Constitutional Law—Protecting Post-Dobbs Abortion-Seeking Minors in a Judicial Bypass System—Doe ex Rel. Rother t v. Chapman, 30 F.4th 766 (8th Cir. 2022)

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ROTHERT V. CHAPMAN, 30 F.4TH 766 (8TH CIR.
2022).¹

In the United States, abortion access is no longer a constitutional
right afforded to pregnant individuals.² Within the scope of abortion rights
left to the states, over half of the nation now bans or severely restricts the
procedures that were previously available to constituents and for minors in
particular.³ In the nineteen states and territories where abortion is not yet
fully banned, but where strict parental authorization requirements exist, the
Fourteenth Amendment safeguards some rights of pregnant minors.⁴ In Doe

¹ As this comment was in the process of publication, the Supreme Court of the United States
vacated and remanded the case to the United States Court of Appeals for the Eighth Circuit with
instructions to dismiss the case as moot. See Chapman v. Doe, 143 S. Ct. 857, 857 (2023) (relying
on doctrine of munsingwear vacatur). Despite this ruling, the legality of the judicial bypass process
is more volatile than ever following the Court’s decision in Dobbs v. Jackson Women’s Health
Organization and, consequently, the issues discussed in this case comment remain relevant and
timely. See Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2242 (2022) (holding women
do not have a fundamental right to an abortion). This case comment’s historical exposition of the
judicial bypass process and analysis of practical implications of burdensome procedures for minors
seeking abortion access will be informative for similar future cases.

² See Dobbs, 142 S. Ct. at 2242 (overruling landmark abortion cases Roe v. Wade and Planned
Parenthood of Southeastern Pennsylvania v. Casey). The Court asserts that the Constitution
“makes no reference to abortion, and no such right is protected by . . . the Fourteenth Amendment.”
Id. But see Roe v. Wade, 410 U.S. 113, 153 (1973) (establishing abortion as fundamental privacy
right afforded to women); Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 845-
46 (1992) (reaffirming Roe and establishing unconstitutional for states to create substantial obsta-
cles in path to abortion).

³ See Erica Kraus & Justine Lei, Supreme Court Decision in Dobbs v. Jackson Women’s Health
Organization Overturns 50 Years of Precedent on Abortion Laws and Rights, SHEPPARD MULLIN
HEALTHCARE L. BLOG (July 1, 2022), https://perma.cc/DU36-36RU (describing state trigger laws
and responses to Dobbs decision). States with trigger laws have removed prior exemptions in cases
of life-threatening conditions, rape, and incest, and some had “require[d] the pregnant individual to
report their case to law enforcement and meet other requirements before the pregnant individual
can proceed with an abortion.” Id.; see also After Roe Fell: Abortion Laws by State, CTR. FOR
REPROD. RIGHTS, https://perma.cc/57MP-PDKT (last visited Mar. 10, 2023) (finding abortion il-
legal in twelve states and at risk of prohibition in nineteen).

⁴ See After Roe Fell: Abortion Laws by State, supra note 3 (identifying abortion restrictions by
state); U.S. CONST. amend. XIV (stating no state shall deny any person equal protection under
laws); see also Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 75 (1976) (holding
constitutional violation where state “provide[s] . . . parent[s] with absolute power to overrule [mi-
nor’s abortion] determination”); Bellotti v. Baird, 443 U.S. 622, 643 (1979) (concluding states re-
quiring parental consent for pregnant minors’ abortions must provide alternative means for
ex rel. Rothert v. Chapman,\(^5\) the Eighth Circuit explored whether a judicial law clerk, Michelle Chapman, violated a constitutional right of an abortion-seeking pregnant minor, Jane Doe, by mandating parental notification of Doe’s judicial bypass hearing; the Eighth Circuit affirmed that Chapman violated Doe’s right to a parentless judicial bypass hearing.\(^6\)

In December of 2018, seventeen-year-old Jane Doe discovered she was pregnant and decided to seek an abortion.\(^7\) Doe, however, feared her parents would disown her and discontinue their financial support if they learned of the pregnancy.\(^8\) At the time, Doe lived in Missouri, where she

authorization); MO. REV. STAT. § 188.028.1(2) (2019) (providing alternative authorization for minors demonstrating sufficient “maturity” and meeting “best interests” test to bypass parental authorization); see generally William H. Danne, Jr., Validity, construction, and application of statutes requiring parental notification of or consent to minor’s abortion, 77 A.L.R. 5th 1 (examining circumstances where minor’s “best interests” exclude parental notification, necessitating alternative option). “... [P]arents might physically abuse a minor upon disclosure of pregnancy or, rather than inflicting physical harm, might force the pregnant minor to enter into a marriage that she does not want, or parents might compel the minor to continue her pregnancy simply as punishment.” Id. States that require parental involvement for minors to access abortion must offer alternative routes to authorization for those who cannot involve, do not feel safe involving, or simply do not want to involve guardians in termination decisions. See id.

\(^5\) 30 F.4th 766 (8th Cir. 2022).

\(^6\) See id. at 772 (“Public officials are protected by qualified immunity unless the facts show a violation of a constitutional right that was clearly established at the time of the alleged misconduct”). Public officials, such as Chapman, do not qualify for protection if they violate an individual’s constitutional right during the incident. See id. Minors are entitled to seek a court order without parental notification, and as such, the court held that Chapman violated Doe’s constitutional right to a judicial bypass hearing by requiring Doe to notify her parents of the hearing. Id. at 775; see also Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 324 (2006) (defining judicial bypass proceeding). A judicial bypass proceeding allows a minor to “petition a judge to authorize her physician to perform an abortion without parental notification.” Id.

\(^7\) See Rothert, 30 F.4th at 769 (describing Doe’s intention to terminate her unwanted pregnancy).

