

# IN THE SUPREME COURT OF TEXAS

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No. 00-0224  
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IN RE JANE DOE

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APPEAL UNDER SECTION 33.004(F), FAMILY CODE  
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JUSTICE O'NEILL delivered the opinion of the Court, joined by JUSTICE ENOCH, JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE GONZALES and by CHIEF JUSTICE PHILLIPS as to Parts II and III.

JUSTICE ENOCH filed a concurring opinion, joined by JUSTICE BAKER.

JUSTICE GONZALES filed a concurring opinion, joined by JUSTICE ENOCH.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE OWEN filed a dissenting opinion.

JUSTICE ABBOTT filed a dissenting opinion.

This is an appeal from an order denying a minor's application for a court order authorizing her to consent to an abortion without notifying a parent. After remand from this Court, *see In re Jane Doe*, \_\_\_ S.W.3d \_\_\_ (Tex. 2000) ("*Doe I(I)*"), the trial court conducted another hearing and found that Jane Doe failed to prove by a preponderance of the evidence that she is sufficiently well informed to have an abortion without parental notification. The court of appeals affirmed. After reviewing the record, we determined that Doe conclusively established the statutory requirements and that she was entitled to consent to the procedure without notifying a parent. We issued an order on March 10, 2000, reversing the court of appeals' judgment, with opinions to follow on the concern that Doe be able to undergo a less risky abortion procedure, if that option was still available to her and that was her decision. The following is our opinion holding that the evidence Doe presented

conclusively established that she was “mature and sufficiently well informed” to consent to an abortion without parental notification. *See* TEX. FAM. CODE § 33.003(i).

## I

Abortion is a highly-charged issue that often engenders heated public debate. Such debate is to be expected and, indeed, embraced in our free and democratic society. It is through this very type of open exchange that our Legislature crafted and enacted the particular statutory scheme before us. Our system of government requires the judicial branch to independently review and dispassionately interpret legislation in accordance with the Legislature’s will as expressed in the statute. We begin our analysis with an overview of the Parental Notification Act’s judicial bypass procedure and our role in interpreting it.

### A. The Proper Role of Judges

*“[Courts] are under the constraints imposed by the judicial function in our democratic society. . . . [T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . A judge must not rewrite a statute, neither to enlarge nor to contract it.”*

–Felix Frankfurter<sup>1</sup>

*“It is the province of the legislature to make the laws; and of the courts to enforce them.”*

*Barrett v. Indiana*, 229 U.S. 26, 30 (1913)

In deciding this case we squarely confront the question of whether, as judges, we should apply the Parental Notification Act as it is written by the Legislature or according to our own

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<sup>1</sup>RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 213 (1947), *reprinted in* COURTS, JUDGES, AND POLITICS, at 414 (Walter F. Murphy & C. Herman Pritchett, eds., 2d ed. 1974).

personal beliefs. In reaching the decision to grant Jane Doe’s application, we have put aside our personal viewpoints and endeavored to do our job as judges — that is, to interpret and apply the Legislature’s will as it has been expressed in the statute.

Unquestionably, in passing the Parental Notification Act the Legislature intended to protect parents’ rights by encouraging minors to involve their parents in the profound decision to proceed with or terminate a pregnancy.<sup>2</sup> The Legislature also chose to provide a mechanism for a minor, under certain circumstances, to obtain an abortion without notifying her parents. In our system of government, it is the Legislature’s job to fashion policy. As judges, we respect and defer to the policy choice our Legislature made to encourage parental involvement in such an important matter. Similarly, we respect and defer to the Legislature’s policy decision to include a judicial bypass procedure in the statute. Our task is to determine how the Legislature intended that process to work.

### **B. The Statutory Proof Standard**

In creating the bypass procedure, the Legislature delegated no authority to the courts to determine the grounds upon which to grant a bypass. Rather, it specifically enumerated the grounds that, if shown, require the courts to grant a parental notification waiver. Neither did the Legislature give courts authority to decide the level of proof a minor must show to prove that she is entitled to a bypass. And although the Legislature could have chosen to impose a higher standard of proof, such as by requiring the minor to establish the statutory requisites by “clear and convincing” proof or proof “beyond a reasonable doubt,” it did not do so. Instead, it set the level of proof at the lower

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<sup>2</sup>And if the projections of the bill’s author, state Senator Florence Shapiro, prove accurate, the law will have its intended effect. Senator Shapiro reported that 39 percent of the 5,523 minors who terminated their pregnancies in 1997 did not involve their parents; she further estimated that only 10 percent of those minors would seek a judicial bypass under the statute. Thus, as a result of the Parental Notification Act, the vast majority of minors will now likely involve a parent in their decisionmaking process. *See* Debate on Tex. C.S.S.B. 30 on the Floor of the Senate, 76<sup>th</sup> Leg., R.S. (March 17, 1999) (statement of Senator Shapiro) (tapes available from Senate Staff Services Office).

