and well-informed.<sup>177</sup> The court must also grant a bypass if the minor is a victim of physical or sexual abuse by one or both parents.<sup>178</sup> This standard is distinct from the best interest standard,

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fact/table/calhouncountyarkansas,crawfordcountyarkansas,madisoncountyarkansas,grantcountyarkansas,pulaskicountyarkansas/PST045219 [https://perma.cc/ZR7C-5YM6]; *Quick Facts Poinsett County, Arkansas; Lafayette County, Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/poinsettcountryarkansas,lafayettcountyarkansas/PST045219> [https://perma.cc/HJL3-2K6N].

<sup>174</sup> While minors can obtain assistance from trusted adults or clinic staff, it is not the constitutional responsibility of these individuals to help minors with the judicial bypass process. A constitutional infirmity in the courts is not cured by people outside of the courts providing information. *See infra* Section II.D.

<sup>175</sup> *See* ARK. CODE ANN. § 20-16-804 (2019). Parental consent is not required if a physician determines there is a medical emergency, but the physician must notify the parents or legal guardian within twenty-four hours of performing an emergency abortion on a minor. *See id.* § 20-16-807(a).

<sup>176</sup> *See id.* § 20-16-809(b). The petition for judicial bypass can be filed with a pseudonym or initials, and the court seals the proceedings. *See id.* § 20-16-809(b)(3)–(4). The judicial bypass takes precedence over other pending matters and includes the opportunity for an expedited appeal. *See id.* § 20-16-809(b)(5)–(7).

<sup>177</sup> *See id.* § 20-16-809(c). In determining the minor's maturity, the court can consider the minor's age, experience living and working outside the home, and experiencing handling personal finances, among other criteria. *See id.* § 20-16-809(d)(2). In considering whether or not the minor is well-informed, the court will look at the steps the minor took to explore their options and to what extent the minor weighed the potential consequences of each option. *See id.* § 20-16-809(d)(3).

<sup>178</sup> *See id.* § 20-16-809(c)(2)(A).

which requires the court to grant a bypass if obtaining the consent of a parent or guardian is not in the best interests of the minor.<sup>179</sup> No other standards are outlined to assist the court in determining what it means for an abortion to be in the best interests of the minor.

The Arkansas legislature amended its parental consent act in 2015 to include the venue restriction, which took effect on January 1, 2016.<sup>180</sup> The legislature included findings in the bill, stating that minors lack the ability to make fully informed choices, and highlighting that the medical, emotional, and psychological consequences of an abortion are long-lasting.<sup>181</sup> The bill aimed to protect minors against their immaturity, foster family unity, and protect the constitutional rights of parents to rear their children.<sup>182</sup> Critics of the bill stated that the new legislation would make it harder for minors who are victims of rape or incest to obtain an abortion.<sup>183</sup> Pro-choice activists also criticized the venue restriction for increasing the risk that a minor's anonymity would

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<sup>179</sup> See *id.*

<sup>180</sup> See Parental Involvement Enhancement Act, 2015 Ark. Acts 934 (codified at ARK. CODE ANN. § 20-16-8 (2016)). The bill passed with overwhelming support, sixty-eight to six in the House and twenty-four to one in the Senate. *House OKs Bills on "Re-homing,"* ARK. NEWS (Mar. . 20, 2015, 11:08 AM), <https://www.arkansasnews.com/article/20150320/NEWS/303209892> [<https://perma.cc/KLF7-T7JU>]; Michael R. Wickline, *Abortion-notice Bill Sent to Hutchinson,* ARK. ONLINE (Mar. 27, 2015, 2:33 AM), <https://www.arkansasonline.com/news/2015/mar/27/abortion-notice-bill-sent-to-hutchinson/?f=news-arkansas> [<https://perma.cc/76FG-YWPM>]. Representative Justin Harris, who introduced this bill, faced widespread criticism after he adopted two young sisters and later "re-homed" them by sending them to live with a former employee from Harris's daycare, Eric Francis. Prior to giving away the girls, friends of the family reported that Harris kept one of his adopted daughters locked in her room and hired a specialist to perform an exorcism. After Harris gave his daughters away to Francis, Francis raped the then-six-year-old girl. Francis is serving forty years in prison; Harris has faced no charges. Tara Culp-Ressler, *Lawmaker Whose Adopted Daughter Was Raped Wants to Restrict Abortion for Rape and Incest Victims,* THINKPROGRESS (Mar. 18, 2015, 12:42 PM), <https://thinkprogress.org/lawmaker-whose-adopted-daughter-was-raped-wants-to-restrict-abortion-for-rape-and-incest-victims-ada0de48698d> [<https://perma.cc/FSQ4-K8FJ>]; Abby Phillip, *The Story of an Arkansas Politician Who Gave Away His Adopted Child, and the Tragedy that Followed,* WASH. POST (Mar. 13, 2015, 12:29 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/13/the-story-of-an-arkansas-politician-who-gave-away-his-adopted-child-and-the-tragedy-that-followed> [<https://perma.cc/KCL2-WD5K>].