\(^8\) See Statement of Material Uncontroverted Facts in Support of Plaintiff’s Motion for Partial Summary Judgment at 3, Doe ex rel. Rothert v. Chapman, 528 F. Supp. 3d 1051 (E.D. Mo. Apr. 17, 2020) (No. 2:19-cv-00025), ECF No. 52 (explaining Doe’s parents would not support Doe if she gave birth before turning eighteen). Doe’s parents threatened to never speak to her again if she got pregnant, and told her, “just know that we’re not going to let you live here, we’re not taking care of [the child], we’re not supporting you.” Id.; see also Deposition of Jane Doe at 49:4-6, Doe ex rel. Rothert v. Chapman, 528 F. Supp. 3d 1051 (E.D. Mo. Apr. 17, 2020) (No. 2:19-cv-00025), ECF No. 52-1 (highlighting familial-based factors impeding Doe’s abortion access without court involvement). Doe disclosed that, “if they ever found out about the abortion, we definitely would not have any contact . . . we probably would not talk ever again.” Deposition of Jane Doe, supra, at 49:4-6. Multiple times during her repeated courthouse visits, Doe became so overcome with emotion at thoughts of potentially losing her family or being unable to seek an abortion that she “cried and then got sick.” Id. at 66:16-22. See generally Complaint at 2, Doe ex rel. v. Chapman, 528 F. Supp. 3d 1051 (E.D. Mo. Mar. 25, 2019) (No. 2:19-cv-00025), ECF No. 1 (discussing factors impeding Doe’s abortion access without court involvement). Doe could not wait until she was eighteen to obtain an abortion because the pregnancy would be too far advanced at that time pursuant to Missouri restrictions on later term abortions. Id. Further, “waiting [would have] expose[d] her to significantly greater risk of medical and physical complications.” Id.
was ineligible for an abortion procedure without the informed, written consent of a parent.9 Doe explored her option to bypass the parental authorization requirement by visiting the Randolph County Courthouse, where she spoke with a court employee who was unfamiliar with Missouri’s judicial bypass procedure.10 The employee asked Doe to return in a few weeks while the employee researched the issue; upon returning to the courthouse after her pregnancy’s continued progression, the court employee stated that they “were pretty sure that [Doe] could not open the petition [for judicial bypass] without notifying a parent.”11 The circuit clerk, Michelle Chapman, later called Doe and erroneously clarified the court’s position: Doe could complete a judicial bypass application, but “[her] parents [would] be notified of the hearing.”12

Based on her own prior independent research online about judicial bypass, Doe was “confused” by Chapman’s statements about required parental disclosure.13 She returned to the courthouse in mid-January, where Chapman again refused to initiate a judicial bypass proceeding, designed to

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9 See Rothert, 528 F. Supp. 3d at 1055 (establishing Doe resided in Randolph County, Missouri); see also Mo. Rev. Stat. § 188.028.1(1) (2019) (prohibiting abortion for minors unless medical emergency or parental consent present).

10 See Rothert, 30 F.4th at 769 (outlining circumstances bringing Doe to court and detailing employee’s lack of awareness of Doe’s rights); see also Mo. Rev. Stat. § 188.028.1(2-4) (2019) (articulating Missouri’s limited circumstances under which minors may access abortion without parental consent). A minor who, during a judicial bypass proceeding, demonstrates “sufficient intellectual capacity” to independently decide to terminate her pregnancy may self-consent to the abortion procedure. Mo. Rev. Stat. § 188.028.1(1-2). If the court is not convinced that the minor is sufficiently mature – considering evidence of “emotional development, maturity, intellect and understanding of the minor” as well as “possible consequences, and alternatives to abortion” – the minor may attempt to convince the court that obtaining the abortion without parental consent is in her “best interest.” Mo. Rev. Stat. § 188.028.2(2). “Best interest” minors obtain court consent for abortions, rather than self-consenting or obtaining parental consent. Id; see also M. Todd Parker, Comment, A Changing of the Guard: The Propriety of Appointing Guardians for Fetuses, 48 St. Louis U. L.J. 1419, 1455 n.223 (2004) (describing process for determining minor’s maturity and “best interest” designations); see infra note 28 (detailing evidence used to determine minor’s maturity and “best interests”).

11 See Rothert, 30 F.4th at 769 (noting court employee not well-equipped to answer questions about Missouri’s minor abortion procedures). The employee and those whom she reported to lacked sufficient knowledge on the topic. Id. This stalled Doe’s abortion-seeking process, forcing her pregnancy to advance while the court familiarized itself with the process she sought. Id.

12 See id. (detailing Chapman misinforming Doe on judicial bypass hearing requirements). Chapman informed Doe that parental notification of the judicial bypass hearing was required in Missouri, when in actuality, pregnant individuals under the age of eighteen are entitled to a judicial bypass hearing without parental notification. Id. (citing Mo. Rev. Stat. § 188.028.1).

13 See Statement of Material Uncontroverted Facts in Support of Plaintiff’s Motion for Partial Summary Judgment, supra note 8, at 1-2; see also Rothert, 30 F.4th at 769 (discussing Chapman’s inaccurate requirement of parental notification of hearing determining necessity of parental notification). Chapman asserted that “a parent would be notified if [Doe] filed an application.” Rothert, 30 F.4th at 769.
determine whether Doe legally required parental authorization for an abortion, without pre-hearing notification of Doe’s parents. After being granted judicial authorization for permission to seek an abortion procedure without any parental involvement in Illinois, Doe filed suit against Chapman alleging that her refusal to proceed with a judicial bypass hearing violated Doe’s constitutional right. Chapman moved for summary judgment, invoking quasi-judicial immunity and claiming that there was a circuit split on pre-hearing parental notification law, creating ambiguity surrounding its

