No. 17-13561-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPRODUCTIVE HEALTH SERVICES, et al.,
Plaintiffs-Appellees,

v.

DARYL BAILEY, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:14-cv-01014-SRW

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1-1 of the Eleventh Circuit Rules, counsel for Appellant hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. ACLU Foundation of Alabama, Inc. - Firm of Appellees' counsel (Randall Marshall)
2. American Civil Liberties Foundation - Firm of Appellees' counsel, (Andrew D. Beck, Jennifer Dalvin)
3. Ayers, June, RN – Appellee
4. Bailey, Daryl D. – Appellant
5. Beck, Andrew D. – Counsel for Appellees
6. Beckman, Kyle A. – Counsel for Appellants during federal district court proceedings
7. Chynoweth, Brad – Counsel for Appellants
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9. Davis, James W. – Counsel for Appellants
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16. Reproductive Health Services – Appellee

17. Strange, Luther – Former Attorney General of Alabama, Defendant in federal district court proceedings

18. Walker, Susan Russ – United States Magistrate Judge

Counsel for the Appellants further certify that no publicly traded company or corporation has an interest in the outcome of this appeal.

Respectfully submitted this 31st day of October, 2017.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents important questions about the constitutionality of a state law. Accordingly, the Court should hold oral argument.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal from a final judgment. *See* 28 U.S.C. § 1291. The district court entered judgment on July 28, 2017. Doc. 85; Doc. 86. The Appellants timely filed a notice of appeal on August 8, 2017. Doc. 87.

STATEMENT OF THE ISSUES

1. The plaintiffs are an abortion clinic and its administrator suing over procedures to a state bypass hearing to which they will never be a party, against a DA and AG who have no control over those procedures, and raising the due process claims of prospective patients who may never be affected by those procedures. Should the district court have dismissed this case for lack of a justiciable controversy?

2. The Supreme Court has held that a bypass procedure is constitutional if it is (1) effective, (2) confidential, and (3) expeditious. Alabama's 2014 amendments do not pose any impediment on the ability of a girl to seek a judicial bypass; they do not require the girl to notify her parents or seek their consent. The amendments provide for a confidential proceeding in which the girl is referred to by her initials with exceptions only as a state judge deems necessary. And the entire proceeding must be expedited. Are Alabama's 2014 amendments facially constitutional?

STATEMENT OF THE CASE

The Supreme Court has held that a State may require a minor to secure her parent's consent before having an abortion so long as the State also provides for a "judicial bypass" to the consent requirement—*i.e.* a proceeding where, in lieu of her parent's consent, a minor can show a judge that an abortion is in her best interest or that she is mature enough to make the decision herself. *See Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 634 (1979). Alabama has long had a parental consent law and a process for bypassing the parental consent law. This appeal concerns a 2014 Alabama law that amends that bypass procedure. Among other things, that law required the local District Attorney to receive notice of and to appear at the bypass hearing, structured a role for a guardian ad litem for a fetus, and allowed for the participation of the girl's parents if they learned independently about the proceeding. The district court held each of these provisions to be unconstitutional as to "only those minors for whom the provision is relevant." Doc. 85 at 13.

I. STATEMENT OF FACTS

Two preliminary points are necessary to understand the following facts. First, the district court granted judgment on the pleadings against the defendants. That means the facts must be construed in our favor. Second, although the defendants

also moved for judgment on the pleadings, we argued in the alternative that the district court should deny the plaintiffs' cross-motion and "allow the defendants a chance to challenge [plaintiffs'] allegations through the ordinary litigation process." Doc. 67 1-2. We submitted two declarations that preview the types of evidence we would expect to submit if the case had gone forward to summary judgment or trial. *See* Doc. 32-1; Doc. 62-1.

A. The Supreme Court treats minors differently than adults in the abortion context.

Since 1987, Alabama law has required minors who seek an abortion to either attain their parent's consent or establish to a judge that they are mature enough to make this decision on their own. *See* Ala. Act No. 1987-286; Ala. Act No. 2014-445. *see also* Ala. Code § 26-21-1 (legislative findings).

The Supreme Court has approved of these "parental consent" laws. Children and teenagers, the Supreme Court has observed, are not like adults. For one thing, they possess an "inability to make critical decisions in an informed, mature manner." *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 634 (1979) (lead opinion). As every parent knows, "'youth is more than a chronological fact.'" *Miller v. Alabama*, 567 U.S. 460, 467 (2012) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). It "is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" *Id.*

(quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). As a result, children and teenagers "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti II*, 443 U.S. at 634. And this may especially be true in the "grave" context of an abortion decision. *H.L. v. Matheson*, 450 U.S. 398, 408 (1981) (quoting *Bellotti II*, 443 U.S. at 641). "There is," after all, "no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Id*.

For another thing, children, as a rule, are "peculiar[ly] vulnerab[le]." *Bellotti II*, 443 U.S. at 634. Children need "'concern, . . . sympathy, and . . . paternal attention.'" *Id.* at 635 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)). As the Supreme Court has explained, this is especially true in the abortion context: "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting"—"particularly . . . when the patient is immature." *H.L.*, 450 U.S. at 411. And yet "'[i]t seems unlikely'" that "'a girl of tender years, under emotional stress'" "'will obtain adequate counsel and support from the attending physician at an abortion clinic.'" *Id.* at 408 (quoting *Bellotti II*, 443 U.S. at 640-41). At the very least, she will be "less likely" to "distinguish the competent and ethical [abortion clinics] from those that are incompetent or unethical." *Bellotti II*, 443 U.S. at 641 n.21.

Finally, whether they like it or not, children and teenagers remain subject to

their parents' recognized and rightful role in child rearing. *See id.* at 634; *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing parents' "fundamental liberty interest . . . in the care, custody, and management of their child"). Parents' actions in "teaching, guiding, and inspiring" their children are so "essential to the growth of young people" that their "'claim to authority . . . to direct the rearing of their children is basic in the structure of our society.'" *Id.* at 638 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). And here again, the abortion context matters: A State "reasonably may determine" that parental "consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns." *Bellotti II*, 443 U.S. at 640. Even on a practical level, involving parents tends to help: They "can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *H.L.*, 450 U.S. at 411.

B. The Legislature adopts the challenged amendments to Alabama's parental consent law.

As required by Supreme Court precedent, Alabama's parental consent law has always contained a judicial "bypass" provision: A minor has been allowed to proceed without parental consent if she persuades a state court either (1) that she is "mature and well-informed enough" to make the abortion decision on her own or (2) that proceeding with the abortion would be in her "best interest." Ala. Code § 26-

21-4(g). Since 1987, these proceedings have been governed by nothing more than the generally-applicable rules of civil procedure and a suite of temporary rules promulgated by the Alabama Supreme Court that primarily address the expedited nature of the proceeding. *See* Temporary Rules Governing Procedures for Petitions by an Unemancipated Minor Requesting Waiver of Parental Consent for the Performance of an Abortion (Sept. 1987).

The absence of rules gave considerable discretion to individual judges on how to structure the hearing. For example, some trial judges appointed a "guardian ad litem" for the unborn fetus to examine the petitioner about "the negative consequences of undergoing an abortion" and "knowledge of the alternatives to abortion." *Ex parte Anonymous*, 810 So. 2d 786, 789 (Ala. 2001). Others relied exclusively on the "testimony of the minor petitioner as adduced by her counsel, and the testimony of other witnesses called by the petitioner to support the petition" without any cross-examination or contrary evidence. S*ee Ex parte Anonymous*, 803 So. 2d 542, 546 (Ala. 2001). Other judges presumably examined the petitioner and any witnesses themselves.

