FILED
12/05/2023
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 23-0272

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0272

PLANNED PARENTHOOD OF MONTANA and PAUL FREDERICK HENKE, M.D., on behalf of themselves and their patients,

Plaintiffs and Appellees,

v.

STATE OF MONTANA and AUSTIN KNUDSEN, Attorney General of the State of Montana, in his official capacity, and his agents and successors,

Defendants and Appellants.

AMICUS CURIAE BRIEF OF FORWARD MONTANA, IF/WHEN/HOW, AND INDIGENOUS WOMEN RISING

On Appeal from the Montana First Judicial District, Lewis & Clark County,
Cause No. DDV-2013-407
Honorable Judge Christopher Abbott Presiding

APPEARANCES:

Caitlin Boland Aarab
BOLAND AARAB PLLP
11 Fifth Street North
Suite 207
Great Falls, MT 59401
(406) 315-3737
cbaarab@bolandaarab.com

Local Counsel for *Amici Curiae*

Jessica S. Goldberg*
IF/WHEN/HOW:
Lawyering for Reproductive Justice
1714 Franklin Street # 100-393
Oakland, CA 94612-3409
(602) 892-0940
jessica.goldberg@ifwhenhow.org

Counsel for *Amici Curiae*
*PHV application pending

AUSTIN KNUDSEN
Montana Attorney General
BRENT MEAD
Deputy Solicitor General
MICHAEL D. RUSSELL
MICHAEL NOONAN
THANE JOHNSON
Assistant Attorneys General
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov

EMILY JONES
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
(406) 384-7990
emily@joneslawmt.com

DALE SCHOWENGERDT
Landmark Law PLLC
7 W. 6th Ave., Suite 518
Helena, MT 59601
(406) 457-5496
dale@landmarklawpllc.com

Attorneys for
Defendants/Appellants

TANIS M. HOLM
Colton Holm
310 Grand Ave.
Billings, MT 59101
(406) 259-9986
tholm@yellowstonelaw.com

ANJALI SALVADOR*
Planned Parenthood Federation of America
123 William St., Floor 11
New York, NY 10038
(212) 261-4602
anjali.salvador@ppfa.org

KYLA EASTLING*
Planned Parenthood Federation of America
123 William St., Floor 9
New York, NY 10038
(212) 541-7800
kyla.eastling@ppfa.org

Attorneys for Plaintiffs/Appellees
*Admitted *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Montana Constitutional Provisions

INTEREST OF *AMICI CURIAE*

Amici advocate for young people's rights,[1] provide funding and advocacy for Indigenous people seeking abortion care, research the impact of judicial bypass proceedings, and provide legal services to minors in those proceedings. *Amici* are united in their understanding that the judicial bypass process is a formidable and often insurmountable barrier to young people's exercise of their constitutionally-protected abortion right. Individual statements of interest for each amicus are set out in the motion for leave to file, filed herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will." *Hodgson v. Minnesota*, 497 U.S. 417, 475 (1990) (Marshall, J., concurring in part and dissenting in part).

Montana's Parental Consent for Abortion Act of 2013, §§ 50-20-501 — 50-20-511, M.C.A. ("the Consent Act") violates minors' fundamental right to privacy by denying them the right to decide privately, with the people they trust, to terminate a pregnancy. This constitutional infirmity is not cured by the statute's inclusion of "judicial bypass" – a court process that requires a minor to file a petition, attend a hearing, and convince a judge to allow them to exercise their decision to end a

[1] *Amici* refer to people under 18 as "young people" or "minors."

pregnancy without involving a parent. Granting others the authority to decide whether a minor may have an abortion violates young people's rights under the Montana Constitution. As the experiences of young people demonstrate, judicial bypass is not a safety valve that protects their constitutional rights against the incursion of forced parental involvement laws.