“preponderance of the evidence” standard.<sup>3</sup> See TEX. FAM. CODE § 33.003(i).

The importance of the evidentiary burden is self-evident. As *amicus curiae* the Texas Coalition for Parents’ Rights recognizes: “Evidentiary standards express the degree of certainty in the outcome that the factfinder must have. Because interests of differing constitutional and societal value come before courts, differing degrees of certainty are required.” (Citations omitted). The Texas Coalition urges this Court to apply a burden of proof similar to the “clear and convincing” standard the Nebraska Supreme Court adopted in *In re Petition of Anonymous 1*, 558 N.W.2d 784, 787 (Neb. 1997). But the Nebraska court was free to adopt a heightened burden of proof because the Nebraska legislature did not articulate a proof standard. Our Legislature mandated a proof standard. For this Court to impose a standard different than that our Legislature chose would usurp the legislative function and amount to judicial activism.

### C. The Statutory Scheme

The Legislature could easily have crafted other more stringent standards for a minor to obtain a judicial bypass, constitutional concerns aside.<sup>4</sup> But as it is written, the statute gives the minor who

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<sup>3</sup>The bill’s author emphasized that the proof standard was relatively low:

Senator West: Are we putting judges in a precarious situation to make these determinations based on the research that you’ve done in other states and is the standard that you are putting in here that a judge makes the determination by a preponderance of the evidence . . . .

Senator Shapiro: *Lowest level.*

Debate on Tex. C.S.S.B. 30 on the Floor of the Senate, 76<sup>th</sup> Leg., R.S. (March 17, 1999) (statements of Senators West and Shapiro) (tapes available from Senate Staff Services Office) (emphasis added).

<sup>4</sup>The United States Supreme Court has never decided whether a notification statute like Texas’s must include a bypass provision to pass constitutional muster. See *Ohio v. Akron Reprod. Health Ctr.*, 497 U.S. 502, 510 (1990). Even so, at the second reading on Senate Bill 30, Senator Shapiro suggested that a judicial bypass procedure was not constitutionally required:

decides to seek a judicial bypass a number of advantages. For instance, the minor is the only party to the bypass proceeding. *See* TEX. FAM. CODE § 33.003. She is entitled to representation by an attorney of her choice or a court-appointed attorney *ad litem*, and the court must appoint a guardian *ad litem* to advocate for the minor's best interests. *See id.* § 33.003(e). The Legislature chose not to provide for anyone to represent any other interests. And although the Family Code requires proof by clear and convincing evidence in other matters, the Legislature deliberately chose proof by a preponderance of the evidence in bypass proceedings. *Compare id.* § 33.003(i) *with id.* § 161.001. Further, if the trial court rules in the minor's favor, there is no appeal, but if it rules against her, she has access to two levels of appellate review. *See id.* § 33.004. Finally, the bypass statute's default provisions favor the minor. If the trial court fails to rule on the minor's application and issue written findings of fact and conclusions of law within the period allowed, the statute deems the application granted and the minor may have an abortion without notifying her parents. *See id.* § 33.003(h). Likewise, if the court of appeals does not rule within its allotted time, the statute deems the appeal granted. *See id.* § 33.004(b).

This Court must interpret the statute as it is written; we are not free to ignore the judicial bypass language. The statute allows a minor to avoid notifying a parent if she can show that: (1) she is mature and sufficiently well informed to make the decision to obtain an abortion without notifying a parent; (2) notifying a parent would not be in her best interest; or (3) notifying a parent

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In fact, just two weeks ago, the State of Virginia's parental notification bill went to the [Supreme Court] and the [Supreme Court] decided that their system works. And I want to mention *they have no judicial bypass, no bypass whatsoever. Their law says, A parent must be notified, period.*

Debate on Tex. C.S.S.B. 30 on the Floor of the Senate, 76<sup>th</sup> Leg., R.S. (March 17, 1999) (statement of Senator Shapiro) (tapes available from Senate Staff Services Office) (emphasis added).

may lead to physical, sexual, or emotional abuse of the minor. *See id.* § 33.003(i). Concerning the first ground, the Legislature could have required that the minor be *fully* informed, rather than *sufficiently well* informed. The Legislature had before it — but rejected — at least one bill that would have required physicians to supply specified, detailed information about abortion procedures and alternatives to all women, including minors, in order to obtain their informed consent. *See* Tex. S.B. 65, 76<sup>th</sup> Leg., R.S. (1999). But the Legislature opted in the Parental Notification Act to impose only the more general requirement that a minor be “sufficiently well informed.”<sup>5</sup> Moreover, to meet the third exception, the Legislature could have required the minor to show that notifying the parents *would* lead, or even *would likely* lead to abuse of the minor rather than the lower standard the Legislature chose — that notification *may* lead to abuse. We do not mean to imply that all these more stringent standards would ultimately pass constitutional muster, but only point out that the Legislature made clear and deliberate choices about the statutory wording.

