No. ____

In the Supreme Court of the United States

MICHELLE CHAPMAN,

Petitioner,

v.

JANE DOE, BY NEXT FRIEND ANTHONY E. ROTHERT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC S. SCHMITT
Missouri Attorney General
JEFF P. JOHNSON
Deputy Solicitor General
Counsel of Record
D. JOHN SAUER
Solicitor General
(314) 340-7366
Jeff.Johnson@ago.mo.gov

Office of the Missouri
Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
Office of the Missouri

Counsel for Petitioner

QUESTIONS PRESENTED

In December 2018, Respondent Jane Doe, an unemancipated minor, sought a judicial bypass procedure to have an abortion from a Missouri circuit The clerk's office, reporting to Petitioner Michelle Chapman, was initially unfamiliar with the process and asked Doe to return. After consulting with the judge, Clerk Chapman required that any petition for a bypass required that notice of the hearing be sent to Doe's parents. The questions presented are:

1. Whether Clerk Chapman was properly denied quasi-judicial immunity because the judge could not recall anything about the case, including whether he directed her to notify the parents when an unemancipated minor filed an application for a judicial bypass to have an abortion?

2. This Court has repeatedly "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional." *Lambert* v. *Wicklund*, 520 U.S. 292, 295 (1997) (per curiam). In light of this Court's announcements, was it clearly established in 2018 that providing pre-hearing notification to an unemancipated minor's parent of a judicial bypass procedure violates the minor's clearly established rights?

3. Whether in light of this Court's intervening decision in *Dobbs* v. *Jackson Women's Health Org*., 142 S. Ct. 2228, 2284 (2022), the Court should remand to determine whether Doe can show she has a right to a judicial bypass procedure without notice to her parents?

PARTIES TO THE PROCEEDING

Petitioner is Michelle Chapman, in her official capacity as the Circuit Clerk for Randolph County, Missouri.

Respondent is Jane Doe, by her next friend Anthony E. Rothert.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Jane Doe, by next friend Anthony E. Rothert* v. *Michelle Chapman*, No. 21-1692 (8th Cir.) (order denying petition for rehearing and rehearing en banc, issued June 2, 2022)
- *Jane Doe, by next friend Anthony E. Rothert* v. *Michelle Chapman*, No. 21-1692 (8th Cir.) (opinion affirming the order of the district court, issued April 7, 2022); and
- *Jane Doe, by next friend Anthony E. Rothert* v. *Michelle Chapman*, No. 2:19-cv-25-CDP (E.D. Mo.) (order denying qualified immunity and quasi-judicial immunity entered on March 23. 2021).
- *Michelle Chapman, Clerk, Circuit Court of Missouri, Randolph County* v. *Jane Doe, by Next Friend Anthony E. Rothert*, No. 22A146 (Aug. 18, 2022) (granting application for extension to file petition for writ of certiorari).

There are no other proceedings in state or federal court or this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The district court's opinion denying Petitioner's claims of qualified immunity and quasi-judicial immunity (and denying cross-motions for summary judgment), is reported at 528 F. Supp. 3d 1051 (E.D. Mo. Mar. 23, 2021), and reprinted at 21a of the Appendix.

The Eighth Circuit's opinion affirming the district court's opinion is reported at 30 F. 4th 766 (8th Cir. 2022), and reprinted at 1a of the Appendix, and the dissenting opinion begins at 30 F. 4th 775 and at 16a of the Appendix.

JURISDICTION

The district court had jurisdiction over the case pursuant to 28 U.S.C. § 1331. The court of appeals issued its opinion on April 7, 2022, and denied the petition for rehearing and rehearing en banc on June 2, 2022. The time to file a petition for certiorari was extended to September 30, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1) and this Court's decision in *Mitchell* v. *Forsyth*, 472 U.S. 511, 525–30 (1985) (orders denying claims of qualified immunity are immediately appealable).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Chapter 42 of the United States Code § 1983 is reproduced at App. 41a. Section 188.028 of the Missouri Revised Statutes is reproduced at App. 45a.

STATEMENT OF THE CASE

A. Doe seeks to file a petition for a judicial bypass procedure with the Circuit Court for Randolph County.

Respondent Jane Doe, a pregnant unemancipated minor, wanted to have an abortion without the consent of her parents. App. 24a. She sought one using Missouri's judicial bypass procedure set forth in § 188.028 of Missouri's Revised Statutes in force at the time.[1] *See* App. 41a. Under the statute, the unemancipated minor must prepare a petition setting forth the minor's initials and age, as well as the names and addresses of the minor's parents, among other things. Mo. Rev. Stat. § 188.028.2(1). That petition protects her confidentiality, requiring only her initials. *Id.* A hearing on the merits of the petition must be held by the juvenile court within five days of the filing of the petition. *Id.* at § 188.028.2(2). Before the hearing, counsel shall be appointed for any party who cannot afford it. *Id.*

At the hearing, the court "shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining … whether the abortion is in the best interests of the minor[.]" *Id.* If the court determines there is good cause, it will grant the petition, and any order requires the court to set forth

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[1] Petitioner notes, as the court of appeals recognized could occur, that Missouri's Right to Life of the Unborn Child Act would override this statute. App. 15a n.2; *see* Mo. Rev. Stat. § 188.017.

its reasons. *Id.* at § 188.028.2(3). The statute provides that an appeal may be taken "by the minor or by a parent or guardian of the minor" and that the notice of intent to appeal must be filed "within twenty-four hours from the date of issuance of the order." *Id.* at § 188.028.2(5). An unemancipated minor's successful petition results in an order that "shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion… ." *Id.* at § 188.028.2(4). Despite the statute's requirements for a petition and the time within which a parent may appeal, the statute does not state whether notice of the hearing must be sent to a parent listed on the petition.

When Doe went to her local courthouse in 2018, the clerk's office needed to research the judicial bypass requirements because "they had 'never heard of that before.'" App. 27a. Indeed, the clerk's office had to adopt sample forms to be used for the petition and the notice. CA Vol. I, JA 58–62; CA Vol. II JA 160, 202–05, 211–212. At her second visit, Doe "was told that she could not file a petition without notifying a parent." *Id.* Clerk Chapman later followed up with Doe stating that "she had the paperwork for [Doe] to fill out but that 'our Judge requires that the parents will be notified of the hearing on this.'" App. 27a–28a.

On her third visit to the courthouse, Doe requested the opportunity to file for judicial bypass but declined to do so because the clerk's office informed her that filing the petition would require notifying a parent. App. 29a. She received an abortion after an Illinois court authorized it without parental notice. *Id.*

Clerk Chapman explained at her deposition that with new filings "I will always get the advice of my

judge that handles this type of case, what he's going to require for it, how he wants us to handle [it] and then I will work from there." *Id.* at 28a. She further stated that she had talked with the juvenile court judge, the Honorable James M. Cooksey, who told her that he would require Doe to send notice to her parents if she filed a bypass application. *Id.* "[H]is words were that he would require us to send notification to these parties." App. 3a. She further noted that "Judge Cooksey 'advised that he would not hear the case without giving notice to the parents.'" *Id.* When asked, Judge Cooksey repeatedly testified that he could not recall what he had said or if he had said anything at all. App. 17a. He specifically stated he could not recall if he ever told Clerk Chapman not to accept an application unless she sent notices to Doe's parents. *Id.* He concluded, "I wouldn't have had any authority to do that unless something was filed and I looked at the law. It's not how I usually would operate. I mean I don't have any recollection of ever doing that." App. 17a–18a.

B. Proceedings in the District Court.

Doe filed suit alleging that Clerk Chapman violated her Fourteenth Amendment right to obtain an abortion without parental consent under 42 U.S.C. § 1983 by requiring notice of the judicial bypass hearing to a parent. App. 21a. Her only remaining claim is for damages against defendant in her individual capacity. App. 22a.

Chapman moved for summary judgment on the grounds of quasi-judicial and qualified immunity. *Id.* She asserted that her actions were in accordance with the statutory procedures and that the judge directed her actions. *Id.* She also argued that Doe's alleged

right to a judicial bypass hearing without notice to a parent was not clearly established and that she did not violate Doe's rights. App. 23a.

The district court denied the motion. *Id.* It held that the statute did not require prehearing notification of the minor's parents to obtain judicial authorization for an abortion. *Id.* Then, the court held there was a disputed material fact as to whether Clerk Chapman's actions were done at the express direction of her judge. *Id.* In the court's view, the case boiled down to whether Judge Cooksey "did, in fact, tell" Clerk Chapman that he would require that Doe's parents be notified of her application for the judicial bypass. App. 32a. Quasi-judicial immunity did not depend on whether the judge was correct or if "he was mistaken," because a "mistake would not strip defendant of quasi-judicial immunity in this case." App. 31a. Because it was undisputed that the judge had no recollection, the court focused on the judge's testimony that instructing the clerk not to accept the petition without notifying the parents is not he "usually operates." App. 32a–33a. Relying on the summary judgment standard, the court found for Doe,[2] the non-moving party in that instance. App. 33a.

The district court denied qualified immunity to Clerk Chapman for two reasons. First, the court rejected Petitioner's argument that § 188.028 is both a parental consent and a parental notification statute.

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[2] On this reasoning that Judge Cooksey's testimony created a genuine issue of material fact, the court also denied Plaintiff's motion for partial summary judgment. App. 30a–31a, 40a. Doe has not appealed this ruling.

App. 34a–35a. The court reasoned that a legislative amendment in 1986 that deleted a requirement for the petition and notice of the hearing to be served upon each parent showed that the amended statute contained no such requirements. App. 35a. Second, the court acknowledged that this Court had not decided "whether a mature or 'best interest' minor is unduly burdened when a State requires parental notification to her parents before she may obtain an abortion." App. 37a–38a. Still, the court held it was "clearly established" that parental notice was not required here because the Eighth Circuit had held that Missouri's judicial bypass procedure notice provision (removed in 1986) was unconstitutional. App. 39a (citing *Planned Parenthood Ass'n of Kan. City, Mo., Inc.* v. *Ashcroft*, 655 F.2d 848, 859 (8th Cir. 1981)).

C. Proceedings before the Court of Appeals.

Clerk Chapman appealed the denial of quasi-judicial immunity and qualified immunity to the U.S. Court of Appeals for the Eighth Circuit. On April 7, 2022, the Eighth Circuit affirmed the district court's opinion in a 2-1 decision. App. 1a, *Doe* v. *Chapman*, 30 F.4th 766 (8th Cir. Apr. 7, 2022).