Judicial bypass proceedings may result in outright denial of a young person's rights, forcing them to remain pregnant against their will and their desires for their future, and in potential deprivation of their health. Jacqueline, whose bypass was denied, said: "'You guys keep telling me I'm not mature enough to make this decision and I don't know what I'm getting myself into . . . how am I mature enough to even have a baby and to go through the emotional and physical changes of having a kid?'" Kate Coleman-Minahan et. al., *Young Women's Experience Obtaining Judicial Bypass for Abortion in Texas,* 64 J. Adolescent Health 20, 24 (2019). But even when a judge grants a bypass, the process's inherent barriers may nonetheless prevent or delay a young person's exercise of their abortion right. As young people explain, the process is inaccessible, humiliating, and puts their privacy at risk: "[W]hen I finally went to court, it was a long day and honestly it was very hard on me. The judge said some hurtful things about me being sexually active, being a young parent, and wanting an abortion. I felt shamed no matter which decision I made." *Threats to Reproductive Rights in America Before the Subcomm. on the*

Const., C.R., and C.L. of the H. Comm. on the Judiciary, 116th Cong. 58-59 (2019) (hereinafter *Threats to Reproductive Rights*) (statement of H.K. Gray, Activist, Youth Testify).[2]

The barriers inherent to the judicial bypass are systemic and replicated across the country, regardless of differences between states' parental involvement statutes. Judicial bypass does not enhance protections for young people; it violates their constitutional rights and puts them at risk.

ARGUMENT

I. Judicial bypass violates young people's fundamental right to privacy.

In Montana, all people, regardless of age, have a fundamental right of privacy. Mont. Const. Art. II, § 10; Art. II, § 15. This includes the right to terminate a pregnancy. *Armstrong v. State*, 1999 MT 261, ¶ 39, 296 Mont. 361, 989 P.2d 364 ("The latter [right to seek and obtain pre-viability abortion services]--procreative autonomy--is a protected form of personal autonomy."); *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116, *6 ("[M]inors, including pregnant minors, have a fundamental right of individual privacy that includes personal-autonomy privacy, and . . . encompasses a woman's right to decide whether to terminate her pregnancy.").

[2] Available at https://www.govinfo.gov/content/pkg/CHRG-116hhrg41177/html/CHRG-116hhrg41177.htm.

In contravention of this fundamental right, the Consent Act requires a minor seeking abortion to get notarized written consent from a parent or legal guardian who can provide government-issued identification and documentation proving they are the minor's lawful parent or legal guardian. Section 50-20-506, M.C.A. Absent a medical emergency, those who cannot involve a parent must petition a court for permission to access abortion. Section 50-20-507, M.C.A.[3] And some who do involve their parents must nonetheless petition a court, because parents without the requisite documents cannot authorize this healthcare. Section 50-20-506, M.C.A.

"Judicial bypass," also known as a judicial waiver, is the legal process a minor must use to seek authorization from a judge to have an abortion. Section 50-20-509, M.C.A. A minor must file a petition, stating they are pregnant and unemancipated.[4] *Id*. The court may appoint a guardian ad litem and must inform the minor of their right to counsel. *Id*. Following the hearing, at which the minor must appear, a court determines whether the minor "is competent to decide whether to have an abortion" or if "the consent of a parent or legal guardian is not in the best interests of the

[3] A parent or guardian may waive consent in a notarized writing. Section 50-20-507, M.C.A. This is the functional equivalent of consent.

[4] "Emancipated" means "a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court. . . ." Section 50-20-503, M.C.A. This definition is narrower than the one in Montana's Consent for Health Services law. *See* Section 41-1-401, M.C.A. Thus some minors forced through judicial bypass would be considered emancipated for the purpose of consenting to all health services except abortion.

minor." *Id*.[5] The court then grants or denies a young person the right to decide whether to have an abortion without parental consent. If the petition is denied, a young person may appeal. *Id.*