That the Legislature chose this particular statutory scheme does not mean that it did not intend the bypass procedure to be meaningful, as we said in *Doe 1(I)*. *See* \_\_\_ S.W.3d at \_\_\_. There, we looked to other states’ jurisprudence interpreting the laws upon which our Legislature modeled our statute. We did so to ascertain what the Legislature intended that a minor must show to demonstrate that she is “mature and sufficiently well informed” to make the decision to obtain an abortion without notifying a parent. The factors we articulated there, and which we apply in this case, reflect other states’ experiences, which are consistent with this Court’s effort to determine what

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<sup>5</sup>As the Bill’s House sponsor, Representative Delisi, observed, the Parental Notification Act is *not* an informed consent statute. *See* Hearing Before the House Comm. on State Affairs, 76<sup>th</sup> Leg., R. S. (April 19, 1999) (statement of Representative Delisi) (audio available at <http://www.house.state.tx.us/house/commit/archive/c450.htm> or tapes available from House Video and Audio Services).

the Legislature intended by the words it chose.

#### **D. The Legislative History**

Senate Bill 30's author and sponsor have filed an *amicus* brief, joined by other legislators,<sup>6</sup> to “provid[e] information regarding the legislative intent” and suggesting that our decisions in *Doe 1(I)*, *Doe 2*, *Doe 3*, and *Doe 4(I)* interpreting the three statutory prongs do not set a high enough standard. We note that it is not the function of this Court to set the standard, but rather to interpret the standard the Legislature set. We further note that “courts construing statutory language should give little weight to post-enactment statements by legislators. Explanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.” *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328-29 (Tex. 1994) (HECHT, J., concurring and dissenting) (citations omitted); *see also Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5<sup>th</sup> Cir.) (what happened after a statute’s enactment may be history and it may come from members of Congress, but it is not part of the *legislative history* of the original enactment); *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993). We believe the Parental Notification Act’s legislative history supports our decision.

The *amici* argue that the Legislature intended that a bypass should be “rare” and “exceptional.” And the legislative history reflects that the legislators believed that only a very small number of minors — ten percent of the thirty-nine percent of minors who did not involve their parents before the Act’s passage, or about 216 minors — would seek a bypass. *See FISCAL NOTE*, Tex. C.S.S.B. 30, 76<sup>th</sup> Leg., R.S. (1999); Debate on Tex. C.S.S.B. 30 on the Floor of the Senate, 76<sup>th</sup>

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<sup>6</sup>Nine out of thirty-one senators, and forty-seven out of one hundred and fifty representatives, comprise the *amici* — representing less than one-third of the Legislature. Thus, contrary to Justice Abbott’s assertion, the *amicus* brief does not make clear that the Court has guessed wrong in discerning the intent of the Legislature.

Leg., R.S. (March 17, 1999) (statement of Senator Shapiro) (tapes available from Senate Staff Services Office). In this sense, it is true that the Legislature thought the statute would make it harder for minors to obtain abortions without notifying a parent and that few requests for judicial bypass were anticipated. But once a bypass was sought, it is less clear that the legislators intended them to be “rare[ly]” granted or intended to construct an “exceptional” evidentiary barrier. While the fiscal note for Senate Bill 30's committee substitute reflects the Department of Health's *economic* assumption that “50 percent of applications filed by minors are denied and appealed,”<sup>7</sup> FISCAL NOTE, Tex. C.S.S.B. 30, 76<sup>th</sup> Leg., R.S. (1999), a number of statements by the bill's authors, sponsors, and sponsors of companion legislation, including some of the *amici*, suggest that the Legislature did not contemplate as strenuous a statutory burden for the minor as the amici now argue.

For example, Representative Wohlgemuth, the author of the House companion to Senate Bill 30, described the judicial bypass as “*an extremely low bar to begin with*” and represented that “obtaining a bypass is not going to be a problem.” *See* Debate on the Floor of the House, 76<sup>th</sup> Leg., R.S. (May 22, 1999) (statement of Representative Wohlgemuth) (audio available at <http://www.house.state.tx.us/audio/archivhc.htm> or tapes available from House Video and Audio Services) (emphasis added). She noted that, although she would personally like to see a higher barrier, over ninety percent of the judicial bypasses were granted in other states with similar bypass provisions. *See id.*

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<sup>7</sup>We do not know the percentage of judicial bypasses that the trial courts are denying. But the fiscal note's economic assumption comports with our percentage thus far. Of the two cases in which we have rendered a final decision, we granted an application in this case and denied another in *In re Jane Doe*, \_\_\_ S.W.3d \_\_\_ (Tex. 2000) (“*Doe 4(II)*”).

