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Clearly Unconvincing: How Heightened Evidentiary Standards in Judicial Bypass Hearings Create an Undue Burden Under *Whole Woman's Health*

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COMMENTS

CLEARLY UNCONVINCING: HOW HEIGHTENED EVIDENTIARY STANDARDS IN JUDICIAL BYPASS HEARINGS CREATE AN UNDUE BURDEN UNDER *WHOLE WOMAN'S HEALTH*

BY HALEY HAWKINS*

Currently, thirty-seven states have parental involvement laws that require a minor seeking to access abortion care to consult or obtain consent from a parent before undergoing the procedure. In these states, a minor's only hope for getting around this obstacle is judicial bypass—a proceeding in which a minor must convince a judge that she should be able to obtain an abortion without parental involvement, based on two Supreme Court-articulated factors. Many of these states impose heightened evidentiary standards—namely, the "clear and convincing evidence" standard—in these proceedings where the minor bears the burden of proof.

This Comment argues that imposing heightened evidentiary standards in judicial bypass proceedings creates an undue burden on a minor's right to abortion under the strengthened standard set out in Whole Woman's Health v. Hellerstedt. *Thus, the imposition of these heightened evidentiary standards in this context is unconstitutional.*

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* Note & Comment Editor, *American University Law Review*, Volume 68; J.D. Candidate, May 2019, *American University Washington College of Law*; B.A., Justice & Law, *cum laude*, 2016, *American University*. I would like to thank my faculty advisor, Professor Stephen Wermiel, for his guidance and mentorship, and the editorial board of the *Law Review* for their invaluable recommendations throughout the Comment writing process. I would also like to thank my mother and stepfather, Babbi Hawkins and Yves Capoen, for supporting me unconditionally in my pursuit of a legal career and for always nurturing my commitment to social justice.

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> Kiera was sure that if she told her mom, who volunteered for an anti-abortion group, that she wanted to end her pregnancy, she'd be out of the house for good. But when Kiera confided in a school counselor, she learned about another option: [s]he could ask a judge for permission to have an abortion. Her panic melted away. "I thought, 'This will save me,'" she recalls. She started socking away every dollar she could get her hands on—lunch money, tips from her waitressing job. And she started calling courthouses.[1]

INTRODUCTION

The Supreme Court has stated that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."[2] However, in the United States, the individual rights of a minor are significantly limited, especially the minor's ability to make medical decisions.[3] This limitation is grounded in the general legal consensus that the right of parents to choose how to raise their children prevails in situations where the wishes of the minor and the parent are in conflict.[4] While courts and legislatures have established certain exceptions to this general rule,[5] a minor's right to consent to medical

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1. Molly Redden, *This is How Judges Humiliate Teens Who Want Abortions*, MOTHER JONES (Sept./Oct. 2014), http://www.motherjones.com/politics/2014/10/teen-abortion-judicial-bypass-parental-notification.

2. Bellotti v. Baird, 443 U.S. 622, 633 (1979) (explaining that, although children are not exempt from constitutional protections, the law does operate differently for minors seeking to invoke such protections).

3. *See, e.g.*, Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1, 17 (1996) (highlighting the general common law rule that minors have no medical decision making power, even with regard to life-sustaining treatment).

4. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (carving out a "liberty [interest] of parents and guardians to direct the upbringing and education of children under their control"); *see also* J. SHOSHANNA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS 40 (2006) (noting that the Supreme Court has most recently "sh[ied] away from the 'Individualistic Model' when faced with cases involving actual or potential disputes between parents and children" and, instead, defers to the "parental control over the 'upbringing and education' of their children"); Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 149 (2000) (noting that the emphasis on parents' rights in medical decision making situations for minors rests on the presumption that parents will act in the best interest of the child because of "natural bonds of affection").

5. *See, e.g.*, Carey v. Population Servs., Int'l, 431 U.S. 678, 681–82 (1977) (striking down a state statute that prohibited minors under sixteen-years-old from obtaining contraception); *see also Minors' Access to Contraceptive Services*, GUTTMACHER INST. (June 1, 2018), https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-

procedures remains extremely limited, including the right to consent to have an abortion.[6]

In 1973, the Supreme Court held in *Roe v. Wade*[7] that women have a fundamental right to abortion based on the substantive due process right to privacy.[8] However, since this landmark ruling, a limiting framework has emerged that governs when minors may exercise this right. Seeking to protect parental rights and provide a check on minors' decision making, the majority of states have enacted parental involvement laws.[9] Laws of this type require parental consent, parental notification, or both, before the minor obtains an abortion.[10] States are permitted to pass these laws, so long as the statute provides a judicial bypass option by which a minor may obtain a waiver of parental consent or notification by court order.[11] In *Bellotti v. Baird*,[12] the Court enumerated two situations in which a waiver of parental consent or notification may be granted: (1) when the minor is mature enough to make the decision independently to have an abortion, or (2) when an abortion is in the minor's best interest, even though she cannot make the decision independently.[13]

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services (stating that "21 states and the District of Columbia explicitly allow all minors to consent to contraceptive services").

6. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992) (ruling that a minor's right to abortion may be subject to parental consent).

7. 410 U.S. 113 (1973).

8. *Id.* at 153 (concluding that regardless of whether the right of privacy is rooted in the personal liberty protections of the Fourteenth Amendment, as the Court believed, or the reserved rights of the Ninth Amendment, as the district court ruled, the Constitution safeguards a woman's freedom to terminate her pregnancy).

9. *See Abortion and Parental Involvement Laws: A Threat to Young Women's Health and Safety*, ADVOCATES FOR YOUTH (Dec. 2013), http://www.advocatesforyouth.org/storage/advfy/documents/abortion%20and%20parental%20involvement%20laws.pdf.

10. *See id.* (explaining that parental involvement laws come in two forms: "those that require parental notification and those that require parental consent before a young person seeks abortion services," and further noting that twenty-one states require parental consent only, thirteen states require parental notification only, and five states require both consent and notification); *see also State Laws and Policies: Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (June 1, 2018), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions (highlighting that thirty-four states allow minors to obtain an abortion without parental consent, notification, or alternative judicial waiver in the case of a medical emergency, and fifteen states allow a minor to do so in cases of abuse, assault, incest, or neglect).

11. Bellotti v. Baird, 443 U.S. 622, 643–44 (1979).

12. 443 U.S. 622 (1979).

13. *Id.* at 643–44.

In these judicial bypass proceedings, the minor bears the burden of proof for establishing her "maturity" or "best interests."[14] However, the Court in *Bellotti* did not specify the evidentiary standard required for a minor to prove she is mature enough to obtain an abortion or that it is in her best interests; instead, the Court left this determination up to the state legislatures.[15] This has resulted in varying evidentiary requirements and appellate standards of review across the country.[16] For example, fifteen of the thirty-seven states with parental involvement laws require "clear and convincing evidence" to prove that a minor is mature enough to obtain an abortion or that it is in her best interests.[17] In light of the widespread use of this heightened evidentiary standard and the substantial obstacle it places in the way of minors, this Comment will argue that heightened evidentiary standards in judicial bypass hearings place an undue burden on minors seeking abortion care without parental involvement based on the strengthened undue burden test articulated in *Whole Woman's Health v. Hellerstedt*,[18] and despite the Court's ruling in *Ohio v. Akron Center for Reproductive*

14. *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 515–16 (1990) (citing *Bellotti*, 443 U.S. at 634) ("A State does not have to bear the burden of proof on the issues of maturity or best interests. The principal opinion in *Bellotti* indicates that a State may require the minor to prove these facts in a bypass procedure.").

15. *See Bellotti*, 443 U.S. at 643–44 (using the terms "best interests" and "maturity" without providing definitions).

16. *See, e.g.*, Planned Parenthood of the Great Nw. v. Alaska, 375 P.3d 1122, 1149, 1154 (Alaska 2016) (overturning a parental involvement statute that required clear and convincing evidence based, in part, on the fact that "in close cases, a higher standard of proof will place the risk of erroneous factfinding on the child" (quoting Evans v. McTaggart, 88 P.3d 1078, 1095 (Alaska 2004) (Fabe, C.J., dissenting))); *In re* Petition of Anonymous 1, 558 N.W.2d 784, 787 (Neb. 1997) (deciding in favor of the clear and convincing evidence standard in judicial bypass proceedings based on the "magnitude of the decision at issue, the fact that the proceedings are ex parte in nature, and [the] recogni[tion] that any evidence will usually satisfy the preponderance of the evidence standard"). While an expedited appeals process is required for judicial bypass hearings where a waiver has been denied, states have varying appellate standards of review that prevent a meaningful check on trial court judges' decisions. *See* Caroline A. Placey, Comment, *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech: Throwing Pregnant Minors Under the Campaign Bus*, 56 EMORY L.J. 693, 707–08 (2006) (citing examples of states with wide-ranging appellate standards of review for judicial bypass hearings from "de novo" to "abuse of discretion"); *id.* at 707 ("A survey of published judicial bypass appellate opinions reveals that varied judgments result from similar facts, even in a single state.").

17. GUTTMACHER INST., *supra* note 10.

18. 136 S. Ct. 2292 (2016).

Health.[19] Furthermore, the outcome of this strengthened analysis negates the ruling in *Akron Center for Reproductive Health* with respect to the Court's assertion that the clear and convincing evidence standard does not impose an undue burden on minors' right to abortion.