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14 See Statement of Material Uncontroverted Facts in Support of Plaintiff’s Motion for Partial Summary Judgment, supra note 8, at 2-3 (describing Doe’s multiple visits to the courthouse seeking clarification on judicial bypass process). Doe attempted to initiate proceedings as soon as she learned of her pregnancy, but was forced to allow the pregnancy to advance due to avoidable delays caused by court employees which put her health and legal abortion-access at risk. See id. Doe was nearly twenty weeks pregnant when she filed suit—notably much further along than when she initiated the judicial process—and at a time where, in some states, people of any age can no longer obtain abortions. See id. at 3; see also After Roe Fell: Abortion Laws by State, supra note 3 (elucidating breakdown of national abortion bans and restrictions). Utah, for example, prohibits abortions after eighteen weeks, two weeks earlier than when Doe filed suit. See After Roe Fell: Abortion Laws by State, supra note 3; see also Deposition of Jane Doe, supra note 8, at 64:15-65:2 (disclosing Doe’s distress over waiting until twenty weeks to terminate her pregnancy). Doe expressed that getting so close to Illinois’ abortion cutoff of twenty-four weeks pregnant caused her debilitating anxiety, as she planned to travel to Illinois for the procedure if her efforts in Missouri failed. Deposition of Jane Doe, supra note 8, at 64:15-65:2. Doe added, “I definitely felt a little hopeless thinking that, you know, there might be a chance . . . . I might not be able to get [the abortion] without telling my parents— or be— having them notified. So I was definitely stressed and really . . . feeling the anxiety.” Id. at 64:22-65:2. Doe testified that her family was so important to her and she was distraught by the prospect of having to notify them. Id. Moreover, she was upset to the point of sickness multiple times following her courthouse meetings with Chapman. Id. at 66:16-22.

15 See Doe ex rel. Rothert v. Chapman, 528 F. Supp. 3d 1051, 1053 (E.D. Mo. 2021) (explaining Doe argued § 1983 violation of her Fourteenth Amendment right to pursue alternative abortion authorization). Doe filed suit against Chapman in the United States District Court for the Eastern District of Missouri for depriving her of her right to convince the court that she was sufficiently mature enough to terminate her pregnancy without parental consent or that it was in her “best interest” to terminate the pregnancy without parental consent. Id.; see also 42 U.S.C. § 1983 (1996) (identifying civil action available for deprived constitutional rights). After multiple failed attempts to navigate the resistance-filled and misinformed judicial bypass process in Missouri, Doe traveled to Illinois, where she successfully obtained a judicial bypass and an abortion. See Statement of Material Uncontroverted Facts in Support of Plaintiff’s Motion for Partial Summary Judgment, supra note 8, at 3 (describing Doe’s decision to seek judicial bypass in neighboring state); see also Doe ex rel. Rothert v. Chapman, 30 F.4th 766, 769 (8th Cir. 2022) (explaining why Doe eventually abandoned efforts to obtain abortion in Missouri); Deposition of Jane Doe, supra note 8, at 37:6-23 (describing how Doe finally accessed an abortion). Doe’s attorneys connected her with a facility that agreed to perform the procedure with the court order from her judicial bypass proceeding and without parental consent. Deposition of Jane Doe, supra note 8, at 36:4-25. Without notifying her parents, a family friend drove Doe across state lines to access the abortion. Id. at 37:10-38:6. Doe was granted a hearing with a judge, received approval to self-consent to the abortion, and then received her abortion. Id. at 38:10-39:8. Doe was forced to lie to her parents about her whereabouts, as she was away from home for forty-eight hours between the travel, the judicial bypass proceeding, and the abortion procedure. Id. at 38:24-39:8, 41:2-8. Doe’s attorneys further arranged hotel accommodations for Doe and the family friend during the trip. Id. at 39:2-5.
constitutionality. \(^{16}\) The district court found that Chapman violated Doe’s constitutional right to obtain a judicial bypass hearing without notifying her parents. \(^{17}\) Ultimately, the United States Court of Appeals for the Eighth Circuit held that by requiring pre-hearing parental notification, Chapman violated Doe’s Fourteenth Amendment right to equal protection under the law. \(^{18}\)

The Fourteenth Amendment of the United States Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” \(^{19}\) The drafters of the Fourteenth Amendment

\(^{16}\) See Rothert, 30 F.4th at 769, 774 (identifying issues presented to court based on Chapman’s motion for summary judgment). Chapman argued that she acted at the direction of a circuit judge, qualifying her for quasi-judicial immunity. \(\textit{Id.}; see also\) Dunham v. Wadley, 195 F.3d 1007, 1010 (8th Cir. 1999) (holding individuals who engage in quasi-judicial acts have absolute immunity). To qualify for absolute immunity an individual must take actions that are “similar to those involved in the judicial process . . . likely to result in lawsuits for damages by disappointed parties, and sufficient safeguards [must] exist in the regulatory framework to control unconstitutional conduct.” \(\textit{Dunham}, 195\ F.3d at 1010; Rogers v. Bruntrager, 841 F.2d 853, 856 (8th Cir. 1988) (explaining judicial employees, like Chapman, qualify for immunity regarding actions taken within official capacities). If a clerk’s action at issue occurred according to direction from a supervising judge, then that clerk is immune from liability. \(\textit{Rogers}, 841\ F.2d at 856.\)

\(^{17}\) See Rothert, 528 F. Supp. 3d at 1061 (discussing lower court decision declaring pre-hearing parental notice unconstitutional). The lower court explained that the Eighth Circuit had previously “held that it is unconstitutional to require plaintiff to give her parents notice of her application for judicial bypass . . . prior to the hearing.” \(\textit{Id.}; see also\) Rothert, 30 F.4th at 775 (affirming Chapman violated Doe’s constitutional right); Bellotti v. Baird, 443 U.S. 622, 647-48 (1979) (negating circuit split argument, stating parental consent statutes unconstitutional if no alternative authorization opportunity exists); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510 (1990) (reinforcing parental consent laws are unconstitutional without judicial bypass option). Such laws give parents “absolute veto power” over minors’ abortion decisions, making the laws unconstitutional under the Fourteenth Amendment. \(\textit{Akron Ctr. For Reprod. Health,} 497\ U.S. at 510; \textit{see also Dunham,} 195\ F.3d at 1010 (explaining individuals who engage in quasi-judicial acts have absolute immunity). To qualify, individuals must act on behalf of the judicial system, where safeguards exist to prevent unconstitutional action. \(\textit{Dunham,} 195\ F.3d at 1010.\)

\(^{18}\) See Rothert, 30 F.4th at 775 (holding Chapman violated Doe’s constitutional right to apply for bypass of parental notification). A qualified immunity defense was unnecessary, as public employees are not immune from liability if they violate constitutional protections even if acting on behalf of their employer. \(\textit{Id.; see also Morgan v. Robinson,} 920\ F.3d 521, 523 (8th Cir. 2019) (denying defendant qualified immunity because defendant’s action included “issues of material fact regarding the constitutionality of the termination.”). Even when acting on behalf of an employer, qualified immunity is unavailable to individuals when their actions at issue violate the Constitution. \(\textit{See Morgan,} 920\ F.3d at 523.\)

