IN THE SUPREME COURT OF PENNSYLVANIA

No. 1 AB

IN RE: JANE DOE

BRIEF OF *AMICI CURIAE* PENNSYLVANIA FAMILY INSTITUTE AND THE PENNSYLVANIA PRO-LIFE FEDERATION

Appeal from the Order of the Superior Court affirming the denial of Appellant's Judicial Bypass

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INTEREST OF AMICI CURIAE

The Pennsylvania Family Institute (PFI) is a non-profit research and education organization, based in Harrisburg, Pennsylvania, which focuses on public policies and cultural trends in Pennsylvania that impact families. Throughout its 21 years of existence, PFI has provided testimony and information to policy makers and the public on a range of issues, including the Abortion Control Act. PFI's expertise can aid the Court because it is directly related to the issue at hand. PFI has long been an advocate for protecting the rights of all members of society, including the unborn, and recognizes that there are often unintended consequences to an abortion, particularly for minors. Pennsylvania's families and the fabric of social life are strongest when we look out for the interests of those who may not be able to look out for themselves. PFI has more than 50,000 families across the Commonwealth as members.

The Pennsylvania Pro-Life Federation is a statewide non-profit educational and advocacy organization and is the Pennsylvania affiliate of the National Right to Life Committee in Washington, D.C. Through legislation, political action, and education, the Federation seeks to promote the dignity and value of innocent human life. In its over thirty years of existence, the Pennsylvania Pro-Life Federation has successfully lobbied for the passage of the Pennsylvania Abortion Control Act. The Federation was instrumental in the establishment of the nation's first publicly-funded abortion alternatives program which empowers women to choose life for their unborn children. The Pennsylvania Pro-Life Federation's experience in educating the public, particularly minors, can assist the court in examining the issues at hand, particularly as to the consequences of abortion. As the Commonwealth's largest single issue pro-life grassroots organization with over 40 local chapters throughout the state, the application and interpretation

of the Abortion Control Act is a principle focus of the Pennsylvania Pro-Life Federation and its members.

Additionally, pursuant to the petition filed contemporaneously herewith, Sen. Richard Alloway, Sen. Jake Corman, Sen. John Eichelberger, Sen. Mike Folmer, Sen. Jeff Piccola, House Speaker Designee Sam Smith, House Majority Leader Mike Turzai, Rep. Matt Baker, Rep. John Bear, Rep-Elect Stephen Bloom, Rep. Karen Boback, Rep. Scott Boyd, Rep. Michele Brooks, Rep. Thomas Caltigirone, Rep. Michael Carroll, Rep. Martin Causer, Rep. Jim Christiana, Rep. Paul Clymer, Rep. Scott Conklin, Rep. Jim Cox, Rep. Tom Creighton, Rep. Bryan Cutler, Rep. Gordon Denlinger, Rep. Anthony DeLuca, Rep.-Elect George Dunbar, Rep. Mike Fleck, Rep. Matt Gabler, Rep. Rick Geist, Rep. Camille "Bud" George, Rep. Jaret Gibbons, Rep. Keith Gillespie, Rep.-Elect Mark Gillen, Rep. Mauree Gingrich, Rep. Glen Grell, Rep. Seth Grove, Rep. Pat Harkins, Rep. Adam Harris, Rep. Sue Helm, Rep. Tim Hennessey, Rep. Dick Hess, Rep. David Hickernell, Rep. Scott Hutchinson, Rep. Rob Kauffman, Rep. Mark Keller, Rep. Jerry Knowles, Rep. William Kortz, Rep. Tim Krieger, Rep. Deberah Kula, Rep. Mark Longietti, Rep. Sandra Major, Rep. Jim Marshall, Rep. Ron Marsico, Rep. Daryl Metcalfe, Rep. Carl Walker Metzgar, Rep. Dan Moul, Rep. Mark Mustio, Rep. Donna Oberlander, Rep. Scott Perry, Rep. Jeff Pyle, Rep. Kathy Rapp, Rep. Mike Reese, Rep. Brad Roae, Rep. Stan Saylor, Rep. Mario Scavello, Rep. Curt Sonney, Rep. Jerry Stern, Rep. Richard Stevenson, Rep. RoseMarie Swanger, and Rep. Will Tallman seek to be added as amici to the present brief. They are Pennsylvania State legislators who wish to join this brief to express their desire that the Legislature's intent in passing the Abortion Control Act be upheld, including the protection of pregnant minors and of the children subject to abortion. *See* 18 Pa.C.S.A. § 3202(a). While they do not take any position concerning the facts of this case, since amici have not been provided any

factual background, they simply wish to express their desire that judges continue to be afforded discretion in their determinations pursuant to the judicial bypass provisions, and that the legislative interest in parental involvement not be undermined.

The Pennsylvania Catholic Conference is comprised of the Bishops of the eight Latin Rite Dioceses in Pennsylvania and the Bishops of the two Byzantine Rite Dioceses whose dioceses are located, in part, in Pennsylvania. The Pennsylvania Catholic Conference is established, in part, to give witness to spiritual values in public affairs and among some of its objectives and functions acts to represent and speak officially for the Catholic Church before all branches of the state government and to advocate for and take positions in defense of human life and, especially, children subject to abortion.

SUMMARY OF ARGUMENT

The Superior Court did not err in employing an abuse of discretion standard since that standard is appropriate for factually intensive determinations, such as here where maturity to give consent and best interest are at play. Discretion should be afforded to trial courts due to their unique vantage point in collecting and weighing the facts and making inherently subjective determinations. The abuse of discretion standard is not unique to this situation, but is employed in most other states with similar parental consent/judicial bypass provisions, except where rule or statute dictates otherwise. Indeed, this standard is used in Pennsylvania for the review of all manner of factual issues, even when the underlying claim has constitutional significance. Conversely, any standard that would undermine judicial discretion and make the grant of a judicial bypass an even more routine matter would undermine legislative intent, interfere with the important and beneficial role of parents, and ultimately put the best interest of minors at risk.

While the law does not require consent of a parent if a minor seeks a judicial bypass, nothing in the law suggests that a judicial bypass should be routinely granted. Indeed, such a requirement is not constitutionally necessary. Moreover, public policy considerations involving the best interest of minors—particularly due to the physical and psychological risks of abortion and a minor's developing level of maturity—strongly suggests the importance of parental involvement rather than a standard that encourages routinely granting judicial bypasses.

ARGUMENT

I. THE SUPERIOR COURT EMPLOYED THE CORRECT STANDARD OF REVIEW FOR THE DENIAL OF A JUDICIAL BYPASS FOR A MINOR SEEKING AN ABORTION.

While this case involving the judicial bypass provisions for a minor seeking an abortion under the Abortion Control Act, 18 Pa.C.S.A. § 3206, is a case of first impression at the Pennsylvania Supreme Court, the Pennsylvania Superior Court appropriately recognized in the case of *In re L.D.F.*, 820 A.2d 714 (Pa. Super. 2003), that the abuse of discretion standard should be used since neither statute nor caselaw called for a different standard. *See id*. at 717. Moreover, no other standard would be appropriate due to the intensive factual assessments the trial court must—and is in the best position to—make. Without fixed measures of maturity or best interest, which are nearly impossible to objectively define, it would be inappropriate to invoke a standard of review that suggested there was an objective measure against which to evaluate a trial court's decision. Recognizing that these are inherently factual determinations, other states have employed an abuse of discretion standard. While this is a case of first impression, Pennsylvania courts use this standard in other factually intensive contexts, even where constitutional rights are implicated. Moreover, a less deferential standard of review would undermine the legislative purposes of encouraging parental involvement to protect minors during this difficult situation.