Part I will provide an overview of minors' abortion rights and the evolution of the judicial bypass process. It will also look at the purpose and function of the clear and convincing evidence standard in general and as applied to judicial bypass proceedings. Then, it will examine the Court's holding in *Akron Center for Reproductive Health* and outline the structure of the *Whole Woman's Health* analysis.[20] Part II will apply the strengthened undue burden test set out in *Whole Woman's Health* to the Court's analysis of the clear and convincing evidence standard permitted under *Akron Center for Reproductive Health* and argue that these heightened evidentiary standards create an undue burden and are therefore unconstitutional.[21] Finally, this Comment will conclude that the use of the clear and convincing evidence standard in judicial bypass proceedings creates an undue burden under the strengthened undue burden test in *Whole Woman's Health*, and will recommend a model parental involvement statute that comports with due process standards enumerated in the *Whole Woman's Health* ruling.[22]

I. BACKGROUND

This Section will provide an overview of the information needed to determine the constitutionality of the imposition of the clear and convincing evidence standard within judicial bypass proceedings. It will first explain how judicial bypass is situated within abortion jurisprudence overall and the governing standards of judicial bypass.[23] Next, it will outline the purpose and function of the clear and convincing evidence standard, both generally and in the context of judicial bypass.[24] Then, the Section will provide an overview of the Court's decision in *Akron Center for Reproductive Health*, and its approval of the clear and convincing evidence standard in judicial bypass

19. 497 U.S. 502 (1990).
20. *See infra* Part I.
21. *See infra* Part II.
22. *See infra* Conclusion.
23. *See infra* Section I.A.
24. *See infra* Section I.B.

proceedings.[25] Last, it will explain the strengthened undue burden standard articulated in *Whole Woman's Health*.[26]

A. Judicial Bypass within the Evolution of Abortion Jurisprudence

In *Roe*, the Supreme Court ruled that abortion is a fundamental right encompassed in the right to privacy.[27] In addition to situating the right to abortion within substantive due process, the Court in *Roe* also set up a trimester framework, which provided that a woman's right to abortion without regulation decreased each trimester of the pregnancy.[28] Specifically, during the first trimester, the choice of whether to abort was to be left to the woman and her doctor;[29] during the second trimester, states were permitted to impose abortion regulations to protect women's health;[30] and during the third trimester, states were permitted to restrict or prohibit abortion, except where an abortion would be necessary to preserve the life or health of the woman.[31] However, despite carefully crafting this approach to protect the abortion right—which was later replaced by the fetal viability standard and undue burden test[32]—the Court in *Roe* left open the question of how the abortion right was to be applied to minors, other than the general assertion that the right to abortion is not absolute.[33]

Three years later, the Court, in *Planned Parenthood of Central Missouri v. Danforth*,[34] ruled that a state could not authorize a blanket parental veto over a minor's right to abortion.[35] In doing so, the Court addressed one of the primary justifications asserted in favor of parental involvement laws and regulations pertaining to such laws—the preservation of parental rights and family cohesion—by stating:

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25. *See infra* Section I.C.
26. *See infra* Section I.D.
27. Roe v. Wade, 410 U.S. 113, 153 (1973).
28. *See id.* at 164–65.
29. *Id.* at 163 ("[P]rior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment, the patient's pregnancy should be terminated.").
30. *Id.* at 164.
31. *Id.* at 164–65.
32. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *see infra* note 47 and accompanying text.
33. *See Roe*, 410 U.S. at 155 (specifying that the right to abortion "is not absolute and subject to some limitations").
34. 428 U.S. 52 (1976).
35. *Id.* at 74.

> It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by a physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.[36]

This set the stage for perhaps the most important Supreme Court decision regarding a minor's right to receive an abortion, which came three years later in *Bellotti*. In that case, the Court addressed the question of the constitutionality of parental involvement statutes for minors seeking abortions.[37] The plaintiffs consisted of a "class of unmarried minors in Massachusetts who [had] adequate capacity to give valid and informed consent [to abortion], and who [did] not wish to involve their parents."[38] The minors challenged the constitutionality of the Massachusetts parental consent statute, arguing that minors of "adequate capacity" are capable of informed consent with respect to abortion procedures.[39] The Court ruled that a parental consent statute did not violate a minor's right to abortion, as long as the state also provided a bypass process through which a minor can petition for a waiver of parental consent. The minor can obtain a judicial waiver by showing that either she is "mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes, or . . . that even if she is not able to make the decision independently, the desired abortion would be in her best interests."[40] The "maturity" determination remains steeped in criticism and judicial application of the standard has varied widely.[41]

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36. *Id.* at 75.

37. Bellotti v. Baird, 443 U.S. 622, 640 (1979) (hearing a challenge to a state statute requiring parental consent for a minor to receive an abortion, enacted in light of the Court's holding in *Danforth*).

38. *Id.* at 626 (noting that the co-plaintiffs also included the Parents Aid Society, Inc., William Baird, the Society's founder, and Gerald Zupnick, M.D.).

39. *See id.* at 628 (discussing the district court's conclusion that "a substantial number of females under the age of 18 are capable of forming a valid consent" (quoting Baird v. Bellotti, 393 F. Supp. 847, 855 (D. Mass. 1975))).

40. *Id.* at 643–44.

41. *See* Hodgson v. Minnesota, 497 U.S. 417, 475 (1990) (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (asserting that "[i]t is difficult to conceive of any reason . . . that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will"); see also HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT

The Court later clarified the "best interests" consideration by opining that finding parental involvement is not in the minor's best interests is equivalent to finding that an abortion is in the minor's best interest and, thus, either articulation of the standard is permissible.[42] However, other than the decision in *Bellotti*, there is little judicial guidance on the meaning of the "best interests" standard in this particular type of proceeding; rather, since the "circumstances in which [the abortion] issue arises will vary widely," the "best interests" determination necessarily requires a case-by-case analysis.[43]

The Court articulated three reasons for requiring a judicial bypass process with the "maturity" and "best interests" considerations: (1) "the peculiar vulnerability of children"; (2) "their inability to make critical decisions in an informed, mature manner"; and (3) "the importance of the parental role in child rearing."[44] The Court first explained that minors' due process rights are coextensive with those of adults, but can be altered to "account for children's vulnerability and their needs for concern, . . . sympathy, and . . . paternal attention."[45] It then went on to define the states' ability to limit minors' decision making power with respect to "important, affirmative choices with potentially serious consequences."[46] Finally, with regard to the third prong of the justification for limitations on minors' right to abortion, the Court relied on long-standing precedent supporting parents' interest in exercising care and custody over their children, and all of the requisite checks on minors' autonomy in decision making that comes along with this interest.[47] In terms of the actual structure of the judicial bypass

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MINORS 26 (2007) (noting that the Court's lack of guidance on the meaning of "maturity" and "best interests" gives judges substantial discretion in these determinations).

42. *See* Lambert v. Wicklund, 520 U.S. 292, 297–98 (1997) (per curiam).

43. *Bellotti*, 443 U.S. at 642–43 (contemplating that alternatives, such as marriage, adoption, or raising the child with family support may be "relevant to the minor's best interests").

44. *Id.* at 634.

45. *Id.* at 635 (internal quotation marks omitted) (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)) (using the juvenile justice system as an example of context in which minors retain their due process rights but are afforded extra procedural protections in light of their vulnerability).

46. *Id.* at 635–36 (using a First Amendment case to illustrate the point). *But see* Moe v. Dinkins, 533 F. Supp. 623, 630 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (distinguishing the denial of minors' right to abortion from other types of temporary denials of minors' rights (i.e. underage marriage), by explaining that "[g]iving birth to an unwanted child involves an irretrievable change in position for a minor").

47. *Bellotti*, 443 U.S. at 637–39; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that choice of children's education was encompassed by parents' liberty interest to "direct the upbringing and education of children under their control");

process, the Court in *Bellotti* stipulated that the process must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained," but did not specify any other procedural requirements.[48]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[49] the Court subsequently affirmed *Bellotti* by upholding a parental consent statute under the new "undue burden" standard. This standard invalidates any statutory provision governing the right to abortion when it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[50] In that case, abortion clinics and physicians challenged five different provisions of the Pennsylvania Abortion Control Act of 1982; one of which "require[d] the informed consent of one of [a minor's] parents, but provide[d] for a judicial bypass option."[51] Applying the new undue burden standard,[52] the Court upheld all of the challenged provisions except for the spousal notification provision in the Act.[53] In striking down a spousal notification provision while upholding the parental consent provision, the Court focused on the possibility of domestic abuse victims facing life-threatening situations if forced to notify their spouses, explaining that "the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[54] Thus, the Court opined that, at least for this group of women, the spousal notification provision—like that of spousal consent—would function as an absolute veto and place an undue burden on a woman's right to abortion.[55] However, the Court

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Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding a law prohibiting the instruction of the German language unconstitutional, in part because of the "right of parents to engage [teachers] so to instruct their children"). *But see* Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (emphasizing parents' right to direct the upbringing of their children, but holding that child labor laws trumped this right, as parental rights are not absolute).

48. *Bellotti*, 443 U.S. at 644.

49. 505 U.S. 833 (1992).

50. *See id.* at 877, 899 (reaffirming the *Bellotti* decision by finding that no undue burden was created by a parental consent statute when there is a judicial bypass option available).

51. *Id.* at 844.

52. *See id.* at 879.

53. *Id.* at 879–901.

54. *Id.* at 894.

55. *See id.* at 897 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976)) (finding spousal consent provisions unconstitutional).

noted that the inclusion of the judicial bypass process appropriately diminished the veto effect of a parental consent requirement, and thus explained why parental involvement laws were upheld in the decision, while spousal notification provisions were simultaneously struck down.[56]

Though it has been asserted that the framework and reasoning used in *Casey* to strike down spousal notification laws could and should be logically extended to parental involvement laws,[57] the Court has yet to do so.[58] Instead, the only clear constitutional guideposts in place for the judicial bypass process are the vague "maturity" and "best interests" standards set out in *Bellotti*.[59] This leaves states plenty of room to expand or restrict minors' rights within the general framework of these proceedings—which results in the imposition of seemingly small hurdles that add up and make the process of judicial bypass extremely burdensome for many young women.[60]

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56. *See id.* at 899. *But see* Hodgson v. Minnesota, 497 U.S. 417, 473 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that "a judicial bypass procedure . . . is itself unconstitutional because it effectively gives *a judge* an absolute veto over the decision of the physician and his patient" (emphasis added) (internal quotation marks omitted)).