<sup>181</sup> See Parental Involvement Enhancement Act § 1.

<sup>182</sup> See *id.*

<sup>183</sup> See Wickline, *supra* note 180.

be compromised when the minor has to file a petition in her home county.<sup>184</sup> No legislators offered criticism or support of the venue restriction.<sup>185</sup>

B. *Benefits to Parental Involvement and Venue Restriction*

Anti-abortion advocates believe parental involvement laws are necessary to ensure abortion providers have access to the minor's medical history through medical records provided by the parents.<sup>186</sup> There is a belief that a minor cannot fully understand the short- and long-term consequences without parental involvement, and thus a minor is not giving their informed consent unless their parents have weighed in on their decision.<sup>187</sup> Adolescent brains are still developing, and the delayed development of certain brain functions has been shown to increase risk-taking behavior in adolescents.<sup>188</sup> While adults make decisions using the frontal cortex, an area of the brain that controls planning and rational thinking, adolescents rely on the amygdala, which

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<sup>184</sup> See Teddy Wilson, *Arkansas GOP Makes Obtaining Abortions for Teen Rape Survivors More Burdensome*, REWIRE NEWS (Mar. 23, 2015, 5:33 PM), <https://rewire.news/article/2015/03/23/arkansas-gop-makes-abortions-teen-rape-survivors-burdensome> [https://perma.cc/SLW6-7FLG].

<sup>185</sup> See generally *All Abortion Bills From Session Now Law*, ARK. NEWS (Apr. 7, 2015, 5:50 AM), <https://www.arkansasnews.com/news/arkansas/all-abortion-bills-session-now-law> [https://perma.cc/HHX2-KM7X]; *Ark. House Passes Bill to Bolster Parental Involvement Requirements*, NAT'L PARTNERSHIP FOR WOMEN & FAMS.: REPRO HEALTH WATCH (Mar. 24, 2015), <http://go.nationalpartnership.org/site/News2?page=NewsArticle&id=47235> [https://perma.cc/7UJA-Q3Q3] (including statements of support from anti-choice activist arguing the increased requirements for parental and guardian verification are beneficial to prevent minors from being coerced into an abortion); Culp-Ressler, *supra* note 180; Wickline, *supra* note 180.

<sup>186</sup> See Maggie Datiles, *Parental Involvement Laws for Abortion: Protecting Both Minors and Their Parents*, AMS. UNITED FOR LIFE (Apr. 23, 2010), <https://aul.org/2010/04/23/parental-involvement-laws-for-abortion-protecting-both-minors-and-their-parents> [https://perma.cc/8D29-HWEW].

<sup>187</sup> See *id.*

<sup>188</sup> Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu, & Sushil Sharma, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449 (2013).

is traditionally associated with instinct and emotions.<sup>189</sup> Adults plan out decisions; adolescents go with their gut feelings.<sup>190</sup>

These scientific differences in brain structure and decision-making give rise to the recognized legal difference between the brains of adolescents and the brains of adults.<sup>191</sup> Defendants under eighteen cannot be given the death penalty based on studies that show teenagers have a lack of maturity and underdeveloped sense of responsibility, which leads them to make poorly-considered decisions.<sup>192</sup> The Supreme Court has upheld the validity of this science when it held sentencing a juvenile to life without parole for a nonhomicide offense to be unconstitutional.<sup>193</sup>

Beyond benefits to minors in the form of parental assistance with decision-making,<sup>194</sup> parental involvement statutes protect parental rights.<sup>195</sup> The right of parents to raise their children as they desire has long been recognized by the Supreme Court.<sup>196</sup> The concept of family

<sup>189</sup> See Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html> [<https://perma.cc/3KYQ-8DH2>].

<sup>190</sup> See *id.*

<sup>191</sup> See Editorial Board, *Crime and the Adolescent Brain*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/opinion/sunday/crime-and-the-adolescent-brain.html> [<https://perma.cc/4PZK-9BPA>]; Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, A.B.A. (Aug. 1, 2015), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability) [<https://perma.cc/LBU7-JHT6>].

<sup>192</sup> See Editorial Board, *supra* note 191; see also *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

<sup>193</sup> See *Graham v. Florida*, 560 U.S. 48, 68 (2010).

<sup>194</sup> See also Timothy F. Piehler & Ken C. Winters, *Decision-Making Style and Response to Parental Involvement in Brief Interventions for Adolescent Substance Use*, 31 J. FAM. PSYCHOL. 336 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5378604> [<https://perma.cc/BWG6-TLBF>] (concluding that parental involvement benefits adolescents with rational decision-making and maladaptive decision-making styles). See generally Kathleen A. Commendador, *Parental Influences on Adolescent Decision Making and Contraceptive Use*, 36 PEDIATRIC NURSING 147 (2010) (demonstrating that parental influence and communication delays sexual intercourse and increases contraceptive use among adolescents). While both groups of adolescents benefited from parental involvement in decision-making, adolescents who are already struggling with decision-making derived a large benefit from parental involvement.