A. Abuse of Discretion is the Appropriate Standard Due to the Intensive Factual Determinations Involved.

The Abortion Control Act spells out in detail the kinds of facts that a trial judge should consider during the mandatory hearing:

> [T]he court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the pregnant woman, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion and any other evidence that the court may find useful in determining whether the pregnant woman should be granted full capacity for the purpose of consenting to the abortion or whether the abortion is in the best interest of the pregnant woman.

§ 3206(f)(4).

Factual findings turn on the demeanor and credibility of witnesses, and a trial judge is in the best position to make such determinations. Because an appellate court does not benefit from the same myriad of details as does the trial judge, this Court has long recognized that significant discretion should be given to the factual assessments of trial courts.

> As long as sufficient evidence exists in the record which is adequate to support the finding found by the trial court, as factfinder, we are precluded from overturning that finding and must affirm, thereby paying the proper deference due to the factfinder who heard the witnesses testify and was in the sole position to observe the demeanor of the witnesses and assess their credibility. This rule of law is well established in our jurisprudence and is rooted in concepts of fairness, common sense and judicial economy.

Com., Dept. of Transp., Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 248 (1989); *Norfolk & W. Ry. Co. v. Pa. Public Utility*, 489 Pa. 109 (1980); *PHRC v. Chester Housing Authority*, 458 Pa. 67 (1974); *Burbage v. Boiler Eng'g. & Supply Co.*, 433 Pa. 319 (1969); and *D.F. Bast, Inc. v. Pa., PUC*, 397 Pa. 246 (1959)).

The deferential standard of this Court is followed by the federal courts as well which require that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed.R.Civ.P. 52(a)(6). This standard mirrors the abuse of discretion standard. "When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 401 (1990). That standard

> requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 1511-1512, 84 L.Ed.2d 518 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous")….

Id. at 400-01.

This Court should apply the "clearly erroneous" or "abuse of discretion" standard in this case because the determinations which must be made are factually intensive. Not only are the underlying questions that must be asked factual, but the ultimate issues of maturity and best interest are factual determinations as well. *See e.g. Indiana Planned Parenthood Affiliates Ass'n, v. Pearson*, 716 F.2d 1127, 1136 (7th Cir. 1983) (reasoning that the "determination of maturity is largely an issue of fact"); *People ex rel. P.K.*, 711 N.W.2d 248, 254 (S.D. 2006) (indicated that the "best interest of the child" was "essentially [an] issue[] of fact"); *Sears v. Fryman*, 2003 WL 22750946, No. 2003-CA-

000024-DG, at *1 (Ky. App. Nov. 21, 2003) (opining that "'the best interest of the child' is an issue of fact"); *Ex parte Anonymous*, 806 So. 2d 1269 (Ala. 2001) (recognizing that the "parental-consent statute itself" implied that "the determination of maturity, of whether the minor is well-informed, and of whether an abortion is in the minor's best interest" were questions of fact since the trial court was to "'issue written and specific factual findings' at the conclusion of the hearing"); *Pace v. Pace*, 22 P.3d 861, 865 (Wyo.2001) (stating that "the best interests of the child is a question for the trier of fact"); *In re Doe*, 19 S.W.3d 249, 253 (Tex.2000) (stating that the requirement for maturity and informed consent "implies that the trial judge is to weigh the evidence and determine the credibility of the minor or any other witnesses. These are typical fact-finding functions, performed by a trial court only after hearing the minor's live testimony and viewing her demeanor."); *In re Doe*, 974 P.2d 1067, 1077 (Haw. Ct. App. 1999) (recognizing that the "best interests of a child is a matter or question of ultimate fact reviewable under the clearly erroneous standard of review"). *But see Upon the Petition of Jane Doe*, 166 P.3d 293 (Col. Ct. App. 2007) (finding maturity and best interest to be mixed questions of law and fact). Indeed, this Court has long recognized that a child's best interest is to be evaluated under an abuse of discretion standard. *See e.g. Moore v. Moore*, 535 Pa. 18, 634 A.2d 163, 167-68 (1993). Since discretion is the appropriate standard for factual review, the Superior Court did not err by applying an abuse of discretion standard.

B. Abuse of Discretion is the Correct Standard Since Best Interest and Maturity Determinations are Inherently Subjective.

Not only is abuse of discretion the appropriate standard generally when dealing with factual determinations, but this standard is all the more appropriate since the

determinations that must be made are inherently subjective. Determinations of "best interest" often rest on the subjective, *see e.g. Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 836 n.36 (1977), and maturity is also difficult to measure objectively, *see e.g. Bellotti v. Baird*, 443 U.S. 622, 644 n.23 (1979) (plurality opinion) (*Bellotti II)* (recognizing that it is "difficult to define, let alone determine, maturity").

In response, some have gone so far as to suggest that the maturity question be jettisoned entirely because of its subjective nature.[1] However, such an approach defies Pennsylvania's statute which explicitly requires determinations of maturity and best interest, *see* § 3206, and it would defy the legislative intent and the interests sought to be protected by the statute to do away with these determinations. Others have suggested that a determination of maturity be made by objective criteria such as age,[2] but this, too, would defy the statutory language that requires the judge to consider factors and make an evaluation rather than create a one-size-fits-all rule.

It is important that the court not cherry pick one or two ingredients of "maturity" and "best interest" and substitute them for the complexities and nuances that are embodied in those terms. In this vein, some have advocated self-serving, fragmented definitions of "maturity" and "best interest" that go where the Pennsylvania General Assembly has declined to tread. To make a small part of these terms the equivalent of their whole would not only constitute a flagrant disregard of the plain language of the

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[1] A. Bonny, *Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings*, UC DAVIS JOURNAL OF JUVENILE LAW & POLICY 11(2):333 (2007).

[2] *See* Bonny, *supra*, at 324.

statute, it would also ignore the United States Supreme Court's cautious jurisprudence in this area.

The U.S. Supreme Court recognized that "the problem of determining 'maturity' makes clear" why "inevitably arbitrary" criteria are often used, but that "the peculiar nature of the abortion decision *requires* the opportunity for *case-by-case* evaluations of the maturity of pregnant minors." *Bellotti II*, 443 U.S. at 644 n.23. Moreover, "[s]uch case-by-case evaluations are best made by the trial court" since "many of the factors necessary for a trial court to make a determination of a petitioner's maturity do not readily transfer to the record for our consideration." *Ex parte Anonymous*, 806 So. 2d at 1274.

Since no objective standard would be consistent with the legislative intent of evaluating all the relevant evidence, *see* § 3206(f)(4) (stating that "the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the pregnant woman, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion and any other evidence that the court may find useful in determining whether the pregnant woman should be granted full capacity for the purpose of consenting to the abortion or whether the abortion is in the best interest of the pregnant woman"), a judge must be given discretion on a case-by-case basis to make the factual determinations of best interest and maturity. Since a judge must necessarily make a discretionary decision, the only appropriate standard of review is for abuse of discretion. Therefore, the Superior Court did not err in applying that standard.

C. Abuse of Discretion (or Clearly Erroneous) is the Standard Used by Nearly Every Other State that has Addressed this Issue.

While a majority of states have either a parental consent or parental notification statute containing a judicial bypass, there have been few cases on the subject. Therefore, the standard of review in most jurisdictions has not been directly addressed.[3] The majority of courts that have addressed the issue, when not set forth by statute, have employed the abuse of discretion (or clearly erroneous) standard.[4] By adopting that standard, the courts in these jurisdictions have properly recognized the importance of paying deference to the trial court's factual findings on the issues of maturity to form consent and the minor's best interest.