Against this backdrop, the Legislature amended the judicial bypass statute in 2014 to provide additional structure and improve the ability of state bypass courts to carry out their intended function. Specifically, these amendments provide Alabama bypass courts "guidance in determining appropriate procedure and evidence"— so

that the courts will have "sufficient evidence and information" to "make informed and proper decisions." Ala. Code § 26-21-1(c), (d). As a secondary goal, they also facilitate the provision of "guidance and assistance" to the girls who are attempting to make such a momentous decision on their own. *Id.* § 26-21-1(f).

In pursuing these ends, the amendments retain the prior law's core protections for bypass petitioners. For example, the law still allows a pregnant girl to seek relief without her parents ever being notified. *See* Ala. Code § 26-21-4(a). It still provides her free assistance in preparing her petition, a state-compensated lawyer to argue on her behalf at the bypass hearing, and an exemption from all court fees and costs. *See id.* § 26-21-4 (b), (c), (p). And critically, the law still provides that parental consent "*shall* be waived" if the girl demonstrates either maturity or best interests as described above. *Id.* § 26-21-4(g) (emphasis added). The amendments' premise, instead, is to give state bypass courts, within appropriate limits, the opportunity to conduct a more meaningful application of that standard.

One way the amendments do this is by providing a circumscribed role for three participants in addition to the girl and her counsel. First, the district attorney or his or her representative must be notified of the hearing and is required to attend the hearing as a neutral assistant to the court, free to take any position (or none at all) as necessary to "do substantial justice." *Id.* § 26-21-4(i) (DA shall participate as

"advocate for the state"); *id.* § 26-21-1(d) (the state's interests include both "protect[ing] the rights of the minor mother" *and* the state's "policy to protect unborn life"). Second, the statute allows a GAL to be appointed for the unborn child and provides that, if a guardian ad litem is appointed, the GAL expressly bears the same "obligations of participation . . . as given to the district attorney's office"—namely, to equip the court to "make an informed decision" under the applicable legal standard and "to do substantial justice." *Id.* § 26-21-4(j). Third, the girl's parents or guardians may participate, but only if they are "otherwise aware" of the proceeding. *Id.* § 26-21-4(*l*). They, too, have the same "rights and obligations" as the other parties. *Id.*

Another way the amendments work is to allow bypass courts, subject to numerous confidentiality protections, to receive evidence from sources beyond the petitioner herself. It still requires proceedings, including appellate proceedings, to be "confidential and anonymous," with the minor being identified in all court papers "by initials only." *Id.* § 26-21-4(o), (n). It still expressly criminalizes the disclosure of "records and [identifying] information" from bypass proceedings. *See id.* § 26-21-8.

And it still prohibits notification of the girl's parents; indeed, it adds redundant language to that effect. *See id.* § 26-21-4(a), (*l*). The amendments recognize a bypass court's authority to allow testimony by witnesses other than the bypass petitioner.

See Ala. Code § 26-21-4(e), (f), & (k). But any such witnesses will learn the girl's identity only if they have a "need to know"—and only then, subject to an additional (and redundant) admonition to "keep her name confidential." *Id.* § 26-21-4(c). The amendments further clarify that even "the court" may not report any criminal offenses that come to light (e.g., statutory rape), absent "the consent of the minor for whom the [bypass] proceedings are conducted." *Id.* § 26-21-4(q).

Similarly, within appropriate constraints, the statute allows bypass courts to take the time they need to do their job. In particular, the amendments allow the bypass court to continue a proceeding for the purpose of obtaining additional "necessary" evidence. Ala. Code § 26-21-4(k). Any such continuances are presumptively to last "not more than one business day" and in all events are "subject to the time constraints of the petitioner related to her medical condition." *Id.* In fact, the amendments actually *decrease* the presumptive overall decision deadline from 72 to 48 hours from the filing of the petition (weekends and holidays excluded). *See id.* § 26-21-4(e). Having said that, the amendments also ratify the Alabama Supreme Court's rules in this area, which require bypass courts to decide *all* petitions within 72 hours of filing. *See* Rule 2, Temporary Rules Governing Procedures for Petitions by an Unemancipated Minor Requesting Waiver of Parental Consent for the Performance of an Abortion (Sept. 1987). Any appeals from the bypass decision must also be

"expedited" as provided in the Alabama Supreme Court's rule. Ala. Code § 26- 21-4(n).

C. The State has implemented the new bypass procedures since 2014.

The 2014 amendments have been in effect for several years. But there is no evidence that state court judges, district attorneys, or court personnel have implemented these amendments in an inappropriate manner. Instead, at this stage of the litigation, "[t]he good faith of [state] officers and the validity of their actions are presumed." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918).

To the extent the record reflects anything about the implementation of the new bypass provisions, it establishes that those provisions have had very little effect. This is so for three reasons.

First, state bypass courts had the power to follow—and were in fact following—some of the procedures that were codified in 2014 before the law was even amended. For example, bypass courts could and did appoint GALs under the civil procedure rules prior to the 2014 amendments. *See* Ala. R. Civ. P. 17(c) (authorizing courts to appoint GALs for "infant[s] unborn"); *see In re Anonymous*, 720 So. 2d 497, 499 (Ala. 1998) (reviewing bypass decision where GAL was appointed). Similarly, even before the 2014 amendments, Alabama bypass courts had independent

power to call whatever witnesses they deemed necessary, as well as to permit intervention of interested parties (*i.e.*, parents who "otherwise" learn of the proceedings). *See* Ala. R. Evid. 614(a); Ala. R. Civ. P. 24 (intervention). *See generally* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805 (June 1995).

Second, girls have continued to seek and receive permission to bypass the parental consent requirement. For example, shortly before the district court ruled in this case, a district attorney appeared in a bypass proceeding and appealed the bypass court's decision to grant the girl's petition. *In re Matter of Anonymous*, No. 2160759, 2017 WL 2963002, at *2 (Ala. Civ. App. July 12, 2017). The Court of Civil Appeals affirmed and a bypass was granted. *Id.* A similar thing happened again several months after the district court ruled in this case, except this time the girl appealed from the *denial* of a bypass and the appellate court granted the bypass. *See In re Anonymous*, --- So.3d ----2017 WL 3911053 (Ala. Civ. App. September 7, 2017)(also noting that trial court appointed a GAL for fetus).

Third, the defendants submitted two declarations from deputy district attorneys that describe how the district attorney's office in Montgomery County treated bypass proceedings. *See* Doc. 32-1; Doc. 62-1. These declarations explain that six bypass hearings occurred in Montgomery County during the 18 month-period be-

tween July 1, 2014—the law's effective date—and December of 2016. These hearings lasted 15 to 20 minutes. Doc. 62-1 at 2. The district attorneys' representative asked basic questions of the petitioner or no questions at all. Doc. 62-1 at 1. And the district attorney took no position on the ultimate question of whether a bypass should be granted. Doc. 62-1. Apart from the participation of the district attorney's representative, there was no "discernible effect" from the 2014 amendments on the hearing. Doc. 62-1 at 2.

II. COURSE OF PROCEEDINGS

This lawsuit began three months after the challenged amendments took effect. *Compare* Doc. 1 (filed Oct. 1, 2014) *with* Ala. Act No. 2014-445, § 4 (providing for a July 1, 2014 effective date). The complaint mounts a facial challenge to discrete procedural rules applicable to the law's judicial-bypass option. Specifically, it sought declaratory and injunctive relief with respect to the following provisions:

- DA participation in the bypass proceeding, Ala. Code § 26-21-4(i);
- a bypass court's authority to appoint a guardian ad litem, *id.* § 26-21-4(j);
- the potential participation of the girl's parents, *id.* § 26-21-4(*l*);
- a bypass court's authority to call witnesses, and to adjourn a proceeding for the acquisition of additional evidence, *id.* § 26-21-4(e), (f), (k);
- the ability of the new parties and any witnesses to learn the girl's identity, *id.* § 26-21-4(c);
  and
- the right of parties besides the girl to take an appeal, *see id.* § 26-21-4(n).