57. *See generally* Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85, 108–18 (2014) (applying the *Casey* spousal notification analysis to parental involvement laws).

58. *Id.* at 108 n.140 (noting that courts often uphold "*Casey* look-alike statutes" despite the questionable purposes and benefits of parental involvement laws).

59. *See* Bellotti v. Baird, 443 U.S. 622, 643–44 (1979); *see also* Lambert v. Wicklund, 520 U.S. 292, 297–98 (1997) (per curiam) (specifying, as to the "best interests" standard, that "requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests").

60. *Hodgson*, 497 U.S. at 441–42 (internal quotation marks omitted)) *(*"[J]udges who adjudicated over 90% of [the] petitions [in question in that case] testified; none of them identified any positive effects of the [parental involvement] law. The court experience produced fear, tension, anxiety, and shame among minors, causing some who were mature, or some whose best interests would have been served by an abortion, to forego the bypass option and either notify their parents or carry to term."); Paul Danielson, *Judicial Recusal and a Minor's Right to an Abortion*, 2 NW. J.L. & SOC. POL'Y 125, 132 (2007) (noting that, in seeking to access the judicial bypass process, "a minor must take a number of time-consuming steps, including 'contact[ing] the attorney, arrang[ing] for transportation to court, and leav[ing] school without having her parents learn of the situation'" (alterations in original)); Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 878 (2006) (arguing that the abundance of judicial recusals for judges assigned to judicial bypass hearings due to an inability to be impartial on an issue involving abortion triggers the application of the undue burden standard by presenting obstacles for the minors undergoing

One practical hurdle for minors going through the judicial bypass process is the current trend among states with parental involvement laws to raise the evidentiary standard for minors in judicial bypass hearings from the common "preponderance of the evidence" standard to the "clear and convincing evidence" standard.[61] Currently, fifteen states[62] require a clear and convincing evidence standard for minors going through the judicial bypass process.[63] Furthermore, only five of these states also provide specific criteria governing how the judge evaluates "maturity" or "best interests,"[64] leaving minors pursuing

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the process); *Judicial Bypass Procedures: Undue Burdens for Young People Seeking Safe Abortion Care*, ADVOCATES FOR YOUTH (June 2015), http://www.advocatesforyouth.org/storage/advfy/documents/Factsheets/judicial%20bypass%20procedures.pdf (highlighting logistical obstacles to judicial bypass implemented by various states, including rules limiting which courts can hold the hearings, longer durations for the process, allowance of bias-laden judicial questioning of the minor, and provision of legal representation for the fetus); GUTTMACHER INST., *supra* note 10 (identifying waiting periods for minors and requirements of notarized documentation of parental consent as obstacles for minors seeking to obtain an abortion, even without going through the judicial bypass process); Redden, *supra* note 1 (providing anecdotal evidence of a Florida teen who faced cumulative obstacles in pursuing a waiver of parental consent through the judicial bypass process).

61. GUTTMACHER INST., *supra* note 10.

62. *See* ARIZ. REV. STAT. ANN. § 36-2152(C) (2014); ARK. CODE ANN. § 20-16-809(c)(1)(A) (2016); COLO. REV. STAT. § 12-37.5-107(2)(a) (2003) (repealed 2018); FLA. STAT. § 390.01114(4)(c) (2011) (amended 2018); IDAHO CODE § 18-609A(2) (2015); KAN. STAT. ANN. § 65-6705(d) (2014); LA. STAT. ANN. § 40:1061.14(B)(4)(b) (2017); MISS. CODE ANN. § 41-41-55(4) (2007); N.D. CENT. CODE § 14-02.1-03.1(2) (2011); NEB. REV. STAT. § 71-6903(2) (2011) (amended 2017); OHIO REV. CODE ANN. § 2151.85(C)(1) (West 2013); OKLA. STAT. tit. 63, § 1-740.3(A) (2013); S.D. CODIFIED LAWS § 34-23A-7(1) (2017); TEX. FAM. CODE ANN. § 33.003(i) (West 2016); WYO. STAT. ANN. § 35-6-118(v)(B) (1997).

63. Many states with heightened evidentiary standards for judicial bypass hearings also have highly deferential appellate standards of review (i.e. "clearly erroneous" or "abuse of discretion") for appellate courts reviewing the decisions from these hearings. *See* Placey, *supra* note 16, at 732–40. This presents even greater concern, given that a denial of judicial bypass under a heightened evidentiary standard will also often go unchecked by the appellate process. *See id.* at 707 ("A survey of published judicial bypass appellate opinions reveals that varied judgments result from similar facts, even in a single state.").

64. *See, e.g.*, FLA. STAT. § 390.01114(4)(c) (instructing the courts to consider the pregnant minor's age, intelligence, "[e]motional development and stability," "[c]redibility and demeanor as a witness," "[a]bility to accept responsibility," "[a]bility to assess both the immediate and long-range consequences of the minor's choices," and "[a]bility to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision"); *see also* ARIZ. REV. STAT.

judicial bypass in the other nine states subject not only to a heightened evidentiary standard, but also blind to specific pleading requirements.[65] The imposition of this heightened standard tends to be motivated by "a sense in these states that girls 'have it easy' going into a bypass hearing."[66] However, before engaging in an in-depth discussion on the permissibility of the use of this standard in judicial bypass proceedings, it is helpful to first gain an understanding of its general origins and its alleged purpose in the judicial bypass context.

B. Purpose and Function of the Clear and Convincing Evidence Standard

The clear and convincing evidence standard of proof is the highest evidentiary standard employed in civil proceedings, second only to the "beyond a reasonable doubt" standard employed in criminal proceedings.[67] In general, standards of proof function to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[68] Within the range of standards, clear and convincing evidence is situated to "protect particularly important individual interests in various civil cases" that involve more than "mere loss of money."[69] Though the meaning of "clear and convincing" varies by state, one can generally articulate the standard as "persuad[ing] the [factfinder] that the proposition is highly probable, or . . . produc[ing] in the mind of the factfinder a firm belief or conviction that the allegations in question are true."[70] Thus, the typical evidentiary standard is preponderance of the evidence, and the clear and convincing evidence standard tends to be employed where a party—usually a defendant in a proceeding initiated by the government—is at risk of having a significant

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ANN. § 36-2152(C); ARK. CODE ANN. § 20-16-801(d)(2); KAN. STAT. ANN. § 65-6705(n); TEX. FAM. CODE ANN. § 33.003(i-1).

65. *Compare, e.g.*, FLA. STAT. § 390.01114(4)(c) (listing multiple factors that courts must consider to determine a minor's "maturity" and "best interests"), *with* MISS. CODE ANN. § 41-41-55(4) (listing the *Bellotti* "maturity" and "best interests" factors without any additional explanation).

66. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 432 (2009); *see infra* notes 75–76 and accompanying text (examining judicial bypass structure).

67. *See* 29 AM. JUR. 2D *Evidence* § 173 (2017) (examining the various evidentiary standards of proof).

68. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

69. *Id.* at 424 (defining intermediate evidentiary standards).

70. 29 AM. JUR. 2D *Evidence* § 173.

liberty interest erroneously taken away.[71] This is justified by the principle that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state," as he or she would presumably be required to do if the applicable standard of proof was preponderance of the evidence.[72] For example, in *Addington v. Texas*,[73] the Court determined that an individual's interest in avoiding civil commitment is so weighty that the government must justify commitment by clear and convincing evidence to comport with due process.[74]

Employing the clear and convincing evidence standard in judicial bypass proceedings has been justified in various ways. For instance, the "magnitude of the decision at issue" has been used to justify a heightened evidentiary standard.[75] Furthermore, the state and parental interests in the outcome of the proceeding provide courts with further support for ruling in favor of the heightened evidentiary standard.[76]

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71. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 768, 791 (1982) (upholding the application of the clear and convincing evidence standard to parental termination proceedings, reasoning that, "at a parental rights termination proceeding, a near-equal allocation of risk [of interest deprivation] between the parents and the State is constitutionally intolerable"); *Addington*, 441 U.S. at 425 (requiring clear and convincing evidence in civil commitment proceedings); Nowak v. United States, 356 U.S. 660, 663 (1958) (requiring that the government prove the defendant's non-citizen status in a denaturalization proceeding by "clear, unequivocal, and convincing" evidence so as "not [to] leave the 'issue in doubt'") (citation omitted).

72. *Addington*, 441 U.S. at 427.

73. 441 U.S. 418 (1979).

74. *Id.* at 427.

75. *See In re* Petition of Anonymous 1, 558 N.W.2d 784, 787 (Neb. 1997) (per curiam) (considering the magnitude of the decision, the ex parte structure of the proceedings, and the relative ease of proving requirements under the preponderance of the evidence standard to justify the imposition of the clear and convincing evidence standard on minors going through the judicial bypass process).

76. *See In re* B.S., 74 P.3d 285, 289–90 (Ariz. Ct. App. 2003) (holding that application of the clear and convincing standard is permissible to prevent the bypass process from becoming "a mere pass-through proceeding," "to maximize the court's ability to make a reasoned decision," and to take into account the impact of the process on parental decision making rights); *see also* Bellotti v. Baird, 443 U.S. 622, 638 (1979) ("[I]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations that state can neither supply nor hinder*." (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944))). *But see* Planned Parenthood of the Great Nw. v. Alaska, 375 P.3d 1122, 1164 (Alaska 2016) (ruling that a parental involvement statute requiring a clear and convincing evidence standard in judicial bypass proceedings was not narrowly tailored to serve the state's interests in "protecting minors from their own immaturity" and "aiding parents to fulfill their parental responsibilities").