The Consent Act violates young Montanans' right to privacy. Forcing young people through judicial bypass does not cure that violation nor does it mitigate the harm of forced parental involvement. *See Wicklund*, 1999 Mont. Dist. LEXIS at *9-*11 (listing negative consequences of judicial bypass). Forcing them to involve a parent or court to access abortion undermines fundamental ethical, legal, and health care principles of respect for the autonomy of young people. *See* American Academy of Pediatrics, *Policy Statement: The Adolescent's Right to Confidential Care When Considering Abortion*, 150 Pediatrics 1, 5 (2022), (hereinafter *Adolescent's Right*) ("Ultimately, the pregnant adolescent's right to decide whom to involve in the decision to seek abortion care should be respected."); *see also* Lauren J. Ralph et al., *The Role of Parents and Partners in Minors' Decisions to Have an Abortion and Anticipated Coping After Abortion*, 54 J. Adolescent Health 428, 432 (2014) (hereinafter *Minors' Decisions*) ("[I]n many respects, minors experience abortion similarly to adults.").

[5] The court may also grant a bypass if there is evidence of abuse by one or both parents, a legal guardian, or a custodian. Section 50-20-509, M.C.A.

When a judge denies a bypass, a minor "who has been deemed too immature to decide to have an abortion is left by law to have a baby." Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 Colum. J. Gender & L. 409, 430 (2009). The harm of bypass, however, is not isolated to denials; it is inherent, "for it is the hearings themselves, and not just their outcomes, that are the misuse of law." *Id*. at 437; *see also* Coleman-Minahan, *supra* at 24 ("[W]e find that state actors may humiliate and chastise adolescents during the process for decisions those individual state actors believe to be morally wrong, including premarital sex and seeking abortion.").

Judicial bypass is a violation of young people's right to privacy. It empowers a court to veto a young person's abortion decision, is inaccessible and necessarily daunting, and threatens the very confidentiality the young person seeks to maintain by going through the process.

A. Judicial bypass is unconstitutional because it allows a court to veto another's abortion decision.

> "Jen said the most difficult part of the process was, '. . . the trial . . . it was— [not knowing] if she was going to grant me access [to abortion], say yes.'" Coleman-Minahan, *supra* at 22.

The Consent Act strips young people of self-determination, vesting in others the power to deny them their abortion right. "For those minors who . . . choose not to seek parental consent, a new adult [is] vested with the power over them. This new

adult is the judge." Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 Hofstra L. Rev. 589, 639 (2002) (citations omitted). *See also* J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 Berkeley Women's L.J. 61, 142 (2003) ("[A] number of the young women, some angrily, questioned how a judge who knew nothing about them or their life circumstances could possibly make a meaningful determination about their maturity or readiness to have a child.").

This veto power is considerably more decisional power than courts would have if a young person decided to continue a pregnancy. This point was underscored by H.K. Gray, who was already a parent when she went through the judicial bypass process:

> "This [getting consent] was a new concept to me because it is something I didn't have to do when I had my daughter. It seemed weird to me that I didn't need anyone's permission to become a parent, but I needed to prove to the state that, as a parent, I was mature enough to not have another child."

Threats to Reproductive Rights, *supra*. In fact, minors who continue their pregnancies retain privacy and decisional rights; they need no one's permission to carry to term, and can consent to prenatal and childbirth care. *See* Section 41-1-402, M.C.A. Young people who decide to terminate their pregnancy and cannot involve a parent, however, are subject to a court's subjective – even arbitrary – veto. *See e.g.* Sanger, *supra* at 433-34 ("[A]n Alabama judge held that because sex education

was taught in the public high school, the minor's 'action[s] in becoming pregnant . . . [are] indicative that she has not acted in a mature and well informed manner.'") (citation omitted); Human Rights Watch, *Access Denied: How Florida Judges Obstruct Young People's Ability to Obtain Abortion Care* (February 9, 2023), https://www.hrw.org/report/2023/02/09/access-denied/how-florida-judges-obstruct-young-peoples-ability-obtain-abortion (hereinafter *Access Denied*) ("[A] trial court judge described a young person as 'curt' in denying her petition . . ."); Lizzie Presser, *She Wasn't Ready for Children. A Judge Wouldn't Let Her Have an Abortion.*, N.Y. Times Mag., (Nov. 29, 2022) (court denied abortion after forcing petitioner to visit an anti-abortion organization for an ultrasound);[6] *see also Hodgson*, 497 U.S. at 475.