See Doc. 1.

There are only two plaintiffs: a Montgomery abortion clinic, RHS, and its administrator, June Ayers, with RHS suing "on behalf of its patients, physicians, and staff." Doc. 1 ¶ 8; *see also id.* ¶ 9. RHS alleges that it provides abortion services to adults and minors, "including minors who require a judicial bypass from the requirement of parental consent." Doc. 1 ¶ 8.

There are likewise only two defendants: the Alabama Attorney General and Montgomery County District Attorney, both sued in their official capacity. According to the complaint, these officers are proper defendants based on (1) their general authority to prosecute criminal violations of the parental-consent law and (2) their specific authority with respect to DA participation in the bypass proceedings. *See* Doc. 1 ¶¶ 10, 11. The complaint does not identify any other way in which these defendants are connected with the procedural requirements at issue in this litigation.

The plaintiffs moved for a preliminary injunction with the filing of the complaint. *See* Doc. 2. The defendants opposed the injunction with a declaration from an Assistant District Attorney. He testified that, since the effective date of the law, he has participated in two bypass hearings, did not take any position on the outcome, and did not appeal the court's decision to allow the abortion in either case. *See* Doc. 32-1. The district court held a hearing on this motion, but never ruled on it.

The defendants filed a motion to dismiss, Doc. 30 & 31, which the district court denied, Doc. 52. The defendants filed an answer. Doc. 53.

The parties filed cross motions for judgment on the pleadings. *See* Docs 60 & 63. The district court granted judgment on the pleadings to the plaintiffs on their due process claim, which was count one in the complaint. *See* Doc. 85. The district court dismissed counts two, three, and four without prejudice. Doc. 85 at 52-54. The district court declared the following provisions "unconstitutional in their entirety: Alabama Code § 26-21-1(i) (the participation of the DA as a party), § 26-21-4(j) (the participation of a GAL for the unborn child as a party), and § 26-21-4(l) (the participation of a parent, parents, or legal guardian of the minor petitioner as a party)." Doc. 85 at 48. The district court also declared unconstitutional a state court's ability to disclose the minor's identity to a person "determined by the court who needs to know" and the state court's ability to "bring before the court admissible evidence or testimony either in support of or against the petition." Doc. 85 at 49.

This appeal followed.

III. STANDARD OF REVIEW

Judgment on the pleadings is appropriate "when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996). The Court reviews the grant of judgment on the pleadings *de novo*. *See Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002).

SUMMARY OF ARGUMENT

The district court erred by granting the plaintiffs judgment on the pleadings and declaring Alabama's 2014 amendments unconstitutional. This Court should either direct the district court to render a judgment in favor of the defendants or, in the alternative, remand so that a factual record may be developed.

As an initial matter, the district court should have dismissed this due process claim as non-justiciable. The alleged harm from the challenged procedures is speculative. And, in any event, a federal court cannot remedy these harms because (1) the DA and AG do not control what procedures are used by state bypass courts and (2) state bypass courts have relied on the pre-existing and unchallenged Alabama Rules of Civil Procedure to do many of the things about which the plaintiffs complain.

The district court attempted to avoid these issues by finding that the administrator and abortion clinic could be prosecuted for violating the parental consent law. But that does not solve the problem. The named plaintiffs are asserting the due pro-

cess rights of their prospective patients. Accordingly, they must show that the challenged laws will result in a violation of their patient's rights and that their patients cannot assert their own rights in the bypass proceeding.

The district court also erred in its conclusion that the 2014 amendments are unconstitutional. The Supreme Court has held that a bypass proceeding must be effective, confidential, and expeditious. Alabama's procedures meet that test.

First, none of the 2014 amendments undermine the effectiveness of Alabama's bypass proceeding. A bypass procedure is effective when it allows the minor to obtain an abortion without seeking her parents' consent upon a showing that she is well-informed and mature or that an abortion is in her best interest.

Although the district court held that the potential involvement of a girl's parents rendered the proceeding unconstitutional, the district court ignored that a girls' parents can only participate if they learn about the hearing independently—almost certainly from the girl herself. Alabama law imposes no bar to a girl's initial access to court and prevents the court or court personnel from informing the girl's parents about the proceeding. As a practical matter, a girl's parents already have immense power to induce her not to pursue an abortion when they independently learn of her bypass petition; their participation in the hearing adds nothing to their influence over their daughter. On the other hand, parental participation in the hearing makes a girl's

parents more likely to respect the result and may provide the court with important evidence about the girl's maturity and family life.

The district court did not conclude that the participation of the DA or GAL made the proceeding ineffective, and for good reason. The whole point of the bypass proceeding is to determine a girl's best interest; it does not disserve a girl for another party to oppose her petition if it fails to meet the relevant legal standard. In any event, the state courts have held that the DA is to act neither as an advocate for or against the granting of a girl's petition. And evidence in the record establishes that DAs treat their role as helping the court to determine the right answer to the question of the girl's maturity and her best interest. The GAL's statutory responsibilities are similar to the DA's. Any evidence or argument that these parties make must be directed to the legal standard established by the Supreme Court.

Second, Alabama's bypass procedure remains confidential. Alabama law requires that the court proceedings remain confidential, provides that the girl may proceed anonymously, and criminalizes anyone from revealing the minor's identity without court permission. The district court erroneously reasoned that the possibility of additional participants and witnesses necessarily compromises the confidentiality of the proceeding. But the confidentiality that the Supreme Court requires is as to "the public," not participants in the proceeding. The girl's parents cannot participate

in the proceeding unless they already know about it, and the DA and GAL are officers of the court. Moreover, a state court judge must find it "necessary" to disclose the girl's identity to a witness, and state court judges are presumed to follow the Constitution and protect the rights of the minor.

Third, Alabama's bypass procedures are expeditious. The law requires that the proceeding be expedited, with a presumptive deadline for a ruling within 48 hours. Similarly, the Alabama Supreme Court has adopted rules that require an expedited appeal.

Finally, although apparently irrelevant to the district court's decision, the district court also held that the benefits do not outweigh the burdens of the 2014 amendments. The Supreme Court has already balanced the benefits and burdens of parental consent laws and has held that they are constitutional if a bypass proceeding is effective, confidential, and expeditious. But, to the extent a lower court is allowed to balance these interests anew, the district court erroneously discounted the government's interests in these procedures. Alabama's 2014 amendments appropriately balance the interest of the girl, the fundamental rights of her parents, and the state's need for procedural rules that allow for a full and fair factfinding.

The district court's decision should be reversed.

ARGUMENT

I. The plaintiffs' due process claim is nonjusticiable.

The procedural posture of this litigation is unusual. The abortion clinic and its administrator are challenging the constitutionality of state procedural rules that apply in state court proceedings to which they will never be party. The only defendants are state prosecutors who have no control over how those hearings are structured. And the challenged rules—for the most part—simply codify powers that state courts already have under generally applicable rules of civil procedure. For its part, the district court issued a declaratory judgment that has had no real world effect: as equally sovereign courts and non-parties to this case, state judges continue to follow the procedural rules that the district court declared unconstitutional. The right way to litigate the constitutionality of Alabama's procedural rules is for pregnant minors and their court-appointed counsel (*see* Ala. Code § 26-21-4(b)), to raise constitutional issues in the state court bypass proceeding itself.

The district court should have dismissed this case. There are two reasons why.