<sup>195</sup> See Datiles, *supra* note 186.

<sup>196</sup> See Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127, 134 (2016).

in the law relies on the idea that parents possess the maturity and judgment capacity that children lack, and the natural affection and bonds parents have with their children mean parents will act in the best interests of their children.<sup>197</sup> For anti-abortion advocates, parental involvement statutes also serve to lower abortion rates.<sup>198</sup> Anti-abortion advocates argue that the current parental involvement laws do not do enough, and that fewer abortions would occur if parents were notified about their children's abortions and their children had no opportunity to bypass their parents.<sup>199</sup>

In addressing judicial bypass venue restrictions, other states have highlighted the need to curb forum shopping by minors.<sup>200</sup> A Texas judge expressed concern that upon being rejected by one court, minors would travel to other counties to refile their rejected petitions in the hope of obtaining a judicial bypass.<sup>201</sup> Justice David Souter, when he was a trial judge in New Hampshire, echoed this concern.<sup>202</sup> There is an understanding that minors will, if they are able, choose counties or judges that are more likely to grant a bypass.<sup>203</sup> Conservative judges will occasionally refuse to rule on or even hear judicial bypass petitions, and minors may try to avoid those judges.<sup>204</sup> There is no clear evidence how

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<sup>197</sup> See *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>198</sup> See Judie Brown, *Pro-Life Basics: Should We Celebrate Laws Requiring Parental Consent or Notification for Abortion?*, CELEBRATE LIFE MAG. (May–June 2014), <https://www.clmagazine.org/post/pro-life-basics-should-we-celebrate-laws-requiring-parental-consent-or-notification-for-abortion> [<https://perma.cc/XV5E-C6JP>].

<sup>199</sup> See, e.g., *Let's Assure that Parental Involvement Laws Save the Most Babies Possible*, NAT'L RIGHT TO LIFE NEWS TODAY (Jan. 31, 2013), <https://www.nationalrighttolifenews.org/2013/01/lets-assure-that-parental-involvement-laws-save-the-most-babies-possible> [<https://perma.cc/YVN7-W3RW>].

<sup>200</sup> See Alexa Garcia-Ditta, *Court Committee Puzzled by New Abortion Restrictions*, TEX. OBSERVER (Oct. 17, 2015, 11:31 AM), <https://www.texasobserver.org/court-committee-puzzled-by-new-abortion-restrictions> [<https://perma.cc/L55N-8HCU>].

<sup>201</sup> See *id.*

<sup>202</sup> See Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 84 (1995).

<sup>203</sup> See HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* 163 (2007).

<sup>204</sup> See *id.*

often this occurs, beyond anecdotal evidence by minors and advocates.<sup>205</sup>

### C. *Burdens to Parental Involvement and Venue Restriction*

The positive influence parents have on their child's decision-making is not the same for all families.<sup>206</sup> Rather, positive parental influence on decision-making generally depends on parenting styles.<sup>207</sup> Over-controlling parents are associated with a higher risk of adolescent pregnancy, possibly because adolescents with authoritarian parents who expect rules to be obeyed without explanation, are less likely to turn to their parents for assistance and more likely to turn to their peers.<sup>208</sup> Another study showed that adolescents who were allowed to make their own decisions, as opposed to adolescents whose parents made all familial and personal decisions, had better decision-making capacity and were less likely to binge drink.<sup>209</sup>

Healthcare professionals also recognize that adolescents can give informed consent, even with their tendency towards snap decisions.<sup>210</sup> Terminally ill adolescents are sometimes more aware of the gravity of their illness than adults in similar situations, and they are able to navigate complex medical decisions.<sup>211</sup> Since public health requires

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<sup>205</sup> See *id.*

<sup>206</sup> See Eugene Lee Davids, Nicolette Vanessa Roman, & Lloyd Leach, *Decision Making Styles: A Systematic Review of Their Associations with Parenting*, 1 ADOLESCENT RES. REV. 69 (2016). "The results indicate that, when parents display or engage in approaches to parenting that are deemed negative, this has detrimental outcomes for child and adolescent decision making, as the child or adolescent would be prone to engage in maladaptive decision making." *Id.* at 84.

<sup>207</sup> See *id.*

<sup>208</sup> See Commendador, *supra* note 194.

<sup>209</sup> See Lin Xiao, Antoine Bechara, Paula H. Palmer, Dennis R. Trinidad, Yonglan Wei, Yong Jia, & C. Anderson Johnson, *Parent-Child Engagement in Decision-Making and the Development of Adolescent Affective Decision Capacity and Binge-Drinking*, 51 PERSONALITY & INDIVIDUAL DIFFERENCES 285 (2011).

<sup>210</sup> See Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251, 283-85 (2005).

