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Judicial Bypass in Nebraska: How the Nebraska Supreme Court's Decision in *In re Anonymous S*, 286 Neb. 640, 838 N.W.2d 226 (2013) Illustrates the Complexity of Parental Consent Laws for State Wards Seeking Abortion

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Note*

Judicial Bypass in Nebraska: How the Nebraska Supreme Court's Decision in *In re Anonymous 5*, 286 Neb. 640, 838 N.W.2d 226 (2013) Illustrates the Complexity of Parental Consent Laws for State Wards Seeking Abortion

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I. INTRODUCTION

In 1973, the United States Supreme Court established in *Roe v. Wade* that a woman’s choice to terminate her pregnancy is a fundamental right under the U.S. Constitution.¹ Three years after *Roe*, the Court held that this right is not limited to those who have reached the age of majority, but it also applies to a pregnant minor’s right to an abortion.² While states have some leeway to encourage parental involvement in a minor’s abortion decision, the Court held that minors cannot be denied abortions as a class, and “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy.”³ As such, most states have passed laws requiring some degree of parental involvement in a minor’s abortion decision, such as parental notification or consent requirements coupled with a judicial bypass option in which the minor can seek separate authorization for the procedure from a court.⁴

State laws requiring parental consent or notification for underage abortion pose a unique set of problems for girls in foster care.⁵ For state wards, legal guardianship rests with the state—not the foster parents, biological parents, or former legal guardian.⁶ “Generally speaking, the [child welfare] agency has the primary legal authority over the child, the foster parents have custodial rights, and the biolog-

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

2. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

3. *Id.*; *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

4. Amy T. Pedagno, *Who Are the Parents? In Loco Parentis, Parens Patriae, and Abortion Decision-Making for Pregnant Girls in Foster Care*, 10 AVE MARIA L. REV. 171, 173 (2011); see also Lynne Marie Kohm, *Roe’s Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1345–46 nn.20–22 (2014) (providing a comprehensive list of state statutes requiring parental consent, parental notification, or both); GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (Feb. 1, 2016) [hereinafter STATE POLICIES], archived at <http://perma.unl.edu/T5X8-632N> (providing an overview of state policies).

5. Throughout this Note, “foster care” is used to describe any placement for youth who are “wards of the state.” Federal law defines foster care as:

24-hour substitute care for children placed away from their parents or guardians and for whom the [state] agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes.

45 C.F.R. § 1355.20 (2012).

6. Katherine Moore, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 COLUM. J. GENDER & L. 29, 32 (2012).

ical parents retain ‘residual parental rights.’”⁷ To further complicate matters, child welfare agencies in most states are unable or unwilling to consent to abortions for foster youth because of federal regulations.⁸ Many states have failed to consider this complexity, resulting in confusion as to who must be notified or who may consent to the abortion procedure for state wards.⁹ While the judicial bypass option would appear to provide some recourse for pregnant state wards who are unable to obtain parental consent for abortion, a closer look reveals that the process is incredibly difficult and burdensome.

*In re Anonymous 5*¹⁰ illustrates the insurmountable difficulty facing state wards in Nebraska who seek an abortion. The Nebraska Supreme Court upheld a district court decision that denied a state ward’s request for judicial authorization to terminate her pregnancy, reasoning that she was not sufficiently mature and well-informed to make the decision on her own.¹¹ The court also found the minor failed to establish that she met any of the exceptions to the parental consent law, including an exception for victims of abuse or neglect.¹² The decision sparked outrage on a national scale from reproductive rights groups and child welfare advocates and brought into question the constitutional soundness of Nebraska’s parental consent law as applied to pregnant girls in foster care.¹³

This Note argues that Nebraska’s parental consent law and judicial bypass mechanism fails to provide an effective avenue of relief for an entire class of vulnerable people who need it most. Moreover, this

7. *Id.* (quoting HARVEY SCHWEITZER & JUDITH LARSEN, *FOSTER CARE LAW: A PRIMER* 4 (2005)).

8. See Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 195 & n.161 (2011); see also *infra* section II.B (discussing various obstacles facing state wards seeking an abortion).

9. Moore, *supra* note 6, at 43.

10. 286 Neb. 640, 838 N.W.2d 226 (2013) (per curiam).

11. *Id.* at 643, 838 N.W.2d at 230.

12. *Id.*

13. See Sydney Lupkin, *Court Says Nebraska Teenager Too Immature to Decide on Abortion*, ABCNEWS (Oct. 9, 2013), <http://abcnews.go.com/Health/court-nebraska-teenager-immature-decide-abortion/story?id=20507284>, archived at <http://perma.unl.edu/K4SY-CL6Y>; George Chidi, *Nebraska Supreme Court Rules 16-Year-Old ‘Not Mature Enough’ for Abortion*, RAWSTORY (Oct. 5, 2013, 5:37 PM), <http://www.rawstory.com/rs/2013/10/nebraska/>, archived at <http://perma.unl.edu/85F3-ZHP4>; Martha Stoddard, *Nebraska Supreme Court Rejects Foster Child’s Abortion Request*, OMAHA.COM (Oct. 4, 2013, 12:00 AM), http://www.omaha.com/news/nebraska-supreme-court-rejects-foster-child-s-abortion-request/article_93dd28d0-0647-5f93-8ac0-fd388a5ddc8e.html, archived at <http://perma.unl.edu/DN2B-8KDM>; Jessica Mason Pieklo, *In Denying a 16-Year-Old Judicial Bypass, Nebraska Supreme Court Creates Ban on Abortions for Minors in State Custody*, RH REALITY CHECK (Oct. 6, 2013, 9:18 AM), <http://rhrealitycheck.org/article/2013/10/06/in-denying-a-16-year-old-judicial-bypass-nebraska-supreme-court-creates-ban-on-abortions-for-minors-in-state-custody/>, archived at <http://perma.unl.edu/CB7A-MWLT>.

Note contends that Nebraska's parental consent law impermissibly grants judges an absolute veto over a state ward's access to abortion, and the judicial bypass procedure imposes an undue burden on state wards who wish to terminate their pregnancies. Part II explains the history and purpose of parental consent laws, as well as their unique complications when applied to pregnant minors in foster care. Sections III.A and III.B examine the specific constitutional issues raised in light of the court's holding in *Anonymous 5*, and section III.C proposes some potential solutions.

While this Note argues in favor of the constitutional protections guaranteed to pregnant minors, it also recognizes the contentious and sensitive nature of the subject of abortion in our nation. The U.S. Supreme Court has not been blind to this reality. In *Roe v. Wade*, the Court eloquently recognized "the deep and seemingly absolute convictions that the subject inspires"¹⁴ when it stated:

One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.¹⁵

Nonetheless, as the Court emphasized in *Roe*, the issue is one of fundamental importance affecting individual rights. Therefore, it must be resolved "by constitutional measurement, free of emotion and of predilection."¹⁶

II. BACKGROUND

A. Parental Consent Laws for Minors Seeking Abortions

Parental consent laws are rooted in the long-established notion of parental rights. Courts have traditionally been "hesitant to delve into internal family matters," viewing the family as a "haven, worthy of its own privacy and autonomy."¹⁷ A series of twentieth-century U.S. Supreme Court cases reinforced the idea that parents should be afforded a great deal of respect for parental and child-rearing decisions without interference from the states.¹⁸ Additionally, the Court has recognized a state interest in protecting the health and well-being of minors by

14. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

15. *Id.*

16. *Id.*

17. Pedagno, *supra* note 4, at 185.

18. *See Pierce v. Soc'y of the Sisters of the Holy Names*, 268 U.S. 510 (1925) (holding an Oregon law that required parents of children between ages eight and sixteen to send their children to public school was unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (overturning the convictions of three Amish parents under a compulsory education law when they refused to send their fourteen- and fifteen-year-old eighth-grade graduated children to school); *Parham v. J.R.*, 442 U.S. 584 (1979) (reversing a federal district court ruling that parents could not commit

encouraging conversation between parents and adolescents about pregnancy and reproductive options.¹⁹

As a result of this underlying respect for parental decision-making, as well as recognition of the pregnant adolescent's need for guidance, a majority of states have passed laws mandating parental involvement in a pregnant minor's decision to terminate her pregnancy.²⁰ Many states require that a physician obtain the consent of at least one parent or guardian before performing an abortion on a pregnant woman under the age of eighteen.²¹ Other states have passed laws requiring only parental notification, or some combination of consent and notification.²²

While the U.S. Supreme Court has upheld parental consent and notification laws, it has held that a parent may not be given an absolute veto over a minor's right to abortion.²³ The Court in *Planned Parenthood of Central Missouri v. Danforth* held that because abortion is a fundamental right that is constitutionally guaranteed,²⁴ "a State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."²⁵

Three years after *Danforth*, the Court decided *Bellotti v. Baird*.²⁶ *Bellotti* struck down a Massachusetts parental consent law, which provided that an abortion could be obtained by a court order upon a showing of good cause so long as both parents were given the opportunity to consent first.²⁷ The Court phrased the issue as "whether [the statute] . . . provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion."²⁸ As Justice Powell's plurality opinion explained, the problem with the statute was that it required minors to notify their parents in *all* cases, without providing an exception for instances in which it would be in the minor's best interest that one or both of her parents not be informed.²⁹

their children to state mental-health facilities for treatment without an adversarial hearing before a formal tribunal).

19. Rebouché, *supra* note 8, at 176.

20. *See supra* note 4.

21. *Id.*

22. *Id.*

23. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

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

25. *Danforth*, 428 U.S. at 74 (invalidating a state law requiring spousal consent for married women and parental consent for minors).

26. 443 U.S. 622.

27. *Id.* at 651.

28. *Id.* at 640.

29. *Id.* at 647 ("We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so

For instance, if the minor has been subjected to abuse or threats from one or both of her parents, it may be against her best interests to involve her parents in her abortion decision.³⁰ Indeed, it is widely recognized that respect for parental autonomy does not preclude interference when parents attempt to use that autonomy as a “shield to hide” abuse or neglect.³¹

Bellotti provided much needed guidance to states on how to satisfy the *Danforth* requirements in parental consent laws. After *Bellotti*, states were required to provide an “alternative procedure whereby authorization for the abortion can be obtained” in the event a minor wished not to involve her parents or guardians in her decision to obtain an abortion.³² Thus, the Court stated:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.³³

Since *Bellotti*, most states have satisfied this requirement by providing a judicial bypass option in such cases where a pregnant minor is unable or unwilling to notify or obtain the consent of her parents for an abortion.³⁴ Many states have also made separate exceptions to parental consent requirements for minors who have destructive relationships with their parents, particularly if their pregnancy may be the result of sexual assault by a parent.³⁵ However, the Court's line of cases concerning parental consent laws demonstrate that there are few “hard lines”—many questions remain unanswered as to how the rights of parents, children, and the states should be balanced.³⁶ As discussed *infra*, even more questions remain when the pregnant minor

desires—to go directly to a court without first consulting or notifying her parents.”).

30. See Pedagno, *supra* note 4.

31. *Id.* at 187.

32. *Bellotti*, 443 U.S. at 643. Although the “alternative procedure” is discussed in terms of a judicial proceeding, the Court clarified in a footnote:

We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

Id. at 643 & 657 n.22.

33. *Id.* at 643–44.

34. See STATE POLICIES, *supra* note 4. *But see* Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 352, 364 (4th Cir. 1998) (holding *Bellotti*'s judicial bypass requirement does not apply to parental notification statutes in the same way it applies to parental consent statutes).

35. Rebouché, *supra* note 8, at 182 (noting these exceptions usually only apply when the parent is the perpetrator, and the evidence required to establish assault varies).

36. Pedagno, *supra* note 4, at 180.

is without access to a parental figure who can legally provide consent for an abortion, such as a minor in foster care.

B. Teen Pregnancy and Abortion in Foster Care

There are currently over 400,000 children living in foster care in the United States.³⁷ Of those children, forty-eight percent are girls.³⁸ Studies have shown girls in foster care are two-and-a-half times more likely than their peers in the general population to get pregnant by the age of nineteen.³⁹ One study found that forty-eight percent of girls in foster care had been pregnant at least once by the age of nineteen.⁴⁰ More disheartening is the fact that teen mothers are twice as likely to have their children placed in foster care or have at least one reported case of child abuse or neglect compared to mothers who waited until later in life to have children.⁴¹ These figures indicate that girls in foster care who have children are more likely to repeat the cycle and perpetuate the very system that aims to protect children from harm and distress.

Although the causes of teen pregnancy in foster care vary at an individual level, there are certain risk factors that could lead adolescents in foster care to engage in risky sexual activity earlier than their peers. Some studies have shown that the lack of close relationships with parental figures leads to a lower rate of contraceptive use.⁴² Often, social workers do not have the time or resources to educate teens on safe sex, and foster parents may not feel comfortable discussing such sensitive subjects with children who are placed in their home only temporarily.⁴³ Moreover, studies suggest foster youth experience greater social acceptance of early pregnancy from their peers, and many *want* to have a baby at an early age.⁴⁴ Often, foster youth per-

37. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, FOSTER CARE STATISTICS 2013, at 1 (2015), *archived at* <http://perma.unl.edu/J2DR-XMVK>.

38. *Id.* at 11.

39. Pedagno, *supra* note 4, at 173; *see also* Heather D. Boonstra, *Teen Pregnancy Among Young Women in Foster Care: A Primer*, 14 GUTTMACHER POL'Y REV., Spring 2011, at 8, *archived at* <http://perma.unl.edu/NB6B-Q6JA> (providing an overview of foster youth and pregnancy).

40. Pedagno, *supra* note 4, at 173.

41. *Id.*; *see also* Jennifer Friedman, *Cause for Concern: Unwanted Pregnancy and Childbirth Among Adolescents in Foster Care*, NAT'L CTR. FOR YOUTH LAW (Apr. 1, 2013), http://www.youthlaw.org/publications/yln/2013/jan_mar_2013/cause_for_concern_unwanted_pregnancy_and_childbirth_among_adolescents_in_foster_care/, *archived at* <http://perma.unl.edu/B586-8RKB> (discussing the significant problem of pregnant adolescents in foster care).

42. Carlie J. Armstrong, *Bypassing Her Constitutional Rights: How the Nebraska Supreme Court Set a Damaging Precedent for Pregnant Minors Seeking Abortion Care*, 9 MOD. AM. 10, 14 (2014).

43. *Id.*

44. Friedman, *supra* note 41.

ceive a child of their own as an opportunity to start a new life, find a sense of stability, and create the family they never had while proving themselves to be more capable at child rearing than their birth parents.⁴⁵ Thus, teenagers in foster care may not be as motivated as other young people to prevent pregnancy.