A. The alleged harm is speculative.

The plaintiffs here are an abortion clinic and its administrator. Even if they could stand in the shoes of a young pregnant girl who would actually be party to a judicial bypass proceeding, that girl's alleged harms would be inherently speculative

and contingent. We do not know, for example, whether a bypass court will appoint a GAL. We do not know whether the girl's parents would somehow learn of the proceeding and ask to participate. We do not know whether any party would ask the court to subpoena a witness; or, if so, whether the court would grant that request; or, if so, whether the witness would learn the girl's identity. And so on. Even to the extent these things happen, we do not know what impact they will have on a particular case. For example, the DA does not know in advance what his participation will entail: He could remain neutral; he could support the petition; he could ask numerous questions; he could ask none at all. *See* Ala. Code § 26-21-1(d) (State's interests at the bypass proceedings include "protect[ing] the rights of the minor mother"). In other words, even if a pregnant girl proposed to file this federal lawsuit in advance of a bypass hearing that she was about to invoke, we would still say her alleged harm is speculative.

Ample authority supports dismissal on this basis. Most recently is *Clapper v. Amnesty International,* 133 S.Ct. 1138 (2013). There the Supreme Court rejected a facial challenge to a federal statute permitting national-security officials to authorize surveillance of designated persons upon receipt of court approval. *See* 133 S. Ct. at 1144. This claim was too "speculative," the Court held. Among other things, the Court noted that "because [the challenged statute] at most authorizes—but does not mandate or direct—the surveillance that respondents fear, respondents' allegations

are necessarily conjectural." *Id.* at 1149. "Simply put, respondents can only speculate as to how the [officials] will exercise their discretion in determining which communications to target." *Id.* So, too, was it speculative whether the surveillance court would give its approval in the first place: In our system, the Court observed, "'[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case.'" *Id.* at 1150 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990)). The same kinds of things can be said here. The present complaint—even were a pregnant minor listed as a plaintiff—would still at most present "a 'perhaps or maybe chance' of an injury occurring." *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006) (quoting *Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1340 (11th Cir. 2000)). That, the courts recognize, "is not enough for standing." *Id.*

B. The purported injury is not redressible in a suit against the District Attorney or Attorney General.

On top of the speculative nature of a pregnant girl's asserted injury are substantial causation and redressability problems. These problems are perhaps most apparent with respect to the provisions allowing (1) the petitioner's parents to appear if they "otherwise" learn about the bypass proceeding, *see* Ala. Code § 26-21-4(*l*); (2) the bypass court to appoint a GAL and call witnesses (including adjourning the

proceedings to do so), *see id.* § 26-21-4 (c), (e), (f), (j), (k); and (3) any GAL and parents to take an appeal, *see id.* § 26-21-4(n).

The only defendants here are the Montgomery County District Attorney and the Attorney General. Although the DA is a new party under the bypass statute, in none of the aforementioned cases does the DA or AG cause the pregnant girl's asserted injury. And in none of these cases does the district court's declaratory judgment against the AG or DA redress that injury. Imagine if the district court had attempted to enjoin the AG or DA instead of simply entering a declaratory judgment. How would enjoining the AG or DA prevent a state court from appointing a GAL or allowing intervention by a girl's parents? How would such an injunction prevent the GAL or parents from taking an appeal? The only part of the bypass proceeding that the DA or, by supervision, the AG can control is the DA's actions inside the proceeding.

Moreover, as the district court expressly recognized,[1] many of the challenged provisions have already been accomplished by existing authority. The bypass court can appoint a GAL just as easily under the civil procedure rules as it can under the authority granted it by the judicial-bypass statute. *See* Ala. R. Civ. P. 17(c) (authorizing courts to appoint GALs for "infant[s] unborn"); *see In re Anonymous*, 720 So.

[1]The district court expressly declined to make any findings about "Alabama Rule of Civil Procedure 17(c)," which allows the appointment of a GAL for unborn children.

2d 497, 499 (Ala. 1998) (exemplifying this practice before passage of the challenged amendments). Similarly, Alabama courts have independent power to call whatever witnesses they deem necessary, as well as to permit intervention of interested parties (i.e., parents who "otherwise" learn of the proceedings). *See* Ala. R. Evid. 614(a); Ala. R. Civ. P. 24 (intervention). They also have inherent authority which would independently allow them to continue the proceedings to obtain more evidence (and possibly, even, to require DA participation). *See generally* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805 (June 1995). "Nothing a federal court could do or say about the challenged [provision] would alter what the state courts could do under [these independent sources of authority]." *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1257 (11th Cir. 2009); *see also Clapper*, 133 S. Ct. at 1149-50. Thus, our hypothetical pregnant girl's asserted injuries (or at least most of them) are not redressable. *See Freeman*, 561 F.3d at 1257.

A final point about the Eleventh Amendment: That Amendment, and the principles of sovereign immunity it reflects, generally bars suits against state officials. Starting with *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court has recognized an exception for suits seeking prospective injunctive relief to prevent ongoing violations of federal law. Relevant here, the *Ex parte Young* exception does not apply "where no defendant has any connection to the enforcement of the challenged law

at issue." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999). Here, the only defendants are the Alabama Attorney General and the Montgomery County District Attorney. They do not structure bypass proceedings and they have no control over them. Accordingly, the Eleventh Amendment and sovereign immunity principles supply an additional barrier to this suit as to all of the challenged provisions except the ones concerning DA participation in a bypass proceeding. *See id.* at 1342; *Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) (en banc).

* * *

The district court attempted to avoid these justiciability problems by finding that the named plaintiffs here—the abortion clinic and its administrator—have suffered an injury in fact that might be redressed by a favorable decision *as to them*. To wit, the district court concluded that the named plaintiffs could be prosecuting for performing abortions in contravention of the parental consent law and that a judgment against the DA and AG would forestall such a prosecution. Doc. 52 at 15-24. Accordingly, the district court concluded that it need not address arguments that "relate to the redressibility of the minor patients' purported injuries from enforcement of the Act." Doc. 52 at 23.

The problem with the district court's reasoning is that the named plaintiffs are not asserting their own due process rights—they are asserting the rights of their patients. *See* Doc. 1. Insofar as we are aware, no court has held that a plaintiff may

invoke an injury to themselves to raise the claims of a third party without also showing a concrete injury as *to that third party*. Instead, it stands to reason that, because the plaintiffs are asserting the rights of their patients, they must identify some non-speculative, redressible injury as to them. Indeed, the Supreme Court has explained that it "allow[s] standing to litigate the rights of third parties [only] when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004). Moreover, the district court never explained "how the unnamed [girls] would be hindered in their ability to assert their own rights" within the judicial bypass proceeding, which is a separate but related requirement for third party standing. *In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1039 (11th Cir. 2015) (citing *Kowalski*).

To be clear, we are not suggesting that an abortion clinic and its administrator *never* have the right to litigate the rights of their patients, just that they *sometimes* cannot do so. Here, it is pure speculation to conclude that the plaintiffs' unknown, prospective patients will be injured by the challenged procedures. And, at the same time, there is nothing the defendants can do to prevent bypass courts from invoking the challenged statute or the Rules of Civil Procedure to appoint a GAL, allow intervention by a girl's parents, or compel witnesses to appear. Before the district court allowed the plaintiffs to invoke their patients' rights—indeed, before it chose to hold

a state law unconstitutional on that basis—it should have come to grips with this problem. The district court did not even try.

II. Alabama's judicial bypass procedures are constitutional.

Even assuming the district court correctly rejected the justiciability concerns above, the district court was wrong to enter judgment on the pleadings in favor of the plaintiffs. The 2014 amendments provide flexibility, balance, and legitimacy to an otherwise incomplete judicial procedure. The resulting statute is carefully crafted to protect minors' rights in this area while also accounting for the inherent immaturity and vulnerability of youth, the fundamental rights of parents to raise their children, and the right of States to express a preference for childbirth.