To allay concerns some legislators voiced that obtaining a judicial bypass would be too onerous for a minor, Senator Shapiro described an attorney's experience who works with Planned Parenthood in Nebraska representing minors who apply for a waiver under Nebraska's similar bypass procedure: "in all of the years that she's done this, one minor child, *one*, that was turned down, not only by the district court, but also by the court of appeals. And the reason this child was turned down was because she was 12 years old. Now that's real world." *The Parental Notification Act: Hearing on Tex. C.S.S.B. 30 Before the Senate Comm. on Human Services*, 76<sup>th</sup> Leg., R.S. 24 (March 10, 1999) (statement of Senator Shapiro) (transcript available from Senate Staff Services Office) (emphasis added). Senator Shapiro emphasized in Senate floor debate that, under the comparable Nebraska bypass procedure (which, we note, applies a higher "clear and convincing" proof standard), "ninety-nine percent" of bypasses had been granted. *See Debate on Tex. C.S.S.B. 30 on the Floor of the Senate*, 76<sup>th</sup> Leg., R.S. (March 17, 1999) (statement of Senator Shapiro) (tapes available from Senate Staff Services Office).<sup>8</sup>

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<sup>8</sup>JUSTICE HECHT suggests that we have selectively quoted the statute's legislative history, citing "contrary statements" in the record. But the statements he excerpts have little or no bearing on the question of the evidentiary burden the Legislature expected minors to face in judicial bypass proceedings. For example, Senator Bernsen's reference to "small exceptions" alludes to the number of minors who would need to resort to the bypass procedure because they are not blessed with loving, supporting families. *See The Parental Notification Act: Hearing on Tex. C.S.S.B. 30 Before the Senate Comm. on Human Services*, 76<sup>th</sup> Leg., R.S. 4 (March 10, 1999) (statement of Senator Bernsen) (transcript available from Senate Staff Services Office). Representative Delisi's "rare cases" comment was in response to a suggestion that some types of nonjudicial bypass, such as a clergy or counselor bypass, might be appropriate. She said, "And you're certainly right that in rare instances when it's not appropriate to tell the girl's parents then the judge of that court of law is appropriate because they're duly sworn to uphold . . . the best interest of the child." *See Hearing Before the House Comm. on State Affairs*, 76<sup>th</sup> Leg., R.S. (April 19, 1999) (statement of Representative Delisi) (audio available at <http://www.house.state.tx.us/house/commit/archive/c450.htm> or tapes available from House Video and Audio Services). The quotes from Representatives Gray and King are found within discussions of *other bills*, not Senate Bill 30. Representative Gray used the term "exceptional" to describe the circumstances in which some type of bypass is constitutionally mandated; that is, when the minor has "abusive or neglectful parents or parents who will not assume their parental rights." *See Hearing Before the House Comm. on State Affairs*, 76<sup>th</sup> Leg., R.S. (April 19, 1999) (statement of Representative Gray) (audio available at <http://www.house.state.tx.us/house/commit/archive/c450.htm> or tapes available from House Video and Audio Services). And Representative King's point was not that parental involvement would be *required* in the vast majority of cases, but that parents need to be involved in the vast majority of cases. *See Hearing Before the House Comm. on State Affairs*, 76<sup>th</sup> Leg., R.S. (April 19, 1999) (statement of Representative King) (audio

While the *amici* legislators now express disagreement with how we read the Legislature’s enactment, we can only apply an interpretation that comports with the statute’s existing plain language, structure, and legislative history. If the Legislature, as a body, agrees with *amici* that we misunderstood their intent, it is the Legislature’s prerogative to amend the statute to give us different guidance. This is precisely how the separation of powers doctrine should work. While we respect the *amici*’s views, we are aware that “[j]udges who pay attention to subsequent expressions of legislative intent not embodied in any statute may break rather than enforce the legislative contract.” RICHARD POSNER, *THE FEDERAL COURTS* 270 (1985).