Thus, the judicial bypass proceeding implicates a complex web of rights and interests and puts the minor at the center of the process in a tricky position, given that the minor is "the party asserting the affirmative of an issue," and thus bears the burden of proof,[77] but is also the party attempting to protect a constitutionally-afforded, fundamental liberty interest.[78] This structure is, therefore, unique in that the clear and convincing evidence standard is not imposed in this context to protect the defendant from government intrusion on a liberty interest.[79] Indeed, there is no defendant, and the principal party with a competing interest—generally the parents—are not actively asserting their rights by virtue of the proceeding's purpose and structure.[80] This, in turn, makes the weighing of interests and application of the undue burden standard all the more complicated. Furthermore, while recent developments in the evolution of the undue burden standard have not specifically referenced its application to judicial bypass proceedings, they do provide a stronger framework for analyzing the impact of heightened evidentiary standards, coupled with the state interests espoused in the process of imposing these standards. However, as of now, the ultimate rule of law is that these heightened standards are constitutional.[81]

C. Using a Heightened Evidentiary Standard Under Ohio v. Akron Center for Reproductive Health

While heightened evidentiary standards present significant challenges for minors who still bear the ultimate burden of proving "maturity" or "best interests,"[82] the Supreme Court has held that the

77. *Anonymous 1*, 558 N.W.2d at 787; *see supra* note 14 and accompanying text.

78. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 90 (1976) (Stewart, J., concurring) (asserting that a statute's "imposition of an absolute limitation on the minor's right to obtain an abortion" renders the statute unconstitutional); *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (situating the right to abortion within the fundamental substantive due process right to privacy); *supra* note 8 and accompanying text.

79. *See supra* note 71 and accompanying text; *see also* Wendy-Adele Humphrey, *Two-Stepping Around a Minor's Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1794 n.165 (2017) ("The Texas Family Code uses clear and convincing evidence in a number of other circumstances, but the burden is generally used only when the state is attempting to take away a constitutional right . . . . Thus, arguably, the heightened burden should not be used as an additional hurdle for a young woman to exercise a constitutional right she already has: the right to choose when and whether to become a parent.").

80. *See supra* note 13 and accompanying text.

81. *See infra* note 83 and accompanying text.

82. *See supra* note 14 and accompanying text.

use of these standards is constitutional where the hearing is conducted ex parte.[83] In *Akron Center for Reproductive Health v. Slaby*,[84] the Sixth Circuit applied a procedural due process analysis and ruled that use of the clear and convincing evidence standard in judicial bypass proceedings was unconstitutional.[85] Specifically, the court illuminated the procedural deficiencies in requiring a heightened standard of proof for minors, given the liberty interest at stake, by stating that:

> [i]n considering whether the standard of proof utilized in a given proceeding complies with due process, a court must consider three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing government interest supporting use of the challenged procedure."[86]

By engaging in this analysis, the court used the *Mathews v. Eldridge*[87] framework, where the risk of erroneous deprivation of a protected liberty interest is weighed against the state interest in using the particular procedural device.[88] The court ultimately found that the clear and convincing evidence standard presented too great a risk of erroneous deprivation of the minor's protected liberty interest in obtaining an abortion.[89] Notably, this decision occurred before the undue burden standard existed, thus explaining the reliance on a procedural due process approach.

However, on appeal in *Ohio v. Akron Center for Reproductive Health*, the Supreme Court overturned the Sixth Circuit's decision, relying heavily on the provision of a non-adversarial setting for the judicial bypass hearing—an ex parte hearing—as well as the assistance of counsel as

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83. *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 516 (1990) (stating that the state may require a clear and convincing evidence standard where the hearing is ex parte and finding the provision of a court-appointed guardian ad litem to be persuasive in favor of the permissiveness of heightened standards). *But see* Elizabeth Susan Graybill, Note, *Assisting Minors Seeking Abortions in Judicial Bypass Proceedings: A Guardian Ad Litem is No Substitute for an Attorney*, 55 VAND. L. REV. 581, 586 (2002) (noting that "it is possible that the guardian ad litem will subvert the minor's expressed interest in seeking a judicial waiver of parental involvement by advocating . . . that an abortion is not in the minor's best interests").

84. 854 F.2d 852 (6th Cir. 1988), *rev'd sub nom. Akron Ctr. for Reprod. Health*, 497 U.S. 502.

85. *Slaby*, 854 F.2d at 864.

86. *Id.* at 863 (quoting Santosky v. Kramer, 455 U.S. 745, 754 (1982)).

87. 424 U.S. 319 (1976).

88. *See id.* at 342 (finding that certain administrative procedures created too great a risk of erroneous deprivation in the form of social security benefits termination, which the Court considered to be a particularly weighty property interest because public benefits are life-sustaining for those who rely on them).

89. *Slaby*, 854 F.2d at 863.

lessening the burden placed on the minor, despite the statutory burden of proof still ultimately resting on her shoulders.[90] Thus, the Court declined to follow the Sixth Circuit's procedural due process analysis,[91] instead relying on what it considered to be ample procedural safeguards—chiefly, assistance of counsel and an ex parte hearing structure.[92] The issue of heightened evidentiary standards in judicial bypass hearings, however, still presents a unique intersection of challenges involving both substantive and procedural due process implications.

D. The Strengthened Undue Burden Standard Under Whole Woman's Health

While the Court in *Casey* defined an undue burden as any provision that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion,"[93] the Court recently gave teeth to this standard in *Whole Woman's Health*.[94] In the case, the Court analyzed the effects of Texas's Targeted Regulations of Abortion Providers (TRAP laws)[95] on women's access to abortion in the state. The Court engaged in two types of analyses in unprecedented depth: (1) examination of extensive data regarding the effect of the laws on women's actual access to clinics and abortion care, and (2) consideration of whether the asserted purpose of the regulations matched up with a demonstrated need for those measures.[96]

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90. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 516 (1990).

91. *See id.* at 519–20.

92. *See id.* at 517.

93. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (explaining that a state provision is invalidated when it creates an undue burden).

94. 136 S. Ct. 2292 (2016).

95. So-called "TRAP laws" encompass laws that "single out the medical practices of doctors who provide abortions and impose on them requirements that are different and more burdensome than those imposed on other medical practices." *Targeted Regulation of Abortion Providers (TRAP)*, CTR. FOR REPROD. RTS. (Aug. 28, 2015), https://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap. These regulations include certain facility standards (most notably, ambulatory surgical center requirements), required relationships with hospitals (for example, physicians performing abortions have admitting privileges at a nearby hospital), and onerous licensing standards. *See State Laws and Policies: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (June 1, 2018), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

96. The Court "conclude[ed] that neither of the provisions confer[red] medical benefits sufficient to justify the burdens upon access that each impose[d]." *Whole Woman's Health*, 136 S. Ct. at 2300. In reaching this conclusion, the Court considered

In enacting the TRAP laws, Texas imposed onerous regulations on abortion providers, which were not required for other similarly situated medical providers, all supposedly in the name of protecting women's health.[97] These laws represent one of many regulation strategies across the United States put in place to chip away at abortion access.[98] However, in analyzing the health benefits of these regulations—or lack thereof—the Court abandoned the deference accorded to legislative findings in the prior case of *Gonzales v. Carhart*,[99] noting that the statute at issue failed to include any legislative findings, so the Court was "left to infer that the legislature sought to further a constitutionally acceptable objective."[100] In its conclusion, the Court placed great emphasis on the legislature producing concrete data on the remedial nature of regulations if claiming they were passed for a women's health-protective purpose.[101]

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data on clinic closures resulting from Texas's admitting privileges requirement, *id.* at 2312, and the same with respect to Texas's surgical center requirements, *id.* at 2315–16. *See* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J.F. 149, 150 (2016) (suggesting that *Whole Woman's Health* unexpectedly broadened the protections for the abortion right by giving "close attention to scientific evidence about the health benefits of regulating abortion," which "call[ed] into question myriad health-justified . . . [and] fetal-protective restrictions on abortion").

97. Greenhouse & Siegel, *supra* note 96, at 151.

98. *See* Olga Khazan, *Planning the End of Abortion*, THE ATLANTIC (July 16, 2015), https://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297 (discussing how state legislators partner with pro-life groups to pass potentially unconstitutional abortion restrictions with the goal of testing the undue burden standard and the Supreme Court's protection of abortion rights).

99. 550 U.S. 124, 165 (2007).

100. *Whole Woman's Health*, 136 S. Ct. at 2310 (emphasizing that "in *Gonzales[,]* the Court, while pointing out that we must review legislative 'fact-finding under a deferential standard,' added that we must not 'place dispositive weight' on those 'findings'" (quoting *Gonzales*, 550 U.S. at 165)); *see also* Meghan Harper, Comment, *Making Sense of* Whole Woman's Health v. Hellerstedt*: The Development of a New Approach to the Undue Burden Standard*, 65 U. KAN. L. REV. 757, 777 (2017) ("Instead of giving a high deference to the stated legislative rationale behind an abortion regulation, the balancing test appropriately replaces this deference with the requirement to examine hard evidence and statistics to consider whether a legitimate state interest is necessarily reached through a regulation or whether the state interest can be attained without harming a woman's right to abortion in the process.").

101. *See Whole Woman's Health*, 136 S. Ct. at 2309–10 (explaining that the Court places "considerable weight upon evidence and argument presented in judicial proceedings" when it is tasked with determining the constitutionality of laws regulating abortion procedures).