\(^{19}\) See U.S. CONST. amend. XIV (establishing equal protection violation requires deprivation of right afforded to majority of individuals); \(\textit{see also CONG. GLOBE, 39th Cong., 1st Sess. 39, 2538}\) (1866) (establishing rationale for Fourteenth Amendment application to states). The construction of the Fourteenth Amendment began,

\( [\text{on January 9, 1866 [when]} \text{[t]he Joint Committee . . . [and] gave Congress the power to make laws to secure ‘to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the} \)
intended to expand the federal government’s ability to protect the fundamental rights of citizens across all states.\textsuperscript{20} Although the drafters’ articulated purpose of the Fourteenth Amendment was to prevent discrimination against people of color, it is now more broadly construed to prevent discrimination against any marginalized group.\textsuperscript{21} The Supreme Court has extended Fourteenth Amendment protections to pregnant minors seeking abortion without parental authorization by requiring that, in states where abortion is not completely banned, an opportunity to achieve alternative authorization exists for qualifying minors in a hearing, often referred to as a judicial bypass proceeding.\textsuperscript{22} This right of pregnant minors was explicitly articulated in \textit{Bellotti},

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\textsuperscript{20} See Michael J. Gerhardt, \textit{The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution}, 43 VAND. L. REV. 409, 438 (1990) (explaining Constitution requires “states to distribute and condition services on equal terms” to all constituents); see also Heiny, supra note 23, at 169 (detailing Fourteenth Amendment drafters’ intention to protect individual freedoms from any state interference). The drafters intended to prevent “the states from discriminating arbitrarily between different classes of citizens. As long as a state treated its citizens equally . . . the state would remain immune from federal intervention pursuant to the Fourteenth Amendment.” Heiny, supra note 23, at 170.
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\textsuperscript{22} See Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976) (establishing states lack authority to give third parties, including parents, absolute veto over pregnancy termination); Hodgson v. Minnesota, 853 F.2d 1452, 1466 (8th Cir. 1988) (example constitutional parental consent statute where judicial bypass option exists for minors). Regarding parental notification laws, the Eighth Circuit postulates that a bypass option is also required under the Fourteenth Amendment. \textit{Miller}, 63 F.3d at 1459-60. \textit{See generally} Carol Sanger, \textit{Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law}, 18 COLUM. J. GENDER \\ & L. 409, 420 (2009) (defining judicial bypass proceeding as confidential opportunity for minors to petition for abortion without parental involvement). Missouri has codified the pregnant minor judicial bypass process in their state code. \textit{See Mo. Rev. Stat.} \S 188.028 (2022) (describing judicial bypass hearing process determining minor’s maturity). No parental authorization is required under this statute if the court establishes that a minor is sufficiently mature and the procedure would be within the “best
where the Supreme Court affirmed a district court’s decision to void a Massachusetts statute that required “every woman under 18 who has not married must secure the consent of both her parents before receiving an abortion.”

The Supreme Court held that statutes that lacked alternative authorization options, such as the potential to self-consent or obtain judicial consent, are unconstitutional.

The Supreme Court placed a limit on parental consent statutes with the Bellotti requirement to afford qualifying minors the ability to self-consent or obtain judicial consent for abortion procedures when the Court established “every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents.”

Many states have accordingly amended their parental authorization statutes to include a bypass provision, such as Missouri’s Annotated Statutes Section 188.028(2), which now allows minors to obtain abortions without parental involvement provided they are sufficiently mature and it is within their “best interests.”

To determine whether a pregnant minor seeking an abortion
without parental involvement qualifies for judicial bypass, courts often consider both (1) the evidence offered and (2) judicial observations of the minor.\(^27\) Nonetheless, judicial bypass procedures, designed to expand abortion access, actually increase restrictions for many abortion-seeking minors and act as a means of imposing control over vulnerable individuals.\(^28\) During judicial bypass hearings, judges interrogate petitioners “about the most

an alternative route through the courts. This “judicial bypass procedure” must allow a minor to “bypass” her parents and go directly to court. There, a judge must determine whether or not the minor has sufficient “maturity” to decide for herself to have an abortion. If the judge determines that a teenager is “mature,” she receives judicial recognition of her maturity for the purposes of the abortion decision. If the judge finds that a teenager lacks the “maturity” to make the abortion decision alone, she must still be allowed to get an abortion without parental involvement if the judge determines that it is in her best interests.

Veith, supra, at 455-56 (1994).

\(^27\) See In re Doe, 319 So. 3d 184, 186 (Fla. Dist. Ct. App. 2021) (listing trial court factors for determining minors’ maturity). Courts consider the minor’s age, overall intelligence, stability, emotional development, ability to “accept responsibility,” ability to assess the consequences of her choices, and ability to understand and explain the medical risks of terminating her pregnancy. See id. Courts may also consider the minor’s credibility and demeanor as a witness during the hearing, as well as her ability to understand and articulate any medical risks of terminating the pregnancy. See id.; see also Danne, Jr., supra note 4 (evidencing conditions causing minor’s “best interests” to include receiving abortion without parental authorization). Judicial bypass is in a minor’s best interest, even where the minor is not considered sufficiently mature, if the minor demonstrates the occurrence of “physical, sexual, or repeated emotional abuse by parent, or that parental consent was not . . . [the] least restrictive means of achieving State’s compelling interests in protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities.” Danne, Jr., supra note 4; see also Maya Manian, Minors, Parents, and Minor Parents, 81 Mo. L. REV. 127, 149 (2016) (discussing “best interest” minors). “Teenage girls who do not discuss their pregnancies with their parents often have weighty fears about forced disclosure, including fears of being kicked out of their family homes or fears of abuse.” Manian, supra, at 149; see also Parker, supra note 10, at 1461-62 (describing court-mandated circumstances where judicial bypass of parental authorization is allowed in Missouri).