#### **E. Why the Court Ruled with Opinion to Follow**

The Court granted Doe’s application on March 10<sup>th</sup>, noting that opinions would follow. We did so because the record indicated both that Doe was entitled to a bypass and out of concern that any further delay might expose her to greater risk. Doe testified that a sonogram performed on February 19, 2000, showed that she was eleven weeks and one day pregnant as of that date. She therefore was fourteen weeks pregnant when we issued our order on March 10. Evidence admitted at the hearing indicated that the “safest method” for performing an early abortion, a suction curettage or vacuum aspiration procedure, is used until the fourteenth week of pregnancy. *See generally Women’s Medical Prof’l Corp. v. Voinovich*, 130 F.3d 187, 198 (6<sup>th</sup> Cir. 1997) (stating “[s]uction curettage can sometimes be performed up to the fifteenth week of pregnancy”). There was also evidence that the usual method for a second trimester abortion is dilation and evacuation, a longer, more complicated, and more invasive procedure. Other evidence indicated that the risk of abortion

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available at <http://www.house.state.tx.us/house/commit/archive/c450.htm> or tapes available from House Video and Audio Services).

increases as the pregnancy advances. *See generally City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 467 (1983) (O'Connor, J., dissenting) (quoting bulletin of the American College of Obstetricians & Gynecologists: "Regardless of advances in abortion technology, midtrimester terminations will likely remain more hazardous, expensive, and emotionally disturbing for a woman than early abortions."), *overruled on other grounds by Planned Parenthood of So. Pa. v. Casey*, 505 U.S. 833, 882 (1992); *Greenville Women's Clinic v. Bryant*, 66 F.Supp.2d 691, 705 (D.S.C. 1999) (stating "[i]t is undisputed that second trimester abortions are significantly more risky to the health of women than first trimester abortions."). We issued our order on the concern that Doe be able to undergo the less risky suction curettage procedure, if that option was still available to her and that was her decision. While the stage of Doe's pregnancy at the time of the hearing and her doctor's general policies about the procedure are in the record, the exact date that Doe would no longer be eligible for the safer procedure is not. Any significant delay would have guaranteed that Doe could not have the safer procedure. JUSTICES HECHT and OWEN contend that we were wrong, and from their reading of the record the time for performing the safer procedure had just passed. The record does not definitively settle the issue, and we made our decision on the side of the minor's safety.

Additionally, Doe initiated these proceedings more than a month before our March 10th order. Thus, we had to also consider that any additional delay might call into question whether the proceedings were sufficiently expeditious to pass constitutional muster. *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. at 513; *Bellotti v. Baird*, 443 U.S. 622, 644 (1979). Moreover, the rules governing these proceedings specifically provide that "[t]he Court must rule as soon as possible." TEX. PARENTAL NOTIFICATION R. 4.3. The Parental Notification Rules expressly recognize that the expedited nature of these proceedings may require a court of appeals to issue its opinion as many as

sixty days after rendering judgment. *See* TEX. PARENTAL NOTIFICATION R. 3.3(e). While Rule 3.3, by its terms, applies only to the intermediate courts, the concept underlying the rule is entirely consistent with requiring this Court to rule as soon as possible. And although JUSTICES HECHT AND OWEN assert that Doe did not seek expedited relief in this Court, her notice of appeal specifically stated, in large, bold-faced type: “**PLEASE EXPEDITE.**”<sup>9</sup>

JUSTICES HECHT AND OWEN also suggest, erroneously, that we issued our March 10th order without deliberating the merits of Doe’s appeal. Because the judicial canons prohibit us from disclosing the substance or course of our deliberations, we cannot describe the process leading to our decision to issue the order.<sup>10</sup> Nevertheless, any suggestion that we issued our March 10th order without a majority consensus on the merits is incorrect because a majority consensus was necessary to issue the order. Moreover, although not our standard practice, we have previously issued orders with opinions to follow. In *Texas Water Commission v. Dellana*, we conditionally granted a writ of mandamus with an opinion to follow. *See* 849 S.W.2d 808, 809 n. 1 (Tex. 1993) (citing 36 TEX. SUP. CT. J. 556 (Feb. 17, 1993)). And more recently, in *Republican Party v. Dietz*, we granted a stay with an opinion to follow that provided all the relief requested. *See* 940 S.W.2d 86, 87, 94 (Tex. 1997); *see also, e.g., Davenport v. Garcia*, 837 S.W.2d 73, 73 (Tex. 1992); *Painter v. Shaner*, 667 S.W.2d 123, 124 (Tex. 1984); *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980). While we acknowledge that this procedure is not routine, the nature of these proceedings and

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<sup>9</sup>We also note that we do not stand alone in following this procedure in these unique cases. *See, e.g., In re Jane Doe*, 485 S.E.2d 354, 354 (N.C. Ct. App. 1997); *In re Mary Moe*, 517 N.E.2d 170, 171 (Mass. App. Ct. 1987); *In re Mary Moe*, 469 N.E.2d 1312, 1314 (Mass. App. Ct. 1984).