The central flaw in the district court's reasoning is that it assumes a worst case scenario in which state judges do not apply the 2014 amendments consistent with their independent constitutional obligations. *See*, *e.g*., Doc. 85 (holding that the "discretion of the bypass judge" undermined "the anonymity of the petitioner and the confidentiality of the bypass proceedings"). But the district court's doomsday predictions turn the normal course of constitutional adjudication on its head. *See Planned Parenthood v. Miller*, 934 F.2d 1462, 1479 (11th Cir. 1991). In a case like this one, it is not sufficient to identify the possibility that a statute might be applied in an unconstitutional manner in a particular case. Instead, as the Supreme Court

held in a judicial bypass case, when plaintiffs make "a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid." *Akron II*, 497 U.S. at 514 (internal quotation marks omitted). An abortion regulation should not be invalidated on a facial challenge "based on a worstcase analysis that may never occur." *Id.* This Court expressly followed *Akron II*'s holding in *Miller*, another judicial bypass case. *See* 934 F.2d at 1482. Neither has been overruled. *Cf. United States v. Chubbuck*, 252 F.3d 1300, 1305 n.7 (11th Cir. 2001). But the district court declined to follow them.

In any event, Alabama's procedures are facially constitutional under the Supreme Court's decision in *Bellotti II*. There, the Supreme Court resolved the conflicting interests at stake in a minor's abortion decision by creating a legal compromise. States may require minors to obtain parental consent before having an abortion, the Court held. But if they do, they must offer minors a judicial bypass option that is effective, confidential, and expeditious. Specifically, it must comply with the following criteria:

> (i) it must "allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently";
>
> (ii) it must "allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests";
>
> (iii) it must "ensure the minor's anonymity"; and

(iv) it must "provide for expeditious bypass procedures."

Lambert v. Wickund, 520 U.S. 292, 295 (1997) (per curiam) (citing *Bellotti II*, 443 U.S. at 643-44). As a matter of law, Alabama's bypass procedure complies with these criteria.

A. The procedure remains "effective."

The first two *Bellotti* criteria require only that the minor be entitled to obtain an abortion by persuading the bypass court that she is well-informed and mature or that the abortion would be in her best interests. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 297-98 (1997) (per curiam); *cf. Ohio v. Akron Ctr. for Reproductive Health* ("*Akron II*"), 497 U.S. 502, 514-15 (1990) (declining to "impos[e] . . . additional requirements on bypass procedures"). The 2014 changes to Alabama's bypass statute in no way rob a petitioner of her right to an abortion if she shows these things. Whatever other changes the amendments made, they did not change the basic fact that "[t]he required [parental] consent shall be waived" upon the minor's showing that she is mature or that an abortion would be in her best interests. Ala. Code § 26-21-4(h) (emphasis added); *see also* Ala. Act No. 2014-445, § 1 (showing no change from previous law). If any of the new bypass participants wish to influence the outcome, they must make their arguments under that framework. And any additional evidence the bypass court might wish to receive must be relevant to those criteria—

and to those criteria alone. The outcome of any appeal, too, comes down to these sole criteria. *See* Ala. Code § 26-21-4(m).

The record also establishes that the bypass procedure remains effective despite the 2014 amendments. Six bypass hearings occurred in Montgomery County while this case was pending, and a bypass was granted in all of them. *See* Doc. 62-1 at 2. Likewise, there have been two appellate proceedings in Alabama's state court system. *In re Anonymous*, --- So.3d ----2017 WL 3911053 (Ala. Civ. App. September 7, 2017); *In re Matter of Anonymous*, No. 2160759, 2017 WL 2963002, at *2 (Ala. Civ. App. July 12, 2017). The pregnant girl's bypass petition was granted in both cases.

Moreover, the case law establishes that additional participants in the bypass proceedings do not pose a problem under *Bellotti II* if their participation is directed at the correct legal standard—the maturity and best interests of the girl. In *Planned Parenthood v. Miller*, this Court approved the participation of a GAL for the minor even though the GAL possessed the authority to "divert" or even "dismiss" a minor's petition over the minor's objection. 934 F.2d 1462, 1479-80 (11th Cir. 1991). The Court recognized that an additional participant who acts in good faith can "promote[] the proper functioning of the Georgia bypass procedure." *Id.* at 1480. Similarly, in *Causeway Medical Suite v. Ieyoub*, the Fifth Circuit implicitly affirmed that a bypass court may make its decision "with both the parents' and minors' input" so long as

the bypass decisionmaker him- or herself is not the one "contact[ing] [the] minor's parents." 109 F.3d 1096, 1112 (5th Cir. 1997), *overruled in part on other grounds*, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

Despite the continuing effectiveness of the bypass procedure, the district court erroneously concluded that the bypass proceeding was not effective because it provides "a statutory mechanism for some parents or legal guardians to participate as parties." Doc. 85 at 19. Parental involvement at the hearing, the district court concluded "eviscerates the judicial bypass mandate of *Bellotti II*." Doc. 85 at 19. For their part, the plaintiffs also argued below that the possibility of other participants in the bypass hearing—the DA and any GAL—renders it unconstitutional. *See* Doc. 61. Neither the district court's holding nor the plaintiffs' other argument is correct.

1. The 2014 Amendments allow a minor to go to court without consulting or notifying her parents.

Alabama's bypass proceeding is effective because it allows a girl to go to court without notifying or seeking her parent's consent. The Supreme Court in *Bellotti II* held unconstitutional a law that required a girl to obtain her parent's consent before "every nonemergency abortion." *Bellotti II*, 443 U.S. at 646. Instead, the Court held that a state must provide a girl the opportunity to "go directly to a court without first consulting or notifying her parents." *Id*. at 647. Alabama's law does that. There is absolutely no legal requirement that a girl notify, inform, or seek her

parent's consent before going to court to obtain permission to have an abortion. The holding in *Bellotti* is that "the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions *upon initial access to court*." *Id.* at 648 (emphasis added). Alabama law, including the 2014 amendments, imposes no condition upon initial access to the court.

Moreover, the Supreme Court also recognized in *Bellotti II* that the child's relationship with her parents "properly may be taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interests." *Id*. at 648. *See also Causeway Medical Suite*, 109 F.3d at 1112 (a bypass court may make its decision "with both the parents' and minors' input" so long as the bypass judge is not the one "contact[ing] [the] minor's parents"). The girl's parents have a fundamental due process right to guide the upbringing of their daughter, and their view of their daughter's maturity and decision-making process is obviously relevant to the bypass determination. To that end, Alabama law contemplates that the girl's parents may participate in the bypass hearing if they independently learn about the hearing from a non-state actor—almost certainly, from the girl herself.

Because a girl's parents can participate in the bypass hearing only when she allows them to know about it, the district court's conclusion that parental involvement "eviscerates the judicial bypass mandate" makes no sense. In the only case the district court cites for this counterintuitive proposition, *Indiana Planned Parenthood*

Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983), the Seventh Circuit addressed a requirement that a girl notify her parents of her intent to seek an abortion. A notification requirement—like a consent requirement—is a bar on "initial access to the court." Here, however, the whole point is that Alabama imposes no bar on a girl's ability to go to court. She decides whether to seek consent or not. She decides who to tell about her decision to get an abortion. And she decides (with a state-funded lawyer) whether to go to court for a judicial bypass. She is not required to seek the consent of, or notify, her parents. There is no bar on her access to the court whatsoever.