\(^28\) See Melissa Jacobs, Are Courts Prepared to Handle Judicial Bypass Proceedings? A.B.A. HUM. RTS. MAG. (Dec. 1, 2005), https://perma.cc/3YPT-AB9R (reporting on vulnerable minors’ difficult experiences with judicial bypass proceedings). Some pregnant minors know “that notifying parents can lead to physical abuse, homelessness, or both. Some are victims of incest or report that a parent will force them to continue a pregnancy even if it is the result of rape. Others may have no living parents or no idea how to locate them.” Id.; see also Manian, supra note 31, at 146 (suggesting judicial bypass acts as safety valve but contains troubling repercussions). Judicial bypass provides minors with “an escape route from their parents, but . . . this is a very problematic route.” Manian, supra note 31, at 146.; see also Carol Sanger, Regulating Teenage Abortion in the United States: Politics and Policy, 18 Int’l. J. L. POL’Y & FAM. 305, 314 (2004) (exposing judicial bypass proceedings as “means of imposing control over teenage sex”). The articulated goal of eliminating a universal parental veto is a pretext. Sanger, supra, at 314; see also Sanger, supra note 26, at 419 (denouncing judicial bypass procedure and considering it gendered punishment). “[G]irls are made to pay a price both for deciding on abortion and for everything else they did that led to their present predicament.” Sanger, supra note 26, at 420.
intimate aspects of their lives, in some cases asking inappropriate and irrelevant questions, such as demanding to know where and how often the individual had sex. Courts have found that petitioners experience emotional trauma throughout the hearings, finding the experience more agonizing than the very abortions they later receive. Studies have also shown that in states with parental authorization statutes, many judicial employees are inadequately acquainted with, or even hostile toward, court officers’ responsibilities to uphold the rights of pregnant minors. Such unfamiliarity and

29 See Manian, supra note 31, at 149 (discussing troubling aspects of judicial bypass proceeding involving conversation between minor and judge); see also Abbey Marr, Judicial Bypass Procedures: Undue Burdens for Young People Seeking Safe Abortion Care, ADVOCS. FOR YOUTH (June 16, 2015), https://perma.cc/JT26-VUUN (discussing judges’ inappropriate questions during judicial proceedings). In one hearing, a judge asked, “What if we found you perfect adoptive parents or I gave you $2000 today to have the baby? ... How many times did you have sex? Where did you do it?” Marr, supra; see also Molly Redden, This Is How Judges Humiliate Pregnant Teens Who Want Abortions, MOTHER JONES (Oct. 2014), https://perma.cc/4DJU-A3F7 (discussing inappropriate questions and assertions one judge made during judicial bypass proceeding). The judge “grilled [the minor] on whether she had contemplated her decision in church, or thought about how she might regret an abortion when she looked at her children in the future. He was upset to learn the minor wasn’t dating the father.” Redden, supra.

30 See Hodgson v. Minnesota, 497 U.S. 417, 477-78 (1990) (Marshall, J., concurring) (exploring stress pregnant minors experience from judicial bypass court proceedings). “Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.” Id.; see also Manian, supra note 31, at 168 (asserting minors endure personal invasion when establishing sufficient maturity). For minors to convince the court they are sufficiently mature, they “must discuss the most intimate details of their lives to a complete stranger in a courtroom environment that would intimidate most adults.” Manian, supra note 31, at 168; see Sanger, supra note 32, at 311-15 (discussing humiliating scheme of questioning present throughout judicial bypass hearings across jurisdictions). The psychological distress from being pregnant at a young age is elevated by the need to take part in a hearing to bypass parental involvement, miss school to attend the hearing, and the fact that a petitioner is forced to testify about intimate, personal matters, such as “the fact of sexual intercourse; the predicament of pregnancy; the structure or disarray of home life that make her believe she should not involve her parents; her views on motherhood; her success (or not) in life so far; and her idea of her future.” Sanger, supra note 32, at 311-12. Although petitioners freely elected to pursue their hearings, the hearings often serve as punishments, and “much of the existing structure and content of bypass hearings—the secrecy, the nature of the questions, the mandatory revelations—convey a sense of [the petitioners’] wrongdoing[s].” Id. at 313.

31 See Bella Mancini Pori, Note, “What Makes You Think You Can Do That?”: How Venue Restrictions Prevent Access to Abortion for Minors in Arkansas, 42 CARDOZO L. REV. 685, 710-11 (2021) (identifying state with eighty-two percent of minors in counties with clerks unaware of bypass option); see also HELENA SILVERSTEIN, GIRL ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 40 (New York University Press 2007) (studying states with parental authorization statutes). Silverstein asked courts how “a girl who’s not eighteen who wants an abortion can get a judge’s permission to avoid telling her parent,” and found a consistent lack of understanding. Id. Forty percent of respondents in Alabama courts, over forty-five percent of respondents in Tennessee courts, and seventy-three percent of respondents Pennsylvania courts were unfamiliar with their responsibilities to bypass petitioners. Id. at 52. Some uninform court employees even “unequivocally rejected the existence of the bypass option.” Id. at 59; see also Jacobs, supra note 32 (using
hostility from judicial employees, who are critical to providing access to this constitutionally-entitled proceeding, have led to inconsistent approval of judicial bypass applications. These inconsistencies precipitated the Eighth Circuit’s opportunity in Rothert to delineate between violations of a pregnant minor’s right to a bypass proceeding and mere adherence to parental consent statutes in a post-Dobbs world.

In Doe ex rel. Rothert v. Chapman, the Eighth Circuit held that by refusing to proceed with a judicial bypass hearing without parental notification, Chapman violated Doe’s Fourteenth Amendment right to equal protection under the law. The Eighth Circuit reasoned that requiring parental notification of the very proceeding that was designed to determine whether parental involvement was required exceeded the bounds of Missouri’s statute governing minors and abortions. The court’s reasoning stemmed from the Silverstein’s criteria to survey Texas judicial law clerks in 254 counties. Over half of the clerks incorrectly believed they were unable to open applications for bypass petitioners. Jacobs, supra note 32. Further, “reluctance, hostility, or lack of awareness on the part of judges was another common reason that counties were unprepared.” Id.; see also Sanger, supra note 26, at 409, 419-20 (declaring some judges require petitioner’s remorse, exceeding statutory requirements).