<sup>211</sup> See Kimberly Gordy, Note, *Adding Life to the Adolescent's Years, Not Simply Years to the Adolescent's Life: The Integration of the Individualized Care Planning & Coordination Model and*

prompt diagnosis and treatment of sexually transmitted diseases, states allow adolescents to access treatment without parental consent.<sup>212</sup> This attitude shows up most frequently in treatment for sexually transmitted infections, to ensure that there are as few barriers as possible between adolescents and the treatment they need. The law allows for healthcare emancipation when minors need to be protected from the consequences that may result if their parents were aware of their actions, whether those consequences are real or assumed.<sup>213</sup> As pregnancy has personal and societal costs for minors, the law can intervene to ensure that minors are able to make decisions about their pregnancy without fear of parental penalties.<sup>214</sup> Minors can access contraception without the approval of their parents, since even though sex can carry hazards, it is unreasonable that the state would punish sex with an unwanted birth and pregnancy.<sup>215</sup> This punishment does not apply to minors any more than it applies to adults, thus a total prohibition on minors accessing contraceptives is not constitutional.<sup>216</sup>

Studies have proven that parental involvement statutes do not reduce abortions.<sup>217</sup> An analysis of Arkansas abortions before and after the parental consent statute took effect showed a downward trend in abortions for all age groups, not just minors.<sup>218</sup> Fewer people were obtaining abortions, but this was the case across age groups; there was nothing in the parental consent statute that reduced abortion rates for minors specifically.<sup>219</sup>

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*a Statutory Fallback Provision*, 11 YALE J. HEALTH POL'Y, L., & ETHICS 169, 186–87 (2011) (citing Leslie S. Kersun & Eyal Shemesh, *Depression and Anxiety in Children at the End of Life*, 54 PEDIATRIC CLINICS N. AM. 691, 694 (2007)).

<sup>212</sup> See Manian, *supra* note 196, at 142.

<sup>213</sup> See Mutcherson, *supra* note 210, at 270–71.

<sup>214</sup> *Id.* at 271.

<sup>215</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972).

<sup>216</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694–95 (1977).

<sup>217</sup> See Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi*, 27 FAM. PLANNING PERSPECTIVE 120 (May–June 1995).

<sup>218</sup> See Ted Joyce, *Parental Consent for Abortion and the Judicial Bypass Option in Arkansas: Effects and Correlates*, 42 PERSP. ON SEXUAL & REPROD. HEALTH 168 (2010).

<sup>219</sup> See *id.*



The majority of minors already involve or inform their parents of their abortion decisions.<sup>220</sup> For the minors that do not tell their family, 30% have either experienced violence, worried that violence will occur, or believed they would be forced to leave their home.<sup>221</sup> These minors frequently still speak to adults about their decision, with 52% confiding in an adult outside of their family and another 22% speaking with a professional about their decision.<sup>222</sup> Minors frequently excluded their parents from their abortion decision when they knew their parents would not be supportive, would prevent them from obtaining an abortion, or when they sensed the revelation of their pregnancy would disrupt familial harmony.<sup>223</sup> All minors in these studies chose to involve someone in their abortion decision, and past research has shown that minors face worse outcomes when forced to involve unsupportive people.<sup>224</sup>

While parental involvement is sure to benefit certain minors, to prescribe it for all minors ignores the capacity minors have to make their own healthcare decisions and assumes that parental involvement will be equally beneficial for all minors, when the opposite is true. Certain parenting styles worsen adolescent decision-making, and adolescents may not benefit from increased parental involvement.<sup>225</sup> As a result, parental involvement statutes have limited benefits and proven burdens.

Judicial bypass hearings cause psychological distress for minors.<sup>226</sup> One study, based around in-depth interviews with minors who had

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<sup>220</sup> See Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLANNING PERSPECTIVES 196 (1992); see also Lauren Ralph, Heather Gould, Anne Baker, & Diana Greene Foster, *The Role of Parents and Partners in Minors' Decisions to Have an Abortion and Anticipated Coping After Abortion*, J. ADOLESCENT HEALTH 428 (2014).

<sup>221</sup> Henshaw & Kost, *supra* note 220.

<sup>222</sup> *Id.*

<sup>223</sup> Lee A. Hasselbacher, Anna Dekleva, Sigrid Tristan, & Melissa L. Gilliam, *Factors Influencing Parental Involvement Among Minors Seeking an Abortion: A Qualitative Study*, 104 AM. J. PUB. HEALTH 2207 (2014).

<sup>224</sup> *Id.*

<sup>225</sup> Davids et al., *supra* note 206.