On the other hand, when a girl's parents independently find out about the bypass hearing, their decision to appear at the hearing is surely one of the *least* burdensome and coercive ways for a girl's parents to express their position. A minor's parents can order her not to attend the hearing; they can refuse to pay for her transportation to the hearing; they can threaten any number of financial, physical, or social punishments and inducements. *See Pearson*, 716 F.2d at 1132. For these reasons, at least one district court has upheld a law that allowed for a girl's parents to *attend* the hearing if they otherwise learned of it. *See American College of Obstetricians & Gynecologists v. Thornburgh*, 656 F. Supp. 879, 882-84 (E.D. Penn. 1987). Citing real-world practicalities, the court noted that once a minor's parents learn of the pregnancy and hearing, the state cannot prevent parents from trying to

influence the minor's decision if they wish to do so. *Id.* Thus, because the parents had access to their daughter outside the courtroom and because of parents' fundamental interest in raising their child, the court held that an absolute right to observe the hearing was not unconstitutional. *Id.*

To be sure, the provision at issue in *Thornburgh* did not contemplate parental participation in the hearing, but that fact should not change the conclusion for three reasons. First, as explained above and ignored by the district court, *Bellotti II* held that the state could not impose conditions upon initial access to the court. 443 U.S. 622, 648. It did not hold that parents could not be involved in the proceeding after it began, but, in fact, suggested otherwise. Second, the *Thornburgh* court was right to recognize the real-world practicalities in play. Put simply, parents are much more likely to respect a court's decision if they are allowed to contribute to it. A procedure that recognizes a parent may know about the hearing but does not allow him or her to offer an opinion on the maturity of the child risks that the parents will disregard the process and prevent their child from attending the hearing. Third, allowing parental participation but not a veto by maintaining the judge's role as the sole decision-maker reconciles a parent's fundamental due process rights, *see infra* n.4, with the minor's right to a neutral arbitrator. At bottom, the Act's provision is constitutional because contemplating possible parental involvement is a nod to the real world, not a parental veto or forced notification.

In short, in *Bellotti II*, the Court wrote that "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents." 443 U.S. at 647. The law in no way prevents a minor from doing just that. Alabama's statute does not require the girl to notify her parents of her decision and it expressly prohibits any other state actor from notifying the girl's parents as well. Ala. Code § 26-21-4(*l*) ("the court shall not be . . . permitted to contact the minor's parent, parents, or legal guardian"). The district court was simply wrong that the possibility of parental participation renders the bypass hearing unconstitutional.

2. The participation of a DA and GAL does not render the procedure ineffective.

Below, the plaintiffs suggested that the participation of the DA and GAL undermined the effectiveness of the proceeding. *See* Doc. 61. The district court did not accept that argument, and for good reason. The plaintiffs' arguments below presumed that the DAs and any GAL will be "adverse" to the minor's interests to the extent they opposed her application. Doc. 61 at 12. But the point of the bypass proceeding is not to rubberstamp the minor's plan to get an abortion. It is to determine what is in the minor's best interest or, relatedly, whether she is mature enough to make that determination for herself. The participants in the bypass proceeding are there to support the court in making that determination. *See* Ala. Code § 26-21-

4(i) (DA); *id.* § 26-24-1(j) (GAL for unborn child); *id.* § 26-21-4(l) (parents). A bypass participant who opposes the petition of a minor who is not constitutionally entitled to bypass the state's parental-consent requirement is not acting "adverse" to that minor at all. Instead, a participant who informs the bypass court about information that shows the minor is too immature to make the decision herself or that an abortion would not be in her best interest is furthering the minor's interests, not undermining them.

In fact, this Court rejected arguments very similar to the ones that the plaintiffs made below. In *Miller*, this Court upheld Georgia provisions that granted bypass participants the authority to "divert" or even "dismiss" a minor's petition. 934 F.2d 1462, 1479-80 (11th Cir. 1991). The Court did so by assuming the best about how these participants would interpret and exercise that authority and then noting that their presence, as is the case with Alabama's newly added bypass participants, would in fact "promote[] the proper functioning of the Georgia bypass procedure." *Id.* at 1480. That is precisely the approach this Court should take here.

DAs. We have maintained throughout this case that the DA's obligation in the bypass proceeding is to serve as an officer of the court, ask relevant questions of witnesses, and ensure that there is a sufficient record for the court to resolve the question of the girl's maturity and her best interests. *See e.g.*, Doc. 31 at 54. As a

matter of fact, the Montgomery DA's Office has treated its role as we have proposed—to assist the court in determining the right answer to the question of the girl's maturity and her best interests, not to oppose the girl's request. And, after the district court's decision on appeal, the Alabama state courts agreed with us as a matter of state law: "The District Attorney is neither an advocate for or against the granting of consent, but rather serves to protect the process." *In re Anonymous*, --- So.3d ----2017 WL 3911053 (Ala. Civ. App. September 7, 2017). In short, the plaintiffs' arguments in the district court below are inconsistent with the way DAs view their role, how the Attorney General views their role, and how a state appellate court views their role. *See Risley v. Nissan Motor Corp. USA*, 254 F.3d 1296, 1299 (11th Cir.2001)(federal courts are "bound to decide the case the way it appears the state's highest court would").

GAL. Moreover, like the DA, the GAL is also present to assist the bypass court in making "an informed decision" and in doing "substantial justice." Ala. Code § 26-21-4(i), (j). In this respect, the GAL is functionally no different from the court reporter, the bailiff, and the petitioner's state-provided lawyer. If states are permitted to conduct judicial bypass proceedings, it follows that they are entitled to make those proceedings effective for their stated purpose of determining the minor's maturity or best interests. The Supreme Court has never required that the bypass procedure simply rubber-stamp the minor's request to have an abortion.

The whole idea of the bypass procedure is that a court will make a thorough and reasonable determination of the minor's maturity and best interests. The girl's court-appointed lawyer will present witnesses that support the girl's petition, including the girl's own testimony. If the bypass proceeding is to be anything other than a rubberstamp, the bypass court should have the power to, if it deems necessary, hear from other witnesses. In any event, it does not pose an undue burden to give a GAL the ability to ask questions or bring other potential witnesses to the court's attention. The legal standard under which the bypass court must evaluate that evidence is the still the same one required by *Bellotti II*—a girl's best interest or whether she is well-informed and mature.

B. The procedure is confidential and anonymous.

The second *Bellotti II* requirement is confidentiality, which Alabama law also meets. The 2014 amendments criminalize the disclosure of the minor's identity and require her to be referred to by her initials. In *Akron II*, the Supreme Court characterized *Bellotti II*'s confidentiality requirement as calling for "reasonable steps to ensure anonymity," not perfect ones. 497 U.S. 502, 513 (1990). The Court noted that "complete anonymity" was not "critical," and that the state statute there took reasonable steps to prevent "the public" from learning the girl's identity. *Id*. Given this, the Court concluded that it would not "base a decision on the facial validity of a

statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Id.*; *see also Miller*, 934 F.2d at 1479.

With those points in mind, the starting point on the confidentiality analysis must be the law's criminal prohibition on disclosing bypass-related records and information:

> (a) Records and information involving court proceedings conducted pursuant to Section 26-21-4 shall be confidential and shall not be disclosed other than to the minor, her attorney, and necessary court personnel.
> . . .
> (b) Any person who shall disclose any records or information made confidential pursuant to subsection (a) of this section shall be guilty of a Class C misdemeanor.

Ala. Code § 26-21-8. This provision is supplemented by several others, which also take reasonable steps to ensure anonymity. For example, the law prohibits the bypass court from notifying the minor's parents or legal guardian. *Id.* § 26-21-4(a). It makes the minor's identity confidential and restricts anyone from revealing it without court permission. *Id.* § 26-21-4(c), (o) (requiring all pleadings or court documents to use only the minor's initials). And finally, it directs the Alabama Supreme Court to provide for a "confidential" appeal. *Id*. § 26-21-4(n).