First, in its decision, the Court used "evidence-based balancing" of the benefits along with the burdens created by the abortion regulations and "assesse[d] the impact of . . . abortion restriction[s] in constitutional terms sensitive to women's experience in making and carrying out a decision to end a pregnancy."[102] Thus, *Whole Woman's Health* expanded the scope of *Casey*, making more room within the undue burden standard for consideration of practical barriers to accessing the right to abortion.[103] Second, the Court questioned, and ultimately found insufficient, the state's asserted women's health-protective purpose of the laws.[104] The Court noted that, while protecting women's health is a legitimate state interest, the state must advance some "evidence that shows that, compared to prior law, . . . the new law advance[s] [the state's] legitimate interest in protecting women's health."[105] As a result, going forward, courts must utilize evidence-based balancing in applying the undue burden test to abortion restrictions by: (1) examining the record to determine the practical impact the restriction has on women's paths to abortion, and (2) considering whether the asserted purpose of the statute is actually supported by a demonstrated need for the regulations.[106] This requirement strengthens the impact of the *Casey* undue burden standard by making the standard more formidable for proponents of statutes that restrict abortion access. Furthermore, the Court only applied this new test to TRAP

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102. Greenhouse & Siegel, *supra* note 96, at 162; *see, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2318 (using evidence of long travel times and distances, as well as overcrowding of clinics, to demonstrate the undue burden created by the TRAP laws).

103. *See Whole Woman's Health*, 136 S. Ct. at 2300 ("We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of a woman seeking a previability abortion . . . ."); Greenhouse & Siegel, *supra* note 96, at 162 ("The Court considers restrictions cumulatively and in context, describing how, taken as a whole, they will alter the lived conditions of exercising the abortion right.").

104. *See* Greenhouse & Siegel, *supra* note 96, at 158 ("While the majority never explicitly states that Texas enacted the admitting privileges and surgical center requirements with a purpose to obstruct women's access to abortion, the Court's deep skepticism of the state's actual motivation shines through the opinion."); *see also Whole Woman's Health*, 136 S. Ct. at 2315 (comparing Texas's regulation of abortion with that of other medical procedures, which pose greater risk to women's health, and finding the singling out of abortion facilities and providers arbitrary at best and targeted at worst); *id.* at 2320 (Ginsburg, J., concurring) ("Many medical procedures, including childbirth, are far more dangerous to patients [than abortion], yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements.").

105. *Whole Woman's Health*, 136 S. Ct. at 2311.

106. *See supra* note 96 and accompanying text.

laws, but did not use limiting language to reach its decision, which suggests that courts could apply the test in different contexts in the future.[107] Since the issuance of the *Whole Woman's Health* decision, courts have applied the strengthened undue burden standard by comparing the practical effects created by a given regulation, and engaging in deeper analyses regarding the impact on abortion access for the women who are most affected by the regulations.[108] Going forward, the decision presents wide-ranging implications for many types of abortion regulations other than purely medical or health-related restrictions,[109] including those involving minors and judicial bypass.[110] Specifically, a heightened evidentiary standard for minors undergoing the judicial bypass process amounts to an undue burden under this strengthened standard set out in *Whole Woman's Health.* This makes the imposition of the clear and convincing evidence standard unconstitutional and negates the Court's approval of heightened evidentiary standards in the ex parte judicial bypass proceedings in *Akron Center for Reproductive Health.*

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107. *See Whole Woman's Health*, 136 S. Ct. at 2300 (concluding that the provisions at issue in the case did not "confer[] medical benefits sufficient to justify the burdens upon access" that they created and that they "place[] a substantial obstacle in the path of women seeking a previability abortion").

108. *See, e.g.*, Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 959 (8th Cir. 2017) (applying the *Whole Woman's Health* analysis to a regulation involving medication abortion facilities by comparing the level of restriction on access to facilities created by the regulation to the similar considerations in *Whole Woman's Health*, and speculating as to the number of women most affected by the regulations that would forgo abortions as a result); W. Ala. Women's Ctr. v. Miller, 299 F. Supp. 3d 1244, 1254–55 (M.D. Ala. 2017) (engaging in the *Whole Woman's Health* requirement of demonstrated need for the regulation based on legislative findings by determining that, absent legislative findings, a "school-proximity law would impose a substantial obstacle . . . [because] the State's asserted interests are only minimally, if at all, furthered by the law, while the burden imposed on a woman's right to obtain an abortion is substantial"); *see also id.* at 1252 (remarking that "[t]he undue-burden test requires courts to examine 'the [challenged] regulation in its real-world context'") (quoting Planned Parenthood Se., Inc. v. Strange, 9 F. Supp. 3d 1272, 1287 (M.D. Ala. 2014)).

109. *See, e.g.*, Greenhouse & Siegel, *supra* note 96, at 160–61 (arguing that the Court's emphasis on production of legislative findings to justify burdensome abortion restrictions could and should also apply to fetal-protective laws).

110. *See id.* at 150.

II. ANALYSIS

A. Requiring Clear and Convincing Evidence is an Undue Burden Under Whole Woman's Health

Use of the clear and convincing evidence standard in judicial bypass proceedings constitutes an undue burden under the strengthened test set out in *Whole Woman's Health*. This Section will apply the two considerations mandated by the *Whole Woman's Health* ruling to assert that the use of heightened evidentiary standards in judicial bypass proceedings are unconstitutional.[111] This Section will also argue that, in light of this assertion, the unconstitutionality of heightened evidentiary standards in judicial bypass proceedings negates the Court's ruling on the issue in *Akron Center for Reproductive Health*.[112] At the core of the legal and political debate over restrictions placed on minors' right to abortion is the tension between the legitimate interest of the state in protecting parents' rights to raise their children and to be active participants in their children's decision making,[113] and the minor's right to abortion.[114] Though fetal protection remains part of the state interest in regulation of abortion for both adult women and minors, specifically in regulating abortions for minors, there are two additional state interests that are commonly espoused to justify the imposition of parental involvement laws and, thus, regulations of the judicial bypass process. These justifications or state interests are: (1) protecting minors from their own immaturity, and (2) preserving parental rights and family cohesion.[115] The *Whole Woman's Health* undue burden framework must be applied to the clear and convincing evidence standard in judicial bypass proceedings with respect to both of these legitimate state interests. Thus, this Section will apply the two prongs of the *Whole Woman's Health* analysis to the imposition of the clear and convincing evidence standard in light of the two rationales advanced in favor of this standard by: (1) evaluating to what extent the imposition of the clear and convincing evidence standard poses

111. *See infra* Section II.A.

112. *See infra* Section II.B.

113. *See supra* note 47 and accompanying text.

114. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (holding that a parent cannot possess an absolute veto over a minor's right to abortion because "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant").

115. *See supra* note 76 and accompanying text.

practical barriers to minors' abortion access, and (2) examining each rationale for the clear and convincing evidence standard—protecting minors from their own immaturity and preserving parental rights—in light of the Court's insistence on a demonstrated need for the abortion regulations based on legislative findings.

1. The clear and convincing evidence standard creates practical barriers to minors' access to abortion care.

The *Whole Woman's Health* decision requires first that a "practical barriers" consideration be applied to the abortion regulation at issue—that is, whether and to what extent the regulation creates practical barriers for minors seeking to access their right to abortion.[116] The Court in *Akron Center for Reproductive Health* justified the constitutionality of heightened burdens of proof in judicial bypass proceedings principally by pointing to the ex parte structure of the proceedings, which it considered a significant procedural safeguard.[117] However, this factor fails to counteract the practical barriers that minors encounter—created by the heightened clear and convincing evidence standard—when seeking a judicial waiver that grants access to abortion services. Specifically, the heightened standard gives judges more leeway to deny petitions for parental consent waivers based on arbitrary determinations, such as the minor's "demeanor,"[118] "composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reasoning and conclusions."[119] Furthermore, in states where appellate standards of review are highly deferential, decisions based on these determinations may go virtually unchecked by appellate courts.[120]

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116. *See supra* note 96 and accompanying text.

117. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 516 (1990).

118. *In re* Doe, 67 So. 3d 268, 268–69 (Fl. Dist. Ct. App. 2011) ("Significantly, the trial court made specific findings and expressed particular concern regarding the minor's demeanor.").

119. Ex parte Anonymous, 806 So. 2d 1269, 1274 (Ala. 2001) (listing various factors from which a trial judge may "draw inferences").

120. *See* Sanger, *supra* note 66, at 420, 433 (noting that, while the judicial bypass process is non-adversarial, "[s]ome judges have included moral verdicts within their assessment of the minor's maturity" or "examined petitioners in a prosecutorial manner"); Redden, *supra* note 1 (reporting on the outcomes of forty judicial bypass cases from Florida in which "judges denied minors' petitions for arbitrary, absurd, or personal reasons—such as a minor's failure to discuss her decision with a priest"); *see also* SILVERSTEIN, *supra* note 41, at 177 (comparing the implementation of Supreme Court decisions on judicial bypass to implementation of the ruling in Brown v. Bd. of Educ., 347 U.S. 483 (1954) and arguing that, while the judicial bypass structure was put in place to balance competing interests, in reality judges bring politics into the process).