<sup>10</sup>Canon 3, part B(11) of the Code of Judicial Conduct provides that “[t]he discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court’s judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.” TEX. CODE JUD. CONDUCT Canon (3)(B)(11).

the record presented necessitated it in this case.

## **F. Respecting the Rule of Law**

The United States Supreme Court has observed that abortion is a divisive and highly-charged issue. *See Casey*, 505 U.S. at 866, 869. Thus, we recognize that judges’ personal views may inspire inflammatory and irresponsible rhetoric. Nevertheless, the issue’s highly-charged nature does not excuse judges who impose their own personal convictions into what must be a strictly legal inquiry. We might personally prefer, as citizens and parents, that a minor honor her parents’ right to be involved in such a profound decision. But the Legislature has said that Doe may consent to an abortion without notifying her parents if she demonstrates that she is mature and sufficiently well informed. As judges, we cannot ignore the statute or the record before us. Whatever our personal feelings may be, we must “respect the rule of law.” *Casey*, 505 U.S. at 868.

## **II**

### **A. Background**

Jane Doe is a pregnant, unmarried minor soon to be eighteen.<sup>11</sup> She lives at home with her parents and has not been emancipated. She sought an order from the trial court allowing her to consent to an abortion without notifying either of her parents. *See* TEX. FAM. CODE § 33.003. Doe retained her own attorney, and the trial court appointed a guardian *ad litem*. *See id.* § 33.003(e). At the conclusion of a hearing, the trial court denied Doe’s application and issued findings of fact and conclusions of law. *See id.* § 33.003(h), (i), (j). Doe appealed to the court of appeals, which affirmed the trial court’s judgment. *See id.* § 33.004(a). She now appeals to this Court. *See id.* §

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<sup>11</sup>We recite the state of the record at the time of the underlying proceedings. Since that time, Doe has turned eighteen. Although she could have obtained an abortion after her eighteenth birthday without notifying her parents, she did not wish to undergo the procedure at that late date.

33.004(f).

This is Doe’s second appeal. Her previous appeal was our first opportunity to examine the requirements of the Texas parental notification statute. *See In re Jane Doe 1(I)*, \_\_\_ S.W.3d at \_\_\_. In that opinion, we reversed the lower courts’ orders and remanded the application to the trial court for further proceedings in the interests of justice. There, we only considered the first statutory ground — that the minor is “mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents.” TEX. FAM. CODE § 33.003(i). The other two statutory grounds were not raised in that appeal, nor are they here.

As we have explained, a minor who seeks to obtain a judicial bypass under the first prong of the statute must prove two elements: (1) that she is mature, *and* (2) that she is sufficiently well informed. *See id.* If she proves both parts by a preponderance of the evidence, she is entitled to a bypass. *See id.* Thus, a trial court can deny a minor’s application by finding that she failed to prove either or both elements. The trial court predicated denial in this case on its finding that Doe did not satisfy the second element and made no finding regarding her maturity. We conclude, however, that Doe conclusively established that she was sufficiently well informed to obtain a judicial bypass. Consequently, we first consider how to review the trial court’s nonfinding on maturity.

### **B. Maturity**

Doe does not have the burden of proving in this Court that she is mature. That is because, as we explain below, a minor such as Doe, who is appealing the denial of her application under the first prong of the statute, only needs to conclusively refute the trial court’s actual findings. Because the trial court found as fact that Doe was not sufficiently well informed, for us to grant her application the record must establish the converse as a matter of law. But the trial court’s failure to

find that Doe was not mature does not require her to conclusively establish her maturity to prevail on appeal. This distinction is, perhaps, unique to proceedings under this statute, but the statutory scheme in place requires it, as well as the Parental Notification Rules this Court adopted under the statute.

This statutory scheme requires both a timely and complete judgment to support the denial of a minor's bypass application. First, if the trial court does not hold a hearing or rule on a minor's application within the statutory time limits, the application is granted as a matter of law. *See* TEX. FAM. CODE § 33.003(h). In addition, if the trial court holds a hearing and denies an application within the allotted time, but does not also issue written findings of fact and conclusions of law, the application is deemed granted, thereby implying findings contrary to the trial court's judgment. *See id.*

A trial court that fails to make a finding on one of the two elements of the first statutory prong does not run afoul of these requirements because a negative finding on only one element supports denial of the minor's application. But because the minor must establish both elements to succeed, an appellate court that determines that the minor conclusively established the element on which the trial court based its denial must confront the effect of the trial court's failure to make a finding on the other element. This failure to find creates uncertainty, because it could reflect either that the minor met her burden of proof on that element or that she did not. By providing that an application is deemed granted if a trial court fails to make required findings, the statute indicates that we must resolve this uncertainty in the minor's favor if she has put on evidence of the element the trial court did not find. Additionally, it is contrary to the expedited nature of these proceedings to require a remand when the trial court fails to issue particular findings. After all, our own rules

prohibit courts of appeals from remanding under any circumstances. *See* TEX. PARENTAL NOTIFICATION R. 3.3(b). For these reasons, an omitted element should be deemed to have been found in the minor’s favor if there is some evidence to support the finding. Here, Doe presented evidence that she is mature; we therefore deem that the trial court found this element in her favor.