B. Judicial bypass is inaccessible, especially for those facing additional barriers.

Even for adults, the legal system is daunting, confusing, and difficult to access. Sanger, *supra* at 447. As recognized in Montana, young people, in particular, may be intimidated by the legal process and not know how to access the courts. *Wicklund*, 1999 Mont. Dist. LEXIS at *9-*10. Getting a bypass requires successfully navigating a labyrinthine system not created to serve the needs of young people. "It's just so confusing. I was so full of stress for like the month before. Just trying to get

[6] Available at https://www.nytimes.com/2022/11/29/magazine/teen-pregnancy-abortion-judge.html.

everything in order and trying to get there and get it done before it was too late, and it's just so stressful for you." Ehrlich, *supra* at 145.

1. Going to court is daunting, intimidating, and may be entirely inaccessible.

Before they can even file a petition, a pregnant young person must figure out how to do it. Confusion about the legal process is exacerbated when court personnel withhold information, give young people inaccurate information, or rebuff minors' efforts to file petitions. *See, e.g.*, If/When/How, *The Judicial Waiver Process in Florida Courts: A Report* 1, 9 (2019) ("'The person [answering the courthouse phone] was very rude and tried to give me information on adoption.'")[7]; If/When/How et al., *The Judicial Waiver Process in North Carolina: A Report* 1, 16 (2022) ("[M]any clerks unaware of the judicial waiver option told the caller that the only way around the parental consent laws was through emancipation.").[8]

If a young person is lucky and finds accurate information about the process, they face other difficulties in getting their case before a judge. *See* Ehrlich, *supra* at 140. Missing school, work, family obligations, or extracurricular activities – all while trying to maintain confidentiality – is extremely challenging. *See e.g.*, *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 636 (2000). Many young people

[7] Available at https://www.ifwhenhow.org/resources/the-judicial-waiver-process-in-florida-courts-a-report/.

[8] Available at https://www.ifwhenhow.org/resources/the-judicial-waiver-process-in-north-carolina-a-report/.

cannot drive, yet must travel for hearings, meet with their lawyer (if they have one), and keep appointments at a clinic. *Id*. Lack of funds increases the difficulty; the time that it takes to secure funding for an abortion can delay the procedure by weeks, increasing the delay that results from the bypass process. *Id* at 634.

Unsurprisingly, getting a bypass is simply impossible for many minors. And this is especially so for young people who face systemic barriers in both the health and legal systems. *See, e.g.,* Sarah Wood & Aletha Akers, *Access to Comprehensive Reproductive Health Care is an Adolescent Health Issue*, Guttmacher Inst. (Nov. 17, 2022), https://www.guttmacher.org/article/2022/11/access-comprehensive-reproductive-health-care-adolescent-health-issue ("This means individuals with the least financial means, greatest access barriers, and longer distances to services will face more access challenges or be forced to forgo care. These inequities will be further magnified for young people who face additional challenges traveling and navigating state-varied parental involvement requirements.").

2. Indigenous young people face additional obstacles that increase the burden of the judicial bypass.

Unfortunately, Indigenous people throughout the U.S. experience discrimination and overcriminalization. Recounting the long history of state and federal discriminatory policies against Indigenous people that directly affect their health and wellbeing is beyond the scope of this brief, but research demonstrates the ongoing impact. As researchers found in 2019, "more than one in five Native

American adults reported personally experiencing discrimination across most domains of life. . . including employment, health care, and the police and courts." Mary G. Findling et al., *Discrimination in the United States: Experiences of Native Americans,* 54 Health Serv. Research 1431, 1434 (2019). And the high rates of gender-based violence against Native people is a national shame. *See* Lauren van Schilfgaarde et al., *Tribal Nations and Abortion Access: A Path Forward*, 46 Harv. J.L. & Gender 1, 16 (2023) ("For Native people, reproductive injustice is also intertwined with domestic and sexual violence. Native people suffer some of the highest sexual assault rates in the world and have limited access to emergency contraception and abortion.").