<sup>226</sup> See Manian, *supra* note 196, at 149.

obtained judicial bypasses, found that almost all the minors surveyed were nervous or frightened about the prospect of going to court, primarily because they were afraid the judge would not give them permission for an abortion.<sup>227</sup> The minors worried about making mistakes that could make them seem immature, or being unable to convey their maturity through discussions of their life circumstances.<sup>228</sup> Others worried that the judge would not be satisfied with the reasons minors gave for choosing not to involve their parents.<sup>229</sup> Several minors in the study, who had never been to court before, could not shake the feeling that court was for people who did something wrong, that they should feel ashamed for being there.<sup>230</sup> This fear is not unfounded; in the course of judicial bypass proceedings, minors can be shamed, interrogated by judges, and forced to discuss intimate details of their lives in court.<sup>231</sup> All the minors surveyed except one said they did not find the judicial bypass process to be helpful in their decision making, and instead found the court process created more stress.<sup>232</sup> Minors also reported logistical issues in obtaining a judicial bypass.<sup>233</sup> These issues came in the form of incorrect information about the procedure and general difficulties traveling to the courthouse for the procedure, particularly if the minor did not have a car or could not drive.<sup>234</sup> These difficulties existed when minors could obtain a judicial bypass from any court in the state,<sup>235</sup> but are heightened when venue restrictions are

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<sup>227</sup> See Ehrlich, *supra* note 24, at 140–45.

<sup>228</sup> See *id.* at 141.

<sup>229</sup> See *id.*

<sup>230</sup> See *id.* at 173.

<sup>231</sup> See Manian, *supra* note 196, at 149; Maya Manian, *Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation*, 50 FAM. CT. REV. 241, 245 (2012); Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305, 314 (2004).

<sup>232</sup> See Ehrlich, *supra* note 24, at 140–45.

<sup>233</sup> See *id.*

<sup>234</sup> See *id.*

<sup>235</sup> See generally *id.*

present, particularly with regard to receiving incorrect information about the procedure.<sup>236</sup>

Venue restrictions may be passed to prevent forum shopping, but too often these statutes can prevent minors from accessing abortion at all.<sup>237</sup> A study of Pennsylvania courts in 1999 found that only eight out of the sixty judicial districts were able to give complete and accurate information to a caller seeking a judicial bypass.<sup>238</sup> A little over half the courts in Tennessee were similarly unprepared to assist minors in the judicial bypass process.<sup>239</sup> Thirty-four of sixty-seven Alabama county courts could not provide constitutionally required information to minors seeking a judicial bypass.<sup>240</sup> Sixty-five percent of Florida courts could not provide assistance to callers about a judicial bypass.<sup>241</sup> In Texas, over half of county courts were either unable or unwilling to assist or provide any information about a judicial bypass procedure.<sup>242</sup>

As disheartening as it is for a minor to call a huge number of courts before reaching one that can assist, this lack of information has the greatest consequences for minors limited by venue restrictions.<sup>243</sup> When a court cannot or will not provide a judicial bypass to a minor, and there is no way for the minor to utilize another court, the minor

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<sup>236</sup> See *infra* Section II.D, which focuses on clerk responses, which are frequently plagued by misinformation.

<sup>237</sup> See, e.g., Shelia Cheaney & Laura Smith, *Staying Open: How Restricting Venue in Texas's Judicial Bypass Cases Would Hurt Minors and Violate the Constitution*, 9 SCHOLAR 45, 55 (2006).

<sup>238</sup> Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 81 (1999).

<sup>239</sup> Helena Silverstein, Wayne Fishman, Emily Francis, & Leanne Speitel, *Judicial Waivers of Parental Consent for Abortion: Tennessee's Troubles Putting Policy into Practice*, 27 L. & POL'Y 399, 408–09 (2005).

<sup>240</sup> Helena Silverstein & Leanne Speitel, "Honey, I Have No Idea": *Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV 75, 90 (2002).

<sup>241</sup> AMANDA BLOCK, AUDREY EASTERWOOD, SAMANTHA KOHL, JULIE LE, CHARLOTTE MYERS, ERIN PAVACIK, & MEGAN SAUMIER-SMITH, *JUDICIAL BYPASS IN FLORIDA: TESTING THE PRO-CHOICE COMPROMISE* (2013), <https://lsa.umich.edu/content/dam/women-assets/women-documents/Florida%20Judicial%20Bypass%202012%20Final%20Report.pdf> [https://perma.cc/5SN2-A45Z].

<sup>242</sup> Cheaney & Smith, *supra* note 237, at 55.

<sup>243</sup> See *generally id.*

has very few options.<sup>244</sup> They can seek approval from their parents or guardians, if indeed their parents or guardians are a part of their life.<sup>245</sup> This prospect is terrifying for minors who would face physical, emotional, or mental abuse from parents who are opposed to abortion or pre-marital sex.<sup>246</sup> The prospect of parental consent is even more upsetting for minors who are the victims of parental incest who are reduced to asking their rapist for permission for an abortion. If minors do not want to seek consent from their parents, they can choose to carry the child to term, or take self-help measures, purchasing pills through the internet, or relying on incredibly unsafe means to induce an abortion.