The Alabama Supreme Court rejected the *de novo* standard of review, *see Ex Parte Anonymous*, 806 So.2d. at 1275-76, reasoning that the maturity to give consent and best interest were factual questions, *see id.* at 1273-74 (citing *Indiana Planned Parenthood Affiliates Ass'n*, 716 F.2d at 1136; *Pace*, 22 P.3d at 865; *In re Doe*, 19 S.W.3d at 253; *In re Doe*, 974 P.2d at 1077; and *Schotz v. Oliver*, 361 So.2d 605, 607 (Ala. Civ. App. 1978)). Because the statute requires specific factual findings, the Court

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[3] The states that have not explicitly addressed this issue are: Arkansas, Delaware, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. While a Florida appellate court mentioned that it is generally bound to defer to factual determinations, it reversed the denial of a bypass petition where there were insufficient factual findings. *See In re Doe*, 932 So. 2d 278, 283-84, 286 (Ct. App. Fl., Dis. 2, 2005). Kansas employed plenary review, but only because the trial judge erred in the construction of the law itself. *See In re Doe*, 19 Kan. App. 2d 204, 208, 866 P.2d 1069 (1994). The appellate court and trial court both agreed that the minor was mature. *See id.* at 210.

[4] Alabama, *In re Anonymous*, 869 So.2d 498, 500 (Ala. Civ. App. 2003); Arizona, *In re B.S.*, 74 P.3d 285, 288-89 (Ariz. Ct. App. 2003); Hawaii, *In re Doe*, 974 P.2d at 1077; Mississippi, *In re R.B.*, 790 So.2d 830, 832 (Miss. 2001); Ohio, *In re Doe*, 749 N.E.2d 807, 807-08, 810 (Ohio 2001); Pennsylvania, *In re L.D.F.*, 820 A.2d at 716-17; Texas, *In re Doe*, 19 S.W.3d at 253.

recognized that it was at a disadvantage to the trial court in the absence of an ability to gauge demeanor and access credibility. Recognizing the unhelpful reality that testimony for judicial bypass petitions is often scripted, the Alabama Supreme Court concluded that the

> trial court is better suited to evaluate whether the minor's testimony is spontaneous or rehearsed. It is the only court that can perceive furtive or reassuring glances and gestures. [T]his Court is not in a better position than the trial court to determine maturity. Clearly, the trial court, as the fact-finder, has the advantage in discerning maturity and best interest.

Id. at 1274-75.

Similarly, in *In Re Jane Doe, 19 S.W.3d 278,* the Supreme Court of Texas utilized the abuse of discretion standard in reviewing the trial court's denial of a minor's application for waiver of parental notification on best interest grounds. In so doing, and in affirming the trial court's denial, the Court stated that "determining the minor's best interests requires the trial court to balance the possible benefits and detriments to the minor in notifying her parents [and that such] balancing necessarily involves the exercise of judicial discretion and should be reviewed on that basis." *Id.* at 281.

Several states have adopted the less-deferential *de novo* standard of review.[5] However, all of these jurisdictions have imposed this standard of review as part of its parental involvement statute or by rule of court.[6] Obviously, the Pennsylvania legislature did not include a *de novo* standard of review when it promulgated the parental consent law–though it certainly had that option. Since it did not, Pennsylvania appellate courts,

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[5] Iowa, Louisiana, Nebraska, North Carolina, and Tennessee.

[6] Iowa Ct.R. 6.401(3); La. Rev.Stat.Ann. § 40:1299.35.5(B)(7) (2010); Neb. Rev.Stat. § 71-6904(6) (2010); N.C. Gen.Stat.Ann. 90-21.8(h) (2010); Tenn. Code Ann. §37-10-304(g) (2010).

like the appellate courts in those states without a statutory mandate, should apply the typical and more deferential abuse of discretion standard in reviewing the findings of maturity and best interest. Therefore, the Superior Court did not err by applying the abuse of discretion standard.

D. Abuse of Discretion is the Standard Used with Other Matters Involving Factual Considerations—Even Those Involving Fundamental Rights.

Pennsylvania appellate courts review a trial court's findings of facts with extreme deference. It is a well-settled principle of Pennsylvania jurisprudence that the fact-finder at the trial court level is best able to make factual determinations. As the Pennsylvania Supreme Court has just recently reiterated, when reviewing findings of fact, "Our standard of review is 'limited to determining whether the trial court's findings are supported by competent evidence, whether errors of law have been committed, or whether the trial court's determinations demonstrate a manifest abuse of discretion.'" *McShea v. City of Philadelphia*, 995 A.2d 334, 338 (Pa. 2010) (quoting *Commonwealth, Dept. of Transportation, Bureau of Driver Licensing v. Tarnopolski*, 626 A.2d 138, 140 (Pa. 1993)).

Pennsylvania appellate courts' deference to trial courts reflects a time-tested and prudent distribution of power. The trial level fact-finder (whether judge or jury) is in a much better position to evaluate the demeanor and believability of witnesses than an appellate court reading a cold record. *See In re Meyers (Girsh Trust)*, 189 A.2d 852, 859-60 (Pa. 1963). As long as the factual record can be read to support the factual conclusions of the trial court fact-finder, an appellate court—even if it might come to a

different conclusion than the trial court—may not substitute its judgment for the trial court's. *See Commonwealth v. Treiber*, 874 A.2d 26, 31 (Pa. 2005).

When reviewing cases concerning a party's fundamental rights, Pennsylvania courts review factual determinations using the abuse of discretion standard. For example, this Court has held that in reviewing child custody cases, findings of fact may only be overturned if the appellate court finds that the trial court abused its discretion. *See Charles v. Stehlik*, 560 Pa. 334, 340 (2000) ("We have stated that an appellate court may not reverse a trial court's custody order absent a showing that the trial court abused its discretion.") The same holds true for appellate review of criminal convictions and guardianship decisions. *See Trieber*, 874 A.2d at 21; *In re Peery*, 727 A.2d 539, 540 (Pa. 1999).

In some cases involving a party's fundamental rights, Pennsylvania appellate courts apply an abuse of discretion standard to factual determinations but subject issues of law to plenary review. For example, in *In re Coats*, 849 A.2d 254 (Pa. Super. 2004), the Superior Court concluded that the lower court did not abuse its discretion in a case involving a prisoner's constitutional right to marry. *See id.* at 258 (citing *Jackson v. Vaughn*, 777 A.2d 436, 438 (Pa. 2001)). However, the court noted that a decision to deny relief based on the plaintiff's failure to state a cause of action in mandamus would be subject to plenary review. *See id.*

Pennsylvania appellate courts afford the trial courts significant discretion in making findings of fact because they recognize the respective strengths of the different tribunals. While the appellate courts are vested with the great responsibility of making clear what the law of Pennsylvania is, the trial courts are best suited to determine

questions of fact in individual cases—no matter the subject of the law in question. For example, in *Com. v. Martin*, 5 A.3d 177 (Pa. 2010), this Court reiterated its deference to the trial judge by stating that “it is inappropriate under this Court's deferential standard of review of factual determinations for us to overturn the PCRA court's decision.” *Id*. at 204. Likewise, in *Buffalo Tp. v. Jones*, 571 Pa. 637 (2002), this Court determined that the issue of abandonment of property should be reviewed for abuse of discretion because it was a fact laden question. *See id*. at 648 n.7 (“In reviewing fact-laden decisions, an appellate court displays a high level of deference to the trial court as the fact finder. *See, e.g.,* Martha Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (Winter 2000). Accordingly, our standard of review regarding an issue of abandonment is whether “a judicial mind, on due consideration of all the evidence, as a whole, could reasonably have reached the conclusion of that tribunal.”). Because Pennsylvania appellate courts employ the abuse of discretion standard in factually intensive contexts, even those affecting constitutional rights, the Superior Court did not err by employing that standard here.