In her dissent, JUSTICE OWEN argues that “well-established common-law principles regarding appellate review” require us to recognize an implied finding that Doe is not mature as though this were an omitted element of Doe’s claim. This purported “common-law” principle, and most of the cases cited to support it, are based upon Texas Rule of Civil Procedure 299, which provides that, when one or more elements of a claim or defense have been found, “omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment.” TEX. R. CIV. P. 299. Thus, the argument goes, if there is some evidence supporting the trial court’s failure to find that the minor is mature, the judgment must be affirmed.

JUSTICE OWEN acknowledges that Rule 299 conflicts with section 33.003 and does not apply. But even under its general principles, omitted findings are only supplied if they are necessary to the judgment. *See, e.g., Wisdom v. Smith*, 209 S.W.2d 164, 166-67 (Tex. 1948); *Bednarz v. State*, 176 S.W.2d 562, 563 (Tex. 1943). As we have explained, a negative finding on one element of the first prong is alone sufficient to support denial of the application. Thus, an implied finding on the second element is not necessary to the judgment and the general principle behind the rule does not authorize such a finding. Furthermore, as we have explained, a deemed finding on an omitted element against the minor would be contrary to the Legislature’s intent in deeming an application granted if the trial court fails timely to make findings.

For these reasons, we cannot infer that the trial court based its decision on a determination

that Doe was not mature. Rather, we consider whether Doe established that she is sufficiently well informed to make the decision to consent to an abortion without notifying a parent.

### **C. Sufficiently Well Informed**

In *Doe 1(I)*, we set out three elements of proof necessary for this determination. First, the minor must show that she has obtained information from a health-care provider about the health risks associated with an abortion and that she understands those risks as they apply to her pregnancy. *See* \_\_ S.W.3d at \_\_. Second, she must show that she understands the alternatives to abortion and their implications. *See id.* at \_\_. Third, she must show that she is aware of the emotional and psychological aspects of undergoing an abortion. *See id.* at \_\_. We examine each of these factors in turn to determine whether Doe has established as a matter of law that she is “sufficiently well informed.”

The trial court found that Doe has been “well apprised of the risks attendant to abortion and childbirth.” Doe’s testimony fully supports this finding. Doe testified that she had discussed the abortion procedure briefly with a doctor and in much more detail with a counselor. She related her understanding of the procedure in some detail and its attendant risks during and after the procedure. She expressed an understanding of post-operative precautions and requirements. Doe also testified that a nurse performed an ultrasound to determine fetal age and that she understood that the chance of complications from the procedure at this point in the pregnancy was not great but would increase as the pregnancy progressed. She testified to her understanding that it would still be legally possible to obtain an abortion after her eighteenth birthday, but stated that she would not undergo the procedure at that late date. From the foregoing we conclude, as the trial court did, that Doe obtained information from a health-care provider about the risks associated with an abortion and that she

understood those risks.

The court of appeals held that Doe failed to satisfy the second *Doe 1(I)* factor, which requires the minor to show “that she understands the alternatives to abortion and their implications.” \_\_\_ S.W.3d at \_\_\_. While the minor is not required to justify her decision, she must “be able to demonstrate that she has given thoughtful consideration to her alternatives, including adoption and keeping the child.” *Id.* at \_\_\_. We also noted that the minor should be aware that if she keeps the child, the law requires the father to assist in the financial support of the child. *See id.* at \_\_\_ (citing TEX. FAM. CODE § 154.001).

The trial court found that Doe had not thoughtfully considered her alternatives because it concluded that she did not understand the intrinsic benefits of keeping the child or adoption, and the court of appeals agreed. Specifically, the trial court asked Doe what the benefits would be if she carried the baby to term. Doe responded that the benefit would be actually having the child, but she candidly admitted that she could not be sure what other benefits there might be since she is not a mother. Doe testified about the joy she experiences in working with children as a volunteer, and that she had taken a parenting class offered by her high school. She also testified that she had considered adoption, but did not feel that adoption was a realistic alternative because she could not give the child up after carrying her pregnancy to term. She further testified that she would worry that the baby would have an unsuitable environment or that the adoptive parents would not provide the proper love or care. The trial court found that Doe did not understand the benefits of keeping the child or putting the child up for adoption and denied the application.