Reviewing the quasi-judicial immunity arguments, the Eighth Circuit dismissed the argument that Judge Cooksey's lack of memory failed to create an issue of material fact because the testimony "references a regular practice of declining to give pre-filing directions." App. 4a. Instead, the court explained that Federal Rule of Evidence 406 permits courts to infer "that a routine practice was actually carried out." App. 5a–6a (quoting *Hancock* v. *Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1261–62 (10th Cir.

2012)). As a result, it found Judge Cooksey's statement that pre-filing direction is "not how I usually would operate," based on his belief he did not have authority to act until a petition was filed, "highly persuasive" habit evidence. App. 9a. Accordingly, this habit evidence created a genuine issue of material fact as to whether Clerk Chapman acted at the judge's discretion, and the district court properly denied quasi-judicial immunity. *Id.*

Judge Stras dissented, explaining that he would find that quasi-judicial immunity applied because Judge Cooksey's "one offhand remark" did not create a triable issue of fact. App. 16a. He recounted that Clerk Chapman had always contended that she was following the judge's directions. App. 17a. Judge Cooksey's testimony, however, showed he "had trouble remembering anything." *Id.* He disclaimed any "independent recollection of what this case is [about]" and was unable to recall what, if anything, he had said to Clerk Chapman. *Id.* Moreover, that one remark was sandwiched between statements stating what he did not recall or remember. App. 18a.

Judge Stras concluded that the statement of what the judge would not usually do was not habit evidence. *Id.* For one thing, it could not reflect a regular practice because the judge denied ever looking at judicial bypasses. App. 18a–19a. At most, the statement was inconclusive and unable to create a genuine issue of material fact. App. 19a.

To determine whether qualified immunity should be granted, the Court of Appeals court reviewed this Court's precedents addressing parental consent and parental notice statutes for minors seeking an abortion. App. 10a–13a. It noted that this Court had

found a one-parent consent statute unconstitutional without a judicial bypass. App. 11a (citing *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 72 (1976)). In *Bellotti* v. *Baird*, 443 U.S. 622, 625 (1979) (*Bellotti II*),[3] the Court also rejected a statute that permitted a judicial bypass after one parent refused consent (and thus had notice). App. 11a. The court explained that Justice Powell's plurality reasoned that the statute posed an undue burden because a minor should be able "to go directly to a court without first consulting or notifying her parents." *Id.* (quoting *Bellotti II*, 443 U.S. at 647–48 (Powell, J., concurring)). By the court's lights, Justice White's dissent revealed that the Court had held that parents could not receive notice of or participate in a hearing. App. 12a.

The court's opinion contrasted this Court's precedents regarding statutes allowing physicians to perform abortions on minors with notice to parents. *Id.* These parental notice statutes have been upheld, including a parental notice statute without a bypass procedure for an unemancipated minor living with her parents. App. 13a (citing *H. L.* v. *Matheson*, 450 U.S. 398, 407–10 (1981)). The panel noted that this Court "has not decided whether a parental notification statute must include some sort of bypass provision to be constitutional." App. 12a (quoting *Lambert* v. *Wicklund*, 520 U.S. 292, 295 (1997)).

The Eighth Circuit recognized that its precedents also distinguished between parental consent statutes

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[3] In *Bellotti* v. *Baird*, 428 U.S. 132, 152 (1976) (*Bellotti I*), the Court required the district court to certify questions of state law to the Supreme Judicial Court of Massachusetts.

and parental notice statutes. In *Planned Parenthood Association of Kansas City*, the court had held that an earlier version of § 188.028 was unconstitutional because it "requires mature or 'best interests' minors to give notice to their parents prior to the court hearing in which they seek judicial consent for an abortion." App. 13a–14a. Despite acknowledging that this Court had not decided whether notice statutes required a bypass, the panel explained that Eighth Circuit precedent held that "parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti [II]*-type bypass." App. 14a (quoting *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995)). The court noted but did not reconcile the Fourth Circuit's precedent holding that notice statutes do not require a bypass procedure. App. 14a (citing *Planned Parenthood of Blue Ridge* v. *Camblos*, 155 F.3d 352, 367 (4th Cir. 1998) (en banc)).

Turning to the case at hand, the panel determined that Missouri's statute was a parental consent statute, like that in *Bellotti II*, because it requires consent or a court order bypassing consent. App. 14a–15a. The panel decided that Clerk Chapman had implemented the statute struck down in *Ashcroft* and held that *Bellotti II* clearly established that "parental consent statutes are unconstitutional unless they provide the pregnant minor an opportunity to seek a court order without notifying her parents." App. 15a.

The panel declined to address Clerk Chapman's remaining arguments, and the court affirmed the district court.

In the petition for rehearing en banc, Clerk Chapman asked the Eighth Circuit to hold the case in

abeyance pending this Court's decision in *Dobbs* v. *Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021). The petition explained that should *Dobbs* overrule this Court's precedents (finding a constitutional right to an abortion), that ruling would impact this case and raise a threshold question of whether Doe could show that a right to a judicial bypass hearing to obtain an abortion even exists. The Eighth Circuit denied the petition for rehearing and rehearing en banc, App. 20a, and this Court overruled *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsyvania* v. *Casey*, 505 U.S. 833 (1992), three weeks later. *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

Missouri filed this timely petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Extent to which State Court Clerks are Entitled to Quasi-Judicial Immunity.

The Court should grant certiorari to decide the extent to which state court clerks receive quasi-judicial immunity because the Eighth Circuit erroneously decided a question of increasing urgency and importance that this Court has not previously addressed.

Quasi-judicial immunity is derivative of the absolute immunity that judges enjoy against a suit for money damages. *See Mireles* v. *Waco*, 502 U.S. 9 (1991) (per curiam). There are two kinds of quasi-judicial immunity recognized in the circuits: (1) public officials whose conduct is functionally similar to that of judges, and (2) officials who act more as an extension or functionary of the judge will be immune for actions taken at her direction. *Richman* v. *Sheahan*, 270 F.3d 430, 435 (7th Cir. 2001); *see also Hamilton* v. *City of Hayti*, 948 F.3d 921, 928 (8th Cir. 2020). Although this Court has determined that court reporters do not receive absolute immunity for their functions, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993), it appears that the Court has yet to pass on the extent to which state court clerks receive absolute immunity. It is well-accepted that filing an application or other documents is a delegated judicial function within the context of absolute immunity. *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1247 (10th Cir. 2007) (collecting cases).

It is undisputed that if Clerk Chapman's statements to Doe "about prehearing notification were

made because the presiding judge told her that is what he required," then she "would be entitled to quasi-judicial immunity." App. 22a–23a; *accord* *Rogers* v. *Bruntrager*, 841 F.2d 853, 856 (8th Cir. 1988) (deputy clerk who acted "at the direction of the" judge absolutely immune); *McCaw* v. *Winter*, 745 F.2d 533, 534 (8th Cir. 1984) (per curiam) (clerk "acting pursuant to the judge's directions" absolutely immune). The issue is what happens when the judge cannot remember or recall any details about the case.

Even though the circuit clerk's office "had never heard of" a judicial bypass procedure, App. 27a, the court of appeals held that the judge's statement that giving pre-filing directions is "not how I usually would operate" was "highly persuasive" habit evidence. App. 9a. This is contrary to several of his statements, including the ones bookending the critical phrase, that he had no recollection. App. 18a. This is insufficient to create an issue of material fact. *See To v. U.S. Bancorp*, 651 F.3d 888, 892 n.2 (8th Cir. 2011) ("An assertion that a party does not recall an event does not itself create a question of material fact about whether the event did, in fact, occur.").

A. The Eighth Circuit's resolution of Clerk Chapman's quasi-judicial immunity was erroneous and contrary to Supreme Court precedent.

Judge Cooksey's one-line phrase does not even create a "metaphysical doubt as to the material facts" and quasi-judicial immunity should have been granted. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986). A mountain of evidence contradicts this offhand comment and any

suggestion that this is proper habit evidence under Federal Rule of Evidence 406.

A court properly grants summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome," and a dispute is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" and, "if the evidence is merely colorable or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. at 249–50 (cleaned up).

As Judge Stras emphasized, Clerk Chapman "has never wavered" from her testimony that she was following Judge Cooksey's directions. App. 17a. Doe testified that she had to make a second trip to the courthouse because the clerk's office needed to research the judicial bypass procedure because they had "never heard of that before." App. 27a. Clerk Chapman testified that the request was "something that was new … I will always get the advice of my judge that handles this type of case[.]" App. 28a (citing Doc. 91-2 at 27–28). She stated that Judge Cooksey told her that he would require plaintiff (Doe) to send a notification to her parents when she filed a bypass application. *Id.* The staff attorney that drafted the summons order testified that Clerk Chapman had talked to the judge and that "he would want summonses to the natural parents, so I included that in my draft order." Vol. I, JA at 141 (Bickel Dep.).

The court of appeals relied on one statement by Judge Cooksey that he would not usually give pre-filing directions because he does not have authority to act without a filing. App. 9a. But his first and oft-repeated response was that he did not recall. App. 17a; *see also* Vol. I, JA at 97–99 (Cooksey Dep.). Unlike Clerk Chapman who testified as to what she "always" did, the one-off statement from Judge Cooksey does not rise to the level of habit evidence.[4] Judge Cooksey denied he had looked up the law on judicial bypasses, App. 19a, and he could not have formed a habit when the clerk's office had not handled a request for a judicial bypass or heard of one.