E. A Heightened Standard that Would Result in Making the Grant of a Judicial Bypass Even More Routine would Undermine Legislative Intent, the Place of the Legislature, and the Important Interests the Legislature Sought to Protect.

As evidenced by the language of the Abortion Control Act, it is clear that the legislature envisioned a robust judicial bypass—not one that is granted as a matter of right. Instead, after hearing evidence, the trial judge is to weigh whether the minor is sufficiently mature to give informed consent and, if not, whether the abortion would be, in his assessment, in the minor’s best interest. *See* § 3206(c), (d), and (f). The instant

amici do not have the record, the opinions below, or even the briefing to know why Appellant deems the present standard to be problematic. However, to the extent that Appellant is suggesting a standard divesting the judge of discretion to make these factual determinations—resulting in even more routinely granted judicial bypasses—such a standard would undermine the clear intent of the legislature.

The legislature has expressed its interest in protecting "human life," 18 Pa.C.S.A. § 3202(b)(4), and the "life and health of the child subject to abortion" and "the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term" § 3202(a). Additionally, the language of the parental consent section indicates an additional interest in protection of minors *and* parental involvement through obtaining the informed consent of both the minor and her parent. *See* § 3206(a) (emphasis added). Moreover, the statute requires upholding the best interest of a minor when the parent or the minor cannot give consent. *See* § 3206(c).

Numerous courts recognize the importance of these interests, even when weighted against an interest in access to an abortion. *See e.g. Bellotti II*, 443 U.S. at 633-34.

> The Court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U. S. 528, 536 (1953) (concurring opinion). The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," *Moore v. East Cleveland*, 431 U. S. 494, 503-504 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents *and* children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Id. The “State is entitled to adjust its legal system to account for children's vulnerability and their needs for ‘concern,…sympathy, and…paternal attention.’” *Id*. at 635 (quoting *McKeiver v. Pennsylvania*, 403 U. S. 528, 550 (1971) (plurality opinion)). “The State commonly protects its youth from…their own immaturity by requiring parental consent to or involvement in important decisions by minors.” *Id*. at 637.

The governmental interest is particularly compelling here.

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns…
>
> “There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.”

Id. at 640 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52, 91 (1976) (Stewart concurring)).

Any suggestion that the grant of a judicial bypass is something that should be provided as a matter of course is contrary to the legislative intent of the Abortion Control Act. While there is a right to petition the court and a right to a judicial bypass when the statutory elements are satisfied to the satisfaction of the trial judge, *see* § 3206(c),(d), and (f), there is no right to a judicial bypass in all circumstances, and the standard of review

should not remove the discretion from the judge that the statute implies that the judge possesses. *See* § 3206(c) (stating that the bypass should be granted *if* "the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent"); § 3206(d) (stating that the bypass should be granted *if* "the court determines that the performance of an abortion would be in the best interests of the woman"); § 3206(f) (referring to "evidence that the court *may find useful in determining* whether the pregnant woman should be granted full capacity for the purpose of consenting to the abortion or whether the abortion is in the best interest of the pregnant woman" (emphasis added)).

It is well recognized that the intent of the legislature as set forth in the terms of statutes should not be set aside by the court. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S.A. § 1921. Since the legislature has been clear about how this law is to operate, this Court should not employ a standard that undermines the discretion given to trial judges in evaluating judicial bypasses. As set forth more fully in the final section, minors would be put in significant jeopardy of physical and emotional harm if the legislative intent of parental involvement is undermined through the routine grant of judicial bypasses as a matter of course. As it is, very few judicial bypasses are denied. It has been observed that in the various states with laws like this that "the judicial bypass currently appears to be functioning as a rubber stamp," despite the important underlying goals of these laws.[7] In the decades since Pennsylvania has had parental consent with a judicial bypass provision, the instant case appears to be the first before the Pennsylvania

[7] Stephanie A. Zavala, *Defending Parental Involvement and the Presumption of Immaturity in Minors' Decisions to Abort*, S. CAL. L. REV., 72: 1750 (1999).

Supreme Court. Clearly access is very broad. If anything, trial judges should be encouraged that judicial bypasses are meant to be meaningfully evaluated—to protect the compelling interests at stake—rather than routinely granted. For these reasons, therefore, the abuse of discretion standard should not be altered.

II. PENNSYLVANIA LAW PROTECTS MINORS BY PLAINLY REQUIRING EITHER ONE-PARENT CONSENT OR AN APPROVED JUDICIAL BYPASS PRIOR TO PERFORMING AN ABORTION ON A MINOR.

In order to protect minors, whose diminished maturity is well-established in the scientific literature (*see* section III.A, *infra*), the Pennsylvania Legislature left no ambiguity in the one-parent consent requirement of 18 Pa.C.S.A. § 3206. Pennsylvania's statute straightforwardly requires that before an abortion can be performed on a minor, she must either obtain one parent or guardian's consent, or successfully receive a judicially-granted bypass of the consent requirement. There is no constitutional requirement to read the statute any other way.

Absent "a medical emergency," a doctor may not perform an abortion on an unemancipated minor unless "he first obtains the informed consent both of the pregnant woman and of one of her parents," § 3206(a), or as applicable, her guardian or a person in loco parentis, § 3206(a) & (b). The statute provides one exception to § 3206(a)'s requirement: if the parents refuse to consent, or if the minor decides not to seek their consent, she may petition the court of common pleas, and the court "shall" authorize the abortion, but only "if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such

consent," § 3206(c), or "[i]f the court determines that the performance of an abortion would be in the best interests of the woman," § 3206(d).

The statute sets forth other procedural details like confidentiality, representation, deadlines and the like, but no other provision changes the requirement that a minor obtain either parental consent or successfully convince the court to grant a judicial bypass. If a doctor with requisite mens rea performs an abortion on a minor to whom the statute applies, but "fails to conform to any requirement of this section," he "is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be suspended," and he will be subject to tort findings of "failure to obtain informed consent and of interference with family relations in appropriate civil actions," including "exemplary damages or damages for emotional distress." § 3206(i). "Nothing in this section shall be construed to limit the common law rights of parents," *id.*, which requires parental consent not only for abortion but for any medical procedure on a minor, *Commonwealth v. Nixon*, 563 Pa. 425, 436, 761 A.2d 1151, 1157 (2000) ("Under the common law, a minor is deemed incompetent to provide informed consent. [] Until the age of majority, a minor's parents make medical treatment decisions on his or her behalf." (citation omitted)).

The plain reading of this statute is shared by the United States Supreme Court, which issued its groundbreaking ruling on § 3206 eighteen years ago. In upholding that statute in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion), the United States Supreme Court explained the statute according to its plain reading:

> except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian)

> provides informed consent . . . . If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

Id. at 899. Based on this plain-text reading, the Court held (*id.*) that the statute was consistent with prior parental consent cases, in which the Court had required only that states provide a judicial bypass where a minor could demonstrate either that she was sufficiently mature and informed to make the abortion decision on her own, or that an abortion would be in her best interests. *See Bellotti II*, 443 U.S. at 643–44.