Although the district court recognized these guarantees of confidentiality, the district court nonetheless concluded that "[o]ther provisions of the Act render [the

confidentiality provisions] impotent as an assurance of anonymity and confidentiality." Doc. 85 at 24. First, the district court held that the possibility of additional bypass participants under the 2014 amendments "compromises the minor's anonymity." Doc. 85 at 25. Second, the district court held that "provisions allowing parties or the court to investigate, gather evidence, and issue subpoenas, as well as the involvement of witnesses . . . breach the minor's anonymity and the confidentiality of the proceedings." Doc. 85 at 25. It is irrelevant, according to the district court, that all of these actors are under the control of state bypass judges who are presumed to "act lawfully and prudently in the exercise of their duties." Doc. 85 at 27.

The district court erred in two respects.

First, the mere possibility of additional participants does nothing to negate the confidentiality of the hearing under *Bellotti*'s framework. The proper frame of reference is whether the law takes reasonable steps to prevent "the public" from learning of the minor's identity. *Akron II*, 497 U.S. 502, 513 (1990). The key word is public. This Court has held that "complete anonymity is not critical." *Miller*, 934 F.2d at 1479. Instead, "[t]he fact that some public officials have access to the minor's court record does not compromise the record's confidentiality, nor does it mean that they will make unauthorized disclosures of it." *Id.* The fact that the minor's identity may be learned by a single person—who will be subject to criminal penalties for later disclosing anything learned—does not qualify as revealing the

minor's identity to "the public." *See Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 788 (9th Cir. 2002) (distinguishing between disclosure to "*the public*" versus disclosure to promote the bypass decisionmaking process).

Moreover, the additional participants contemplated by the 2014 amendments are akin to the kind of state employees and public officials that do not raise an unreasonable risk of disclosing the minor's identity to the public. The District Attorney and GAL are attorneys; they are both present to assist the bypass court in making "an informed decision" and in doing "substantial justice." Ala. Code § 26-21-4(i), (j). They are officers of the court and are functionally no different from the court reporter, the bailiff, and the petitioner's state-provided lawyer—all of whom are unquestionably allowed to attend the bypass hearing. The child's parents, which the district court only referenced obliquely, are allowed to participate only if they have *already* learned about the proceeding independently. Finally, a witness may only learn of the minor's identity if the witness has, in the court's judgment, a true "need to know" that identity. *Id.* § 26-21-4(c). And even *then*, any witness who learns the petitioner's identity is subject to multiple overlapping provisions prohibiting disclosure of the identity outside of the courtroom. *See id.* § 26-21-4(o); *see also id.* § 26-21-8(a) (criminal liability for unauthorized disclosure of bypass information). The

district court's assertion that this kind of tailored disclosure "raise[s] the spectre of public exposure and harassment" (Doc. 85 at 26) is a gross exaggeration.

Second, the district court simply ignores that state court judges control any disclosure. The law is clear that "[a]ll proceedings under this chapter shall be confidential and anonymous." Ala. Code § 26-21-4(o). The bypass judge determines whether to appoint a GAL under the statute, just as state judges do under the generally applicable rules of civil procedure. Witnesses may be called only if the court deems the additional evidence "necessary" for purposes of completing the maturity and best-interests analysis, and the minor's identity may be disclosed only if the court concludes the witness "needs to know." Ala. Code § 26-21-4(c) &(f).

State judges are presumed to act competently, in good faith, and consistent with constitutional requirements. "State judges are bound, just as federal judges are, to uphold the Constitution of the United States and to follow the opinions of the United States Supreme Court." *Manning v. Hunt*, 119 F.3d 254, 270 (4th Cir. 1997) (judicial bypass provision constitutional). For that reason, "the Supreme Court has ruled, in the context of challenges to abortion regulations, that federal courts should not assume lightly that a state will not comply with Supreme Court mandates." *Id.* Accordingly, "a plaintiff challenging state statutes which require parental or judicial consent before a minor can obtain an abortion must show that the statutory program

on its face exhibits some clear intent of the state to circumvent *Bellotti*'s requirements or some clear deficiency making compliance impossible, or introduce evidence showing that the statutory program is actually applied in a manner which does not comply with *Bellotti*." *Id.* By filing a motion for judgment on the pleadings, the plaintiffs did not adduce any evidence to meet this standard.

Instead, implicit in all of the district court's reasoning, is a worst-case scenario: a judge who allows the parties to call as many witnesses as they wish and discloses the girl's identity without any concern for the girl's privacy interests, all while the girl's state-funded lawyer stands idly by and neglects to protect his client. But there is no reason to believe that, in the words of the district court, a state bypass judge will maliciously disclose the girl's circumstances to "members of the 'public' whom [the girl] is most likely not to want informed about her decision, and whose opposition to the petition could become coercive." Doc. 85 at 26. Even though the 2014 amendments have been in effect for several years, "[t]here is no evidence on this record that the state courts will do anything but observe the statutory restrictions regarding confidentiality and protect a pregnant minor's privacy rights." *Lawall*, 307 F.3d at 789 n.6. In like manner to the Supreme Court's refusal to assume state

employees will make unlawful disclosures in *Akron II*, so too should this Court refuse to assume state courts will violate the confidentiality of girls in a bypass proceeding that is confidential by statute. *See Akron II*, 497 U.S. 502, 513 (1990).

C. The procedure remains sufficiently expeditious.

Finally, Alabama's amended bypass law is sufficiently expeditious to satisfy *Bellotti II*, and the district court did not suggest otherwise. *Bellotti II* requires a judicial-bypass procedure and any subsequent appeals to be completed with "sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. Under Alabama's statutory text itself, bypass courts are presumptively required to rule within "48 hours of the time the petition is filed." Ala. Code § 26-21-4(e). They may extend that time for the limited purpose of obtaining "necessary" information. *Id*. § 26-21-4(k). But the Alabama Supreme Court's rules, which the statute ratifies, require bypass courts to decide *all* petitions within 72 hours of filing,[2] and the statute makes any extension "subject to the time constraints of the petitioner related to her medical condition," *id.* § 26-21-4(n). Appeals are no different. Under the Alabama Supreme Court's rules, they must proceed "in an expeditious . . . manner." And critically, neither the statute nor the rules include an automatic

[2] See Rule 2, Temporary Rules Governing Procedures for Petitions by an Unemancipated Minor Requesting Waiver of Parental Consent for the Performance of an Abortion (Sept. 1987).

stay provision. This means that if the petition is granted, the successful minor may proceed with the abortion and thereby moot any appeal taken by any other bypass participant.

These timeframes are consistent with other state laws that have been held constitutional. For example, in *Planned Parenthood v. Ashcroft*, the Supreme Court approved a Missouri statute that provided only that a hearing on the petition must be held as soon as possible within five days of the filing; the statute imposed on the bypass court no time limit for reaching a decision. 462 U.S. 476, 492 n.20, 493; *see also Planned Parenthood Ass'n of Kansas City, Inc. v. Ashcroft*, 655 F.2d 848, 860 (8th Cir. 1981) (noting that the "statute sets forth reasonable time requirements for court action on the petition"). Similarly, *Ashcroft* approved a statutory framework calling only for "expedited" appellate review. 462 U.S. at 491 n.16. Indeed, the Supreme Court itself later recognized that *Ashcroft* had upheld a regime "that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels." *Akron II*, 497 U.S. at 514 (citing *Ashcroft*, 462 U.S. at 491 n.16 (emphasis added)). Similarly, in *Hodgson v. Minnesota*, the Supreme Court declined to strike down a statute because it lacked a definite time limit. 497 U.S. 417, 427 n.9 (1990). There, the Court upheld a law that provided simply that a petition "be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of

the minor." *Hodgson*, 497 U.S. at 427 n.9. In the same fashion, the Court also upheld Minnesota's appeal-based provision, which provided only that an "expedited confidential appeal shall be available." *Id*. *See also Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1300-1302 (10th Cir. 2006); *T.L.J. v. Webster*, 792 F.2d 734, 736-38 (8th Cir. 1986); *Planned Parenthood v. Camblos*, 155 F.3d 352, 379-81 (4th Cir. 1998).