Judge Cooksey's testimony that he does not recall is at best inconclusive and insufficient to create a genuine issue of material fact. *Hemphill v. State Farm Mut. Auto Ins. Co.*, 805 F.3d 535, 541 (5th Cir. 2015) ("Lack of memory by itself is insufficient to create a genuine issue of material fact"); *Mucha* v. *Vill. of Oak Brook*, 650 F.3d 1053, 1056 (7th Cir. 2011) (plaintiff's testimony that he "could not recall" whether event occurred was "inconclusive" and so "cannot by itself create a genuine factual dispute"); *Fed. Elec. Comm'n* v. *Toledano*, 317 F.3d 939, 950 (9th Cir. 2002) ("[F]ailure to remember and lack of knowledge are not sufficient to create a genuine dispute."). And the judge's lack of recollection cannot

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[4] The Court of Appeals' citation to *Smith* v. *Arrington Oil & Gas, Inc.*, 664 F.3d 1208 (8th Cir. 2012) favors petitioner. The court there found there was no habit evidence because the routine statements were not germane to the dispositive legal element, whether there was "a good faith disapproval of title." *Id.* at 1218. Thus other similar transactions were inconclusive as to what the party may or may not have done. *Id.*

(and should not) be treated as the equivalent of a denial. *Cf. Kennedy v. City of New York*, 570 Fed. App'x 83, 84 (2d Cir. 2014) (summary order) (deposition testimony claiming a lack of recollection insufficient to contradict affirmative evidence and, therefore, failed to raise a genuine dispute of fact); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735–36 (7th Cir. 2002) (affidavit asserting plaintiff did not remember seeing or receiving document failed to raise genuine issue of material fact particularly where two other uncontroverted affidavits stated document was sent and presumably received); *Hatfield v. Occidental Chem. Corp.*, 842 F.2d 1290, at *4 (4th Cir. 1988) (table decision) ("A party opposing a properly supported motion for [summary] judgment cannot create a genuine factual dispute simply by claiming that he does not recall a particular fact upon which the moving party has presented affirmative evidence.").; *Tinder*, 305 F.3d at 735–36; *Hudson v. C.P. Rail Sys.*, 24 F. App'x 610, 613 (7th Cir. 2001) (party's "bare assertion" that he did "not recall" making inappropriate comments did not create a genuine issue of material fact); *FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 205 F.3d 66, 75 (2d Cir. 2000) ("vague denials and memory lapses ... do not create genuine issues of material fact"); *I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51, 55 (1st Cir. 1999) (testimony amounting to a "mere lack of recollection does not suffice to create an issue of fact"); *Ayer v. United States*, 902 F.2d 1038, 1045–46 (1st Cir. 1990) (plaintiff's "own lack of recall" insufficient to create genuine issue of material fact).

Moreover, even if Clerk Chapman was mistaken about the judge's directions, quasi-judicial immunity

would apply. Absolute immunity is immunity from suit. *Mireles*, 502 U.S. at 10. "Judicial immunity is not overcome by allegations of bad faith or malice," *id.*, or mistake. *Cleavinger* v. *Saxner*, 474 U.S. 193, 199–200 (1985) (Judicial immunity "applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'"). Judicial immunity is overcome only if the actions are nonjudicial actions or taken in absence of all jurisdiction. *Mireles*, 502 U.S. at 11.

"[T]he filing of complaints and other documents is an integral part of the judicial process[.]" *Smith* v. *Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989). Nor could Doe claim that Clerk Chapman was in a clear absence of jurisdiction because that requires a clear lack of all subject matter jurisdiction. *Mullis* v. *U.S. Bankr. Ct. for Dist. of Nevada*, 828 F.2d 1385, 1389 (9th Cir. 1987) (noting clear absence of jurisdiction is akin to a bankruptcy judge trying criminal case). As the circuit court clerk, Clerk Chapman has responsibility for all filings and communicating with the juvenile judge who is assigned to handle judicial bypass procedures is in her jurisdiction.

As a result, the Court should grant certiorari to determine whether Clerk Chapman is entitled to quasi-judicial immunity because it applies so long as she has jurisdiction and "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott* v. *Harris*, 550 U.S. 372, 380 (2007) (quoting *Matsushita Elec.*, 475 U.S. at 586–87)).

II. The Court Should Settle Whether Courts of Appeals' Precedent Constitutes Clearly Established Law for Questions this Court has Expressly Left Open.

The Court should also grant certiorari to resolve what law can serve as "clearly established" for the purposes of evaluating qualified immunity claims. This Court has cast doubt on whether "a controlling circuit precedent could constitute clearly established federal law in these circumstances, … ." *City & Cnty. of San Francisco, Cal.* v. *Sheehan*, 575 U.S. 600, 614, (2015) (quoting *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014) (per curiam)). That doubt has more force when the Court's opinions have been divided and expressly "declined to decide" the issue on multiple occasions. *See Lambert* v. *Wicklund*, 520 U.S. 292, 295 (1997) (per curiam). And when that issue has caused disagreement among the courts of appeals, courts should heed this Court's direction in deciding whether the particular right has been "clearly established." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009).

The "clearly established" prong provides certainty to courts and litigants that "all but the plainly incompetent or those who knowingly violate the law" will not face a trial. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011). The Court should provide critical guidance to the courts of appeals as to when an issue is "beyond debate." *Id.* at 741. Because the Eighth Circuit erroneously found Clerk Chapman's conduct prohibited by *Bellotti II*, App. 16a, it did not resolve the briefed issue. Chapman CA Br. at 25. The petition presents an opportunity to better define the contours of what is considered clearly established law.

A. The Eighth Circuit erred in holding that *Bellotti II* controlled when neither the Missouri statute nor Clerk Chapman's conduct required attempting to obtain parental consent and then issuing notice to a minor's parents of the hearing.

The Eighth Circuit erred in concluding that § 188.028 (and Chapman's efforts) was exactly the same as the Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, in *Bellotti II*. App. 14a–15a. The Massachusetts statute required that if the minor first failed to obtain both parents' consent, the parents must be notified of the judicial bypass hearing. 443 U.S. at 630. The Missouri statute lets the minor decide to seek consent *or* a judicial bypass procedure. Mo. Rev. Stat. § 188.028.1; App. 41a. Thus, any requirement to notify the minor's parents of the court proceeding is not dependent on the parent withholding consent in the first instance. This difference is important because the denial of qualified immunity requires that "the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *D.C.* v. *Wesby*, 138 S. Ct. 577, 590 (2018) (per curiam). Here, it did not.

The second time this Court reviewed Massachusetts's § 12S, it had the benefit of a binding interpretation by the Supreme Judicial Court. *Bellotti II*, 443 U.S. at 629. The district court had certified nine questions for clarification. *Id.* The Massachusetts court had responded, in relevant part, that "[a]s a general rule, a minor who desires an abortion may not obtain judicial consent without first

seeking both parents' consent." *Id.* at 630. Further, "[u]nless a parent is not available, he must be notified of any judicial proceedings brought under § 12S." *Id.* Armed with this information, the Court asked whether the statute "provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion." *Id.* at 640.

Although the Court recognized that "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" was a constitutionally permissible goal, *id.* at 640–41 (quotation omitted), the Court was concerned with the "need to preserve the constitutional right and the unique nature of the abortion decision," *id.* at 642. The minor's right to be free from an "absolute, and possibly arbitrary, [parental] veto" was affirmed, thus the Court required an alternative authorization procedure. *Id.* at 643–44.

Section 12S's dual requirements of having to ask for consent (in the vast majority of circumstances) and when it is withheld have the court notify the parents of the bypass hearing posed too much of an undue burden. The Court assumed that this would not be a problem for most parents but pregnant minors living at home "are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." 443 U.S. at 647. So for any state regulation like the Massachusetts one, "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents." *Id.* The Court further noted that if a court decides it is in a minor's best interests, "she is entitled to court authorization without any parental

involvement." *Id.* at 648. But a state court may also require parental consultation—just not the parents' consent. *Id.*

The Eighth Circuit, in the present case, explained that it had already interpreted *Bellotti II* to require a minor to access a court without consulting or notifying the parents. App. 13a. Indeed, that case had invalidated a previous Missouri provision that required either consent or notice of the hearing (and copies of the petition). *Planned Parenthood Ass'n of Kansas City*, 655 F.2d 848, 859 (8th Cir. 1981), *aff'd in part, rev'd in part* 462 U.S. 476 (1983). Indeed, the Eighth Circuit had recognized that the physician notice in *Matheson* was constitutional and that it was answering a question left open: whether mature or best interests minors must notify their parents prior to a court hearing. *Id.* at 859. The decision in *Planned Parenthood Ass'n of Kansas City* noted that this Court had suggested such a notice was unconstitutional, and then held so. *Id.* Relying on this precedent, the Eighth Circuit posited that the current conditions of a bypass procedure, notifying the minor's parents, were the same as the Missouri provision struck down and repealed by the legislature. App. 14a–15a.

The Court of Appeals' reliance on its precedent overlooked the differences between *Bellotti II's* double notice statute and merely requiring notice of a court hearing that could extinguish a parent's rights to recover from any ill effects suffered from an abortion procedure. § 188.028.2(4). In doing so, the court repeated the mistake in *Planned Parenthood Ass'n of Kansas City* by not recognizing the limitation in *Bellotti II* and misconstruing this Court's more recent precedents that *approve* parental notification

requirements as not controlling and *disapproving* notice under so-called parental consent statutes.

The Eighth Circuit believed that this Court had created clear, mutually exclusive categories—consent and notice statutes. App. 14a. This caused it to prematurely reject a constitutional interpretation of what happened here: the statute requires consent or a bypass procedure where notice is provided to the parents. The relevant statutory provisions do not explicitly require pre-hearing notice, but they clearly contemplate other parties participating at the hearing. The law requires the court to appoint counsel for "any party who is unable to afford counsel" and requires that parents file a notice of intent to appeal within twenty-four hours of an adverse decision. §§ 188.028.2(2) & (4). Though it is true the statute requires parental consent or judicial bypass, a decision to require notice of the hearing is not the same as §12S's requirement the minor to seek consent first and then notify her parents—causing more friction.

As a result, the Eighth Circuit's decision here fails to see that this Court has not disapproved a consent or notice statute.

B. No controlling Supreme Court precedent or a robust consensus of cases exist to put the issue beyond debate.

The Eighth Circuit held that *Bellotti II* and its previous decision in *Planned Parenthood Ass'n of Kansas City* provided sufficient precedent to clearly establish Doe's right to a judicial bypass without notice. App. 16a. But as *Bellotti II* does not give

particular notice that Clerk Chapman's conduct violated the Constitution, there is no controlling precedent or a robust consensus of cases. Indeed, the courts of appeals are nearly evenly divided.

This Court has consistently announced that "we have not decided whether parental notice statutes must contain [bypass] procedures." *Akron*, 497 U.S. at 510; *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997); *Matheson*, 450 U.S at 405–06. The Court has said only that a bypass procedure that suffices for a consent statute will suffice also for a notice statute. *Hodgson* v. *Minn.,* 497 U.S. 417 (1990). These precedents do not fully control the outcome here because the statutes all had a bypass procedure or did not involve a mature or best interests minor. *Lambert*, 520 U.S. at 296 (noting *Akron* had same bypass procedure for notice statute); *Matheson*, 450 U.S at 405–06 (noting best interests or mature minor not at issue).