Nonetheless, research indicates that unwanted pregnancies and births among foster youth far outnumber the wanted.⁴⁶ While there is little information about the number of pregnant girls in foster care who seek abortions,⁴⁷ some studies have suggested that “[m]ost foster girls have their babies, whether they wish to or not.”⁴⁸ One study found that only 4.7% of pregnant teens in foster care terminated their pregnancy, compared to the national average of thirty-two percent of teen pregnancies terminated nationwide.⁴⁹ These numbers suggest that girls in foster care who wish to end their pregnancy face a number of hurdles—far more than their counterparts who are not in foster care.

Foster youth face a unique set of obstacles when it comes to parental consent or notification requirements for abortion. Many states fail to consider who should be notified, or who is authorized to consent to the abortion procedure when the patient is a ward of the state.⁵⁰ When a child is committed to the state, the government child welfare agency (for example, the Department of Health and Human Services or Child Protective Services) becomes her legal guardian.⁵¹ However, many state child welfare agencies—including Nebraska’s—refuse to provide consent for abortion procedures.⁵² Thus, foster youth residing in states that require parental consent for abortions often have no one to turn to, as they are without a parent or guardian who can legally provide consent.

There are several reasons why state child welfare agencies may refuse to provide legal consent for abortions. First, agencies may be hesitant to consent when there is no available funding for the procedure.⁵³ A federal policy known as the Hyde Amendment prohibits states from spending federal dollars on abortion services unless the

45. *Id.*; see also Amy Sullivan, *Teen Pregnancy: An Epidemic in Foster Care*, TIME (July 22, 2009), <http://content.time.com/time/nation/article/0,8599,1911854,00.html>, archived at <http://perma.unl.edu/Z8N5-G7SD> (“For some foster youth,’ says University of Chicago researcher Amy Dworsky, ‘having a child is a way to create a family that they don’t have, or to fill an emotional void.’”).

46. Friedman, *supra* note 41.

47. Pedagno, *supra* note 4, at 173.

48. Moore, *supra* note 6, at 41.

49. *Id.* at 41–42.

50. *Id.* at 32.

51. *In re Anonymous 5*, 286 Neb. 640, 657, 838 N.W.2d 226, 229 (2013) (Connolly, J., dissenting).

52. *Id.*; see *infra* note 105 and accompanying text.

53. See Rebouché, *supra* note 8.

pregnancy is the result of rape or incest or if there is a medical emergency placing the pregnant woman's life in danger.⁵⁴ The Hyde Amendment is not a permanent law, but rather a "rider" that has routinely been attached to annual appropriations bills since *Roe v. Wade*.⁵⁵

Second, even if the minor is able to pay for the abortion procedure on her own, child welfare agencies often refuse to provide consent because they fear repercussions due to federal or state regulatory provisions. For example, Alabama passed a state regulation that preempted child welfare agencies from consenting to abortions based on the presumption that the state would lose federal funding under the Hyde Amendment.⁵⁶ Similarly, while Nebraska state regulations provide that a caseworker should provide unbiased information to a pregnant state ward without acting to "encourage, discourage . . . prevent or require the abortion," the Department of Health and Human Services (the Department) will not provide consent for the abortion procedure.⁵⁷

Having no one to turn to for consent, a pregnant foster youth who wishes to terminate her pregnancy is often left with only one option—to petition the court for judicial authorization for the abortion procedure. On the surface, the court system appears to provide some recourse for pregnant minors who are unable or unwilling to obtain parental consent. However, a closer look reveals that pregnant girls in foster care who wish to terminate their pregnancy by way of judicial authorization face an "incredible uphill battle."⁵⁸

54. *Id.* at n.161. However, states may pay for or subsidize abortion services using their own funds. See, e.g., *Public Funding for Abortion*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/files/FilesPDFs/map.pdf> (last visited Feb. 18, 2016), archived at <http://perma.unl.edu/WQ5V-Y9UT> (providing a map showing which states fund abortion for low-income women voluntarily or because of a court order).

55. Rebouché, *supra* note 8, at 198 n.175.

56. See *Ex parte Anonymous*, 531 So.2d 901, 902 (Ala. 1988) ("[The child protective agency] takes the position that it cannot give consent because of regulatory prohibitions against an agency receiving Federal funds if it participates in a decision for an abortion.").

57. 390 NEB. ADMIN. CODE § 11-002.04A (2016) ("If a ward decides to have an abortion, the consent of the parent(s) or Department is not required, but notification may be required unless [certain conditions] exist."). However, this regulation has not been reformed since recent amendments to Nebraska law, which changed the notification requirement to a consent requirement. See *infra* section II.C.

58. Rebecca Gudeman, *Nebraska Supreme Court Deals a Blow to Foster Youth's Ability to Obtain an Abortion*, NAT'L CTR. FOR YOUTH LAW (Jan. 1, 2014), http://www.youthlaw.org/publications/yln/2013/oct_dec_2013/nebraska_supreme_court_deals_a_blow_to_foster_youths_ability_to_obtain_an_abortion/#sdfootnote4sym, archived at <http://perma.unl.edu/Z8DQ-XNS6>.

C. Nebraska's Parental Consent Law and the Supreme Court's Holding in *Anonymous 5*

Nebraska law has traditionally barred a physician from performing an abortion on an unemancipated pregnant woman under the age of eighteen without first providing notification to a parent or guardian forty-eight hours in advance.⁵⁹ However, in 2011, the Nebraska legislature amended the law to require the written, notarized consent of at least one parent or legal guardian.⁶⁰ The law includes a judicial bypass mechanism, by which the court may waive the consent requirement if it determines “by clear and convincing evidence that the pregnant woman is both sufficiently mature and well-informed to decide whether to have an abortion.”⁶¹ Additionally, if the court finds “clear and convincing evidence” of child abuse or neglect, or that it would be in the best interests of the minor to obtain an abortion without the consent of a parent or guardian, the court shall issue an order authorizing the pregnant woman to consent to the abortion without the consent of a parent or a guardian.⁶² Additionally, the law mandates that the judicial bypass process and any appeal should be expedited while ensuring the complete anonymity and confidentiality of the minor.⁶³

Anonymous 5 provided the first opportunity for the Nebraska Supreme Court to consider a petition for waiver of parental consent under the amended Nebraska law.⁶⁴ The petitioner, a sixteen-year-old state ward, had been in foster care for the preceding two-and-a-half years as a result of abuse and neglect from her biological parents.⁶⁵ Five months prior to the case, the juvenile court terminated the rights of her biological parents.⁶⁶ At ten weeks along in her pregnancy, she requested that the district court authorize her to obtain an abortion without the written consent of a parent or guardian.⁶⁷

The petitioner explained to the district court judge that she wished to have an abortion because she did not feel she could “financially support a child or be the right mom that [she] would like to be.”⁶⁸ She also explained that she did not want her foster parents to know about her pregnancy because she feared she could lose her placement due to

59. NEB. REV. STAT. § 71-6901 (Reissue 2009), amended by L.B. 690, 102d Leg. Sess. §§ 3–15 (Neb. 2011).

60. See L.B. 690 §§ 3–15; NEB. REV. STAT. § 71-6902 (Cum. Supp. 2011).

61. NEB. REV. STAT. § 71-6903(2) (Cum. Supp. 2011).

62. *Id.* § 71-6903(3).

63. See *id.* § 71-6903(8)–(11).

64. *In re Anonymous 5*, 286 Neb. 640, 645, 838 N.W.2d 226, 232 (2013) (per curiam).

65. *Id.* at 643, 838 N.W.2d at 231.