D. The district court erred in balancing the benefits and burdens of the 2014 amendments.

The district court ended its constitutional analysis by purporting to "consider[] the benefits conferred by the provisions in question together with the burdens they impose on abortion access." Doc. 85 at 27. Given that this discussion comes after the district court declared the 2014 amendments unconstitutional, it is not clear what role the district court's view of the law's benefits played in the district court's analysis, if any. In any event, the district court's benefits/burdens balancing test does not justify striking down the 2014 amendments as unconstitutional.

First, in our view, this case should be resolved by a straightforward application of *Bellotti II*, not a balancing of benefits and burdens. There is no question that the undue burden standard in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), applies to parental consent statutes, but the Supreme Court has already told us what counts as an undue burden in this context: a parental consent statute without an effective, confidential, and expeditious bypass procedure. Ultimately, the very notion

of a bypass proceeding is at odds with a bypass petitioner's desire to obtain an abortion. In 100% of cases, the bypass procedure will delay the petitioner's decisionmaking process. And in 100% of cases, it will allow other people to learn her identity and intimate personal information. In some of these cases, of course, the bypass procedure will even prevent the minor from obtaining an abortion at all. But despite all of these things, the Supreme Court has held that parental consent laws—and the judicial bypass proceedings of which they are a part—are a constitutional way for the State to encourage pregnant girls to consult with their parents about an indisputably important decision. Once the Supreme Court has balanced the state's and woman's interests in a particular context, lower courts are bound to apply that specific articulation of the undue burden standard rather than conduct the test anew. *See Olantunji v. Ashcroft*, 387 F.3d 383, 399 n.1 (4th Cir. 2004) ("The Supreme Court has directed us to follow the most analogous precedent . . . when determining what authority directly controls.").

Accordingly, the district court erred by purporting to balance the "benefits and burdens" of the Act. The Supreme Court has held that application of the three-part *Bellotti* criteria is an issue of "purely statutory construction." *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476, 491 (1983) (opinion of Powell, J.). This was the approach the Supreme Court followed in *Bellotti II*. See 443 U.S. at 644. It is the approach the Supreme Court considered settled law when evaluating

Pennsylvania's parental consent statute in *Casey*. *See* 505 U.S. at 899. And it is the approach the Supreme Court followed post-*Casey* in *Lambert v. Wicklund*. *See* 520 U.S. at 295. In fact, litigants have asked the Supreme Court to "extend the criteria used . . . in *Bellotti II*," but the Supreme Court has declined to do so. *See Ohio v. Akron Center for Reproductive Health* ("Akron II"), 497 U.S. 502, 514-16 (1990). To the extent the district court's opinion relies on its balancing of benefits and burdens, the district court erred in failing to apply *Bellotti*'s straightforward framework for evaluating the constitutionality of Alabama's bypass procedure.

Second, even if the district court were free to "balance" the respective interests under Alabama bypass statute, Alabama's 2014 amendments would still be constitutional. Alabama's bypass procedure does not "place[] an 'undue burden' in the path of a 'large fraction' of the women the law effects." *Casey*, 505 U.S. at 895. The Supreme Court recently reiterated that "the relevant denominator" in this fraction is "'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" *Whole Women's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292, 2320 (2016) (quoting *Casey*, 505 U.S. at 895). This means that for each challenged provision, the Court must ask whether it would deprive a large fraction of affected pregnant minors of their right to an adequate proceeding. In other words, will the DA's participation deprive a large fraction of affected minors of an effective, confidential, and expeditious proceeding? What about the involvement of a witness or

one of the new participants' decision to take an appeal? *Cf. Planned Parenthood v. Miller*, 934 F.2d 1462, 1482 (11th Cir. 1991) (asking similar questions under the no-set-of circumstances standard for facial challenges). As demonstrated above, *supra* Part II.A, the answer to these questions is no—at least not for a large fraction of affected bypass petitioners.[3]

The 2014 amendments also serve important state interests that the district court erroneously discounted. Most clearly, they serve to provide bypass judges with "sufficient evidence and information upon which they may make informed and proper decisions." Ala. Code § 26-21-4(i). Indeed, the "whole point" of the judicial bypass requirement is to determine whether the state may legitimately apply its parental-consent requirement to a particular minor. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1462 (8th Cir. 1995). Because the purpose of the

[3] The district court held that the GAL provision is relevant only to those girls who are seeking a bypass in which a GAL is appointed, that the parental involvement provision is relevant only to those girls who are seeking a bypass in which their parents appear as parties, and so on. Doc. 85 at 12. But the bypass procedures are actually relevant to *every* girl who seeks a bypass. We note that, immediately after describing the large fraction test in *Casey*, the Supreme Court explained that all minors seeking abortions comprised the appropriate class for judging the constitutionality of a parental consent requirement: "This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Casey*, 505 U.S. at 895.

bypass procedure is to make a factual determination—specifically, whether the minor is sufficiently well-informed and mature or whether an abortion is in her best interests—procedures that increase the quantity and quality of the evidence presented lead to a better and more thoughtful resolution. The Legislature reasonably concluded that an ex parte hearing with the testimony of a single witness adduced by a single lawyer may not always be the best format for reaching a factual determination. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (noting the "well tested principle that truth . . . is best discovered by powerful statements on both sides of the question.").

The 2014 amendments serve other interests as well. For example, by allowing parents to participate in the proceeding if they learn of it from their daughter, the Act allows testimony from a category of witness with knowledge of the petitioner's maturity and best interest. In doing so, the Act recognizes and values their fundamental liberty interest in the "care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). After all, the parents' fundamental due process right has the same provenance as, and is no less significant than, the girl's own right to an abortion.[4] And it seems common sense that a judge evaluating whether a girl's

[4] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on nu-merous occasions that the relationship between parent and

petition would want to know why her parents withheld their consent. Indeed, in most bypass cases, the girl makes representations about her family and parents for this purpose. *See* Doc. 85 at 17 n. 11.

The district court was wrong to discount these state interests. The district court complained that the Act "makes no finding that judicial bypass proceedings previously undertaken under Alabama's former bypass law . . . were in fact deficient in developing the evidence necessary for bypass courts to decide the issues properly before them." Doc. 85 at 31. The district court ignores that bypass judges in Alabama have been engaged in a form of self-help for several years by appointing GALs to participate in the bypass hearing under the generally applicable rules of civil procedure. Moreover, that the Legislature enacted this law is itself a testament to the inadequacy of the previous regime. The district court also suggests that, because the parents, GAL, and witnesses are not required for *every* hearing (although the DA is), they are not useful for *any* hearing. But the point of the amendments is to provide the procedural tools for a judge to conduct the hearing, not to mandate how the hear-

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child is constitu-tionally protected"); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (dis-cussing "[t]he fundamental liberty interest of natural parents in the care, cus-tody, and management of their child")

ing is to be conducted in every instance. Likewise, it is reasonable for the Legislature to provide an avenue for parents to be heard in the unusual case where they already know about the bypass proceeding, even while recognizing that a girl's parents need not be heard in every case.

* * *

The bottom line is that Alabama's amended bypass statute is a carefully crafted enactment designed to effectuate the State's recognized interests in ensuring that only mature minors—and only minors whose best interests would otherwise be compromised—might obtain an abortion without a parent's approval. These amendments are novel. But one "of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory" for a new and innovative way of doing things. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Alabama judges should be allowed to resolve any problems that may arise under these procedures on a case-by-case basis. The district court was wrong to hold Alabama's 2014 amendments facially unconstitutional.

CONCLUSION

This Court should **REVERSE** the district court and **RENDER** judgment in favor of the defendants. In the alternative, the Court should **REVERSE** the district court and **REMAND** so that a factual record may be developed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on October 31, 2017, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on the following:

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