Though the Eighth Circuit identified these more recent decisions upholding "parental notice statutes," App. 13a–15a, it felt bound by *Planned Parenthood Ass'n of Kansas City*. This renewed a disagreement among the courts of appeals over whether *Bellotti II* applies with full force to notice statutes. *See Planned Parenthood of the Blue Ridge* v. *Camblos*, 155 F.3d 352, 373 (4th Cir. 1998) (en banc) ("[W]e hold that a notice statute . . . need not include . . . a bypass for the mature minor in order to pass constitutional muster."). *But see Causeway Medical Suite* v. *Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997) (applying *Bellotti* to parental-notice statute), *overruled on other grounds*, *Okpalobi* v. *Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001); *Planned Parenthood* v. *Miller*, 63 F.3d

1452, 1460 (8th Cir. 1995) ("In short, parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass."); *Planned Parenthood of Idaho, Inc.* v. *Wasden*, 376 F. Supp. 2d 1012, 1020 (D. Idaho 2005) (disagreeing with *Camblos*). This disagreement includes one court that "do[es] not reach out to decide whether, if we were faced with a notice statute that did *not* include a bypass procedure such as the procedure at issue here, such a statute would be valid." *Zbaraz v. Madigan*, 572 F.3d 370, 380 (7th Cir. 2009) (emphasis in original).

This state of affairs hardly qualifies as "sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589. And this Court frequently questions whether circuit precedent may constitute clearly established law for purposes of qualified immunity. *Accord City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) ("Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity[.]"); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) ("[E]ven if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here.") (citation omitted); *Wesby*, 138 S. Ct. at 591 n.8 ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. We express no view on that question here.") (citation omitted)); *Taylor v. Barkes*, 575 U.S. 822, 826 (2015) (per curiam) ("Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals[.]"); *City & Cty. of San Francisco, Calif. v.*

Sheehan, 575 U.S. 600, 614 (2015) ("But even if a controlling circuit precedent could constitute clearly established federal law in these circumstances, it does not do so here.") (cleaned up)); *Carroll v. Carman*, 574 U.S. 13, 17 (2014) (per curiam) ("Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances[.]"); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case[.]").

As the Court has continually reserved this question, *Lambert*, 520 U.S. at 295, the contours of this right cannot be said to be "beyond debate." This Court should provide clear guidance that open questions will not permit the denial of qualified immunity. The Eighth Circuit erred in finding that the right to a judicial bypass procedure for an abortion without parental notice has not been "clearly established."

III. The Court Should Vacate and Remand in Light of this Court's Intervening Decision in *Dobbs*.

The Eighth Circuit denied the petition for rehearing en banc three weeks before this Court issued its decision overruling the central holdings in *Roe* and *Casey*. *Dobbs*, 142 S. Ct. at 2228. This Court held that these decisions must be overruled because "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision[.]" *Id.* at 2242.

To overcome qualified immunity, the plaintiff must show "whether the plaintiff has alleged a deprivation of a constitutional right at all." *Pearson*, 555 U.S. at 232 (citation omitted). Doe's claims rely on the proposition that parental notification of a judicial bypass must satisfy the undue burden test propagated in *Casey*. App. 36a ("An undue burden exists, and therefore a provision of law is invalid … ."). With *Casey* overruled, the case now "raise[s] the threshold question whether the right [Appellant is] alleged to have violated even exists." *Dillard v. O'Kelley*, 961 F.3d 1048, 1053 (8th Cir. 2020) (en banc). That issue need not be resolved by this Court on first view. Because the *Dobbs* opinion issued during the pendency of the appeal, vacatur and remand is appropriate.

CONCLUSION

The petition for writ of certiorari should be granted or, in the alternative, the Court may see fit to grant the petition, vacate the opinion below, and remand on the basis of quasi-judicial immunity or for qualified immunity in light of this Court's intervening decision in *Dobbs*.

Respectfully submitted,

ERIC S. SCHMITT

Missouri Attorney General

JEFF P. JOHNSON
Deputy Solicitor General
Counsel of Record
D. JOHN SAUER
Solicitor General
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(314) 340-7366
Jeff.johnson@ago.mo.gov

Counsel for Petitioner

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 21-1692

Jane Doe, by next friend Anthony E. Rothert
Plaintiff - Appellee

v.

Michelle Chapman, in her official capacity as Circuit Clerk for Randolph County
Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - Hannibal

Submitted: January 12, 2022
Filed: April 7, 2022

Before BENTON, SHEPHERD, and STRAS, Circuit Judges.

BENTON, Circuit Judge.

In Missouri, an abortion may not be performed on a woman under the age of 18 without, as relevant here, the informed written consent of one parent or guardian. **§ 188.028.1(1), RSMo 2016**. A minor may bypass this requirement by obtaining a court order granting the right to self-consent (for mature minors), or judicial consent (for "best interests" minors). **§§ 188.028.1(3), 188.028.2(3)**. The minor (or next friend) must apply to the juvenile court. **§ 188.028.2(1)**. Within five days, thejuvenile court must hold a hearing. **§ 188.028.2(2)**. The juvenile court may then (a) find the minor is sufficiently mature and grant the right to self-consent, (b) find the abortion is in her best interests and give judicial consent, or (c) deny the petition. **§ 188.028.2(3)**. The current text of § 188.028 neither requires nor prohibits prehearing parental notification.

Jane Doe, then 17 years old, discovered she was pregnant in December 2018. Seeking an abortion, she went to the Randolph County Courthouse to apply for a judicial bypass. An employee at the clerk's office hadn't heard of the judicial bypass procedure, said they would do some research, and told Doe to come back later. A few weeks later, Doe returned. An employee told her "they were pretty sure that [she] could not open the petition without notifying a parent." After this second visit, Doe received a call from the circuit clerk of Randolph County, Michelle A. Chapman. She offered to provide an application form but said that "our Judge requires that the parents will be notified of the hearing on this." Returning to the courthouse in mid-January, Doe was again told that a parent would be notified if she filed an application. She eventually traveled to Illinois in March 2019,

obtained a judicial bypass, and had an abortion without parental consent or notification.

Doe sued Chapman in her individual and official capacities under 42 U.S.C. § 1983, alleging that Chapman's refusal to allow her to apply for a judicial bypass without parental notification violated her Fourteenth Amendment rights. Chapman moved for summary judgment, invoking quasi-judicial and qualified immunity. The district court[1] denied the motion. Chapman appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

This court reviews de novo the denial of summary judgment based on quasijudicial and qualified immunity. ***VanHorn* v. *Oelschlager***, 457 F.3d 844, 847 (8th Cir. 2006).

Chapman asserts quasi-judicial immunity, claiming she acted at the direction of Associate Circuit Judge James Cooksey, the juvenile judge in Randolph County. Chapman testified she "chatted with James Cooksey" and "his ad-- his words were that he would require us to send notification to these parties." She added that Judge Cooksey "advised that he would not hear the case without giving notice to the parents," and that she was simply "following what he said he was going to require to hear the case." After her call with Doe, Chapman sent an email to a juvenile officer confirming that "I also let her know that our Judge requires that the parents will be notified of the hearing on this."

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[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

The district court agreed that, if Chapman acted at the direction of a judge, she would be shielded by quasi-judicial immunity. *See* ***Rogers v. Bruntrager***, 841 F.2d 853, 856 (8th Cir. 1988); ***McCaw v. Winter***, 745 F.2d 533, 534 (8th Cir. 1984). However, when Judge Cooksey was asked if he ever told Chapman not to accept an application without notifying Doe's parents, he testified, "Not to my recollection. I wouldn't have had any authority to do that unless something was filed and I looked at the law. It's not how I usually would operate." The district court, "[v]iewing this testimony in the light most favorable to plaintiff and drawing all reasonable inferences in her favor," found a genuine dispute of material fact whether Judge Cooksey gave Chapman a direction about Doe.

Chapman argues that Judge Cooksey's statements do not create a genuine dispute of material fact because a lack of memory, by itself, is insufficient.

True, a lack of memory does not, alone, create a genuine dispute of material fact. *See, e.g.,* ***To v. U.S. Bancorp***, 651 F.3d 888, 892 n.2, 893 (8th Cir. 2011) ("An assertion that a party does not recall an event does not itself create a question of material fact about whether the event did, in fact, occur . . . . To's lack of memory does not create a genuine factual dispute."), *citing* ***Elnashar v. Speedway SuperAmerica, LLC***, 484 F.3d 1046, 1057 (8th Cir. 2007) ("Erickson's inability to recall the hours-reduction policy does not dispute Stehr and Schneider's testimony that the policy existed."). But Judge Cooksey's testimony does not convey only a lack of memory. It references a regular practice of declining to give pre-filing directions. The question is whether this practice

evidence creates a genuine dispute of material fact whether Judge Cooksey gave Chapman a pre-filing direction.

Federal courts consider "all admissible evidence" on a motion for summary judgment. ***Jain v. CVS Pharmacy, Inc.***, 779 F.3d 753, 759 (8th Cir. 2015); ***Gannon Int'l, Ltd. v. Blocker***, 684 F.3d 785, 793 (8th Cir. 2012) ("[T]he standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it *could* be presented at trial in an admissible form."), *citing* **Fed. R. Civ. P. 56(c)(2)** ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

"Rule 406 provides that '[e]vidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine.'" ***Burris v. Gulf Underwriters Ins. Co.***, 787 F.3d 875, 881 (8th Cir. 2015), *quoting* **Fed. R. Evid. 406**. The rule reflects "general agreement" that habit evidence "is highly persuasive as proof of conduct on a particular occasion." **Fed. R. Evid. 406, Notes of Advisory Committee**, ¶ 4 (1972). The notes define "habit" as "the person's regular practice of meeting a particular kind of situation with a specific type of conduct." ***Id.*** at ¶ 2. Because all admissible evidence is considered on summary judgment, and because Rule 406 admits habit evidence, habit evidence is considered on summary judgment. "Courts may accept Rule 406 evidence at the summary judgment stage as providing an inference that a routine practice was actually carried out." ***Hancock v. Am. Tel. & Tel. Co.***, 701 F.3d 1248,

1261-62 (10th Cir. 2012) (summary judgment declarations of employees about the standard practice for acceptance of contract terms were evidence that particular customers accepted the terms), *citing* ***Morris v. Travelers Indem. Co. of Am.,*** 518 F.3d 755, 761 (10th Cir. 2008) (reversing summary judgment where district court failed to consider testimony about insurance agent's regular sales practices); ***Gould v. Winstar Commc'ns, Inc.***, 692 F.3d 148, 161 (2d Cir. 2012) (reversing summary judgment where an investment analyst was "unable to recall specifically" whether she reviewed an opinion letter endorsing a stock, but "there was evidence that she actively reviewed such letters as a matter of practice in deciding whether to recommend certain stocks" and explaining that "[a]t this stage of the proceedings, Asher's testimony is enough; from that evidence, a jury reasonably could infer that she actually reviewed and relied on the relevant statements in the documents"); ***Rogers v. Evans***, 792 F.2d 1052, 1061 (11th Cir. 1986) (considering on summary judgment a prison doctor's testimony that she "would [not] normally describe a patient as faking," even though she did not recall what she said about a particular prisoner).