For example, in *In re Anonymous 5*,[121] the Nebraska Supreme Court affirmed the trial court's determination of a lack of sufficient maturity, despite the minor having proffered evidence of her fear that her foster home placement would be put in jeopardy; her participation in multiple sessions of abortion counseling, including multiple ultrasounds; her understanding of the potential consequences of abortion; and her college plans.[122] Additionally, the court in that case accorded deference to the trial court's determination that the sixteen-year-old minor petitioner was not mature, in part, because she was "not self-sufficient, and [was] dependent upon her foster parents."[123] In Florida, a court of appeals upheld a denial of a parental consent waiver, in which the trial judge had included his own moral convictions as a Catholic within the hearing, and actively discouraged the minor from seeking the abortion.[124] In a more recent case, a Texas court of appeals affirmed a trial court's determination that the minor petitioner was not sufficiently aware "of the emotional and psychological aspects of undergoing an abortion," because she testified that she had read a booklet produced by the Department of Health detailing the psychological consequences of abortion, but could not adequately expound on the knowledge she obtained by reading the booklet.[125] Additionally, some courts have denied waiver petitions, despite a finding of parental abuse in the minor's home, potentially making the situation for an already vulnerable minor even worse by mandating that she carry her pregnancy to term.[126]

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121. 838 N.W.2d 226 (Neb. 2013) (per curiam).

122. *See id.* at 234–35; *see also In re* Jane Doe 1, 566 N.E.2d 1181, 1184 (Ohio 1991) (upholding a trial court determination of lack of maturity, despite a doctor having testified to the minor's sufficient knowledge and understanding of the abortion procedure, in addition to allegations of parental abuse and demonstrated college plans).

123. *Anonymous 5*, 838 N.W.2d at 231.

124. *See In re* Doe, 973 So. 2d 548, 554, 564–66 (Fla. Dist. Ct. App. 2008) (Kelly, J., concurring) (affirming the denial of parental consent waiver, despite the trial judge telling the petitioning minor to consider how distressed her Catholic parents would be if they discovered that she had obtained an abortion, and referencing his own Catholicism in the process).

125. *See In re* Doe, 501 S.W.3d 313, 320–24 (Tex. App. 2016). Notably, the Texas legislature recently adopted the clear and convincing evidence standard in 2015, and has a highly deferential "abuse of discretion" appellate standard of review for judicial bypass cases. *See* TEX. FAM. CODE ANN. § 33.003(i) (West 2016); Placey, *supra* note 16, at 739 (listing Texas as requiring an "abuse of discretion" appellate standard of review).

126. *See, e.g.*, Redden, *supra* note 1 (highlighting the statements of an Alabama judge who denied a waiver petition, despite the fact that the minor's father, who

Thus, while the heightened evidentiary standard has been advanced for the purpose of requiring judges to take more care in deciding these cases,[127] the practical result is that judges have significantly more room to consider potentially arbitrary, insignificant, or inappropriate factors, especially where there is a highly deferential appellate standard of review in place.[128] Moreover, oftentimes the asserted purpose of the heightened evidentiary standard with regard to judicial determinations seems to indicate that they are actually put in place simply to make the process harder for the minor petitioner.[129] This makes the ex parte structure of the judicial bypass hearing an ineffective safeguard against the unduly burdensome nature of the heightened evidentiary standard, given that some judges act as a pseudo-adversary in these proceedings. In reality, a minor's ability to successfully obtain a waiver of parental consent through the judicial bypass process may be entirely dependent on the judge assigned to her case.[130] Additionally, when a higher evidentiary standard is coupled with a lack of specific criteria accessible to minor petitioners in advance of the hearing, the barrier to a minor's access to abortion is even more difficult to overcome.[131] When combined with the myriad other obstacles within the judicial bypass process,[132] the heightened clear and convincing evidence

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physically abused his children, "had told [the minor] that if she ever came home pregnant he would kill her").

127. *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 517–18 (1990) (finding that the clear and convincing evidence standard "does not place an unconstitutional burden" on the minor, but rather safeguards due process).

128. *See supra* note 120 and accompanying text (highlighting judges who have weighed factors such as the minor's failure to consult a priest).

129. *See, e.g.*, *In re* B.S., 74 P.3d 285, 289 (Ariz. Ct. App. 2003) (holding that application of the clear and convincing evidence standard is permissible "to avoid making a judicial bypass a mere pass-through proceeding, and to maximize the court's ability to make a reasoned decision").

130. *See* SILVERSTEIN, *supra* note 41, at 170–71 (highlighting the particular difficulty with judges in the so-called "Bible Belt" who harbor specific cultural and religious inclinations that make them anti-abortion); Redden, *supra* note 1 (alteration in original) (providing commentary from a judicial bypass scholar in which she stated, "[I]n practice, girls are at the mercy of whichever judge they happen to draw . . . . 'If a girl wanders into the wrong [court], she doesn't have a chance'").

131. *See, e.g.*, *supra* notes 64–65 and accompanying text; GUTTMACHER INST., *supra* note 10 (noting that only seven states require and publish specific criteria for judges to consider in judicial bypass hearings).

132. *See, e.g.*, *supra* note 60; *see also* Marlow Svatek, *Seeing the Forest for the Trees: Why Courts Should Consider Cumulative Effects in the Undue Burden Analysis*, 41 N.Y.U. REV. L. & SOC. CHANGE 121, 132 (2017) (arguing that an undue burden analysis should consider the effects of abortion restrictions in the aggregate); *cf.* Whole Woman's

standard fails to pass constitutional muster under the first prong in *Whole Woman's Health*;[133] considering the burdens of the standard in terms of practical barriers to minors' abortion access, along with the benefits it confers, it constitutes an undue burden on a minor's right to abortion.

2. There is no evidence based on legislative findings that the asserted purpose of imposing the heightened standard matches up with a demonstrated need for this measure.

The second prong of the *Whole Woman's Health* undue burden framework dictates that the state's asserted purpose of the abortion restrictions must be supported by legislative findings sufficient to show a demonstrated need for the regulations.[134] However, there is no effective evidence showing that there is a need for the clear and convincing evidence standard based either on the interest in protecting minors from their own immaturity or the interest in protecting parental rights. Therefore, after *Whole Woman's Health*, a state legislature imposing the clear and convincing evidence standard in judicial bypass proceedings must supply findings that support a need for this restriction based on the asserted interests.

In *Planned Parenthood of the Great Northwest v. Alaska*,[135] the Supreme Court of Alaska refused to buy into the legislature's asserted purposes for a heightened evidentiary standard in judicial bypass proceedings, one of which was "protecting minors from their own immaturity."[136] While it is not always phrased in that particular way, this seems to be one of the driving forces behind abortion restrictions on minors,

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Health v. Hellerstedt, 136 S. Ct. 2292, 2313 (2016) (emphasizing the cumulative burdens the state's TRAP laws placed on women seeking to obtain an abortion).

133. *See Whole Woman's Health*, 136 S. Ct. at 2309 ("The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.").

134. *See id.* at 2309–10 (stressing that the Court does not place dispositive weight on legislative findings, but rather maintains their constitutional duty to review Congress' findings); *id.* at 2313 (observing the "virtual absence of any health benefit" produced by the Texas law); Greenhouse & Siegel, *supra* note 96, at 157–58 ("[E]xamining the evidence about the law's impact[,] . . . Justice Breyer concludes that the law was at cross-purposes with its stated ends . . . This evidence-based balancing of the law's benefits and burdens calls into question Texas' very purpose in enacting the state's health-justified restrictions on abortion.").

135. 375 P.3d 1122 (Alaska 2016).

136. *Id.* at 1139, 1143 (concluding that the state's asserted interests were insufficient justification for the parental notification statute).

originating from the "maturity" standard established in *Bellotti*.[137] However, there is no sufficient evidence that a heightened evidentiary standard would have a protective effect on minors who want to obtain an abortion to the extent that it outweighs the burden created by making a waiver of parental consent significantly more difficult to obtain.

For example, because states tend to impose the clear and convincing evidence standard based on assumptions that the bypass process is not rigorous enough[138] or might become a "mere pass-through" proceeding,[139] the ruling in *Whole Woman's Health* dictates that the states asserting this rationale would need to show that the process was *actually* functioning as a "mere pass-through" without the heightened evidentiary standard in place.[140] Moreover, the harm of a minor being forced to carry her pregnancy to term is much greater than the risk of the minor being able to obtain an abortion when it may have been an immature decision.[141] When comparing the abortion decision in this context to other bodily decisions, the distinction becomes clear. For example:

> [t]he pregnant minor's options are much different from those facing a minor in other situations, such as decision whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision . . . . A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.[142]

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137. Bellotti v. Baird, 443 U.S. 622, 643 (1979); *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part) (arguing that parental involvement laws help protect minors "from the consequences of an incorrect decision"); EHRLICH, *supra* note 4, at 43 (characterizing the dissent in *Danforth* as viewing "parental involvement as a necessary prerequisite to the exercise of the [abortion] right, since a young woman may otherwise mistakenly believe that abortion was the best choice for her").

138. *See supra* note 66 and accompanying text (demonstrating that the misconception that girls "have it easy" going into bypass hearings has given rise to an unfairly heightened standard).

139. *In re* B.S., 74 P.3d 285, 289 (Ariz. Ct. App. 2003).

140. *See* Whole Woman's Health v. Hellerstedt, 132 S. Ct. 2292, 2309–10.

141. *See* Moe v. Dinkins, 533 F. Supp. 623, 630 (S.D.N.Y. 1981) ("Giving birth to an unwanted child involves an irretrievable change in position for a minor . . . ."); *see also* Hodgson v. Minnesota, 497 U.S. 417, 475 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) (highlighting the circular logic of the "maturity" standard, in that it forces immature minors to carry their pregnancies to term and potentially raise a child, despite their judicially determined immaturity with regard to their own health decisions); *supra* note 134 and accompanying text.

142. *Bellotti*, 443 U.S. at 642; *see also* EHRLICH, *supra* note 4, at 44 (comparing abortion to body piercing, for which "a 16-year-old . . . simply needs to wait two years

Thus, the irreversible nature of the harm that occurs if a waiver is erroneously denied supports the conclusion that heightening the minor petitioner's burden of proof not only fails to protect her against her own immaturity, but actually makes it more likely that she will be saddled with an irreversible harm.