66. *Id.*

67. *Id.*

68. *Id.* (internal quotation marks omitted).

her foster parents' "strong religious beliefs about abortion."⁶⁹ She did not want to put the child up for adoption because she feared her foster parents would respond harshly and tell her siblings she was a "bad person."⁷⁰ The petitioner further explained that before making her decision she received six counseling sessions and three ultrasounds during which the risks associated with terminating a pregnancy were discussed with her.⁷¹ The district court judge responded, "[W]hen you have an abortion, it's going to kill the child inside you," and asked if she would "rather do that than to risk problems with the foster care people?"⁷² The petitioner answered "yes."⁷³

The district court denied the petitioner's request for judicial bypass, finding that she was not sufficiently mature to decide on her own whether to have an abortion.⁷⁴ The district court based this finding on the fact that she was only sixteen years old and dependent on her foster parents.⁷⁵ Additionally, the district court held that since the rights of her biological parents had been terminated, her foster parents were her guardians for the purpose of providing consent.⁷⁶ The district court found it was not in the petitioner's best interests to have an abortion without the consent of one of her foster parents.⁷⁷ She promptly appealed.⁷⁸

In reviewing the case *de novo*, the Nebraska Supreme Court upheld the district court's decision and agreed that the petitioner was not sufficiently mature and well-informed to decide whether to have an abortion.⁷⁹ The court also held that in order for the exception for abuse or neglect to apply "the pregnant woman must establish that a parent or guardian, who fills that role *at the time she files her petition*, has abused or neglected her."⁸⁰ Because the petitioner's foster parents had not abused nor neglected her, the exception did not apply. The court did not consider the petitioner's contention that the district court judge should have recused himself for bias.⁸¹ Additionally, although she asserted that she had no guardian to provide consent for her in the absence of a judicial authorization, the Nebraska Supreme Court sidestepped the question of whether the Department could pro-

69. *Id.*

70. *Id.*

71. *Id.* at 649–50, 838 N.W.2d at 235.

72. *Id.* at 643, 838 N.W.2d at 231.

73. *Id.*

74. *Id.* at 644, 838 N.W.2d at 231.

75. *Id.*

76. *Id.* at 643–44, 838 N.W.2d at 231.

77. *Id.* at 644, 838 N.W.2d at 231.

78. *Id.* at 642–43, 838 N.W.2d at 230. She appealed pursuant to the expedited procedures provided by NEB. REV. STAT. § 71-6904 (Cum. Supp. 2011).

79. *Anonymous 5*, 286 Neb. at 645, 838 N.W.2d at 237.

80. *Id.* (emphasis added).

81. *Id.*

vide consent, or whether the petitioner's foster parents were her guardians for purposes of providing consent.⁸²

Also at issue in *Anonymous 5* was Section 390 of the Nebraska Administrative Code, which states that “[a] female ward has the right to obtain a legal abortion” and “[i]f a ward decides to have an abortion, the consent of the parent(s) or Department is not required, but notification may be required unless [certain conditions] exist.”⁸³ The court first observed that the regulation had not been amended or superseded in light of the recent change in Nebraska law, which amended the notification requirement to a consent requirement.⁸⁴ Nonetheless, the court “assumed” the regulation remained effective, but refused to rule on whether the petitioner should be granted an abortion under the regulation.⁸⁵

Writing for the dissent, Justice William Connolly emphasized the legislature's mistake in assuming that all minors would have a parent or guardian who can give consent for a minor's abortion,⁸⁶ and concluded that the petitioner was without a parent or guardian to provide consent.⁸⁷ Moreover, he reiterated that state regulations prohibit the Department from providing consent.⁸⁸ He concluded that the district court erred in holding that the petitioner's foster parents could provide consent, because foster parents are granted no legal authority to consent to an abortion or any other major medical procedure.⁸⁹ As a result, Justice Connolly stated: “She is in a legal limbo—a quandary of the Legislature's making.”⁹⁰

The dissent also concluded the court did not have subject matter jurisdiction to hear the case at all.⁹¹ Nebraska law provides that a minor may seek court authorization for an abortion “[i]f [she] elects not to obtain the consent of her parents or guardians.”⁹² Justice Connolly maintained that as a jurisdictional prerequisite, the minor must elect not to obtain the consent of a parent or guardian; because the petitioner had no one who could consent, she could not “elect” not to obtain consent.⁹³ Therefore, Justice Connolly concluded that the jurisdictional prerequisite was not met; thus, the court had no subject

82. *Id.*

83. *Id.* at 650, 838 N.W.2d at 235; 390 NEB. ADMIN. CODE § 11-002.04A (2016).

84. *Anonymous 5*, 286 Neb. at 650, 838 N.W.2d at 235.

85. *Id.* See *infra* section III.A for an analysis of why this regulation is of no avail to state wards seeking an abortion under the new Nebraska law.

86. *Anonymous 5*, 286 Neb. at 658, 838 N.W.2d at 240 (Connolly, J., dissenting).

87. *Id.* at 654, 838 N.W.2d at 238.

88. *Id.*

89. *Id.* at 657, 838 N.W.2d at 239.

90. *Id.* at 654, 838 N.W.2d at 238.

91. *Id.* at 655, 838 N.W.2d at 238.

92. NEB. REV. STAT. § 71-6903(2) (Cum. Supp. 2011) (emphasis added).

93. *Anonymous 5*, 286 Neb. at 655, 838 N.W.2d at 238 (Connolly, J., dissenting).

matter jurisdiction over her request for a judicial bypass.⁹⁴ Justice Connolly noted that this conclusion meant none of the statutory exceptions applied, resulting in an absolute and unconstitutional ban on the petitioner's right to an abortion.⁹⁵

III. ANALYSIS

A. Nebraska's Parental Consent Law Grants Judges an Impermissible, "Absolute, and Possibly Arbitrary, Veto" Over a State Ward's Access to Abortion

In *Danforth*, the U.S. Supreme Court recognized the unique nature and consequences of the abortion decision when it held that it is unconstitutional for a state "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."⁹⁶ In *Bellotti*, the Court again emphasized the importance of preventing a complete third party "veto" when it handed down its decision requiring that minors have the option for judicial bypass.⁹⁷ Both cases indicate that the Court has placed significant value on a pregnant woman's decision to terminate her pregnancy, even when she is a minor.⁹⁸

The U.S. Supreme Court has recognized that a state law requiring a minor to seek parental consent for an abortion before pursuing judicial authorization fails to "provide an effective avenue of relief for some of those who need it most."⁹⁹ When the judicial bypass process was created, it was assumed that a pregnant minor would have someone—whether it be a parent, guardian, or even grandparent¹⁰⁰—to provide consent. However, as evidenced by *Anonymous 5*, such is not always the case. The Court has not addressed an instance where a minor does not have a parent or guardian who can legally consent to the abortion procedure, in which case judicial bypass serves as the minor's only option. Unfortunately, under Nebraska law, it is the judi-

94. *Id.* at 661, 838 N.W.2d at 242.

95. *Id.*

96. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)

97. *Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

98. *See* Pedagno, *supra* note 4, at 181 (asserting that a state's right to mandate parental consent for other decisions of a minor would be met with "very little constitutional argument," but that a minor is afforded more "perspective" and "judgment" in the abortion decision "solely because of the nature of the . . . decision").

99. *Bellotti*, 443 U.S. at 647.