D. *Results of Study Testing Clerk Knowledge or Willingness to Provide Information about Judicial Bypass Procedure*

Arkansas has seventy-five circuit courts spread across twenty-three judicial districts.<sup>247</sup> In order to obtain a judicial bypass, minors must petition the circuit court in the county where they reside.<sup>248</sup> Since a petition must be filed in the local circuit court, I conducted a telephone survey of the seventy-five circuit court clerks in Arkansas.<sup>249</sup> I opened each call by asking for information about where a person under eighteen could drop off a petition so she could have an abortion without having to tell her parents.<sup>250</sup>

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<sup>244</sup> See generally Ehrlich, *supra* note 24.

<sup>245</sup> See generally Cheaney & Smith, *supra* note 237.

<sup>246</sup> See Manian, *supra* note 196, at 149.

<sup>247</sup> See *Circuit Clerks*, ARK. JUDICIARY, <https://www.arcourts.gov/directories/circuit-clerks> [<https://perma.cc/CKS8-JP5B>].

<sup>248</sup> See ARK. CODE ANN. § 20-16-808 (2019); ARK. CODE ANN. § 20-16-809(b)(1)(A) (2019).

<sup>249</sup> The idea to call clerks was borrowed from Shelia Cheaney and Laura Smith's study. Cheaney & Smith, *supra* note 237, at 54.

<sup>250</sup> Each call began by me stating, "I'm calling to get information about where a girl under eighteen should drop off a petition to get an abortion without her parent's approval. Do you have any information about that?" For the first ten calls, I asked, "How a girl under eighteen can get an abortion without having to tell her parents," but that brought up such confused responses from clerks that I targeted the request to make it more about a petition for a judicial bypass. While it is unlikely a minor would know to use the phrase "petition," I hoped that by using

The vast majority of courts had no idea how to handle this inquiry. Only three courts provided accurate information. The clerk of the Pulaski County's circuit court knew the most, which is understandable, as Pulaski County contains both Little Rock and the state's main surgical abortion clinic. The Madison County clerk had to research the question, but eventually communicated where the petition would be filed, that no filing fee was required, and gave the number in the Arkansas code where more information about the procedure could be found.<sup>251</sup> Finally, the Crawford circuit clerk provided contact information for a person in the juvenile division who was knowledgeable about the procedure.

Five other courts provided some information, not all of it accurate.<sup>252</sup> Grant and Calhoun counties' clerks knew enough to advise that this type of petition would be filed in circuit court and had no knowledge beyond that fact. Two courts in Lafayette County and White County provided inaccurate information. Lafayette County said it may cost money to file a petition for judicial bypass, which is not the case. An erroneous statement like that could dissuade minors from filing these petitions. The clerk of White County was confident that parental consent for an abortion was not needed at all.<sup>253</sup>

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language the clerks may be familiar with, I would elicit more informed responses. This did not turn out to be the case. *See infra* Section II.D.

<sup>251</sup> There was a small inaccuracy in the Madison clerk's response. This information came from the county clerk, which is not the person who handles petitions for judicial bypass. These petitions should go through the circuit clerk, but the circuit clerk in Madison County knew nothing about the petitions, and the county clerk did. Thus, even though a minor would receive the necessary assistance, the circuit court is not in statutory compliance with the law.

<sup>252</sup> The clerk of Poinsett County provided information about a petition to remove disability, which is not a judicial bypass, but did say it had to be filed in circuit court. The Poinsett County also provided the quote that serves as the title of this Note.

<sup>253</sup> Unable to contain my surprise at this statement, I responded, "Oh, that's not true," to which the clerk said, "Well, that's what the attorney told me." A confident assertion, given that many other clerks bent over backwards to inform me they did not give legal advice.



Fifteen counties had no information, and suggested speaking with specific attorneys, either through Arkansas Legal Aid or local attorneys.<sup>254</sup> Another seventeen counties had no information and suggested speaking with an attorney, but provided no information about where to find an attorney, oftentimes stating that they as clerks could not provide legal advice or attorney referrals.<sup>255</sup> Thirteen counties referred me to service providers: either local shelters, hospitals, or health departments.<sup>256</sup> Five courts referred me to attorneys and local services,<sup>257</sup> for a total of fifty counties with no information about the

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<sup>254</sup> Crittenden, Craighead, Randolph, Hot Spring, Desha, Arkansas, Lincoln, Union, Boone, Marion, Benton, and Lonoke counties all suggested I speak with an attorney: either legal aid, an attorney in the courthouse, or other local attorneys. Clark, Little River, and Yell counties suggested I speak with a prosecutor's office.

<sup>255</sup> Woodruff, Cross, Monroe, Mississippi, Jackson, Howard, Ashley, Jefferson, Sebastian, Ouachita, Columbia, Scott, Independence, Stone, Garland, Montgomery, and Polk counties recommended I talk to "an attorney."

<sup>256</sup> Lawrence, Washington, Franklin, Perry, Hempstead, Miller, Chicot, Cleveland, Conway, Fulton, Izard, Prairie, and Searcy counties.