32 Compare In re Doe 22-B, 344 So. 3d 601, 602 (Fla. Dist. Ct. App. 2022) (Makar, J., concurring in part and dissenting in part) (disagreeing with majority’s denial of parentless minor’s judicial bypass application), and In Re Doe, 501 S.W.3d 313, 325 (Tex. App. 2016) (affirming lower court decision to deny judicial bypass because minor was not sufficiently mature), with In Re Doe, No. 11-CO-34, 2011 Ohio App. LEXIS 5232, at *13 (Ohio Ct. App. Dec. 7, 2011) (reversing decision to deny sufficiently mature minor judicial bypass of parental notification); see also Eric Parker Babbs, Note, Pro-Life Judges and Judicial Bypass Cases, 22 NOTRE DAME J. L. ETHICS & PUB. POL’Y 473, 491 (2008) (discussing judicial flexibility to adopt biased, pro-life approach to bypass hearing). Some have postulated that believing “a judge who issues a judicial bypass hearing . . . does not cooperate formally in the evil of abortion,” is incorrect. Babbs, supra, at 491; see also Manian, supra note 31 (suggesting disproportionate denial of judicial bypass applications for certain petitioners). Laws, even those regarding controversial topics such as abortion, should be applied consistently, fairly, and without bias. Manian, supra note 31.

33 Compare Doe ex rel. Rothert, 30 F.4th 766, 775 (8th Cir. 2022) (clarifying unconstitutionality of enforcing pre-hearing parental notification when petitioner initiated application to bypass parental involvement), with Hodgson, 853 F.2d at 1466 (clarifying constitutionality of enforcing parental consent statute that includes alternative authorization option for qualifying petitioners); see Kraus & Lei, supra note 3 (explaining varied state responses to Dobbs decision); see generally Erik Ortiz, Reprimand of judges for social media misconduct warrants updated guidelines, experts say, NBC NEWS (July 8, 2021, 4:32 AM), https://perma.cc/3M3B-KEHD (describing how current increased polarization in United States impacts revered judges). Numerous cases exist, “in which judges were rebuked for expressing views on controversial topics or endorsing political candidates.” See Ortiz, supra. In the recently-decided Dobbs v. Jackson Women’s Health Organization decision, the Supreme Court overruled Roe v. Wade and Planned Parenthood v. Casey, determining that the Constitution does not confer a fundamental right to abortion. See 142 S. Ct. 2228, 2242 (2022) (holding right to abortion is not “deeply rooted in this Nation’s history and tradition”). The Court in Dobbs emphasized deference to individual states’ powers to regulate abortion. See id. at 2257.

34 See 30 F.4th at 774 (determining Chapman’s actions were unconstitutional).

35 See MO. REV. STAT. § 188.028 (2022) (providing alternative consent opportunity for abortion-seeking minors deemed sufficiently mature without parental involvement). Under the Bellotti
holding in Bellotti that, pursuant to the Fourteenth Amendment, parental consent statutes are “unconstitutional unless they provide the pregnant minor an opportunity to seek a court order without notifying her parents.” Ultimately, the Eighth Circuit interpreted the Bellotti principle to support the finding that Missouri’s parental consent statute was constitutional, but that Chapman’s enforcement of the statute was not.

Although the Eighth Circuit properly upheld the constitutional requirement of a parentless judicial bypass option, the court failed to acknowledge the dangerous implications and procedural failures highlighted in Rothert. The apparent ignorance, apathy, or resentment that fueled Chapman’s refusal to proceed without parental involvement is not unique to this particular court clerk in this one circuit. From incorrectly asserting that abortion-seeking minors must obtain parental consent before a judicial bypass hearing, to dubiously informing them to acquire legal representation before a bypass hearing commences and inappropriately suggesting that the minors should, instead, go home and pray about their decisions, court decision, an alternative consent opportunity is constitutionally required in states that have strict parental authorization requirements. See Bellotti v. Baird, 443 U.S. 622, 647-48 (1979); see also Rothert, 30 F.4th at 774 (holding Chapman violated Doe’s established right to apply for judicial bypass without parental involvement). The Eighth Circuit explained that Bellotti established a pregnant minor’s right to pursue a judicial bypass hearing without parental notice. Rothert, 30 F.4th at 774. Missouri statute § 188.028 accounts for those alternative methods of consent, but “[b]y requiring notice to Doe’s parents before her bypass hearing, Chapman implemented the prior version of § 188.028 this court found unconstitutional under Bellotti.” Id. at 775.

See id. at 774-75 (discussing how Bellotti applies to Missouri statute § 188.028). The statute is “not a ‘mere notice statute’; it requires parental consent—or a court order bypassing parental consent—exactly like the statute in Bellotti . . . .” Id. at 774.

See id. at 775 (explaining Chapman’s actions were unconstitutional, making her ineligible for qualified immunity). The Eighth Circuit denied Chapman’s motion for summary judgment. See id.

See Doe ex rel. Rothert, 30 F.4th 766, 775 (8th Cir. 2022) (refuting Chapman’s decision to notify Doe’s parents of judicial bypass proceedings). The Eighth Circuit affirmed the district court’s decision that it was unconstitutional for Chapman to require Doe’s parental notification. Id. But see In re Doe 22-B, 344 So. 3d 601, 601 (Fla. Dist. Ct. App. 2022) (per curiam) (denying minor parentless proceeding after meeting sufficient maturity requirements). In re Doe-22B was decided less than six months after Rothert, but also after the recent Dobbs decision, and produced drastically different results for a similarly situated abortion-seeking minor. Id. See also Silverstein, supra note 35, at 52 (discussing troubling implications of judicial bypass procedures). “Ignorance of the law among judges and judicial gatekeepers stands between minors and their access to bypass hearings. This ignorance is substantially at odds with what one imagines the bypass process will provide.” Id. Whether because of ignorance or animosity towards abortion-procedures, court employees improperly implement judicial bypass proceedings on a national level. Id.