This court considers habit evidence on summary judgment. In *Yellow Horse v. Pennington County*, a prisoner's estate sued a corrections officer, alleging deliberative indifference to the prisoner's mental health needs and suicide risk. ***Yellow Horse v. Pennington Cty.***, 225 F.3d 923, 925-26 (8th Cir. 2000). The officer moved for summary judgment. The officer could not "specifically recall taking Yellow Horse off suicide watch." ***Id.*** at 927. She did testify

that her "routine practice for removing someone from suicide watch was that she would gather information by reviewing the contact journal, which contained information on the eating, sleeping and social habits of the inmate, and then interview and evaluate the inmate before removing him from suicide watch." ***Id.*** This court relied on habit evidence:

> The estate makes much of Severson's failure to specifically recall taking Yellow Horse off suicide watch. However, Severson's . . . .failure to specifically remember taking Yellow Horse off suicide watch is hardly surprising in light of the intervening time between the suicide and the statements, and does not create a genuine issue of material fact. Severson testified that if she did, in fact, remove Yellow Horse from the watch, the aforementioned process would have been followed. The estate cannot show otherwise, and therefore cannot meet its burden of establishing a material fact which would preclude summary judgment in favor of Severson.

Id. at 927-28. *See also* ***McPherson v. O'Reilly Auto., Inc.***, 491 F.3d 726, 729 (8th Cir. 2007) (granting summary judgment based on vocational counselor's testimony that "it was her habit to identify herself" when calling employers to verify employment information). Habit evidence may also be used to *defeat* a motion for summary judgment. In *County of Harding v. Frithiof*, a county sued to void its lease agreement with a fossil hunter because the county commission did not hold a public hearing before approving the lease. ***Cty. of Harding* v. *Frithiof***, 483 F.3d 541, 544 (8th Cir. 2007). The district court

granted summary judgment to the county, finding that the annual value of the lease exceeded $500—the threshold requiring a hearing. ***Id.*** at 545-46, *quoting* **SDCL § 7-18-32**. This court reversed, holding that the county's "past practice of not holding a public hearing on contingency-based fossil-collecting leases" created the inference that the annual value of such leases was less than $500—an inference "the district court was required to accept . . . for purposes of summary judgment." ***Id.*** at 549-50.

Smith v. *Arrington Oil & Gas, Inc.* is not to the contrary. There, a company refused to pay bank-drafts to oil and gas lessors, alleging disapproval of title. ***Smith* v. *Arrington Oil & Gas, Inc.***, 664 F.3d 1208, 1211-12 (8th Cir. 2012). The lessors claimed the refusal had nothing to do with title, emphasizing the company's admission in a separate case that it abandoned other leases in their county because of an unproductive well. ***Id.*** The company countered with unpaid bank-drafts for properties not involved in the litigation, marked with handwritten notations: "Do Not pay[,] title not complete," "Do not pay[,] title failed and/or not complete," and "Do not pay[,] title not complete." ***Id.*** at 1217. The company contended that, based on these other drafts, a reasonable jury could conclude that the disputed drafts were dishonored due to disapproval of title. ***Id.*** This court determined the notations were "inconclusive" whether the company searched title and found grounds for disapproval, or merely failed to search title. ***Id.*** at 1217-18. This court concluded that evidence showing the company "may or may not have completed a review of the titles for drafts in similar transactions [did] not create a genuine issue of material fact as to whether [the

company] disapproved of the landowners' titles in good faith in the instant cases." ***Id.*** at 1218 (alterations added). Terms like "habit," "practice," and "Rule 406" do not appear in that opinion.

Here, Judge Cooksey testified that giving a pre-filing direction about Missouri's judicial bypass procedure is "not how I usually would operate" based on his belief that he "wouldn't have had any authority to do that unless something was filed and I looked at the law." His testimony shows a "regular practice of meeting a particular kind of situation with a specific type of conduct." **Fed. R. Evid. 406, Notes of Advisory Committee, ¶** 2 (1972). Not only is this habit evidence admissible; it is "highly persuasive" that, on the particular occasion here, Judge Cooksey acted in accordance with his practice of not giving pre-filing directions. ***Id.*** at ¶ 4.

The Supreme Court's "repeated" admonition is that "the plaintiff, to survive the defendant's [summary judgment] motion, need only present evidence from which a jury might return a verdict in his favor." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 257 (1986) (alteration added). A reasonable jury could conclude that Judge Cooksey has a regular practice of not giving pre-filing directions, and based on that practice, he did not give a pre-filing direction to Chapman. A reasonable jury could alternatively conclude that, on this occasion, Judge Cooksey departed from his regular practice of not giving pre-filing directions. "What weight to give competing testimony is a credibility issue, one properly left to the fact-finder." ***Onstad v. Shalala***, 999 F.2d 1232, 1234 (8th Cir. 1993). The district court correctly denied summary judgment based on quasi-judicial immunity.

II.

Public officials are protected by qualified immunity unless the facts show a violation of a constitutional right that was clearly established at the time of the alleged misconduct. ***Morgan v. Robinson***, 920 F.3d 521, 523 (8th Cir. 2019) (en banc). Doe claims that Chapman violated her clearly established constitutional right to apply for a judicial bypass without notifying her parents. Chapman counters that (1) the Supreme Court has not recognized a constitutional right to apply for a judicial bypass without pre-hearing parental notification; (2) there is a circuit split on the issue; and (3) this court's decision in *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft* is not controlling because (a) it is factually distinguishable, (b) a single holding of this court does not make a right clearly established, and (c) clerks of Missouri courts are not bound by Eighth Circuit precedent.

The Supreme Court distinguishes "parental consent statutes" (that require a parent's consent or a court order before an abortion) *from* "parental notice statutes" (that require abortion providers to notify a parent before an abortion).

The first parental consent statute confronted by the Court—from Missouri—required the consent of at least one parent to perform an abortion on an unmarried woman under the age of 18. ***Planned Parenthood of Cent. Missouri v. Danforth***, 428 U.S. 52, 72 (1976). It had no procedure to bypass the consent requirement. ***Id.*** The Court held that, "in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass

procedure if it elects to require parental consent." ***Ohio v. Akron Ctr. for Reprod. Health***, 497 U.S. 502, 510-11 (1990), *describing* ***Danforth***, 428 U.S. at 74.

Three years after *Danforth*, the Court reviewed a Massachusetts statute that allowed minors to seek a judicial bypass, but only after at least one parent refused consent. ***Bellotti v. Baird***, 443 U.S. 622, 625 (1979). The Massachusetts Supreme Judicial Court had confirmed that, under the statute, "an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion." ***Id.*** at 646. Eight Supreme Court justices decided that the statute, construed in this manner, placed an undue burden on pregnant minors. Justice Powell's plurality opinion (joined by three other justices), concluded:

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

Id. at 647-48. Justice Stevens (joined by three other justices) would not have allowed even a judge to decide whether an abortion is in an immature minor's best interests, leaving the decision to the physician and patient. ***Id.*** at 654-56 (Stephens, J., concurring in the judgment). But the concurrence agreed that

parental notice, prehearing, was unconstitutional. ***Id.*** at 656 (agreeing that "the statute . . . as . . .construed [by the Massachusetts Supreme Judicial Court] is not constitutional"). Dissenting, Justice White recognized the "Court's holding" that parents may not be given "notice that their daughter seeks [a judicial bypass] and, if they object to the abortion, an opportunity to participate in a hearing." ***Id.*** at 657 (White, J., dissenting) (alteration added). *Accord* ***Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft***, 462 U.S. 476, 503-04 (1983) (Blackmun, J., concurring in part) (explaining the opinions in *Bellotti*).

Later, the Court reviewed an Ohio statute that allowed physicians to perform an abortion on a minor—with or without parental consent—if they provided at least 24-hours' notice to one of the minor's parents. ***Akron***, 497 U.S. at 507. The Court identified the law as a "parental notice statute," in contrast to the "parental consent statutes in *Danforth* [and] *Bellotti*." ***Id.*** at 510 (alteration added). The Court stated that "our cases have required bypass procedures for parental consent statutes," but "we have not decided whether parental notice statutes must contain such procedures." ***Id.*** The Court has yet to answer that question. *See* ***Lambert v. Wicklund***, 520 U.S. 292, 295 (1997) ("In *Bellotti,* we struck down a statute requiring a minor to obtain the *consent* of both parents before having an abortion, subject to a judicial bypass provision . . . . In *Akron,* we upheld a statute requiring a minor to *notify* one parent before having an abortion . . . . We declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional."); ***Zbaraz v.***

Madigan, 572 F.3d 370, 380 (7th Cir. 2009) ("[T]he Supreme Court has repeatedly stated that it has declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional.") (quotation marks omitted). *Cf.* ***H. L. v. Matheson***, 450 U.S. 398, 407-10 (1981) (parental notice statute with no bypass procedure was constitutional as applied to an unemancipated minor "living with and dependent upon her parents . . . when she has made no claim or showing as to her maturity").

This court applied the Supreme Court's distinction between parental consent statutes and parental notice statutes in *Ashcroft* and *Miller*. *Ashcroft* addressed a previous version of § 188.028 that, like the statute in *Bellotti*, required parental consent or a judicial bypass, and required parental notification prior to the judicial bypass hearing. ***Planned Parenthood Ass'n of Kansas City, Missouri, Inc.* v. *Ashcroft***, 655 F.2d 848, 859 (8th Cir. 1981). This court held that *Bellotti* controlled:

> We are thus faced with the question . . . whether it is constitutionally permissible to require mature or "best interests" minors to notify their parents prior to a court hearing in which they seek judicial consent for an abortion. We have no need to analyze this problem at length, as the justices of the Supreme Court have already explored it.

Id. This court quoted *Bellotti's* holding that "(E)very minor must have the opportunity if she so desires to go directly to court without first consulting or notifying her parents." ***Id.*** at 858. This court concluded that "subsection 188.028.2(2) is

unconstitutional because it requires mature or 'best interests' minors to give notice to their parents prior to the court hearing." ***Id.*** at 859. After *Ashcroft*, Missouri repealed the pre-hearing notice requirement. *See* 1986 **Mo. Laws** 691-92 (H.B.1596).