<sup>257</sup> St. Francis, Greene, Baxter, Faulkner, and Saline counties.

judicial bypass procedure, but a willingness to refer to those who may have knowledge about the procedure.<sup>258</sup>

Two clerks had no information about the procedure and referred me to local crisis pregnancy centers.<sup>259</sup> Another twelve counties did not know anything about the judicial bypass procedure and provided no referrals to attorneys or services.<sup>260</sup> Two clerks were unable to keep their own opinions out of the calls, stating that there were many families who wanted children, that an abortion was a drastic measure, and there were options available.<sup>261</sup> One county clerk was clear that the judge would not grant petitions for judicial bypass, stating a minor had brought a petition once in the past, and the judge had refused to grant the petition.<sup>262</sup>

Little Rock Family Planning does provide valuable assistance to minors who are filing petitions for judicial bypass.<sup>263</sup> As this is one of two clinics in the state, it is highly likely that, in practice, almost every minor will receive the necessary assistance in filing a judicial bypass. It is not the responsibility of the clinic, however, to correct the court system's failure to comply with the law. The state of Arkansas has vested in its courts a responsibility to hear and grant judicial bypass petitions, and most circuit courts are unable to do so, leaving a health clinic with the burden of providing legal guidance. Finally, all the guidance of Little Rock Family Planning means nothing if a judge will not grant petitions for minors who qualify for an abortion without parental consent.

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<sup>258</sup> While I did not contact any referred attorneys, I called several local health departments, none of whom had any information about the judicial bypass procedure, which is to be expected, as this procedure is not something that would be handled by the health department.

<sup>259</sup> Johnson and Bradley counties. A crisis pregnancy center is an organization that looks like a health clinic but exists to spread misinformation about abortion and pressure people out of obtaining an abortion. See Amy G. Bryant and Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 *AMA J. ETHICS* 269 (2018).

<sup>260</sup> Phillips, Lee, Sharp, Nevada, Pike, Sevier, Drew, Dallas, Newton, Logan, Pope, and Cleburne counties.

<sup>261</sup> Clay and Van Buren counties.

<sup>262</sup> Carroll County.

<sup>263</sup> The Pulaski county clerk assured me that no lawyer was necessary, and Little Rock Family Planning would provide all the help a minor would need.

Over eighty-two percent of Arkansas minors live in a county with a clerk that either knows nothing about the judicial bypass procedure, does not take the time to learn about it, or who refuses to provide the procedure.<sup>264</sup> While certain minors would benefit from consultation with parents, a large fraction of the minors who would be utilizing a judicial bypass, those minors that cannot or do not want to share their abortion decision with their parents, would be unduly burdened by a requirement to seek a judicial bypass from a court that does not care to or cannot provide one. The burden faced by a large fraction of minors, in the form of unwilling or unknowledgeable courts, is not outweighed by any benefits to the state in strengthening a family unit that is already fractured, given that the minors in question do not want to communicate with their parents, or in preventing potential but unproven forum shopping.<sup>265</sup>

### III. PROPOSAL

Courts across Arkansas are not prepared to provide judicial bypass procedures to minors. Given that the majority of Arkansas's population lives outside of a county that can provide a judicial bypass, the majority of minors who need a judicial bypass in order to obtain an abortion will confront a substantial obstacle. The burdens created by a venue

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<sup>264</sup> Arkansas is 23.2% minors, which out of its 3,017,804 people is 700,131 minors. *Quick Facts Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/AR/PST045219> [<https://perma.cc/25AU-ZQBD>]. The combined population of minors in Pulaski, Madison, Crawford, Grant, Calhoun, Lafayette, and Poinsett counties is 120,568. *Quick Facts Calhoun County, Arkansas; Crawford County, Arkansas; Madison County, Arkansas; Grant County, Arkansas; Pulaski County, Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/calhouncountyarkansas,crawfordcountyarkansas,madisoncountyarkansas,grantcountyarkansas,pulaskicountyarkansas/PST045219> [<https://perma.cc/ZR7C-5YM6>]; *Quick Facts Poinsett County, Arkansas; Lafayette County, Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/poinsettcountyarkansas,lafayettecountyarkansas/PST045219> [<https://perma.cc/HJL3-2K6N>]. The minors in the counties that provided some information make up 17.22% of Arkansas minors, which leaves 82.78% of Arkansas minors in a county that is not prepared to provide a judicial bypass.

<sup>265</sup> Beyond Silverstein's observation that many minors do their best to choose sympathetic judges, there have been no systematic studies of perceived "forum shopping" by minors. SILVERSTEIN, *supra* note 203, at 163.



restriction, namely that a large fraction of minors who need to utilize the judicial bypass process will be unable to obtain one, do not outweigh any benefits the law may provide. In creating a substantial obstacle to the judicial bypass procedure, Arkansas has given parents a veto over their children's abortion decision, which is unconstitutional under *Bellotti v. Baird*.<sup>266</sup>