See Pori, supra note 35, at 725 (discussing statistics showing high percentage of court employees unaware of judicial bypass proceedings); see also Silverstein, supra note 35, at 40 (disclosing rates of court employees resentful toward judicial bypass proceedings in multiple states); see also Jacobs, supra note 32 (highlighting difficulties pregnant minors face in their interactions with judgmental clerks and judges).
employees have created additional obstacles for pregnant minors on a national level.40 As if pregnant minors having to discuss extremely personal and intimate topics before highly educated court officers—without the support of their parents—was not intimidating enough, the resistance with which they are met only makes the process all the more burdensome 41 In our post-Dobbs world, where anti-abortion legislatures and courts have been empowered to restrict reproductive procedures influenced by political or personal grievances, the Eighth Circuit failed to (1) articulate this occurrence in Rothert v. Chapman, and (2) express a clear, uniform standard for courts to determine whether a minor meets the maturity and “best interests” standards, thus allowing for future court employees to treat abortion-seeking minors unconstitutionally.42

When court employees like Chapman create unnecessary obstacles for abortion-seeking minors, leading them to believe that they have done wrong or that they cannot access an abortion without parental notification, access to this constitutionally-entitled proceeding is inappropriately

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40 See Silverstein, supra note 35, at 52 (divulging court employee responses to study questioning judicial bypass options available to pregnant minors). In one revealing phone call, a court employee stated, “that it would be best for a minor to talk to a lawyer before coming to the court for further information.” Id. at 59. In another phone call, a juvenile court employee also suggested the minor seek an attorney, then asked whether the minor had “prayed about this.” Id. at 65. “She might ought to,” the employee continued, “She may live to regret it.” Id.

41 See Silverstein, supra note 35, at 90 (noting many minors justifiably fear judicial proceeding). Although courts often amount this fear to lack of maturity, it is a pretext to roadblock minors’ access to their constitutional rights to bypass proceedings before they even have a chance to demonstrate maturity or need. Id. at 90. “In the best of circumstances, a minor would have reason to be apprehensive about the prospect of going to court for a hearing. Indeed, Doctor Jane Hodgson, testified that when her minor patients returned from the court process, ‘some of them are wringing wet with perspiration . . .’” Id.; see also Hodgson v. Minnesota, 497 U.S. 417, 476 (1990) (Marshall, J., concurring) (asserting many minors find their hearings more distressing than subsequent abortion procedures). The invasive questioning and nature of the proceedings inflicts fear, tension, and trauma upon bypass-petitioners. Hodgson, 497 U.S. at 476 (Marshall, J., concurring). Minors often dread standing before judges, or persons of legal authority who control the fate of their potentially life-altering decision, who resent the need to justify their decision, and are “left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy.” Id.

42 See Rothert, 30 F.4th at 774-75 (failing to address grievance-based behavior Chapman presented in her official capacity in holding); see also Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2319-20 (2022) (Kagan, J., dissenting) (arguing majority used inappropriate political biases in overturning Roe and Casey). In leaving abortion decisions to the States, the majority in Dobbs allowed for States to implement an extremely wide range of statutes, leading to inconsistent protections and procedures for pregnant individuals. See Dobbs, 142 S. Ct. at 2319-20 (Kagan, J., dissenting) (“[T]he Court does not act ‘neutrally’ when it leaves everything up to the States . . . When the Court decimates a right women have held for 50 years, the Court is . . . [positioned] against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so.” Id. at 2328.
impeded. 43 In districts with such employees, their interactions with potential petitioners serve to constructively limit access to the proceedings, initiating a sense of culpability and “inflict[ing] a kind of legal harm—harm by process—on young women seeking to abort.” 44 Harm by process can prevent a more vulnerable or sensitive petitioner reasonably incapable of maintaining the persistence that Doe embodied consistently in Rothert, from exercising her right to a judicial bypass hearing. 45 Unfortunately, the result is that minors who cannot combat underinformed or biased court employees resistant to parentless judicial bypass hearings, inevitably have unwanted pregnancies, unwanted childbirths, or unsafe and illegal abortions. 46

More obstacles await those minors savvy enough to land judicial bypass hearings after navigating the error-prone pre-hearing process, as the hearings themselves are plagued by unnecessarily crude, invasive

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43 See Silverstein, supra note 35, at 52-94 (discussing ignorance, apathy, misconduct, and resentment exhibited by court employees in judicial bypass proceedings). This creates additional unnecessary obstacles for the abortion-seeking minor; see also Sanger, supra note 32, at 313 (outlining current, troubling scheme of alternative abortion authorization options for minors). Its “secrecy, the nature of the questions, the mandatory revelations – convey a sense of wrongdoing.” Sanger, supra note 32, at 313. “This scheme – bypass hearing as a threat – [is] . . . humiliating, risky, intrusive . . . [and] is properly understood as punishment. If some teenagers insist on aborting against the perceived wishes of their parents, bypass hearings at least make them pay a price for their decision.” Id. at 314; see also Manian, supra note 31, at 130 (exploring inquiry into history of minors and abortion rights). Parental involvement statutes are a form of punishment aimed at upholding traditional gender norms and controlling minors in an already difficult position. Manian, supra note 31, at 130.

44 See Silverstein, supra note 35, at 418 (discussing that judicial bypass proceedings inflict harm by process on minors). “[J]udicial bypass proceedings] produce a civil version of what Malcolm Feeley identified in the criminal context as ‘process as punishment,’ a form of harm that is pervasive but not always immediately apparent.” Id.; see also Veith, supra note 30, at 460 (highlighting judicial bypass procedure serves as punishment). “No matter how gentle and understanding a judge may be, the message of the entire experience must be that the teenager is at least suspected of doing something wrong, or of being a bad, untrustworthy, person.” Veith, supra note 30, at 460-61.

45 See Doe ex rel. Rothert, 30 F.4th 766, 769 (8th Cir. 2022) (outlining Doe’s persistent efforts to engage in her constitutionally-entitled judicial bypass hearing).