On the other hand, addressing a statute that did *not* require parental consent—but did require parental notification before the abortion itself—this court acknowledged that Supreme Court precedent is inconclusive: "the Supreme Court has yet to decide whether a mature or 'best interest' minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." ***Planned Parenthood, Sioux Falls Clinic v. Miller***, 63 F.3d 1452, 1459 (8th Cir. 1995). This court ultimately held that a state "may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and 'best interest' minors can avoid it. In short, parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass." ***Id.*** at 1460. *But see* ***Planned Parenthood of Blue Ridge* v. *Camblos***, 155 F.3d 352, 367 (4th Cir. 1998) (concluding that "the Constitution does not require for 'mere notice' statutes the full panoply of safeguards required by the Court in *Bellotti II* for parental consent statutes" and holding that parental notice statutes are constitutional even without a bypass procedure).

Relying on parental notice cases like *Akron* (and *Miller* and *Camblos*), Chapman argues she could not have deprived Doe of a clearly established right because Supreme Court precedent is inconclusive, and circuits courts are split. But § 188.028 is not a "mere

notice statute"; it requires parental consent—or a court order bypassing parental consent—exactly like the statute in *Bellotti* (and *Ashcroft*). *Bellotti* is clear: parental consent statutes are unconstitutional unless they provide the pregnant minor an opportunity to seek a court order without notifying her parents. ***Bellotti***, 443 U.S. at 647-48; ***id.*** at 656 (concurring opinion). By requiring notice to Doe's parents before her bypass hearing, Chapman implemented the prior version of § 188.028 this court found unconstitutional under *Bellotti*. ***Ashcroft***, 655 F.2d at 859 ("[S]ubsection 188.028.2(2) is unconstitutional because it requires mature or 'best interests' minors to give notice to their parents prior to the court hearing.").

Because Doe's constitutional right to apply for a judicial bypass without notifying her parents is clearly established by Supreme Court precedent, this court need not address Chapman's other arguments about qualified immunity.[2]

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[2] In 2019, Missouri passed the Right to Life of the Unborn Child Act, which would override § 188.028:

> Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical emergency . . . . The enactment of this section shall only become effective upon notification to the revisor of statutes by an opinion by the attorney general of Missouri, a proclamation by the governor of Missouri, or the adoption of a concurrent resolution by the Missouri general assembly that [t]he United States Supreme Court has overruled, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973), restoring or granting to the state of Missouri the authority to regulate abortion.

* * * * * * *

The district court's order denying summary judgment is affirmed.

STRAS, Circuit Judge, dissenting.

Even giving Doe every benefit of the doubt on summary judgment, the evidence does not create a genuine issue of material fact. *See Bharadwaj v. Mid Dakota Clinic*, 954 F.3d 1130, 1134 (8th Cir. 2020) (explaining that we must view "the evidence . . . in a light most favorable to the nonmoving party" (citation omitted)). The record is filled with statement after statement from Judge Cooksey that he does not remember any of the details underlying this lawsuit. The question is whether one offhand remark—"[i]t's not how I would usually operate"—is enough to get this case past summary judgment. The court says it is. *See ante* at 3–7. Read in context, I conclude it is not.

Let's begin with the basics. Everyone pretty much agrees that judicial immunity shields Michelle Chapman from liability if she was following Judge Cooksey's directions. *See ante* at 3; Appellee's Br. at 28; *see also Rogers v. Bruntrager*, 841 F.2d 853, 856 (8th Cir. 1988) ("Clerks of court have absolute

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§ 188.017, RSMo Supp. 2019. *See also* ***Doe v. Parson***, 960 F.3d 1115, 1116 (8th Cir. 2020) ("Missouri's official position is that '[t]he life of each human being begins at conception.'"). *See generally* ***MKB Mgmt. Corp. v. Stenehjem***, 795 F.3d 768, 773-76 (8th Cir. 2015) ("Although controlling Supreme Court precedent dictates the outcome in this case, good reasons exist for the Court to reevaluate its jurisprudence."); ***Little Rock Fam. Plan. Servs. v. Rutledge***, 984 F.3d 682, 692-93 (8th Cir. 2021) (Shepherd, J., concurring) (reiterating, as discussed at length in *MKB Mgmt. Corp.*, that the viability standard has proven unsatisfactory).

immunity from actions for damages arising from acts they are specifically required to do . . . at a judge's direction." (quotation marks omitted)). So our task is to determine whether Doe has actually "set forth specific facts showing that" Chapman was acting on her own, without guidance from Judge Cooksey. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *see also Rogers*, 841 F.2d at 856.

The court views this as a he said/she said case, one that is inappropriate for summary judgment. The problem is that we have a "she said," but no "he said." Chapman's position all along has been that she was following Judge Cooksey's directions when she told Doe that her parents would need to be notified. She has never wavered on that point.

Judge Cooksey, for his part, had trouble remembering anything. At his deposition, he repeatedly stated that he could not recall what he had said—or, for that matter, if he had said anything to Chapman at all. After being asked, for example, "[d]o you know who . . . Jane Doe is in this case," he said "no[,] . . . I mean I don't know who -- what her name is or who -- no." Then when asked "[w]hat understanding do you have, if any, about what this case is about[,]" Judge Cooksey said he had no "independent recollection of what this case is. Something about a notice to -- notification of parents because the children were young."

Judge Cooksey's inability to remember is clear, absent one cryptic remark. When asked about the directions he purportedly gave to Chapman, "[d]id you ever tell Michelle Chapman not to accept a petition for judicial -- a petition to obtain judicial consent to obtain an abortion without parental consent unless she sent

notices to the natural born parents of the minor[,]" Judge Cooksey said "[n]ot to my recollection." But then he added, "I wouldn't have had any authority to do that unless something was filed and I looked at the law. It's not how I usually would operate. I mean I don't have any recollection of ever doing that." He then went on to deny that he had "ever looked at the Missouri law regarding judicial bypasses."

What is the takeaway? Judge Cooksey has no memory of the events in question, but he believes he would not "usually" operate that way. I am unconvinced that this stray remark is enough for a trial because it is sandwiched between roughly a half-a-dozen statements containing some variation of "I don't remember." It is, in short, a "vague denial[]" couched in a series of "memory lapses," which by itself cannot create a genuine issue of material fact. *FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 205 F.3d 66, 75 (2d Cir. 2000); *see also To v. U.S. Bancorp*, 651 F.3d 888, 892 n.2 (8th Cir. 2011) ("An assertion that a party does not recall an event does not itself create a question of material fact about whether the event did, in fact, occur.").

But let's assume for the moment that Judge Cooksey's description of what he would *not* "usually" do counts for something more. It is still not the "habit evidence" that the Court believes it to be. *See ante* at 4–6. For one thing, the statement is phrased in the negative and uses the word "usually," meaning that it does not eliminate the possibility that he did something different here.[3] For another, it cannot

[3] Consider a driver who gets in a car accident because he is drunk. At the scene, he says, "I do not usually drive drunk." This

reflect a "regular practice" because he denied ever looking at Missouri law on "judicial bypasses." *See* Fed. R. Evid. 406 advisory committee's note (defining "habit" evidence). So besides being cryptic, the statement is "inconclusive." *See Smith v. Arrington Oil & Gas, Inc.*, 664 F.3d 1208, 1218 (8th Cir. 2012) (noting that "inconclusive [evidence] indicating that [a party] may or may not have" done a particular thing "in similar transactions do[es] not create a genuine issue of material fact as to whether" the same party did the same thing "in the instant case[]"); *see also Anderson, 477 U.S. at 249–50 ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).*

The bottom line is that there is no genuine issue of material fact here. The unrebutted evidence is that Chapman was acting "at [her] judge's direction," which entitles her to absolute immunity. *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997) (citation omitted).

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statement, by itself, would not eliminate the possibility that, on that particular night, he did. It almost goes without saying that, in the face of clear evidence that he was intoxicated at the time, the statement would not create a genuine issue of material fact. The same is true here.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1692

Jane Doe, by next friend Anthony E. Rothert

Appellee

v.

Michelle Chapman, in her official capacity as Circuit Clerk for Randolph County

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - Hannibal
(2:19-cv-00025-CDP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 02, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:19 CV 25 CDP
	)	
MICHELLE CHAPMAN,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

At the time this complaint was filed, plaintiff was a pregnant minor who was seeking to obtain an abortion using Missouri's alternative authorization procedure set out in Mo. Rev. Stat. § 188.0281[4] instead of obtaining the consent of her parents. Plaintiff alleges that defendant, the Circuit Clerk of Randolph County (where plaintiff sought to obtain alternative authorization for her abortion), refused to allow her to petition the court under the statute without first providing notice to her parents, in violation of her Fourteenth Amendment right to obtain an abortion without parental consent.

[4] The statute permits a pregnant minor to apply to the juvenile courts for either the right to self-consent to abortion or consent by the court to obtain an abortion.

Defendant admits that she told plaintiff her parents would be notified if she filed a bypass application, but claims that she was acting at the direction of the presiding judge and that her actions did not run afoul of Missouri or federal law. Plaintiff seeks damages against defendant in her individual capacity under 42 U.S.C. § 1983.[5]

Defendant now moves for dismissal of plaintiff's claim for damages on the grounds that she enjoys either quasi-judicial or qualified immunity for her actions. Alternatively, defendant argues that she is entitled to summary judgment because plaintiff cannot show "that an official policy or custom existed for a judicial bypass hearing in Randolph County." Plaintiff also moves for summary judgment on the issue of liability, contending that she is entitled to judgment as a matter of law that defendant violated her constitutional rights.

Missouri's judicial bypass statute does not require prehearing notification of the parents of minors seeking to obtain judicial authorization to obtain an abortion and so defendant's statements to plaintiff were not in accord with the Missouri statute. However, if defendant's statements that such notice would be given were made at the express direction of the judge who would hear the application, then

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[5] To the extent plaintiff's second amended complaint restates claims or seeks relief that the Court has previously dismissed, these claims remain dismissed in accordance with the Court's prior orders of November 12, 2019 (dismissing claims for prospective injunctive and declaratory relief as moot) and June 18, 2020 (dismissing plaintiff's official capacity claim and affirming that plaintiff's claims for prospective injunctive and declaratory relief remain dismissed as moot). (Docs. 42, 80).

defendant would be shielded from liability under the doctrine of quasi-judicial immunity. Whether this is the case, however, is a disputed issue of material fact that precludes either the dismissal of plaintiff's claims or the entry of summary judgment in plaintiff's favor on the issue of liability. Defendant is not qualifiedly immune from suit, because the law in this circuit is clearly established that defendant may not require that prehearing notification be given to the parents of a minor seeking to utilize Missouri's judicial bypass procedure, particularly where the statute itself embodies no such requirement. Finally, because the United States Supreme Court has squarely rejected defendant's "policy or custom" argument, she is not entitled to judgment as a matter of law on that ground. For the reasons that follow, this case will be set for trial.