To rectify the unconstitutionality of the parental consent statute, Arkansas must remove the venue restriction and allow minors to file a petition for judicial bypass in any county.<sup>267</sup> This will allow minors to file a petition with a court that is aware of the procedure and can provide the constitutionally required judicial bypass without delay. Removing the unconstitutional venue restriction will not remove every obstacle minors in Arkansas will face in seeking a judicial bypass. Minors may be forced to travel great distances in order to find a judge or clerk who is knowledgeable about the procedure, which leads to financial stress and delays. Removing the venue restriction will make the judicial bypass constitutional but will not address the practical concerns facing minors in Arkansas who wish to obtain abortions without their parents' permission. Those practical issues, however, are created by the parental consent statute, which courts have repeatedly held to be constitutional.<sup>268</sup>

#### CONCLUSION

The judicial bypass in Arkansas is a right without a remedy. Minors have the theoretical option to go to their local court and petition

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<sup>266</sup> See *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>267</sup> Providing training to circuit clerks to ensure they are knowledgeable about the judicial bypass procedure does not cure this constitutional infirmity. There are clerks and judges across Arkansas who are not just unable, but absolutely unwilling to provide assistance to a minor seeking an abortion. Training about the statute will not solve this issue, nor make these courts more willing to assist minors. Minors must be able to file a petition for a judicial bypass in any court in the state, to prevent clerks from substituting their own moral judgement for constitutional law.

<sup>268</sup> There is an argument to be made that parental consent statutes as a whole are an unconstitutional violation of a minor's right to privacy. This argument is outside the scope of this Note.

for a judicial bypass, but unless they live in one of three counties familiar with the procedure, they cannot utilize the judicial bypass procedure created by the Arkansas legislature. In over forty percent of Arkansas counties, minors may feel obligated to retain a lawyer solely because the clerks lack the knowledge to assist, and erroneously tell minors they must speak with a lawyer in order to proceed.<sup>269</sup> Minors in twenty percent of Arkansas counties would be referred to organizations that either cannot assist them or would actively try to dissuade them from an abortion. Faced with little information or outright refusal from courts, minors in the majority of Arkansas counties have few options. Those wealthy or lucky enough can hire a lawyer, even though no lawyer is required for the procedure. Others will have to do their own research on the judicial bypass procedure, a tall order for a high school student, particularly since there is little information online about how to navigate Arkansas's judicial bypass option.<sup>270</sup> Minors who cannot find a lawyer or information on the procedure will be forced to go to their parents for approval, carry the pregnancy to term, or use at-home remedies to induce a miscarriage.

If a judicial bypass process does not conform to the standards set out in *Bellotti*, the bypass procedure, and by extension the parental consent requirement, is unconstitutional. If a minor is unable to access the court due to clerk intransigence or lack of knowledge, that minor will not receive an expeditious judicial bypass. By restricting minors to file in their county of residence, Arkansas has made the judicial bypass process out of reach for a large fraction of the state's minors. Under the undue burden test as articulated by *Whole Woman's Health v. Hellerstedt*, the burdens of the law that can prevent minors from

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<sup>269</sup> Not necessary, per ARK. CODE ANN. § 20-16-809(b)(1)(A) (2019), which states a “pregnant woman may petition a circuit court for a waiver of the consent requirement and may participate in the proceedings on her own behalf” and can even be provided counsel by the court.

<sup>270</sup> See generally *Abortion in Arkansas*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/planned-parenthood-comprehensive-health-great-plains/abortion-information/abortion-in-arkansas> [<https://perma.cc/D3EC-4YU5>]; *Frequently Asked Questions*, LITTLE ROCK FAM. PLANNING, <https://lrfps.com/frequently-asked-questions> [<https://perma.cc/E33E-423B>]; Robin Marty, *Judicial Bypass in Arkansas? “We Don’t Give ANYONE Permission for Abortions Here!”*, REWIRE NEWS (Sept. 26, 2012, 8:50 PM), <https://rewire.news/article/2012/09/26/we-don%E2%80%99t-give-anyone-permission-abortions-here-trying-to-obtain-judicial-bypass-i> [<https://perma.cc/NFN2-S9E4>].

accessing a judicial bypass proceeding are not outweighed by the stated benefits, namely strengthening family unity and ensuring minors make informed decisions. These benefits are not enough to outweigh a third-party veto on a minor's abortion, and in order for the Arkansas parental consent statute to be constitutional, minors must have more than their county of residence in which to file a petition.

If minors were able to file a petition for judicial bypass in any state court, some of these problems would be ameliorated. To allow minors to file a petition for judicial bypass in any county in the state would enable them to obtain an abortion and a judicial bypass in the same county. Similar benefits would exist if minors were able to file in nearby counties that are knowledgeable about the procedure, as this would minimize the need for travel, while still allowing minors to obtain the constitutionally required judicial bypass. This would remove the undue burden that is created when minors are limited to file in their county of residence. As it stands, if minors are limited to file a petition for judicial bypass only in their county of residence, this creates an undue burden, which renders the parental consent statute unconstitutional, since without an adequate mechanism for a judicial bypass, the statute gives parents an absolute veto over their children's abortions.