The Supreme Court explained that § 3206's plain requirements are "reasonably designed to further the State's important and legitimate interest 'in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'" *Casey*, 505 U.S. at 841 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)). The Supreme Court recently upheld the right of states to require parental involvement (consent or notification) when a minor considers having an abortion. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

The plainness of § 3206's requirements is further illustrated by the fact that the statute, enacted in 1982, was evidently designed to meet the requirements that the Supreme Court set forth in *Bellotti II*. In that case, the Court held that, even though states could require parental consent before abortion, a state must also provide a way to bypass that consent. The Court described this requirement as follows:

> A pregnant minor is entitled in [a proceeding to bypass a parental consent requirement] to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or 2) that even if she is not able to make this

> decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth.*

Bellotti II, 443 U.S. at 643–44 (internal quotations omitted).

The fact that the statute provides a minor a right to a judicial bypass *petition*, does not mean that she has a right to have that bypass petition *granted* such that it could be said that § 3206 does not really require one parent's consent prior to the performance of an abortion. As the Court's describes in *Bellotti II,* and as the Pennsylvania statute requires, the judge is only required to authorize a non-parental-consent abortion "***if the court determines***" that the minor is sufficiently mature or the abortion is in her best interests. These are pure factual inquiries that, as explained above, are inherently in the judge's discretion (*see* section I.A, *supra*). The statute's plain requirement is that the judge be able to decide whether *or not* to grant a bypass to the *requirement* of parental consent contained in § 3206(a).

"The maturity of a pregnant minor must be determined on a case-by-case basis." *Bellotti II,* 443 U.S. at 643 n.23. For example, in *In re Doe*, 973 So.2d 548 (Fla. App. 2008), the court held that the maturity determination "is an inherently 'difficult, yet delicate and important, decision that a trial court must necessarily make, not only in light of the testimony of the minor, but also in the context of the minor's demeanor, background, and sundry other circumstances.'" *Id.* at 550 (quoting *In re Doe 2,* 166 P.3d 293, 295 (Colo. Ct. App. 2007)). The various factors for making the maturity determination listed in *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh,* 737

F.2d 283, 296 (3d Cir.1984), also illustrate that the bypass procedure is a *determination*, not guaranteed to be granted, and therefore not rendering the one-parent consent requirement of § 3206 a nullity.

III. THE COMMONWEALTH HAS A COMPELLING INTEREST IN PROTECTING MINORS FROM THE HARMS OF ABORTION PERFORMED WITHOUT PARENTAL INVOLVEMENT, ESPECIALLY IN LIGHT OF THE SCIENTIFICALLY ESTABLISHED DIMINISHED MATURITY OF MINORS.

The State has a profound interest in encouraging parental involvement in the abortion decision (and absent that involvement, allowing discretionary judicial review before an abortion is approved). Because minors are particularly susceptible to the immediate and long-term physical and psychological consequences of abortion, it is extremely helpful in most circumstances for a minor's parents to be involved. Moreover, minor's need for parental involvement is all the more acute since science established that they are still in the process of maturing in ways necessary to handle such a decision. If judicial bypasses are granted as a matter of right without deference to a judge's thoughtful determination of maturity and best interests, the State's interest in encouraging parental involvement in this critical decision will be undermined.

A. Not Only are the Risks Significant, But Due to the Proven Lack of Maturity of Minors, the Need for Parental Oversight is All the More Profound.

Psychology and neuroscience confirm the intuition of the legislature and courts: that minors are impaired in their decision-making ability by their "immaturity, inexperience, and lack of judgment." *Hodgson*, 497 U.S. at 444.

> [A]s any parent knows and as the scientific and sociological studies…tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

The American Psychological Association, the American Psychiatric Association, National Association of Social Workers, and Mental Health America, recently compiled the most up to date research on adolescent maturity into a brief for the United States Supreme Court (hereinafter APA Brief).[8] They concluded that cross-professional medical science "confirms that juveniles" (persons 17 and under) "are less mature, more vulnerable, and more changeable than adults." *Id.* at 7. They describe studies showing that "virtually every category of reckless behavior" is "a normative characteristic of adolescent development." *Id.*

Decision-making specifically has been shown to be significantly underdeveloped in adolescents. "[E]mpirical research confirms that adolescents, including older adolescents" up through 17 years of age "are more impulsive than adults and less able to exercise self control." *Id.* at 9. Adolescents display a "significant difference" in their "less mature weighing of risk and reward" that leads them to more risk taking generally and even criminal activity. *Id.* at 11. Research further shows that adolescents are less able to "foresee and take into account the consequences" of their decisions, including

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[8] Brief for the American Psychological Association, *et al*., 2009 WL 2236778 (July 23, 2009), in *Graham v. Florida*, 130 S.Ct. 2011 (2010); *also available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-7412_PetitionerAmCu4HealthOrgs.pdf (last accessed Dec. 22, 2010). For a more thorough treatment of the issues introduced here, see pages 9–18 and 22–27 of the brief.

short-and long-term consequences and other people's perspectives. *Id.* at 12. These decision-making skills, which empirical research shows are inherently deficient in adolescents, "are critical components of social and emotional maturity," and are "necessary in order to make mature, fully considered decisions." *Id.* at 12–13. Even "older adolescents (aged 16–17) might have logical reasoning skills that approximate those of adults, but nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment." *Id.* at 14–15.

Adolescents also need real parental or judicial oversight in the abortion decision because they are more susceptible to negative influences and pressure that impairs their decision-making. Studies show that "[j]uveniles' lesser ability to resist peer influence affects their judgment and behavior both directly and indirectly, leading juveniles to take risks that adults might not." *Id.* at 17. Their "mental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures." *Id*. at 18.

Even neuroscience shows the substantial immaturity of adolescents that needs parental involvement. Alongside the APA's brief in *Graham*, the American Medical Association and the American Academy of Child and Adolescent Psychiatry filed a brief generally agreeing with the APA's findings of adolescent immaturity (hereinafter AMA Brief).[9] The AMA adds that adolescents are more susceptible to the pressures of stress and of hormonal influences than adults, and even more than children, all of which

[9] Brief of the American Medical Association, *et al*., 2009 WL 2247127 (July 23, 2009), in *Graham v. Florida*, 130 S.Ct. 2011 (2010), *also available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-7412_NeutralAmCuAMAandAACAP.pdf (last accessed Dec. 22, 2010).

"translates into a further distortion of their already skewed cost-benefit analysis," *id*. at 11–12.

But both the AMA's and the APA's briefs conclude with startling findings showing that adolescent brains are actually different than those of adults. "[A]dolescent brains are not yet fully developed in regions related to risk evaluation, emotional regulation, . . . social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition." APA Brief at 22–23 (internal citations omitted). The AMA similarly observes that the prefrontal cortex, the part of the brain that controls "planning and organization," "decision-making, the ability to judge and evaluate future consequences, recognizing deception,… and making moral judgments," is "one of the last brain regions to mature." AMA Brief 16–18 (internal quotations and footnotes omitted).