100. *See* NEB. REV. STAT. § 71-6902.01 (Cum. Supp. 2011) (requiring that if the pregnant woman declares she is a victim of abuse or neglect, the "physician shall obtain the notarized written consent required by § 71-6902 from a grandparent").

cial bypass process itself that threatens to deprive an entire class of pregnant minors from effective relief.¹⁰¹

As the dissent in *Anonymous 5* correctly pointed out, the petitioner—a pregnant girl in foster care—had no guardian or parent that could legally provide consent for her to obtain an abortion.¹⁰² Justice Connolly stated:

The petitioner has no legal parents; the juvenile court terminated their parental rights. Her legal guardian, the Department—by regulation—will not give her consent. And although the district court has required her to get her foster parents' consent to obtain an abortion, their consent would be meaningless under the law because they are neither parents nor guardians. She is in a legal limbo—a quandary of the Legislature's making.¹⁰³

Although the Nebraska Supreme Court failed to rule on whether Section 390 of the Nebraska Administrative Code provides an alternate route for a minor in foster care to consent to her own abortion procedure, it is unlikely that this regulation could provide any relief. As the court noted, the regulation has not been updated since the recent change from a notification to a consent requirement under Nebraska law.¹⁰⁴ Furthermore, interpreting the plain language of the regulation would likely lead a court to conclude that it does not provide an exception for a state ward under Nebraska law. The relevant parts of the regulation state:

A female ward has the right to obtain a legal abortion The child's worker will provide unbiased information to the ward regarding alternatives and appropriate agencies and resources for further assistance. The worker will not encourage, discourage, or act to prevent or require the abortion. If a ward decides to have an abortion, the consent of the parent(s) or Department is not required, but notification may be required unless [an exception] exists.¹⁰⁵

The language of the regulation indicates that the Department must strive to comply with state law regarding parental notification, not parental consent.¹⁰⁶ Furthermore, the regulation states that a state ward has the right to obtain a *legal* abortion—meaning the abortion must be legal under Nebraska law. However, under Nebraska law, it is *illegal* for a minor to obtain an abortion without the consent

101. Armstrong, *supra* note 42, at 15.

102. See NEB. REV. STAT. § 43-905(1) (Cum. Supp. 2015) (“The Department of Health and Human Services shall be the legal guardian of all children committed to it.”); see also Pedagno, *supra* note 4, at 193 (“Because the child welfare agency has legal custody over the child, [f]oster parents have little real authority regarding medical care.”) (quoting SCHWEITZER & LARSEN, *supra* note 7, at 34)).

103. *In re Anonymous 5*, 286 Neb. 640, 654, 838 N.W.2d 226, 238 (2013) (Connolly, J., dissenting).

104. *Id.* at 650, 838 N.W.2d at 235 (majority opinion).

105. 390 NEB. ADMIN. CODE § 11-002.04A (2016). The exceptions following are those that have traditionally been included in the Nebraska law, such as the case of a medical emergency, or if the pregnant ward is a victim of abuse, neglect, or sexual abuse. *Id.*

106. *Id.* (“Consent is not required, but notification may be required.”).

of a parent or guardian, or without authorization from a court, unless an exception applies.¹⁰⁷ Therefore, this outdated provision of the Administrative Code provides no relief for a pregnant state ward such as the petitioner in *Anonymous 5*.

Because the petitioner in *Anonymous 5* did not have a parent or guardian who could legally consent, her only option was to petition the court for a judicial bypass. Thus, the court system was the petitioner's sole route of access to her fundamental right to an abortion. The petitioner found herself at the mercy of a single decision-maker who could either approve or deny her request—the district court judge.

The level of discretion exercised by the judge in a judicial bypass proceeding creates the same risk of an arbitrary veto that the judicial bypass process was designed to address in the first place. In fact, in many cases a pregnant minor may be worse off having a judge as the sole decision-maker. In a judicial bypass proceeding, the minor must convince the judge—who she may be meeting for the first time—that an abortion would be in her best interests, or that she is sufficiently mature to make the decision on her own. Someone more familiar with the minor, such as a family member, mentor, or caseworker is better positioned to understand the totality of circumstances in order to assist the minor in making such a life-altering decision.¹⁰⁸ Nonetheless, a pregnant minor in foster care is unable to obtain consent necessary for an abortion from anyone other than a judge.

In his concurring opinion in *Bellotti*, Justice Stevens took issue with the statutory requirement of third-party consent—whether it be parental or judicial—in all cases.¹⁰⁹ He recognized that:

[T]he only standard provided for the judge's decision is the best interest of the minor . . . [which] provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.¹¹⁰

Three-and-a-half decades after *Bellotti*, legislation continues to afford judges ample discretion by mandating best interests and maturity standards with little specificity.¹¹¹ Thus, judges are left to

107. NEB. REV. STAT. § 71-6902 (Cum. Supp. 2011).

108. Kohm, *supra* note 4, at 1348; *see also infra* section II.A (outlining the purpose of parental consent laws as honoring the child rearing rights of parents, as well as the need for adolescents to have support and guidance). Although this assertion may seem to support the district court's finding that the minor's foster parents should provide consent, compare *infra* section II.A (explaining that her foster parents are legally unable to provide consent), with *infra* section III.C (arguing that foster parents or another party close to the minor should be given legal rights to consent).

109. *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring).

110. *Id.* at 655–56.

111. Rebouché, *supra* note 8, at 186.

determine whether a minor should be permitted to terminate her pregnancy with no objective guidelines. Although judges are expected to resolve issues by “constitutional measurement, free of emotion and of predilection,”¹¹² one can only imagine the inherent difficulty a judge must face in separating individual beliefs and convictions on the emotional subject of abortion from a determination of a child’s best interests, which is itself a subjective determination.

The judge’s power to veto a state ward’s abortion decision is rarely, if ever, mitigated by appellate review. Even under a *de novo* review, it is very unlikely that an appellate court will overrule a lower court’s decision when based on an assessment of the minor’s maturity and best interests.¹¹³ In *Anonymous 2*, the concurrence pointed out that while evaluating the maturity of a minor is “difficult enough for a trial or appellate judge, the task is made even more difficult when that evaluation hinges solely on the testimony of a minor.”¹¹⁴ As a result, the court held in *Anonymous 5* that many of the factors necessary to evaluate maturity “cannot be discerned from the cold record before us and are another reason why we elect to give weight to the fact that the trial judge heard and observed Petitioner in finding her not to be mature and well informed.”¹¹⁵

Anonymous 5 clearly illustrates an instance in which a judge’s life-altering veto of a woman’s right to abortion was not only absolute, but also arbitrary. Due to the lack of objective guidelines, the judge was given great leeway to rule based on his subjective evaluation of whether the petitioner was “sufficiently mature” to make the decision on her own, or whether the abortion would be in her best interests. The district court judge denied the petitioner’s request, citing no objective criteria besides the fact that she was sixteen years old and dependent on her foster parents.¹¹⁶ By holding that it was not in the petitioner’s best interests to have an abortion without the consent of her foster parents and concluding that she was not sufficiently mature to make the decision on her own, the district court judge exerted his

112. *Id.*

113. Compare *In re Anonymous 1*, 251 Neb. 424, 558 N.W.2d 784 (1997) (upholding a lower court judgment finding that the minor did not establish sufficient maturity or that notifying at least one of her parents would not be in her best interests), and *In re Anonymous 2*, 253 Neb. 485, 570 N.W.2d 836 (1997) (holding that the evidence was insufficient to establish that the minor had the requisite level of experience, perspective, and judgment to support an order authorizing an abortion without parental consent), with *In re Anonymous 3*, 279 Neb. 912, 782 N.W.2d 591 (2010) (overturning the lower court’s holding that the minor was emancipated and therefore neither judicial bypass nor parental notification was required).