Standards Governing Motions to Dismiss and for Summary Judgment

The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and deigned to fail, thereby sparing the litigants the burden of unnecessary pretrial and trial activity." *Young* v. *City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)).

On a motion to dismiss, the Court accepts as true all of the factual allegations contained in the complaint, even if it appears that "actual proof of

those facts is improbable" *Twombly*, 550 U.S. at 556, and reviews the complaint to determine whether its allegations show that the pleader is entitled to relief. *Id*. at 555-56. The principle that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Iqbal*, 556 U.S. at 678-79. Although legal conclusions can provide the framework for a complaint, they must be supported by factual allegations. *Id*. at 679.

Summary judgment is appropriate if, after viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party, the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp*., 475 U.S. 574, 587 (1986). "Once a party moving for summary judgment has made a sufficient showing, the burden rests with the non-moving party to set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists." Nat'l Bank of Comm. v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999).

Background Facts[6]

In December of 2018, plaintiff was a pregnant minor who wanted to get an abortion without the consent of her parents using Missouri's alternative

[6] Although this is a bench-tried case, the Court states these facts for purposes of deciding the pending motions only, and neither party may rely upon this Memorandum and Order to establish any fact at trial.

authorization procedure. The statute, Mo. Rev. Stat. § 188.028, permits a pregnant minor to apply to the juvenile courts for either the right to self-consent to abortion or consent by the court to obtain an abortion. It reads in relevant part as follows:

188.028. Minors, abortion requirements and procedures – 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or . . .

(3) The minor has been given the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a

petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend:

(2) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(3) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(4) If the petition is allowed, the informed consent of the minor, pursuant to a grant of majority rights, or the judicial consent, shall bar an action by the parents of guardian of the minor on the grounds of battery of the minor by those performing the abortion . . . .

(5) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule provide for expedited appellate review of cases appealed under this section.

Mo. Rev. Stat. § 188.028(1) and (2). As plaintiff was living in Randolph County, she went to the Randolph County Courthouse in early December of 2018 to request alternative authorization to seek an abortion. She was instructed to return at a later time so the clerk's office could research what she was requesting, since they had "never heard of that before." During her second visit, she was told that she could not file a petition without notifying a parent. She was later called by defendant who told her that

she had the paperwork[7] for plaintiff to fill out but that "our Judge requires that the parents will be notified of the hearing on this." (Doc. 91-7). In her deposition, defendant testified that, because "this being something that was new . . . I will always get the advice of my judge that handles this type of case, what he's going to require for it, how he wants us to handle and then I will work from there." (Doc. 91-2 at 27-28). Defendant testified that Judge James Cooksey (who as the presiding judge for the juvenile court would rule on any judicial bypass application filed by plaintiff) told her that he would require plaintiff to send notification to her parents if she filed a bypass application. (Doc. 91-2 at 28). Judge Cooksey, however, testified at his deposition that he had no recollection of ever telling defendant "not to accept a petition to obtain judicial consent to obtain an abortion without parental consent unless she sent notices to the natural born parents of the minor" and that is "not how he would usually operate." (Doc. 91-13 at 22).

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[7] This "paperwork" was a form petition created by an attorney for the Randolph County juvenile officer and has a space to provide the name, birthdate, social security number and address of the natural father and natural mother of the minor. (Doc. 91-4). The accompanying sample pre-hearing Order for the judge to sign (which bears Judge James Cooksey's name on the blank signature block as the judge of the juvenile court) has a blank to add a hearing date and orders the circuit clerk "to issue summons and notices to the minor and the minor's natural parents." (Doc. 91-5).

Plaintiff went to the courthouse a third time in mid-January of 2019 to request an opportunity to file for judicial bypass and was again told that she could not file a petition without a parent being notified. Consequently, plaintiff went to Illinois where she sought and was granted (without parental notification) judicial authorization to obtain an abortion. During the pendency of this case, plaintiff obtained an abortion and turned eighteen years of age.

Discussion

A. Quasi-Judicial Immunity

Defendant first renews her motion to dismiss this case on immunity grounds. She contends that, as a circuit clerk, she has quasi-judicial immunity from suit. "Absolute quasi-judicial immunity derives from absolute judicial immunity." *Martin* v. *Hendren*, 127 F.3d 720, 721 (8th Cir. 1997). "A judge's absolute immunity extends to public officials for acts they are specifically required to do under court order or at a judge's direction." Id. "Clerks are absolutely immune only for acts that may be seen as discretionary, or for acts taken at the direction of a judge or according to court rule." *Geitz* v. *Overall*, 62 Fed. App'x 744, 746 (8th Cir. 2003) (citing *Antoine* v. *Byers & Anderson*, Inc., 508 U.S. 429 (1993)).

Plaintiff argues extensively that defendant's actions in issuing prehearing notices should be considered ministerial, rather than discretionary, in nature, but this argument does not foreclose the application of quasi-judicial immunity because defendant asserts that her actions were undertaken at the express direction of the presiding judge, which is a separate category entitling defendant to

immunity. See *Geitz*, 62 Fed. App'x at 746; *Smith* v. *Finch*, No. 1:18CV118 SPM, 2018 WL 6621528, at *4–6 (E.D. Mo. Dec. 18, 2018) (clerk who issued warrant at the express direction of the judge was entitled to quasi-judicial immunity even though the warrant was mistakenly issued for the wrong person).

Plaintiff also points to Judge Cooksey's testimony that he "lacked jurisdiction" to "issue orders" in cases that have not been filed and that he was not plaintiff's supervisor as evidence that defendant could not assert quasi-judicial immunity in this case, but these factors are not dispositive of the issue. *Geitz* does not require a written order or pending case for immunity to attach, regardless of Judge Cooksey's personal opinion of his jurisdiction or whether he was defendant's supervisor.

The evidence is undisputed that Judge Cooksey was the juvenile judge who would be assigned to hear any judicial bypass application that might be filed. Defendant would be entitled to quasi-judicial immunity only if her statements to plaintiff about prehearing notification were made because Judge Cooksey told her that is what he required. If Judge Cooksey told defendant to do this, he was performing a judicial function; if defendant's statements were made to carry out Judge Cookey's requirement, she too would be performing a judicial function. Whatever the precise contours of the judicial immunity doctrine may be, they encompass this situation, where the Missouri bypass statute requires "the court" (of which both defendant and Judge Cooksey are undoubtedly

members)[8] to assist plaintiff "in preparing the petition and notices required pursuant to this section." See Mo. Rev. Stat. § 188.028(1).

If Judge Cooksey told defendant to do this, even though he was mistaken[9] in his instructions to issue prehearing notice to the parents and defendant was mistaken in relaying those instructions to plaintiff, that mistake would not strip defendant of quasi-judicial immunity in this case. Despite any mistaken direction to defendant, Judge Cooksey himself would be protected from suit by judicial immunity in this situation, see *Denoyer* v. *Dobberpuhl*, 208 F.3d 217 (8th Cir. 2000), and the Eighth Circuit Court of Appeals has found that an individual who makes a mistake or acts improperly in carrying out a judge's order does not lose the protections of quasi-judicial immunity either, noting that "[a]bsolute quasi-

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[8] Plaintiff cannot argue otherwise, as the statute goes on to require "the Court" (i.e., Judge Cooksey) to hold the hearing and either grant or deny plaintiff's application.

[9] As discussed below, such an instruction would undoubtedly be mistaken because the Missouri statute does not require prehearing notification of parents, and in fact was specifically amended to remove such a requirement after the Eighth Circuit Court of Appeals decided that such a requirement would violate a minor's constitutional rights. See *Planned Parenthood Ass'n of Kansas City, Missouri, Inc.* v. *Ashcroft*, 655 F.2d 848 (8th Cir. 1981). That the statute grants a minor's parents a right to appeal any decision on a judicial bypass application does not, despite defendant's arguments to the contrary, vest the court with authority to send prehearing notification to a minor's parents. The constitutionality of any post-hearing parental notification is not before this Court, nor is the facial constitutionality of Missouri's statute at issue. This case is limited to whether defendant violated plaintiff's constitutional rights by requiring prehearing notification of plaintiff's parents when plaintiff sought to obtain judicial authorization for an abortion.

judicial immunity would afford only illusory protection if it were lost the moment an officer acted improperly." *Martin*, 127 F.3d 720 at 722 (holding that an officer carrying out a judge's order to remove a witness from the courtroom was entitled to absolute quasi-judicial immunity because he was obeying a judicial order that was "related to the judicial function"; finding that the officer did not lose the protections of absolute quasi-judicial immunity when he used excessive force in carrying out the order); *see also Smith*, 2018 WL 6621528, at *4–6 (clerk who issued warrant at the express direction of the judge was entitled to quasi-judicial immunity even though the warrant was mistakenly issued for the wrong person).

Therefore, the key issue on defendant's assertion of quasi-judicial immunity in this case is whether Judge Cooksey did, in fact, tell defendant that he would require plaintiff's parents to be notified before he would hold a hearing on any judicial bypass application that might be filed by plaintiff. As there is a genuine dispute as to whether Judge Cooksey gave defendant this express directive, the Court cannot determine as a matter of law whether defendant is entitled to assert quasi-judicial immunity at this time. In support of her position, defendant relies solely on her own testimony.[10] Judge Cooksey testified that he had no recollection of telling defendant "not to accept a petition to obtain judicial consent to obtain an abortion without parental consent unless she sent

[10] Although defendant represented early in this case that Chanda Bankhead was also a party to the conversation and heard Judge Cooksey tell her this, neither party has submitted any testimony from Ms. Bankhead.

notices to the natural born parents of the minor" and that would not be how he "usually operates." Viewing this testimony in the light most favorable to plaintiff and drawing all reasonable inferences in her favor, the Court concludes that genuine disputes of material fact remain on this material issue. This is an issue that must be resolved by a trial, at which time the Court can weigh the evidence and assess the credibility of witnesses.[11] Defendant's renewed motion to dismiss on the basis of quasi-judicial immunity is denied. Because defendant may ultimately be entitled to absolute quasi-judicial immunity, plaintiff's motion for summary judgment as to liability must also be denied.