46 See Veith, supra note 30, at 461 (expressing dire state of judicial bypass proceedings). “The sad truth is that a pregnant teenager who is unable to face her parents or a judge may end up having a child she does not want or seeking an illegal abortion at the risk of her life.” Id.
questioning. To date, the Supreme Court has not offered guidelines for judges to uniformly identify the maturity or “best interests” standards for minors. Without such guidelines, the inappropriately subjective, vague “maturity” and “best interests” standards allow for the abuse of judicial discretion, which has grown prevalent in our increasingly polarized society. In cases where judges abuse their discretion, the “maturity” and “best interests” standards act as a pretext for unfair discrimination against abortion-seeking minors. It is no stretch, then, to consider the idea that personal,

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47 See Manian, supra note 31, at 149 (describing hearings as “means to shame teenage girls for their transgression of gendered sexual purity norms”). These proceedings imply that by getting pregnant, minors violate anachronistic ideals for women and girls. Id.; see also Sanger, supra note 26, at 419-20 (explaining in addition to invasive questioning into intimate experiences, many judges demand displays of remorse). The requirement of remorse suggests wrongdoing, resulting in a demand of performative accountability that establishes an additional obstacle for abortion-seeking minors. See Sanger, supra note 26, at 420. Such judges expect minors to demonstrate regret for their so-called wrongful sex acts and morally questionable decisions to abort pregnancies, often a traumatic experience of shame and embarrassment. Id.

48 See Silverstein, supra note 35, at 98 (discussing lack of guidance for judges determining maturity or “best interests” standards). Bellotti and other Supreme Court cases provide

“no guidance on how a judge is to determine whether a minor is sufficiently ‘mature’ and ‘capable’ to make the decision on her own . . . The statute similarly is silent as to how a judge is to determine whether an abortion without parental notification would serve an immature minor’s ‘best interests.’”

Id.; see also Pori, supra note 35, at 698 (explaining Supreme Court has not articulated “sufficiently mature” standards, beyond “well-informed” consideration). Therefore, troublingly, “many states require simply that courts determine if a minor is mature and well-informed, without providing guidance within the legislation for how courts can make that determination.” Pori, supra note 35, at 697-98; see also Veith, supra note 30, at 473 (describing vague maturity standards permit inconsistencies among judges). Aside from factors judges weigh in determining maturity, there are no definitions or guidelines for judges to follow in making bypass determinations. See Pori, supra note 35, at 697. Further, the proceeding is merely another obstacle for pregnant minors seeking abortion. See Veith, supra note 30, at 461. At its best, the proceeding inconveniences pregnant minors, but at its worst, it humiliates pregnant teenagers without benefit, and “is not designed to offer such girls genuine comfort, advice, or support. Judges are not required or equipped to offer advice or counselling.” Id. at 458, 461.

49 See In re Doe 22-B, 344 So. 3d 601, 602 (Fla. Dist. Ct. App. 2022) (Markar, J., concurring in part and dissenting in part) (exampling judicial bypass denial of parentless and mature minor). In re Doe 22-B provides an example of inconsistent application: here, a Florida appellate court affirmed the district court’s denial of a pregnant minor’s judicial bypass request, even though the district court found that the minor “was ‘credible,’ ‘open’ with the judge, and non-evasive.” See id. Indeed, the minor “showed, at times, that she is stable and mature enough to make this decision.” Id. Scholars and journalists have analyzed the recent uptick in partisan-based judicial misconduct, which has influenced their decision-making on issues like abortion. See generally Ortiz, supra note 37 (describing increase in partisan-based judicial misconduct and need for reform).

50 See Danne, Jr., supra note 4 (describing instance where Alabama appellate court determined trial court denial of judicial bypass to “mature” minor was “pretextual”). Many scholars and judges advocate for judicial discretion, however, so they can factor in their own personal beliefs and biases. See Babbs, supra note 36, at 479 (justifying judicial discretion to apply the law in apparent
religious, or political motivations may underly a judge’s decision to reject a qualifying judicial bypass application, directly contributing to unwanted pregnancies, unwanted childbirths, and unsafe or illegal abortions.\footnote{See Sanger, supra note 32, at 314 (“Understanding the hearings as a means of imposing control over teenage sex and abortion helps explain why bypass statutes are so popular among legislatures . . .”). Politicians can safely adopt a guise of pro-life, pro-choice, and pro-family all at once and, “[a]t the level of symbolic politics, the statutes vindicate a moral position against teenage promiscuity and for parental authority. They represent law on the books that says in our state girls can’t run around having sex and aborting their fetuses.” Id. at 314-15; see also Manian, supra note 31, at 147-48 (“Certainly, there are legislators and advocates of parental involvement laws who are motivated by their anti-abortion stance, seeking to throw any obstacles in the way of girls’ and women’s access to abortion.”).} To eliminate, or at least minimize, judicial discretion to arbitrarily reject judicial bypass applications, the Eighth Circuit should cultivate clear, uniform standards for the “maturity” and “best interests” tests for minors.\footnote{See Silverstein, supra note 35, at 115 (“When a minor appears before a judge to petition for a bypass of parental involvement, we expect the setting to be neutral”); see also Sanger, supra note 32, at 310 (identifying judicial desire for guidelines). “Judges who regularly grant bypass petitions have testified how ill-equipped they feel themselves to be in assessing a pregnant minor’s maturity or her best interests with regard to the question of abortion.” Sanger, supra note 32, at 310.}

In the states that have not fully banned abortion following the Dobbs decision but enforce parental authorization requirements, minors seeking to terminate their pregnancies without parental involvement have a right to pursue an alternative authorization option. Although the Eighth Circuit recognized this bypass right, it failed to recognize the miscarriages of justice within the procedure as it stands. Courts across the country engage in a draconian harm by process, punishing young pregnant individuals for neglecting to subscribe to outdated gender expectations, preventing them from obtaining constitutionally entitled bypass hearings, and obstructing the hearings themselves. The Eighth Circuit neglected its responsibility to construct articulable guidelines for the “maturity” and “best interests” tests for minors seeking to terminate their pregnancies without parental involvement. This decision not only threatens the fundamental rights of young pregnant individuals in a polarized society, but it specifically fails minors who have been shown to disproportionately suffer the repercussions of unconstitutional conduct.

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