The decision to have an abortion implicates all of the above decision-making deficiencies that science shows exist in adolescents.[10] Abortion has high risks physically and emotionally, as discussed below. But adolescents are inherently less capable of weighing such risks. Abortion can seem to them like the easy way out, one which the

[10] In the APA's brief it mentions that it has been criticized for filing a brief like this one on behalf of the petitioner in *Roper*, while also filing a brief in favor of the minor in an abortion case. *Id.* at 13 n.23. The APA responds by clarifying that in its abortion-related brief, it was not arguing that minors are mature in any of these ways, it was only arguing that some minors can achieve mere cognitive medical competency. *Id.* The standard under this statute, however, which the U.S. Supreme Court has upheld for a judicial bypass of parental consent, is not merely a determination of whether the minor is capable of cognitive medical competency. It is whether she is sufficiently "mature and" capable of informed consent. That statutory category of "maturity," as discussed in *Casey, Bellotti II* and other cases, incorporates all of the decision-making and consequence-discerning deficiencies that the briefs in *Graham* demonstrate.

minor might not have the self-restraint to resist long enough to fully consider its negative consequences. They consider their situation under enormous social, emotional and peer pressure, much of which tells them they should have an abortion, despite often being inclined not to have an abortion if the consequences could be seen as manageable. Other persons exert their own intense interests on these minors, including negative pressure for the minor to abort against her desires due to a boyfriend who faces a risk of paternity liability, or even an adult sexual abuser whose behavior will be uncovered if the pregnancy is known. Adolescents need discerning parental or judicial involvement to assist their inability to take the full range of consequences into account, and the Commonwealth has a compelling interest in protecting minors through this statute.

Courts have repeatedly recognized the importance of parental interaction with adolescents for weighty decisions like abortion. Indeed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U. S. 104, 115 (1982). Consequently, the Commonwealth's interest behind the parental consent provisions should be upheld by affirming the plain text reading of requiring either parental consent or a judge's discretionary review of her maturity and best interests, and by maintaining an abuse of discretion standard when the trial judge believes the elements for a bypass have not been met.

B. Minors Who Abort Face Demonstrated Physical Risks.

The scientifically demonstrable immaturity of adolescents leaves them particularly vulnerable to the similarly well-established risks that abortion can cause them if they make the decision without the experience of parental involvement.

1. Short-Term Physical Risks of Abortion

The undisputed[11] short-term physical risks of surgical abortion include blood clots; incomplete abortions, which occur when part of the unborn child or other products of pregnancy are not completely emptied from the uterus; infection, which includes pelvic inflammatory disease and infection caused by incomplete abortion; and injury to the cervix and other organs, which includes cervical lacerations and incompetent cervix—a condition that affects subsequent pregnancies.

Minors are even more susceptible to these risks than are older women. For example, minors are up to twice as likely to experience cervical lacerations during abortion.[12] Researchers believe that smaller cervixes make it more difficult to dilate or grasp with instruments. Minors are also at greater risk for post-abortion infections, such as pelvic inflammatory disease and endometritis.[13] Again, researchers believe that

[11] These risks are openly acknowledged by abortion providers. *See*, *e.g.*, Planned Parenthood, *In-Clinic Abortion Procedures* (2010), available at http://www.plannedparenthood.org/health-topics/abortion/abortion-procedures-4359.htm (last visited Dec. 22, 2010).

[12] *See*, *e.g.*, K.F. Schultz *et al.*, *Measures to prevent cervical injury during suction curettage abortion*, LANCET 1(8335):1182 (1993); R.T. Burkman *et al.*, *Morbidity risk among young adolescents undergoing elective abortion*, CONTRACEPTION 30(2):99 (1984).

[13] *See*, *e.g.*, R.T. Burkman *et al.*, *Culture and treatment results in endometritis following elective abortion*, AM. J. OBSTET. GYNECOL. 128(5):556 (1997); W. Cates, Jr., *Teenagers and sexual risk-taking: The best of times and the worst of times*, J. ADOLESC. HEALTH

minors are more susceptible because their bodies are not yet fully developed and do not yet produce the protective pathogens found in the cervical mucus of older women.

While these risks apply to surgical abortion, it is important to note that drugs producing a chemical abortion have never been tested on minors. For example, the common abortion drug RU-486 has only been tested on women aged 18 to 46.[14] We simply do not yet know how RU-486 has specifically affected young women; but we do know that by May of 2006, the FDA acknowledged a total of 1070 adverse event reports related to the use of RU-486.[15] These adverse events included 6 deaths, 9 life-threatening incidents, 232 hospitalizations, 116 blood transfusions, and 88 cases of infection.[16] Since that time, there have been hundreds of additional adverse events reported, as well as additional deaths in the United States.[17] A European drug manufacturer has publicly stated that 29 women have died worldwide after using RU-486.[18]

12(2):84 (1991); D. Avonts & P. Piot, *Genital infections in women undergoing therapeutic abortion*, EURO. J. OBSTET. GYNECOL. & REPROD. BIO. 20(1):53 (1985).

[14] *See* Mifeprex Label, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2000/20687lbl.htm (last visited Dec. 22, 2010)

[15] Staff Report, *The FDA and RU-486: Lowering the Standard for Women's Health*, prepared for the Chairman of the House Subcommittee on Criminal Justice, Drug Policy and Human Resources, at page 25 (Oct. 2006), available at http://www.usccb.org/prolife/issues/ru486/SouderStaffReportonRU-486.pdf (last visited Dec. 22, 2010)

[16] *Id*.

[17] *Id*. at 32.

[18] *See, e.g.*, APM Health Europe, *Italy questions safety of Exelgyn's abortion pill, approval still not granted* (June 23, 2009), available at http://www.apmhe.com/story.php?mots=MIFEPRISTONE&searchScope=1&searchType=0&numero=L15579 (last visited Dec. 22, 2010).

2. Long-Term Physical Risks of Abortion

Minors are also more susceptible to the long-term risks of abortion. In fact, the Guttmacher Institute—Planned Parenthood's research wing—has acknowledged that because minors are less likely than adults to take prescribed antibiotics or follow other regimens of treatment, they are at greater risk for subsequent miscarriage, infertility, hysterectomy, and other serious complications.[19]

Included in these long-term risks are the harmful effects on future pregnancies—yet most women who abort do so early in their reproductive lives while desiring to have children at a later time.[20] However, induced abortion increases the risk of pre-term birth (premature birth) and very low birth weight in subsequent pregnancies. Induced abortion has been associated with an increased risk of the premature rupture of membranes, hemorrhage, and cervical and uterine abnormalities, which are responsible for the increased risk of pre-term birth.[21]

Pre-term birth occurs prior to the 37th week of pregnancy and is very dangerous to the child. In 2006, the U.S. Centers for Disease Control announced that premature

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[19] Guttmacher Institute, *Teenage Pregnancy: Overall Trends and State-by-State Information* (Feb. 19, 2004).

[20] C. Moreau *et al.*, *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, BRIT. J. OBSTET. & GYN. 112:430, 431 (2005).

[21] *Id.*

birth is the leading cause of infant mortality.[22] It is also a risk factor for later disabilities for the child, such as cerebral palsy and behavioral problems.[23]

There are currently 114 studies showing a statistically significant association between induced abortion and subsequent pre-term birth.[24] In 2009 alone, three different systematic studies demonstrated the risk of pre-term birth following abortion. P. Shah *et al*. reported that induced abortion increases the risk of pre-term birth in a subsequent pregnancy by 37 percent, with two or more abortions increasing the risk by 93 percent.[25] Similarly, R.H. van Oppenraaij *et al*. found that a single induced abortion raises the risk of subsequent pre-term birth by 20 percent, with two or more abortions increasing the risk by 90 percent.[26] Those researchers also found that a woman who has two or more abortions doubles her risk of subsequently having a "very" premature baby (before 34 weeks gestation).[27] Likewise, Swingle *et al*. reported an odds ratio of a statistically

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[22] J.M. Thorp *et al*., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OBSTET. & GYNECOL. SURVEY 58[1]:67, 75 (2003); W.M. Callaghan, *The Contribution of Preterm Birth to Infant Mortality Rates in the U.S*., PEDIATRICS 118(4):1566 (Oct. 2006).

[23] B. Rooney & C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, J. AM. PHYSICIANS & SURGEONS 8(2):46, 46-47 (2003).