B. Qualified Immunity

Defendant also asserts that she is qualifiedly immune from liability in this case. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotation marks and citation omitted). "Because the focus is on whether the [official] had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (alteration added). "'A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Thurmond* v. *Andrews*, 972 F.3d

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[11] The Court reminds defendant that it is her burden to demonstrate that she is entitled to quasi-judicial immunity.

1007, 1012 (8th Cir. 2020) (quoting *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015)) (internal quotation omitted). "We do not 'define clearly established law at a high level of generality.'" Id. (quoting *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018)). "Rather, we look for a controlling case or a robust consensus of cases of persuasive authority. There need not be a prior case directly on point, but 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Dillard* v. *O'Kelley*, 961 F.3d 1048, 1053 (8th Cir. 2020) (quoting *Ashcroft* v. al-*Kidd*, 563 U.S. 731, 741 (2011)).

Here, defendant argues that plaintiff does not have a clearly established right to seek a judicial bypass without prehearing notification of her parents because the United States Supreme Court has not yet squarely decided the issue. In making this argument, defendant characterizes Missouri's statute at issue as both a "parental notification" statute and a "parental consent" statute. While the statute may be a "parental consent law," the Court disagrees with defendant's characterization of Mo. Rev. Stat. § 188.028 as a "parental notification" statute to the extent her argument is construed as one that the statute requires prehearing notification to the parents.[12] The statute contains no language requiring prehearing parental notification, and the legislative history demonstrates that such a requirement was removed from the prior version of the statute, which required

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[12] The Court is not required to decide any issue regarding any post-hearing notifications the statute may require with respect to the appeal rights granted to a minor's parents, and therefore it does not reach or address that issue.

that "copies of the petition and a notice of the date, time, and place of the hearing [] be personally served upon each parent . . . ." (Doc. 110 Ex. 16 at 3). This provision was deleted by the Missouri legislature in 1986. See Missouri House Bill 1596 (Doc. 110 Ex. 15). Thus, defendant is wrong that Missouri's judicial bypass procedure statute requires that notice of the petition and hearing be sent to the parents of a minor seeking to utilize the alternative authorization procedure set out in the statute.[13]

Defendant's next argument is that, in the absence of controlling Supreme Court precedent, there is no "clearly established law" that she can be accused of violating. In support of this argument, she cites the Supreme Court's decision in *Kisela*, in which the Court assumed, without deciding, that circuit precedent amounts to "clearly established law" for qualified immunity purposes. 138 S. Ct. at 1153. The Court disagrees with defendant's characterization of the Supreme Court's decision in *Kisela* as "doubting" whether circuit precedent creates clearly established law. Assuming without deciding is not the same as doubting. In a recent decision, the Eighth Circuit, examining *Kisela*, considered the parameters of "clearly established law" in the context of qualified immunity where a "Supreme Court decision raises the threshold question whether the right defendants are alleged to have violated even exists." *Dillard*, 961 F.3d

[13] Defendant's attempt to justify her request for the names and identifying information of plaintiff's parents in the application because she was required to notify the parents of their appeal rights is unavailing given her own admission that she told plaintiff "our Judge requires that the parents will be notified of the hearing on this."

at 1053. That is not the case here. In a concurring opinion, Circuit Judge Steven M. Colloton made clear that "[t]his case leaves undisturbed our precedent that a prior holding of the Eighth Circuit is sufficient to recognize a clearly established right." *Id*. at 1056 (citing *Chestnut* v. *Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020); cf. *City of Escondido* v. *Emmons*, 139 S. Ct. 500, 503 (2019)). Unless and until the Supreme Court (or the Eighth Circuit en banc) dictates otherwise, this Court is bound to follow the Eighth Circuit's pronouncement that its own prior decisions are sufficient to constitute clearly established law for qualified immunity purposes. Thus, if defendant's actions would violate plaintiff's clearly established rights as dictated by the Eighth Circuit, she is not entitled to qualified immunity in this case.

The "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Planned Parenthood of Se. Pa.* v. *Casey*, 112 S. Ct. at 2821 (1992).

A parental-consent requirement is not an undue burden for minors seeking abortions so long as the minor has the opportunity to avoid the requirement by demonstrating that she is mature or that an abortion is in her best interests. *Bellotti* v. *Baird*, 443 U.S. 622, 651 (1979) (plurality). *See also City of Akron* v. *Akron Center for Reproductive Health*

(*Akron I*), 462 U.S. 416, 440 (1983) (following *Bellotti* by invalidating a consent statute that made "a blanket determination that all minors under the age of 15 are too immature to make [an abortion] decision or that an abortion never may be in the minor's best interests without parental approval"). Under *Bellotti*, consent statutes must have an anonymous bypass procedure that allows a minor to show either that she has the maturity to make her own abortion decision or, even if she is immature, that the desired abortion would be in her best interests. *Bellotti*, 443 U.S. at 643–44; *Akron II*, 497 U.S. at 511–13. Without that opportunity, the consent requirement unduly burdens the minor's right to choose. *Planned Parenthood, Sioux Falls Clinic* v. *Miller*, 63 F.3d 1452, 1458–60 (8th Cir. 1995).

As for parental notice requirements, the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests. *H.L.* v. *Matheson*, 450 U.S. 398, 409 (1981); id. at 414 (Powell, J., concurring). Although the Supreme Court has yet to decide whether a mature or "best interest" minor is unduly burdened when a State requires parental notification to her parents before she may obtain an abortion, in *Planned Parenthood Ass'n of Kansas City, Missouri, Inc.* v. *Ashcroft*, 655 F.2d 848 (8th Cir. 1981), the Eighth Circuit struck down the very prehearing notification requirement in Missouri's prior version of Mo. Rev. Stat. § 188.028 that defendant sought to impose against plaintiff in this case:

We are thus faced with the question left open in Matheson: whether it is constitutionally

permissible to require mature or "best interests" minors to notify their parents prior to a court hearing in which they seek judicial consent for an abortion. We have no need to analyze this problem at length, as the justices of the Supreme Court have already explored it. As noted, in *Bellotti II*, Justice Powell's opinion advances persuasive reasons for concluding that parental notice is unduly burdensome in cases involving mature or "best interests" minors. 443 U.S. at 642-48. In *H. L.* v. *Matheson*, Justices Powell and Stewart concurred in the decision, but insisted that "a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests." 101 S. Ct. at 1176-77. Justices Marshall, Brennan and Blackmun concluded that the Utah statute, which is very similar to the Missouri statute, is unconstitutional on its face because the burdens it imposes exceed any identifiable state interests. *Id*. at 1184-94. **The analysis in these opinions strongly suggests that subsection 188.028.2(2) is unconstitutional because it requires mature or "best interests" minors to give notice to their parents prior to the court hearing. We so hold.** *See also Wynn* v. *Carey*, 582 F.2d 1375, 1388 (7th Cir. 1978).

Ashcroft, 655 F.2d at 859 (8th Cir. 1981) (emphasis added). Although this case was partially reversed on other grounds by the Supreme Court, the Court noted

that Missouri had not appealed the holding that the notice requirement was unconstitutional. *See* 462 U.S. 476, 491 n.17 (1983). The Eighth Circuit has thus squarely held that it is unconstitutional to require plaintiff to give her parents notice of her application for judicial bypass under Mo. Rev. Stat. § 188.028 prior to the hearing. *Ashcroft*, 655 F.2d at 859. By telling plaintiff that "our Judge requires that the parents will be notified of the hearing on this," defendant did exactly what the Eighth Circuit said she could not do. In so doing, defendant violated clearly established law. *See also Miller*, 63 F.3d at 1454 ("[T]he State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and best interest minors can avoid it. In short, parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass") (internal quotation marks omitted). She is not entitled to qualified immunity, and her renewed motion to dismiss on this ground is denied.

C. Unconstitutional Policy or Custom

Finally, defendant moves for summary judgment, arguing that plaintiff must show an unconstitutional policy or custom for liability to attach. This argument is meritless. "On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky* v. *Graham*, 105 S. Ct. 3099, 3105 (U.S. 1985); see *Butterfield* v. *Young*, 833 Fed. App'x 38, 40 (8th Cir. 2021) (quoting *Clay* v. *Conlee*, 815 F.2d 1164, 1169–70 (8th Cir. 1987) ("To establish personal liability in a § 1983 action, the plaintiff must show

that the official, acting under color of state law, caused the deprivation of a federal right.")). Plaintiff brings this suit against defendant in her individual capacity and has sufficiently alleged that defendant deprived her of her constitutional rights, resulting in damages. She is entitled to a trial.

Conclusion

The Court previously vacated the referral to mediation after the parties asked to defer mediation until they received a ruling on their dispositive motions. They now have that ruling. Given that neither party is entitled to judgment as a matter of law, the Court will once again refer this case to mediation in an attempt to resolve this dispute without further judicial proceedings. The Court will give the parties 90 days to conduct mediation. If they do not settle the case, they should file a joint memorandum by no later than June 25, 2021 setting out mutually agreeable dates after September 1, 2021 for the bench trial of this matter.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss [86] is denied.

IT IS FURTHER ORDERED that plaintiff's second motion for partial summary judgment [90] is denied.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 23rd day of March, 2021.

APPENDIX C

188.028. Minors, abortion requirements and procedure. — 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and

consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

(2) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(3) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(4) If the petition is allowed, the informed consent of the minor, pursuant to a court grant of majority rights, or the judicial consent, shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the

abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties;

(5) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

(L. 1979 H.B. 523, et al., A.L. 1986 H.B. 1596)

(1981) Provisions of statute requiring notice to parents of all minors seeking abortions is unconstitutional because it requires notice to the parents of minors who are mature or minors for whom it is not in their best interest to give notice. *Planned Parenthood* v. *Ashcroft* (8th Cir.) 655 F.2d 848.

(1983) Statute requiring minors to obtain parental or

judicial consent to obtain an abortion is constitutional as interpreted in Planned Parenthood v. Ashcroft, 655 F.2d 848 (8th Cir. 1981). *Planned Parenthood of Kansas City, Mo.* v. *Ashcroft*, 103 S.Ct. 2517.

(1985) Requirement that unemancipated minor secure parental consent or court ordered right to self-consent in order to obtain abortion is constitutional. *C.L.G.* v. *Webster*, 616 F.Supp. 1182 (D.C. Mo.).

(1986) This section held constitutionally valid. *T.L.J.* v. *Webster*, 792 F.2d 734 (8th Cir.).

APPENDIX D

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.