In addition, substandard, underfunded health care – including reproductive health care – remains an ongoing and serious problem. *Id*. at 5, 9, 14-15, 19-20. The federal government is the primary funder of health care to Indigenous people. *Id*. at 19-21. But the Hyde Amendment prohibits federally-funded health systems from providing abortion care except in extremely limited circumstances. *Id*. This means that Indigenous young people who need abortion care must pay for it on their own and must locate and travel to providers. *Id.* at 26.

Montana is a geographically large state, with only 5 abortion providers, none of which are on tribal lands. Guttmacher Inst., *State Facts About Abortion: Montana* (June 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-

montana. Thus Indigenous young people living on reservations may have to travel hundreds of miles to access care, although they "disproportionately lack access to reliable transportation." Schilfgaarde et al., *supra* at 26-27. If they cannot involve a parent, they must do all of that *and* seek a judicial bypass.

The bypass imposes on Indigenous young people the same barriers it imposes on all young people, but with the added potential for discrimination and the fear that past discriminatory treatment instills. *See* Human Rights Watch & ACLU of Illinois, *The Only People It Really Affects Are the People It Hurts: The Human Rights Consequences of Parental Notice of Abortion in Illinois* (March 11, 2021), https://www.hrw.org/report/2021/03/11/only-people-it-really-affects-are-people-it-hurts/human-rights-consequences (hereinafter *People It Hurts*) ("[T]he prospect of going to court could be especially traumatizing for Black, Indigenous and other young people of color coming from communities heavily impacted by racism in the criminal justice system."). In short, even if Indigenous young people overcome these obstacles and find transportation and raise funds to pay an abortion provider, the bypass requirement poses additional risks to their wellbeing.

C. Judicial bypass threatens young people's privacy, dignity, and confidentiality.

If a young person makes it through these barriers (and not all do[9]) they then must tell multiple strangers – their lawyer, if they have one, a guardian ad litem, if the court appoints one, court clerks, the judge, and court personnel present at the hearing– intimate details about their lives. "[C]ourt records . . . show young people forced to respond to deeply personal, and often highly stigmatizing, questions from both attorneys and judges during hearings." *Access Denied*, *supra*.

One young person in Texas told researchers, "'[t]he most difficult [part of the bypass] was talking to strangers about my problems and my life. . . telling them personal things I hadn't told anyone else.'" Coleman-Minahan, *supra* at 23. Another described being laughed at by her guardian ad litem: "She was kind of making fun of me for not knowing that condoms were considered birth control." *Id*. A Florida judge asked a petitioner, already a parent, "whether her current pregnancy was 'the same or a different father. . .'" *Access Denied*, *supra*.

Judicial bypass, even in a closed courtroom and litigated with sealed pleadings, is not entirely confidential. *See, e.g., Wicklund*, 1999 Mont. Dist. LEXIS at *10. Arranging transportation, traveling to and from a court and clinic, and

[9] *See People it Hurts*, *supra* ("Nearly everyone interviewed for this report expressed concern about young people who never learn judicial bypass is an option or are ultimately unable to follow through with the process.").

missing school or work increase the likelihood that confidentiality will be compromised. *Id.*; *see also* Coleman-Minahan, *supra* at 22 ("Such burdens were not only stressful, they also increased risk of parents' discovery and the likelihood that they would experience the adverse consequences that led them to seek bypass in the first place. . ."). It may be even harder to maintain confidentiality in smaller communities where a young person could be recognized while at a courthouse or away from school. *Wicklund*, 1999 Mont. Dist. LEXIS at *10-*11; *Farmer*, 165 N.J. at 636. As a retired judge told researchers,

> "Adding what I believe is an unnecessary step of coming to court just makes it that much more difficult for her [to get abortion care], and that much more likely she'll be found out [along the way]. If she has a fear of being found out and it's legitimate, we're putting her at risk."