114. *Anonymous 2*, 253 Neb. at 490, 570 N.W.2d at 840 (Gerrard, J., concurring).

115. *In re Anonymous 5*, 286 Neb. 640, 648–49, 838 N.W.2d 226, 234 (2013) (*per curiam*).

116. *Id.* at 644, 838 N.W.2d 226 at 231.

authority as the sole decision-maker and effected a complete, arbitrary, and impermissible veto on the fundamental right of a vulnerable minor.

B. Nebraska's Parental Consent Law Imposes an Undue Burden on State Wards Seeking an Abortion

In *Bellotti*, the U.S. Supreme Court held that “if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.”¹¹⁷ The Court also concluded that “every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents,” and “the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court.”¹¹⁸ *Bellotti* was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹⁹ which held that state regulations governing abortion, including parental consent laws, are permissible only “[i]f they are not a substantial obstacle to the woman’s exercise of the right to choose.”¹²⁰

Nebraska’s parental consent law imposes the very same “undue burden” and “substantial obstacle” on a state ward’s access to abortion as cautioned against in *Bellotti* and *Casey*. When a pregnant girl in foster care is unable to obtain parental consent for an abortion, her only options are to forgo the abortion or seek judicial authorization for the procedure. As Justice Stevens emphasized in his concurrence in *Bellotti*, “I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than that imposed on the minor child by the need to obtain the consent of a parent.”¹²¹ Unfortunately, Justice Stevens’ prediction has revealed itself to be exceptionally accurate, as it is often impossible or extremely difficult for a pregnant minor to utilize the process “without significant delay, cost, or embarrassment.”¹²²

At the outset, the risk is great that a pregnant foster youth will be completely uninformed of her right to seek judicial authorization for an abortion.¹²³ Conversely, she might be aware of the judicial bypass option but unsure how to navigate the court system quickly enough to obtain authorization for the procedure while still protecting her pri-

117. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

118. *Id.* at 647–48.

119. 505 U.S. 833 (1992).

120. *Id.* at 877.

121. *Bellotti*, 443 U.S. at 655 (1979) (Stevens, J., concurring).

122. Rebouché, *supra* note 8, at 177.

123. Moore, *supra* note 6, at 41.

vacy interests.¹²⁴ Because of the non-permanent nature of foster care, foster youth who become pregnant often worry that they will lose their placement or jeopardize future placements if their pregnancy or abortion decision is discovered.¹²⁵ As a result, foster youth may not feel comfortable asking their caseworker or others involved in their case for help with the judicial bypass process.¹²⁶

If a pregnant foster youth decides to take her request for waiver of parental consent to a judge, she must somehow figure out how to navigate the cumbersome court system, which poses many difficulties—particularly to a young girl in foster care. First, she is faced with meeting the court’s pleading requirements. Nebraska law requires that the State Court Administrator create a petition form and instructions on the judicial bypass procedure, and then post a sufficient number of petition forms and instructions “in each courthouse, in such a place that members of the general public may obtain a form and instructions without requesting [them] from the clerk.”¹²⁷ Although the legislature likely intended to make it as easy as possible for vulnerable minors seeking relief to access the forms, this effort was counteracted by a lack of flexibility from the court in *Anonymous 5*. Specifically, the appellate court refused to consider the petitioner’s argument that she lacked a parent or guardian for the purpose of providing consent because her original petition did not mention it as a specific concern.¹²⁸

In his dissent, Justice Connolly emphasized the absurdity of holding a vulnerable minor to the same pleading standards as an attor-

124. *Id.* Although Nebraska law includes provisions relating to confidentiality and timeliness of the proceedings, an unrepresented minor may not be aware of these protections when deciding whether to pursue judicial bypass. See NEB. REV. STAT. § 71-6903(8) (Cum. Supp. 2011) (mandating the confidentiality of all proceedings and documents to ensure the anonymity of the pregnant woman, and stating that “[o]nly the pregnant woman, the pregnant woman’s guardian ad litem, the pregnant woman’s attorney, and a person whose presence is specifically requested by the pregnant woman or [her] attorney may attend the hearing on the petition.”); *id.* § 71-6903(10) (requiring the court to give petitions for judicial bypass precedence over other pending matters and make a ruling within seven days).

125. Moore, *supra* note 6, at 47; see also *In re Anonymous 5*, 286 Neb. 640, 643, 838 N.W.2d 226, 231 (2013) (per curiam) (“[The petitioner] explained that she did not want her foster parents to know about her pregnancy because she feared she could lose her placement due to her foster parents’ ‘strong religious beliefs about abortion.’”).

126. A foster youth’s apprehension of jeopardizing her privacy interests by involving her caseworker is not unfounded. Nebraska regulations provide that “the worker will inform the ward that her/his [sic] decision may not remain confidential” when discussing the abortion decision with a state ward. 390 NEB. ADMIN. CODE § 11-002.04A (2016).

127. NEB. REV. STAT. § 71-6903(7).

128. *Anonymous 5*, 286 Neb. at 653–54, 838 N.W.2d at 237.

ney.¹²⁹ Doing so, he argued, places an unconstitutional burden on a minor seeking an abortion.¹³⁰ As Justice Connolly pointed out, the pleading for a judicial bypass proceeding is made up of “blanks and checkmarks” and is “intended to be a simple filing that a minor can navigate.”¹³¹ Additionally, an attorney is usually not appointed for the minor for the judicial bypass proceeding until after the petition is filed.¹³² In such an instance where the state’s parental consent law fails to take into account the unique circumstances of foster youth, leaving the judge as the sole decision-maker, the court should be as flexible as possible so as to not effectively bar the minor’s access to abortion on purely procedural grounds.

Assuming the foster youth is able to make it past the pleading stage in her request for a judicial bypass, she could face a potential conflict of interest if her case is heard in front of the same court or judge that has jurisdiction over her foster care case. This concern is particularly relevant in rural areas, where juvenile courts and courts of general jurisdiction are often one in the same.¹³³ For example, a pregnant minor could appear in court and request authorization to terminate her pregnancy without notifying or obtaining consent from the Department or her foster parents. Shortly after, the same minor could appear in front of the same judge for a different hearing, in which the Department may argue that it is in her “best interests” that her medications be altered.¹³⁴ In such instances, “[t]he judge is prevented from revealing the minor’s abortion decision, yet he also has an obligation to her and her family concerning the provision of a safe and healthy foster-care environment.”¹³⁵

Even if a foster youth’s request for judicial authorization is granted, she is likely to face significant difficulty paying for the procedure, which may cost up to \$1,500 in the first trimester.¹³⁶ The vast majority of children in foster care receive Medicaid, which cannot be used to fund abortion services.¹³⁷ Furthermore, since Nebraska has

129. *Id.* at 660, 838 N.W.2d at 241 (Connolly, J., dissenting).

130. *Id.*

131. *Id.*

132. *Id.*

133. *The Nebraska State Judicial System*, NEBRASKA.GOV, <https://supremecourt.nebraska.gov/4853/nebraska-state-judicial-system> (last visited Feb. 14, 2016), *archived at* <http://perma.unl.edu/G7WP-MDG8> (“Nebraska has three separate juvenile courts located in Douglas, Lancaster, and Sarpy Counties. In the remaining counties, juvenile matters are heard in the county courts.”).