[24] *See*, *e.g*., J.M. Thorp *et al*., *supra*; B. Rooney & C. Calhoun, *supra*; American Association of Pro-Life Obstetricians & Gynecologists, *Dr. Iams* (2010), available at http://www.aaplog.org/get-involved/letters-to-members/dr-iams/ (last visited Dec. 22, 2010).

[25] P. Shah *et al*., *Induced termination of pregnancy and low birth weight and preterm birth: a systematic review and meta-analysis*, B.J.O.G. 116(11):1425 (2009).

[26] R.H. van Oppenraaij *et al*., *Predicting adverse obstetric outcome after early pregnancy events and complications: a review*, HUMAN REPROD. UPDATE ADVANCE ACCESS 1:1 (Mar. 7, 2009).

[27] *Id*.

significant 64 percent higher risk of "very pre-term birth" (before 32 weeks gestation) for women with one prior induced abortion.[28]

The 2009 studies simply confirmed what was already in the medical literature. For example, a 2005 study demonstrated that a woman who has an abortion is 50 percent more likely to deliver before 33 weeks, and 70 percent more likely to deliver before 28 weeks in subsequent pregnancies.[29] A 2003 study demonstrated that a woman who has two abortions doubles her future risk of pre-term birth, and a woman who has four or more abortions increases the risk of pre-term birth by 800 percent.[30]

The Institute of Medicine, which is part of the National Academy of Science, lists first-trimester abortion as a risk factor associated with subsequent pre-term birth.[31] Likewise, a renowned pregnancy resource book states, "if you have had one or more induced abortions, your risk of prematurity with this pregnancy increases by about 30 percent."[32] The resource also states that birth before 32 weeks is ten times more likely when a woman has an incompetent cervix—which has already been discussed as a common risk following abortion.[33]

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[28] H.M. Swingle *et al.*, *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review and Meta-Analysis*, J. REPROD. MED. 54:95 (2009).

[29] J.M. Thorp *et al.*, *supra*, at 75.

[30] B. Rooney & C. Calhoun, *supra*, at 46-47.

[31] R.E. Behrman, PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION 519 (2006).

[32] B. Luke, EVERY PREGNANT WOMAN'S GUIDE TO PREVENTING PREMATURE BIRTH 32 (1995).

[33] *Id*.

Abortion is also a risk factor for placenta previa in subsequent pregnancies.[34] Placenta previa increases the risk of fetal malformation and excessive bleeding during labor.[35] Placenta previa also increases the risk that the baby will die during the perinatal period, which begins after 28 weeks gestation and ends 28 days after birth.[36]

Finally, it is undisputed that a first full-term pregnancy offers a protective effect against subsequent breast cancer development.[37] A woman who aborts her first pregnancy loses this protection. Thus, not only does abortion pose an increased risk for future pregnancies, it also strips a woman of the protective effects of a first full-term pregnancy. Furthermore, while it is debated whether abortion is a direct cause of breast cancer, a study by pro-choice researcher Dr. Janet Daling in the *Journal of the National Cancer Institute* sheds light on the risk to minors. In her study, *every woman* with a family history of breast cancer who was under the age of 18 at the time of her abortion developed breast cancer before age 45.[38] In other words, the risk to minors was incalculable.

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[34] D.C. Reardon *et al.*, *Deaths Associated with Abortion Compared to Childbirth: A Review of New and Old Data and the Medical and Legal Implications*, J. CONTEMP. HEALTH LAW & POL'Y 20(2):279 (2004).

[35] J.M. Barrett, *Induced Abortion: A Risk Factor for Placenta Previa*, AM. J. OBSTET. & GYNECOL. 141:7 (1981).

[36] *Id.*; TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1630 (20th ed. 2001).

[37] D.C. Reardon *et al.*, *supra*. The woman also loses the protective effect against cancers of the cervix, colon and rectum, ovaries, endometrium, and liver. *Id.*

[38] J.R. Daling *et al.*, *Risk of Breast Cancer Among Young Women: Relationship of Induced Abortion*, J. NAT'L CANCER INST. 86(21):1584 (1994).

C. Minors Who Abort Face Demonstrated Psychological Risks.

Numerous studies have examined the effect abortion has on the mental state of women and confirm that abortion poses drastic risks—risks that inflict minors with particular force. These risks include depression, anxiety, and even suicide. One of the leading studies examined a sample group of over 500 women from birth to age 25.[39] That study, led by pro-abortion researcher D.M. Fergusson, was controlled for all relevant factors, including prior history of depression and anxiety and prior history of suicide ideation.[40] The Fergusson study found that 42 percent of young women experience major depression after abortion.[41] Moreover, minors were found to be particularly at risk for depression. In studying teens aged 15 to 18, researchers found that minors who became pregnant and carried to term had a 35.7 percent chance of experiencing major depression, but minors who aborted had an astonishing 78.6 percent chance of experiencing major depression.[42]

The study also found that women who abort are twice as likely to experience anxiety disorders.[43] In teens, the chance of experiencing anxiety after abortion was 64.3 percent, and the chance of suicidal ideation was 50 percent.[44] Importantly, the study

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[39] D.M. Fergusson *et al.*, *Abortion in Young Women and Subsequent Mental Health,* J. CHILD PSYCHOL. & PSYCHIAT. 41(1):16 (2006).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 19.

[43] *Id.* at 16.

[44] *Id.* at 19.

showed that abortion led to depression and anxiety, and that it was not depression and anxiety that led to the abortion. Likewise, a 2003 study showed that women who abort their first pregnancies were 65 percent more likely to be at "high risk" for depression than women who did not abort.[45]

Yet another study stated that "anxiety and depression have long been associated with induced abortion," and that anxiety is the most common adverse mental effect of abortion.[46] Up to 30 percent of women experience extremely high levels of anxiety and stress one month after abortion.[47]

Consider also the findings of the following studies:

- P.K. Coleman *et al.*: Across the four years studied, women who aborted had 40 percent more claims for neurotic depression than women who gave birth.[48]
- W.B. Miller *et al.*: Six to eight weeks post-abortion, 35.9 percent of women experienced some depression.[49]
- G. Congleton & L. Calhoun: Depression was reported in 20 percent of women who aborted.[50]

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[45] J.R. Cougle *et al.*, *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, MED. SCI. MONITOR 9(4):CR157, CR 162 (2003).

[46] V.M. Rue *et al.*, *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, MED. SCI. MONITOR 10(10):SR5, SR6 (2004).

[47] P. Coleman, *Induced Abortion and Increased Risk of Substance Abuse: A Review of the Evidence*, CURRENT WOMEN'S HEALTH ISSUES 1:21, 23 (2005); Z. Bradshaw & P. Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, CLINICAL PSYCHOL. REV. 23:929-58 (2003).

[48] *State-funded abortions vs. deliveries: A comparison of outpatient mental health claims over four years*, AMER. J. ORTHOPSYCHIATRY 72:141 (2002).

[49] *Testing a model of the psychological consequences of abortion*, in L.J. Beckman & S.M. Harvey, THE NEW CIVIL WAR: THE PSYCHOLOGY, CULTURE, AND POLITICS OF ABORTION (American Psychological Association 1998).