As previously mentioned, the protection of parental rights is the second and probably most significant state interest driving states to differentiate between the way they regulate abortion access for adult women versus minors.[143] States enact procedural restrictions on the judicial bypass process, including the clear and convincing evidence standard, in part to support the role of parents in their children's decision making and encourage family cohesion.[144] This is a valid purpose, given the invaluable guidance and protection parents can provide to their children, and the general presumption that parents will act in the their children's best interest.[145] However, there is no evidence indicating that a heightened evidentiary standard is necessary to serve this legitimate state interest, but rather there is evidence that making judicial bypass harder tends to hurt the most vulnerable minors, many with already unstable familial relationships.[146] Thus, an analysis similar to that of the Court in *Casey*—with regard to spousal notification—can be applied here.[147]

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until she can self-consent to the procedure," to demonstrate the comparatively "grave and indelible" consequences of not being able to consent to an abortion at the same age (quoting *Bellotti*, 443 U.S. at 642)).

143. *See supra* note 47 and accompanying text (discussing parents' interest in directing the upbringing of their children in the abortion context).

144. *See generally* SILVERSTEIN, *supra* note 41, at 8–10 (asserting that procedural restrictions that encourage parental involvement can mitigate the negative psychological consequences minors may suffer from obtaining an abortion).

145. *See* Troxel v. Granville, 530 U.S. 57, 69 (2000) (highlighting the "traditional presumption that a fit parent will act in the best interest of his or her child"); SILVERSTEIN, *supra* note 41, at 5–10 (noting that parents can provide support for a minor's physical health and safety, as well as her emotional health and well-being during the process of making the abortion decision or obtaining an abortion).

146. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (specifying that the "relevant denominator," or group of women who should be considered when a given abortion regulation is challenged, is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction" (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992))); Rex, *supra* note 57, at 89 (arguing that parental involvement laws, despite judicial bypass, create an undue burden on "affected minors," meaning the minors for whom the laws are directly relevant).

147. *See* Rex, *supra* note 57, at 108–18 (applying the *Casey* spousal notification analysis to parental involvement laws).

First, most minors consult their parents before seeking an abortion, despite the presence of a judicial bypass option.[148] However, thirty percent of teens who do not consult their parents refrained from doing so because they "feared violence or being forced to leave home," and many others fall through the cracks due to unstable familial relationships.[149] Indeed, the danger that can come from minors being forced to notify or obtain consent from their parents is analogous to the points asserted in Justice Ginsburg's concurrence in *Whole Woman's Health*; that making the judicial bypass a more formidable barrier—parental notice or consent, and ultimately childbirth—may actually be more harmful to minors than the alternative.[150] Furthermore, studies show that parental involvement laws disproportionately impact young women of minority races for various reasons, including higher rates of teen pregnancy, greater likelihood of living in states with parental involvement laws, language barriers, and disproportionate low-income status.[151] Therefore, by making it harder to obtain a waiver of parental

148. ADVOCATES FOR YOUTH, *supra* note 10.

149. *Id.*; *see also* EHRLICH, *supra* note 4, at 114–30 (outlining the various, diverse reasons a minor may elect not to consult her parents, including fear of "neglect, pressure, and anger," "anticipated severe adverse parental reaction or parental anger," "concern for the [parent-child] relationship," "concern for a parent," "lack of relationship," "parental pressure and ideology," and "[desire for] autonomy"); Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 194–95 (2011) (identifying minors in state or foster care as a population particularly vulnerable to the defects in judicial bypass proceedings, and asserting that parents' failure to comply with consent requirements might reflect their opposition to abortion or "may also relate to a parent's work schedule, immigration status, or temporary absence due to travel or incarceration"); Redden, *supra* note 1 ("Susan Hays, a Texas attorney who represents minors . . . says about a third of the girls she works with don't have the option of asking their parents for permission—they're undocumented immigrants whose parents are not in the country, orphans, or what Hays calls 'de facto orphans': 'Mom's dead, Dad's in prison, they never liked me much anyway.' . . . Legal guardians may grant permission for an abortion in most states. But this is no help to girls who live with family members who never established guardianship.").

150. *See Whole Woman's Health*, 136 S. Ct. at 2320–21 (Ginsburg, J., concurring) (attacking the asserted purpose of the TRAP laws at issue—protecting women's health—by pointing out the greater danger imposed on women if forced to carry a pregnancy to term due to practical barriers to abortion access, based on the relatively high maternal mortality rate in the United States).

151. ADVOCATES FOR YOUTH, *supra* note 9 (noting that women of minority races face higher rates of teen pregnancy and are more likely to live in states with parental involvement laws); *Issue Brief: Latinas and Abortion Access*, NAT'L LATINA INST. FOR REPROD. HEALTH (Jan. 2004), http://latinainstitute.org/sites/default/files/Abortion IssueBrief.pdf (highlighting that young Latina women are disproportionately impacted by barriers in judicial bypass proceedings for reasons such as lack of

consent by imposing a heightened evidentiary standard, the state is not serving its interest in supporting familial cohesion for the minors who are disparately impacted by the process.[152] While the right of parents to direct the upbringing of their children maintains an established place in privacy jurisprudence,[153] there is a point at which this interest is outweighed by the minor's right to abortion.[154] The same standard that is applied in parental termination hearings, where the parent is facing deprivation of the weighty interest of complete parental rights,[155] should not also be applied in a context where the most the parent will be deprived of is the ability to counsel his or her child on one health decision—especially one that involves a life-altering, constitutionally protected decision for the minor involved.

The strengthened undue burden standard can be effectively applied to the imposition of the clear and convincing evidence standard, even though this procedural barrier may not be supported by concrete data like the TRAP laws in *Whole Woman's Health*.[156] Specifically, according

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awareness "of the existence of [judicial bypass] procedures," intimidation "due to cultural and linguistic barriers," and Latinas are more likely to be low-income and uninsured); Kylie Cheung, *As Laws Target Minors' Abortion Rights, These Groups Help Them Get Access*, REWIRE (Sept. 13, 2017), https://rewire.news/article/2017/09/13/laws-minors-abortion-groups-help (quoting a representative from the National Network of Abortion Funds as saying: "Young people of color, undocumented youth, transgender youth, and others are already too often criminalized because of their very identities. Young people who have been neglected by the systems that are charged with supporting them are often hesitant to enter the court system"); *U.S. Teenage Pregnancies, Births and Abortions, 2008: National Trends by Age, Race and Ethnicity*, GUTTMACHER INST. (Feb. 2012), https://www.guttmacher.org/sites/default/files/pdfs/pubs/USTPtrends08.pdf (tabulating data "indicat[ing] that there are still large and long-standing disparities in [teenage pregnancy, birth, and abortion] rates by race and ethnicity").

152. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–94 (1992) (reasoning that spousal notification laws create an undue burden because of the potential effect on victims of domestic violence).

153. *See supra* note 47 (highlighting the long-standing precedent respecting a parent's interest in the upbringing of their child).

154. *Cf.* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) ("The obvious fact is that when the wife and husband disagree on [the abortion] decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.").

155. *See* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (requiring that allegations be proven by clear and convincing evidence to justify termination of parental rights).

156. *See, e.g.*, Treadwell, *supra* note 60, at 878 (applying the undue burden test to judicial recusals, even though "[j]udicial recusals are likely not the type of 'regulation'

to the conclusions in *Whole Woman's Health*, state legislatures should be required to proffer evidence of the need for procedural restrictions like heightened evidentiary standards either to protect minors from their own immaturity or to support parental rights and family cohesion.[157] As there is no evidence of this need, and conversely evidence does exist concerning the negative effects of evidentiary standards on these interests,[158] the imposition of the clear and convincing evidence standard creates an undue burden on minors' right to abortion under the new framework in set out in *Whole Woman's Health*.

B. The Unconstitutionality of the Clear and Convincing Evidence Standard in Judicial Bypass Proceedings Negates the Supreme Court's Ruling in Ohio v. Akron Center for Reproductive Health *with Respect to the Permissibility of Heightened Evidentiary Standards in Judicial Bypass Proceedings*

Having established that requiring minors to prove "maturity" or "best interests" by clear and convincing evidence creates an undue burden, applying the strengthened undue burden test negates the Court's ruling in *Akron Center for Reproductive Health* with respect to heightened evidentiary standards. Thus, the procedural due process reasoning in the lower court decision should be revisited to inform the new undue burden determination. Given that the clear and convincing evidence standard is typically used when a defendant faces potential deprivation of a weighty liberty interest, usually in an action initiated by the government,[159] it simply does not make sense to require a minor to meet the same standard to *assert* a protected liberty interest.[160] When *Akron Center for Reproductive Health* was decided, there was no undue

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the Court had in mind when deciding *Casey*" because they "have the same effect as laws regulating access to abortion").

157. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) ("[T]he relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective . . . ."); *see supra* note 134 and accompanying text.

158. *See supra* notes 149–150 and accompanying text (highlighting that minors with undocumented parents or other strained familial relationships may be forced to carry to term because they could not obtain parental permission).

159. *See supra* note 71 and accompanying text (comparing the clear and convincing evidence standard used in parental rights termination cases with the one used for civil commitment).

160. *See supra* note 155 and accompanying text (arguing that a parent's interest during a parental rights termination case is not comparable to the State's interest and should not be held to the same standard); *see also supra* note 159.

burden standard in place, much less the strengthened undue burden standard that now exists under *Whole Woman's Health*. Therefore, the Sixth Circuit's procedural due process analysis, applied pursuant to the *Mathews* framework, would likely no longer be a valid method for analyzing this issue.[161] However, the basic comparison performed in the Sixth Circuit decision with regard to the competing interests at stake can help inform the evidence-based balancing test the Court would be required to engage in if applying the *Whole Woman's Health* undue burden standard to the imposition of the clear and convincing evidence standard in judicial bypass proceedings.[162] In other words, while not a permissible controlling test, the *Mathews* framework can help answer the required question introduced in *Casey* and strengthened in *Whole Woman's Health*—do the benefits the regulation confers outweigh the burdens?