134. Pedagno, *supra* note 4, at 196–97.

135. *Id.*

136. *In-Clinic Abortion Procedures*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures> (last visited Feb. 13, 2016), *archived at* <http://perma.unl.edu/JQ4N-6PTZ>.

137. Moore, *supra* note 6, at 49–50 (“Medicaid recipients are entitled to funding for abortion under the Hyde Amendment in cases of rape, incest, or life endanger-

implemented stringent restrictions on state funding for abortions, state funding would only be available in the most extreme circumstances.¹³⁸ Thus, the petitioner would have to use her own resources, if any, or rely on assistance from a not-for-profit organization that assists low-income women with abortion funding.¹³⁹

Given the many obstacles that foster youth face in obtaining judicial authorization for an abortion when consent is unavailable, it is not surprising that “[m]ost foster girls have their babies, whether they wish to or not.”¹⁴⁰ These obstacles impose an undue burden on a foster youth’s access to abortion. When taken into consideration along with a foster youth’s inability to obtain parental consent as a ward of the state, it’s questionable whether access to abortion has been essentially barred for this population.

C. Nebraska’s Abortion Law Needs Reform to Clarify Parental Consent Requirements and Judicial Bypass Considerations for State Wards

In January 2014, Nebraska State Senator Danielle Conrad introduced legislation that proposed several revisions to Nebraska’s abortion law.¹⁴¹ Legislative Bill 1109 (LB 1109) would have repealed the parental consent requirements that were enacted in 2011, while reinstating the less stringent requirement of parental notification.¹⁴² Additionally, it would have altered the requirement that the minor be “sufficiently mature and well-informed” to instead require that the minor be “mature and capable of giving informed consent.” The proposed amendment also clarified that a best-interests determination should be made separately and independently from the finding of whether the minor is “mature and capable of informed consent.”¹⁴³

Although LB 1109 ultimately was not passed by the Nebraska legislature, the bill and its proposed changes indicate at least some awareness among Nebraska lawmakers about the many predicaments caused by the parental consent requirement. A reversion to the requirement of parental notification rather than parental consent would

ment, but, barring such situations, may not receive federal funds.” (internal citations omitted). See *supra* section II.B for an explanation of the Hyde Amendment’s impact on abortion funding.

138. See *Public Funding for Abortion*, *supra* note 54 (providing a map showing which states fund abortion for low-income women voluntarily or because of a court order).

139. See Moore, *supra* note 6, at 49 & 50 n.111.

140. *Id.* at 41.

141. L.B. 1109, 103d Leg. 2d Spec. Sess. (Neb. 2013). The proposed legislation would have also amended the *mens rea* requirement and certain penalties for physicians charged in violation of the law.

142. *Id.* at §§ 4–5.

143. *Id.* § 5.

lessen the burden on marginalized pregnant minors who seek an abortion. Nebraska's Administrative Code relating to abortion for state wards would no longer be obsolete, as the Department could receive notification for the minor to obtain a legal abortion. More importantly, an entire class of vulnerable women would not be subject to the arbitrary veto of a judge who controls their destiny in a judicial bypass decision.

However, because LB 1109 was unsuccessful in the 2014 legislative session, the drawbacks of Nebraska's parental consent law, as evidenced by *Anonymous 5*, remain. If the legislature wishes to retain the consent requirement for minors seeking abortions, reform is necessary to avoid overlooking an entire class of teenage girls who are perhaps the most in need of the support that the law seeks to ensure.

1. *Consent Requirements*

As mentioned above, a reversion to a parental notification mandate rather than a parental consent requirement would greatly reduce the burden faced by pregnant state wards seeking an abortion. On the other hand, it is generally justifiable for the legislature to regard parental consent as essential in a minor's abortion decision. Such a decision is one that should be made only after serious and well-informed consideration. It is conceded that adolescents, especially those who have experienced the sort of trauma that would land them in the foster care system, are "not generally known for their mature judgments"¹⁴⁴ and are therefore in need of support and guidance in making their choice.

While the state has an interest in actively encouraging adolescents to seek guidance on the abortion decision, the law should unambiguously delineate who may provide consent when the minor does not have a parent or guardian to fill that role. Provided the objective of the law is to protect the health and well-being of minors and to encourage dialogue about pregnancy options,¹⁴⁵ the law should provide flexibility by allowing an alternate person to consent when no parent or guardian is available. Such an exception would still provide the indispensable guidance that follows when someone close to the minor provides consent.¹⁴⁶ Moreover, the availability of an alternate route of legal consent for minors who are without parents or guardians would lessen the burden faced by this population and prevent judges from being placed in the position of sole decision-makers.

The Nebraska legislature should broaden the language of its parental consent statute in order to address the needs of marginalized

144. Pedagno, *supra* note 4, at 200.

145. Rebouché, *supra* note 8, at 174.

146. *See* Armstrong, *supra* note 42, at 15.

pregnant minors. For instance, it could bestow on foster parents the right to consent to an abortion for a minor in their care.¹⁴⁷ However, foster parent consent should not be the only option available, as not all state wards may wish to involve their foster parents in their decision. Often, a state ward fears removal from her foster home when she becomes pregnant.¹⁴⁸ To further complicate matters, foster parents may not feel comfortable fulfilling such a role, or they may not have the resources or training necessary to provide unbiased guidance to a pregnant adolescent.¹⁴⁹ Alternatively, the law could provide an exception under the parental consent requirement for a family relative or other adult who is not a “parent or guardian” for purposes of the statute, but nonetheless occupies an important role in the minor’s life.

As another option, the legislature could mandate that the Department assume the responsibility of providing consent for pregnant minors in its care. Contrary to the commonly held belief, it does not necessarily follow that the state would lose federal funding. Although the Hyde Amendment preempts states from using federal funds to reimburse the cost of abortions under the Medicaid program,¹⁵⁰ the state could provide consent for the procedure without using federal funds for the procedure.¹⁵¹

147. Allowing foster parents to legally provide consent for abortions for state wards in their care would be in line with the “reasonable and prudent parent standard” for foster homes that was recently recognized by federal law in the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113–183, 128 Stat. 1919 (2014). “The term ‘reasonable and prudent parent standard’ means the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child.” *Id.* at 1923. A bill proposed by Nebraska State Senator Kathy Campbell in the 2016 legislative session would implement the prudent parenting standard in Nebraska. *See* L.B. 746, 104th Leg. 2d Spec. Sess. (Neb. 2016).

148. *See* Moore, *supra* note 6, at 130–31; *see also* Bryn Martyna, *The Youth Perspective on Laws Requiring Parental Involvement in the Decision to Have an Abortion*, NAT’L CTR. YOUTH LAW (July 1, 2013), <http://youthlaw.org/publication/the-youth-perspective-on-laws-requiring-parental-involvement-in-the-decision-to-have-an-abortion/> (last visited Nov. 3, 2015), *archived at* <http://perma.unl.edu/5RZ9-JZRU> (providing an overview of youth perspectives on parental involvement laws).

149. *See* Moore, *supra* note 6, at 130–31.

150. *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the constitutionality of the Hyde Amendment).