People It Hurts, *supra*.

In sum, judicial bypass, by its nature, violates young people's fundamental right to privacy. It does so in the service of no state interest.

II. Judicial bypass does not enhance the protections of young people and therefore serves no state interest.

A process so fraught does not serve young people. *See Hodgson*, 497 U.S. at 477 (Marshall, J., concurring in part and dissenting in part) ("The judges who have adjudicated over 90% of the bypass petitions between 1981 and 1986 could not identify any positive effects of the bypass procedure."); *Wicklund*, 1999 Mont. Dist. LEXIS at *15 ("Judicial bypass procedures accomplish little, if any, protection for

adolescents . . .”). Mandating parental or court involvement puts young people’s health and safety at risk. *Id.* (“Those . . . forced to experience the judicial bypass procedure were subjected to needless stress, anxiety, delay and breaches of confidentiality.”). *See also Am. Acad. of Pediatrics v. Lungren* , 16 Cal. 4th 307, 354 (1997) (“The evidence was nothing less than overwhelming that the legislation would not protect these interests, and would in fact *injure* the asserted interests of the health of minors and the parent-child relationship.”) (quoting decision below).

Young people who choose not to involve a parent do so for their safety and well-being, to protect themselves from judgment and physical harm, ensure their relationship with a parent, and protect their family from the stress of their pregnancy and abortion decision. Coleman-Minahan, *supra* at 21-22. Research demonstrates that young people are good predictors of the outcome of involving a parent. Stanley Henshaw & Kathryn Kost, *Parental Involvement in Minors’ Abortion Decisions*, 24 Fam. Plan. Persp. 196, 207 (1992); *see also Minors’ Decisions, supra* at 431-32 (anticipating poorer coping for minors who involve an unsupportive mother compared to those who do not tell their mother or told a supportive mother); *Adolescent’s Right*, *supra* at 2 (“[M]andating parental involvement does not promote positive family communication . . . and creates an unsafe family atmosphere for some adolescents.”). Forcing them to either involve a parent, or go through a bypass, with all the barriers and injury that entails, serves no state interest.

A. Judicial bypass unnecessarily delays and obstructs medical care.

Judicial bypass does not enhance protections for young people; instead, it significantly delays their access to medical care. *Adolescent's Right* at 5; *see also Farmer*, 165 N.J. at 612 (". . . [T]he waiver process serves only to delay the abortion rather than advance the State's asserted interests."). Delay in accessing abortion may mean a more invasive procedure and increased cost. Lauren J. Ralph et al., *Reasons for and Logistical Burdens of Judicial Bypass for Abortion in Illinois.*, 68 J. Adolescent Health 71, 75 (2021) (Hereinafter *Reasons*).[10] Delay is particularly detrimental to young people, who are less likely than older women to recognize that they are pregnant early on. *See e.g.*, Liza Fuentes, *Policy Analysis: Inequity in US Abortion Rights and Access: The End of Roe is Deepening Existing Divides*, Guttmacher Institute (Jan 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides. For some, delay compounds and obstructs access to care: ". . . Bree's bypass was granted within five days after contacting [attorneys], even this relatively short delay still advanced her past the gestational age limit of her clinic . . . increasing stress and cost." Coleman-Minahan, *supra* at 22. This delay or obstruction affects every young person forced

[10] For example, medication abortion, often a more affordable option and used in more than half of abortions in the U.S., is approved by the FDA for use up to 10 weeks gestational age. Guttmacher Institute, *Medication Abortion* (October 2023), https://www.guttmacher.org/state-policy/explore/medication-abortion.

to seek a bypass. *Id*.; *see also Reasons, supra* at 75; Elizabeth Janiak et. al., *Massachusetts' Parental Consent Law and Procedural Timing Among Adolescents Undergoing Abortion*, 133 Obst. & Gyn. 978, 983 (2019).