When engaging in the undue burden analysis, the Court "consider[s] the burdens a law imposes on abortion access together with the benefits those laws confer."[163] Here, the risk of erroneous deprivation of the fundamental liberty interest of obtaining an abortion is particularly great given that clear and convincing evidence is the highest evidentiary standard used in civil proceedings.[164] Furthermore, the asserted benefits the heightened standard confers—protecting minors from their own immaturity and preserving parental rights—are substantial, but do not outweigh the burdens it imposes on a minor's fundamental liberty interest.[165] Specifically, while a lower evidentiary standard would present the risk of the minor being able to make an "immature" decision, this is outweighed by the risk of erroneous deprivation of a constitutionally protected right that is implicated by the use of the heightened clear and convincing evidence standard.[166] Furthermore, while protection of parental involvement in

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161. *See supra* Section I.C.

162. *See supra* note 86 and accompanying text (discussing the Sixth Circuit's consideration of the benefits and burdens of heightened evidentiary standards in judicial bypass proceedings as part of its procedural due process analysis); *see also supra* note 96 and accompanying text (noting the Court's extensive analysis into the purpose and effect of an abortion regulation).

163. *See Whole Woman's Health*, 136 S. Ct. at 2309 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992)).

164. *See supra* note 67 and accompanying text.

165. *See supra* Section II.A (rationalizing that the harm of forcing a minor to carry a pregnancy to term and raise an unwanted child is greater than the harm imposed by a judicial bypass).

166. *See supra* note 141 and accompanying text.

minors' medical decision making is an asserted benefit of a heightened evidentiary standard, parental rights are not absolute where there is a weighty interest at issue for the minor.[167] Thus, in the judicial bypass situation, the minor's constitutionally protected right to abortion should outweigh a parent's right to have input or control on one medical decision for the minor.[168]

However, if applying the strengthened undue burden test to heightened evidentiary standards, the Court would have to also address the heavy reliance on adequate procedural safeguards in *Akron Center for Reproductive Health*.[169] At first glance, the ex parte structure of the proceeding, as well as the appointment of a guardian ad litem,[170] appear curative of the challenges posed by the clear and convincing evidence standard placed on the ultimate bearer of the burden of proof—the minor.[171] However, it is not this simple. There are numerous defects in these safeguards, including issues with provision of a guardian

167. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 251–52 (1978) (applying the "best interests of the child" standard and holding that an illegitimate father who never petitioned for legitimation or sought custody of his son did not have the authority to block an adoption); *see also* New York v. Ferber, 458 U.S. 747, 757 (1982) (noting that the Court has upheld legislation protecting the well-being of children, "even when [those] laws have operated in the sensitive area of constitutionally protected rights"); Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (finding that parents' rights to care, custody, and control over their children are limited and subject to state intervention or involvement where the children's well-being is at stake).

168. *See supra* note 154 and accompanying text (stressing that "it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy," and therefore her interests should outweigh the interests of others).

169. *See supra* note 92 and accompanying text (rejecting the Sixth's Circuit undue burden analysis and implementing an ex parte hearing and assistance with counsel to lessen the burden on minors).

170. *See* Graybill, *supra* note 83, at 585–86 (explaining that a guardian ad litem is generally "'appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party'" and is generally "not bound by the client's expressed wishes and is able to advocate for a result that he or she believes to be in the minor's best interests").

171. *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 516 (1990) (emphasizing the ex parte structure and appointment of a guardian ad litem as reasons for finding the application of the clear and convincing evidence standard in judicial bypass proceedings constitutional); *see also id.* at 515–16 (citing Bellotti v. Baird, 443 U.S. 622, 634 (1979)) (providing that state legislatures may place the burden of proof in judicial bypass hearings on the petitioning minor).

ad litem,[172] lack of specific pleading requirements,[173] and judges' prosecutorial manner of conducting the ex parte proceeding,[174] that make them insufficient to overcome the substantial burden produced by the heightened evidentiary standard. More to the point, none of these "safeguards" matter if the imposition of the heightened standard does not pass the strengthened undue burden test from *Whole Woman's Health*, which it does not.[175]

CONCLUSION

In light of the new framework established in *Whole Woman's Health*, the application of the clear and convincing evidence standard to judicial bypass proceedings places an undue burden on minors' right to abortion. This is shown through the examination of the practical barriers imposed on minors seeking judicial bypass and by the lack of evidence that heightened evidentiary standards serve the state interests in protecting minors from their own immaturity or protecting parental rights. To pass constitutional muster, the state legislatures imposing this heightened burden would have to proffer findings that show a need for this more stringent procedural structure to accomplish one of these interests.

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172. *See* Graybill, *supra* note 83, at 586 (arguing that a guardian ad litem is an insufficient representative for a minor in a judicial bypass proceeding due to the conflict involved in being a representative of the minor's wishes versus the minor's best interests, which a guardian ad litem is tasked with protecting). Additionally, the appointment of a guardian ad litem is not required in judicial bypass proceedings, meaning that this "safeguard" could simply not exist in states that require a clear and convincing evidence standard. *See id.* at 585 (noting that states *may* allow for appointment of a guardian ad litem in judicial bypass proceedings); *see also Akron Ctr. for Reprod. Health*, 497 U.S. at 517–18 (upholding the clear and convincing evidence standard in the context of a state statute that contained an appointment of guardian ad litem provision, but not specifying this as a precondition to the permissibility of imposing a heightened evidentiary standard). *But see* Ind. Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983) (requiring appointment of counsel for minors going through the judicial bypass process, but only for courts in the Seventh Circuit since this decision was not appealed).

173. *See* GUTTMACHER INST., *supra* note 10 (showing that only six out of the fifteen states that require clear and convincing evidence in judicial bypass proceedings also contain specific pleading requirements in their judicial bypass statutes); *see also supra* notes 64–65 and accompanying text (noting that only a few states provided specific criteria for determining "maturity" and "best interests" in judicial bypass proceedings).

174. *See supra* note 120 and accompanying text (highlighting the reoccurrence of judges bringing in their own moral convictions and politics into judicial bypass decisions).

175. *See supra* Section II.A (failing to meet the unconstitutional heightened evidentiary clear and convincing standard set forth in *Whole Woman's Health*).

Furthermore, since this heightened evidentiary standard constitutes an undue burden, the Supreme Court's ruling in *Akron Center for Reproductive Health* is negated with respect to the constitutionality of heightened evidentiary standards in judicial bypass hearings. Furthermore, procedural safeguards relied on by the Court in this decision are insufficient to overcome the unduly burdensome nature of heightened evidentiary standards in judicial bypass proceedings.

Finally, in light of the foregoing conclusions, a model judicial bypass statute would contain a preponderance of the evidence standard for the minor, as well as specific descriptions of pleading requirements,[176] given the highly subjective nature of the *Bellotti* factors and the demonstrated judicial tendency to consider arbitrary indicators, particularly of maturity, but also of best interests.[177] These specific pleading requirements could include: consultation with a physician, knowledge of the abortion procedure, knowledge of the alternatives to abortion, and similarly concrete factors. Because these requirements can sometimes still amount to ambiguous and arbitrary considerations, even in the cases of states that have already included specific pleading requirements in their judicial bypass statutes.[178] The specific pleading requirements, coupled with the preponderance of the evidence standard, should adequately inform the minor of the requirements of the process, and be sufficiently clear to provide a fairer proceeding with more certainty in the potential outcome. Moreover, the inclusion of specific descriptions of pleading requirements would aid the minor

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176. *See, e.g.*, OHIO REV. CODE ANN. § 2151.85(A) (West 2013) (outlining the specific information that must be included in a judicial bypass complaint). Another viable alternative is placing the decision in a physician's hands, which would be a more direct way of curing the issues with judicial discretion; however, this Comment will not cover this alternative extensively, as it does not pertain directly to the issue of evidentiary standards in judicial bypass proceedings. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 20-103(c)(1)(i)–(iii) (West 1991) (providing that a *physician* may bypass the state's parental notice requirement if she determines: "(i) Notice to the parent or guardian may lead to physical or emotional abuse of the minor; (ii) The minor is mature and capable of giving informed consent to an abortion; or (iii) Notification would not be in the best interest of the minor").

177. *See, e.g.*, *supra* notes 118–120 and accompanying text (examining cases in which judges denied parental consent waivers for irrelevant reasons, such as the minor's demeanor in court).

178. *See, e.g.*, FLA. STAT. § 390.01114(4)(c) (2011) (requiring factors that necessarily require a significant amount of judicial discretion, such as overall intelligence, emotional development and stability, credibility and demeanor as a witness, ability to accept responsibility, and ability to accept both the immediate and long-term consequences of her choices).

and any legal representation she is afforded, in the ability to protect her fundamental liberty interest, as well as guide the judge presiding over the hearing away from arbitrary or inappropriate considerations.[179] Finally, given the weighty liberty interest at stake, and the rampant evidence of past trial judges making inappropriate considerations and determinations, a model judicial bypass statute would require that appellate courts consider judicial bypass issues de novo, so as to provide a meaningful check on hearing decisions.[180]

179. *See supra* notes 118–120 and accompanying text (demonstrating how the lack of pleading guidelines produces inconsistent judicial decisions and varied case outcomes).

180. *See supra* note 16; *see also, e.g.*, Placey, *supra* note 16, at 732–40 (listing states, whose judicial bypass statutes require both a preponderance of the evidence standard and a de novo appellate review).