- P.K. Coleman & E.S. Nelson: Depression increased after abortion to a rate of 56.7 percent.[51]

- H. Soderberg *et al.*: 50 to 60 percent of aborting women experienced emotional distress of some form, with 30 percent of cases classified as severe.[52]

- L.M. Pope *et al.*: 19 percent of women experienced moderate to severe levels of depression 4 weeks post-abortion.[53]

- W. Pedersen: Women with an abortion history were nearly 3 times as likely as their peers without an abortion to report significant depression.[54]

- D.I. Rees & J.J. Sabia: After adjusting for controls, abortion was associated with more than a two-fold increase in the likelihood of having depressive symptoms at a second follow-up.[55]

- F.O. Fayote *et al.*: Previous abortion was significantly associated with depression and anxiety among pregnant women.[56]

  Thus, abortion increases stress and decreases the ability to deal with stress.[57]

These findings are significant, because depression is a known risk factor for suicide.[58]

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[50] *Post-abortion perceptions: A comparison of self-identified distressed and non-distressed populations*, INT'L J. SOC. PSYCHIATRY 39:255 (1993).

[51] *The quality of abortion decisions and college students' reports of post-abortion emotional sequelae and abortion attitudes*, J. SOC. & CLINICAL PSYCHOLOGY 17:425 (1998).

[52] *Emotional distress following induced abortion: A study of its incidence and determinants among abortees in Malmo, Sweden*, EUROPEAN J. OBSTET. & GYNECOL. & REPROD. BIOLOGY 79:173 (1998).

[53] *Post-abortion psychological adjustment: Are minors at increased risk?*, J. ADOLESCENT HEALTH 29:2 (2001).

[54] *Abortion and depression: A population-based longitudinal study of young women*, SCANDINAVIAN J. PUB. HEALTH 36(4):424 (2008).

[55] *The relationship between abortion and depression: New evidence from the Fragile Families and Child Wellbeing Study*, MED. SCI. MONITOR 13(10):430 (2007).

[56] *Emotional distress and its correlates*, J. OBSTET. & GYNECOL. 5:504 (2004).

For example, the Fergusson study found that 27 percent of women who aborted reported experiencing suicide ideation, with as many as 50 percent of minors experiencing suicide or suicide ideation.[59] The risk of suicide was three times greater for women who aborted than for women who delivered. The researchers concluded that their findings raised the possibility that, for some young women, exposure to abortion is a traumatic life event which increases longer-term susceptibility to common mental disorders.[60]

The Fergusson study is not the first (nor the last) to demonstrate a connection between induced abortion and suicide. Ten years prior to the 2006 Fergusson Study, a team led by M. Gissler found that the suicide rate was nearly 6 times greater among women who aborted compared to women who gave birth.[61] In 2005, Gissler *et al*. once again found that abortion was associated with a 6 times higher risk for suicide compared to birth.[62]

Other studies have found an even higher risk following abortion. In 1995, Gilchrist *et al*. reported that, among women with no history of psychiatric illness, the rate

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[57] V.M. Rue *et al*., *supra*, at SR5-SR16.

[58] J.R. Cougle *et al*., *supra*, at CR 162.

[59] D.M. Fergusson *et al*., *supra*, at 19, Table 1.

[60] *Id*. at 22.

[61] M. Gissler *et al*., *Suicides after pregnancy in Finland, 1987-94: Register linkage study*, BRIT. MED. J. 313:1431 (1996).

[62] M. Gissler *et al*., *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, EURO. J. PUBLIC HEALTH 15:459 (2005).

of deliberate self-harm was 70 percent higher after abortion than childbirth.[63] In a comparison study of American women and Russian women, V.M. Rue *et al*. reported that 36.4 percent of the American women and 2.8 percent of the Russian women reported suicidal ideation.[64] While abortion has a "deleterious effect," childbirth appears to have a protective effect against suicide.[65]

Other studies have linked a history of abortion to sleeping disorders, eating disorders, and promiscuity, all of which are destructive to women's health.[66] In 2006, researchers in a federally-funded study found that adolescents who abort their unintended pregnancies are five times more likely to seek help for psychological and emotional problems afterward than those adolescents who carried their pregnancies to term.[67] The study also revealed that adolescents who had abortions were three times more likely to experience trouble sleeping.[68]

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[63] A.C. Gilchrist *et al*., *Termination of pregnancy and psychiatric morbidity*, BRIT. J. PSYCHIATRY 167:243 (1995).

[64] V.M. Rue *et al*., *supra*.

[65] J.R. Cougle *et al*., *supra*, at CR162. *See also* M. Gissler *et al*., *Pregnancy-associated deaths in Finland 1987-1994: Definition problems and benefits of record linkage*, ACTA OBSTETRICA ET GYNECOLOGICA SCANDINAVICA 76:651 (1997).

[66] D.C. Reardon & P.C. Coleman, *Relative Treatment Rates for Sleep Disorders and Sleep Disturbances Following Abortion and Childbirth: A Prospective Record-Based Study*, J. SLEEP 29:105-06 (2006); D.C. Reardon *et al*., *supra*.

[67] P.J. Smith, *Study Shows Abortion Takes Toll on Adolescent Mental Health* (Aug. 18, 2006), available at http://www.lifesitenews.com/ldn/2006/aug/06081805.html (last visited Dec. 22, 2010) (discussing the federally-funded P. Coleman research in *Journal of Youth and Adolescents*).

[68] *Id*.

Abortion may also sometimes fuel other destructive behaviors, such as subsequent drug and alcohol abuse. Women who abort are twice as likely to drink alcohol at dangerous levels and three times as likely to become addicted to illegal drugs.[69] Women who never abused drugs before abortion are 4.5 times more likely to abuse drugs after abortion.[70] Another study found that the use of drugs other than marijuana was 6.1 times higher among women who had abortions than women who did not have abortions.[71] Regarding minors, one study found that minors who abort their pregnancies are nine times more likely to report marijuana use after their abortions than are minors who carry their pregnancies to term.[72]

There are over 1 million induced abortions performed in the United States each year.[73] Minors aged 15 to 17 account for six percent of all abortions—thus an estimated 60,000 abortions per year.[74] The Guttmacher Institute—again, the research arm of Planned Parenthood, the nation's leading abortion provider—has estimated that 40

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[69] D.M. Fergusson *et al.*, *supra*.

[70] P.G. Ney, *Abortion and Subsequent Substance Abuse*, AM. J. DRUG & ALCOHOL ABUSE 26:61-75 (2000).

[71] K. Yamaguchi & D. Kandel, *Drug Use and Other Determinants of Premarital Pregnancy and its Outcome: A Dynamic Analysis of Competing Life Events*, J. MARRIAGE & FAMILY 49:257-70 (1987).

[72] P.J. Smith, *supra* (discussing P. Coleman research in *Journal of Youth & Adolescents*).

[73] Guttmacher Institute, *In Brief: Facts on Induced Abortion in the United States* (May 2010), available at http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited Dec. 22, 2010).

[74] *Id*.

percent of teenage abortions occur without parental involvement.[75] Those teens are left without the protective oversight of their parents following abortion—oversight that might alert parents to psychological effects before it is too late. Therefore, parental involvement should be encouraged by judges who carefully exercise discretion after scrupulously following the hearing outline established in the Abortion Control Act at § 3206(f)(4) rather than merely rubber stamp judicial bypass petitions.

[75] Guttmacher Institute, *Teenage Pregnancy*, *supra*.

CONCLUSION

Amici curiae respectfully request this Honorable Court to maintain the abuse of discretion standard in the review of a denial for a judicial bypass, and, to the extent in question, to uphold the parental consent provisions of the Abortion Control Act.

Respectfully submitted,

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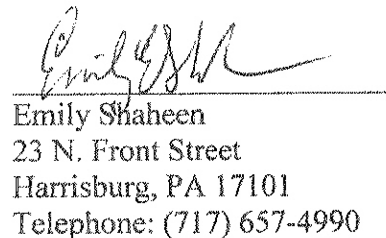
By: 

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