Even when young people have accurate information and representation, and appear before an unbiased judge, the process still delays their access to medical care. *See People It Hurts*, *supra*. Judicial bypass delays abortion access, even in states with established networks of qualified bypass attorneys. *Reasons*, *supra* at 75. Researchers infer that the delay would be significantly greater in states without such networks. *Id*.

Judicial bypass offers no protections. *See Hodgson*, 497 U.S. at 477 (Marshall, J., concurring in part and dissenting in part) ("[D]espite the substantial burdens imposed by these proceedings, the bypass is, in effect, a 'rubber stamp . . .') (quoting testimony of Hon. William Sweeney). At best, it delays access – a serious harm in the context of time-sensitive care. A young person in foster care was delayed over three weeks because of judicial bypass:

> It took something that would have been a one-day procedure and made it a two-day procedure. She needed cervical preparation and had to be out of house (sic) for a prolonged period of time. The cervical preparation made her uncomfortable, but [she] couldn't react to that discomfort, because didn't want anyone to know [she was getting an abortion].

People It Hurts, *supra* (quoting Dr. Amber Truehart). Delaying medical care contingent on timely access also causes extreme stress to young people who need that care. *See* Ehrlich, *supra* at 140 ("[I]ncorrect information resulted both in delay and significantly increased anxiety.").

B. Making young people go to court does not support or protect them; the experience intimidates and humiliates them.

Navigating the legal system is inevitably intimidating, more so for young people forced into a court process to access abortion. *See* Sanger, *supra* at 447 ("Courtrooms and courthouses are often intimidating settings, even for adults and even for litigants not testifying about unwanted pregnancy."). Being forced to discuss an intimate personal decision with a judge is more than just daunting: it is injurious. *See People It Hurts*, *supra*. As an obstetrician-gynecologist explained:

> When you start equating legal ramifications around healthcare decisions, it's much more harmful to a young person than good. They have to go in front of a person of power, [often] a person who doesn't look like them, doesn't have experiences like them, and explain themselves… Asking a young person to have to defend a decision about their own body to a stranger may cause more emotional trauma than anything else.

Id.

The process is intimidating and humiliating even if the bypass is granted. *See* Sanger, *supra* at 419. Even when the process works as intended, it introduces strangers into young peoples' personal lives and involves systems strongly

associated with negativity and wrongdoing. *Id.* at 418 (*"*The hearings provide an opportunity to inflict a kind of legal harm--harm by process--on young women seeking to abort. They produce a civil version of what Malcolm Feeley identified in the criminal context as 'process as punishment.' This is the proposition that participation in criminal proceedings, long before trial or conviction, can itself be punitive.") (citations omitted). This injury is exacerbated when the authorities responsible for this process abuse their power: "[O]ne is chilled to read reports of judges who harassed pregnant minors in their courtrooms, forced them to go to anti-abortion clinics prior to granting a hearing, and assigned anti-abortion lawyers to represent them in court." Guggenheim, *supra* at 644-45. Unsurprisingly, young people often experience this process as punishment. As researchers explain:

> Our data provide evidence that adolescents experience the judicial bypass process in Texas as a form of punishment for their sexuality, pregnancy, and abortion decision and that the process includes logistical burdens, unpredictability, and humiliation, resulting in a traumatic experience for some. . . . [A]ccording to our participants' accounts of the bypass experience, the process may be a mechanism by which the state directly affects the internalization of abortion stigma…

Coleman-Minahan, *supra* at 24.

Young people and judges recount pain, fear, anxiety, and humiliation inherent to the bypass process. In Massachusetts:

> Virtually all of the young women reported being extremely nervous or frightened about going to court . . . Melissa described being so

> frightened that she forgot the answers to some of the questions she was asked . . . Afraid of being denied consent, these young women worried about making a mistake that would make them appear stupid or immature. They worried that they would not be able to convey their maturity to a judge who knew nothing of them or their life circumstances. . . .