151. Alas, the minor may have to seek funding on her own, as the state may also deny funding for the procedure. While the Supreme Court has held that a state may not create an undue burden on a minor who seeks an abortion, it has also held that states have no obligation to provide funding for abortion procedures. *See* *Maher v. Roe*, 432 U.S. 464 (2013) (upholding a Connecticut regulation that granted Medicaid benefits for childbirth but not for medically necessary abortions); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (“The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected.”); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (“[I]t simply does not follow [from *Roe*] that a woman’s freedom of choice carries with it a

Lastly, the legislature should eliminate the use of the word “elect” in parental consent legislation. As Justice Connolly pointed out in his dissent, the use of the word creates serious constitutional concerns by possibly taking away the court’s subject matter jurisdiction over state wards. If a minor does not have a parent or guardian, she cannot *elect* to obtain their consent. While the majority of the court has not interpreted the word as a jurisdictional prerequisite, it nonetheless creates the potential for a constitutional challenge when applied to this particular class of minors.

2. *Judicial Bypass Considerations*

As discussed in section III.A herein, a pregnant foster youth faces a number of obstacles when utilizing the court system for judicial authorization to terminate her pregnancy. As such, specific standards regarding the judicial bypass procedure are necessary to provide clear guidance to judges and ensure that foster youth are aware of the option. Such standards would lessen the burden faced by pregnant foster youth seeking abortion and prevent challenges on constitutional grounds.

First, courts should be required to make independent evaluations of the petitioner’s best interests and maturity, so that if the minor seeking court authorization for an abortion does not meet one standard, she may meet the other.¹⁵² The ultimate holding of *Bellotti* stated:

[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. *If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests.*¹⁵³

As discussed in section II.C, *supra*, Nebraska includes a judicial bypass mechanism, through which the court may waive the consent requirement if it determines that an exception applies. These exceptions allow the court to enter an order waiving the consent requirement if it determines that the minor is “sufficiently mature and well-informed to decide whether to have an abortion.”¹⁵⁴ Additionally, the court may grant judicial authorization for an abortion if it finds that there is evidence of child abuse or neglect, or that it would be in the best interests of the minor to obtain an abortion without the consent of

constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”)

152. Rebouché, *supra* note 8, at 193–94 (citing *Bellotti v. Baird*, 443 U.S. 622, 651 (1979)).

153. *Bellotti*, 443 U.S. at 647–48 (emphasis added).

154. NEB. REV. STAT. § 71-6903(2) (Cum. Supp. 2011).

a parent or guardian.¹⁵⁵ Although the Nebraska Supreme Court did articulate a clear and separate best-interest determination under the previous law, which required only parental notification,¹⁵⁶ the court seemed to conflate maturity and best interests when ruling under the new law requiring parental consent in *Anonymous 5*.¹⁵⁷

There are strong arguments in favor of requiring a judge to make a best-interest determination separately from the other exceptions, particularly when it comes to pregnant minors in foster care. First and foremost, whether the minor is “sufficiently mature” to decide to have an abortion on her own is a separate question from whether the procedure would be in her best interests, and thus the two questions should be decided separately. Furthermore, when it comes to the determination of whether a minor is sufficiently mature, the judge is deciding whether there is justification to allow the minor to make the abortion decision on her own and without the guidance of a parental figure.¹⁵⁸ In a situation in which the minor has a parent who can consent, she is not completely barred from obtaining an abortion when the judge decides she is not mature—she still has the option to obtain parental consent. However, when a state ward is denied access to an abortion based solely on the reason that she is not “sufficiently mature,” she does not have the same option. Thus, it is exceptionally important that a separate best-interest determination be made for minors in foster care in order to avoid a complete ban on abortions for state wards deemed to lack the requisite level of maturity.

Second, judges should be given clear guidelines in making the best-interests determination. As evidenced by *Anonymous 5*, a determination of a minor’s best interests on an issue as emotionally charged as abortion without clear guidelines is far too likely to produce a ruling based on subjective factors alone. It is conceded that “[e]ven when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must accommodate life’s complexity.”¹⁵⁹ Nonetheless, having clear guidelines in place would greatly reduce the risk of judges inserting

155. *Id.* § 71-6903(3).

156. See *In re Anonymous 1*, 251 Neb. 424, 558 N.W.2d 784 (1997) (upholding a lower court judgment that the minor did not establish sufficient maturity or that notifying at least one of her parents would not be in her best interests); *In re Anonymous 2*, 253 Neb. 485, 570 N.W.2d 836 (1997) (holding that evidence was insufficient to establish that the minor had the requisite level of experience, perspective, and judgment to support an order authorizing abortion without parental consent); *In re Anonymous 3*, 279 Neb. 912, 782 N.W.2d 591 (2010) (overturning the lower court holding that the minor was emancipated and therefore neither judicial bypass nor parental notification was required).

157. *In re Anonymous 5*, 286 Neb. 640, 648–50, 838 N.W.2d 226, 234–35 (2013) (per curiam).

158. *Bellotti*, 443 U.S. at 647–48.

159. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

their own values and beliefs into the best-interests determination. The probability that a judge's ruling will "reflect personal and societal values and mores"¹⁶⁰ when a fundamental right is at stake is a risk that no legislature should be willing to take.

In making the best-interests determination, judges should limit considerations regarding the extent to which the minor has consulted with her foster parents. A very problematic holding in *Anonymous 5* was that "it is not in the best interests of petitioner to have an abortion without the consent of one of her foster parents."¹⁶¹ Although *Bellotti* permits the consideration of parental involvement when it comes to the best-interests determination,¹⁶² a decision based on that factor alone would set a dangerous precedent. In doing so, the court effectively defied the ultimate purpose of a judicial bypass proceeding by giving the foster parents a veto over the minor's decision, without a separate best-interests determination by the court.

Lastly, the Department should be required to provide information to minors in its care about their right to judicial bypass, as well as provide resources to help them navigate the process. It is important that a pregnant minor is aware of all the options available to her. When resources are not readily available, she may feel humiliation or concern for her privacy if she is forced to seek out the Department for help. In such instances, the minor's utilization of the judicial bypass option may cause harm in itself.¹⁶³ Therefore, it is important that she be provided as much information as possible, so that she may effectively weigh her options and navigate the system while maintaining her dignity.

IV. CONCLUSION

State laws requiring parental involvement in a minor's abortion decision are designed to protect the best interests of a pregnant minor, while recognizing the right to parental autonomy in child rearing. Nonetheless, abortion is a fundamental right that must be balanced with the competing interests of the state. The United States Supreme Court has held that although states may impose parental consent requirements for a minor seeking an abortion, such requirements must not give another party absolute—and possibly arbitrary—veto power over the minor's right to an abortion, nor may they impose an undue

160. *Bellotti*, 443 U.S. at 655–56.

161. *Anonymous 5*, 286 Neb. at 644, 838 N.W.2d at 231.

162. *Bellotti*, 443 U.S. at 648 ("On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate.").

163. See Moore, *supra* note 6.

burden on the minor's ability to seek an abortion. Moreover, the Court has recognized that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."¹⁶⁴

Anonymous 5 illustrates the complex issues facing a pregnant minor who is a ward of the state without a parental figure to provide legal consent. While the option of a judicial bypass would appear to provide a remedy, it has proven inadequate. When applied to pregnant minors in foster care, Nebraska's judicial bypass procedure perpetuates the very problems against which it was designed to protect.

To avoid a constitutional challenge, the Nebraska legislature should consider redrafting its parental consent law to explicitly include special consent options for wards of the state. Additionally, clear guidance should be provided to judges for use in judicial bypass proceedings. These reforms will allow the state to effectively balance its interests while ensuring that a fundamental, constitutional right is not denied to an entire class of vulnerable youth.

164. *Bellotti*, 443 U.S. at 642.