Ehrlich, *supra* at 141. In Texas:

> [P]articipants described going to the courthouse as "nerve-racking" and "intimidating." Maya was "intimidated" by being with criminals in a criminal courthouse . . . . Adolescents described "fight or flight" physical responses at the hearing, including stuttering, shaking, sweating, nausea, and pallor.

Coleman-Minahan, *supra* at 23. A judge in Minnesota:

> [T]he level of apprehension that I have seen contrasted with even the orders for protection, which is a very intense situation, very volatile, and the custody questions, is that the level of apprehension is twice what I normally see in court. . . You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her - her hands were turning blue and it was warm in my office. . .

Hodgson v. Minnesota, 648 F. Supp. 756, 766 (D. Minn. 1986) *rev'd en banc*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990).

The extreme stress associated with the bypass process has lasting impact. *See* Coleman-Minahan, *supra* at 23 ("Multiple participants cried during the interview when describing the hearing, saying they still think about it, even months later."). A process that causes fear, pain, and humiliation for young people hardly protects

them. As young people report, and research has demonstrated, judicial bypass hurts young people, and, like forced parental involvement itself, violates their fundamental right to privacy.

CONCLUSION

The Consent Act violates young people's fundamental right to privacy guaranteed by the Montana Constitution by requiring them to either involve a parent in their abortion decision or go through a court process to seek authorization from a judge. But young people have the constitutionally-protected right to decide for themselves whether or not to carry a pregnancy to term. The judicial bypass process is just as much a violation of this right as mandated parental involvement; first because it vests with a judge the right to make a deeply private decision that affects a young person's health and life, and second because it is inaccessible, difficult to navigate, frightening, and threatening to young people's confidentiality. This is especially so for young people who already face additional barriers to accessing care, including Indigenous young people. Forcing young people to go through this process – if they can even access it at all – serves no state interest, because it does not enhance the protections of young Montanans but rather actively subjects them to humiliation, punishment, and violations of their privacy.

Respectfully submitted this 1st day of December, 2023.

By: /s/ *Caitlin Boland Aarab*
Caitlin Boland Aarab
BOLAND AARAB PLLP
Local Counsel for *Amici*

/s/ *Jessica Goldberg**
Jessica Goldberg
IF/WHEN/HOW
Counsel for *Amici*
*PHV application pending

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing *Amicus Curiae* Brief is proportionately spaced, printed with the typeface Times New Roman, 14-point font, is double-spaced, and contains 4,998 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

DATED this 1st day of December, 2023.

By: /s/ *Caitlin Boland Aarab*
Caitlin Boland Aarab
BOLAND AARAB PLLP
Local Counsel for *Amici*

/s/ *Jessica Goldberg**
Jessica Goldberg
IF/WHEN/HOW
Counsel for *Amici*
*PHV application pending

CERTIFICATE OF SERVICE

I, Caitlin Boland Aarab, hereby certify that I have served true and accurate copies of the foregoing Amicus Brief to the following via the Court's electronic filing service on December 1, 2023.

AUSTIN KNUDSEN
Montana Attorney General
BRENT MEAD
Deputy Solicitor General
MICHAEL D. RUSSELL
MICHAEL NOONAN
THANE JOHNSON
Assistant Attorneys General
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov

EMILY JONES
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
(406) 384-7990
emily@joneslawmt.com

DALE SCHOWENGERDT
Landmark Law PLLC
7 W. 6th Ave., Suite 518
Helena, MT 59601
(406) 457-5496
dale@landmarklawpllc.com

Attorneys for Defendants/Appellants

TANIS M. HOLM
Colton Holm
310 Grand Ave.
Billings, MT 59101
(406) 259-9986
tholm@yellowstonelaw.com

ANJALI SALVADOR*
Planned Parenthood Federation of America
123 William St., Floor 11
New York, NY 10038
(212) 261-4602
anjali.salvador@ppfa.org

KYLA EASTLING*
Planned Parenthood Federation of America
123 William St., Floor 9
New York, NY 10038
(212) 541-7800
kyla.eastling@ppfa.org

Attorneys for Plaintiffs/Appellees
*Admitted *pro hac vice*