When we wrote in *Doe 1(I)* that a minor must have considered the “benefits, risks, and consequences” of the various options, we did not intend to suggest that trial courts should create

checklists that a minor must recite in order to establish that she has thoughtfully considered her options. \_\_\_ S.W.3d at \_\_\_. That a minor does not share the court’s views about what the benefits of her alternatives might be does not mean that she has not thoughtfully considered her options or acquired sufficient information about them. It is, of course, beyond dispute that parenting or placing an infant for adoption can be deeply rewarding. The fundamental importance of the parent-child relationship in our society has long been recognized. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). And, as the court of appeals observed, the adoption alternative may provide “positive and long lasting feelings of good will and selfless giving she might experience not only from giving life to the child and bringing it into the world, but also from giving a much wanted newborn to an adoptive family . . . .” But *Doe I(I)* does not require the minor to mechanically list or recite the potential benefits of her options. See \_\_\_ S.W.3d at \_\_\_. Instead, the focus of the inquiry is whether the minor has thoughtfully considered her alternatives, *see id. at* \_\_\_, and “the examining court must weigh her situation not against the ideal but against a standard of basic understanding of her situation, her choices, and her options.” *In re Doe*, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994).

The concept of “benefits” is inherently subjective; what one person may consider a benefit, another may not. That Doe does not accept and pursue the alternate benefits to abortion does not mean that she has not given those alternatives thoughtful consideration. Moreover, even though there may be generally recognized benefits to an alternative, those benefits must be considered in light of the minor’s particular situation. According to Doe’s testimony, adoption was not a realistic option for her because she would grow emotionally attached to the child after birth and would be unwilling to give the child up. Doe’s testimony shows that she does not perceive any benefits to carrying a baby to term in her current situation. The undeniable benefits of adoption the court of

appeals identified are thus, to Doe, immaterial.

Doe's testimony demonstrates that she understands the alternatives to abortion as they apply to her and that she has thoughtfully considered their implications. Doe received information about her alternatives from several different sources. Before seeking information from organizations, Doe read books and did research on the Internet about her alternatives. She also visited an organization where she received additional oral and written information that advised her of her alternatives. While she did not recite in detail the information contained in the written materials, she testified that she had read and considered them. These materials discuss parenthood, adoption, abortion, and the benefits and drawbacks of each. One section on parenting discusses the difficulties of parenting, but states that a child could be a welcome addition to her family. The materials also state that the organization can provide information about pregnancy care, parenting skills, and sources of financial help for pregnant women. The section on adoption makes it clear that this, too, is a viable option. The materials note that there are more families interested in adopting than there are children to adopt so that the child would go to a family that really wants a child. The section on abortion explains the procedure and comments that some feel abortion is not moral while others claim it is more moral to have an abortion than an unwanted child. Doe also read other materials focusing on abortion that provided greater detail and answered questions about the procedure. Doe testified that she read through these materials several times.

Doe spoke for more than an hour and a half, on two different occasions, with one of the organization's counselors. The counselor told Doe what would happen if she decided to keep the child. Doe also had several conversations with a person who counsels pregnant teenagers and teenage mothers. Doe testified that, while both were supportive, neither urged abortion over carrying

the child to term. Instead, they both wanted her to make her own decision.

In addition to speaking with people experienced in this area, Doe spoke with several people who had been in a similar situation. She spoke to a relative who had an abortion, a teenager who had an abortion, and two teenagers who did not have abortions and are now raising their children. Doe testified that the relative was happy with her decision, and the two teenagers who kept their children regretted their decisions because they were having difficulties as a result of having a child at a young age. The teenager who had an abortion talked to Doe about the procedure and about her thought processes in choosing to have an abortion. She told Doe that she is glad she had an abortion and does not regret it.

Doe did not seek information or counseling from anyone who would be against her having an abortion. JUSTICE HECHT argues in his dissent that her failure to do so supports the trial court's finding that she was not sufficiently well informed. But this Court held in *Doe 1(I)* that a minor is not required to seek information from any particular group or viewpoint so long as "she has obtained information on the relevant considerations from reliable sources of her choosing that enable her to make a thoughtful and informed decision." \_\_\_ S.W.3d at \_\_\_. Although JUSTICE HECHT may question whether *Doe 1(I)* was correctly decided, "there is no doubt that it is the law. The Court cannot simply pick and choose the cases in which the rule it has announced will apply." *Vickery v. Vickery*, 999 S.W.2d 342, 344 (HECHT, J. dissenting from denial of petition for review).

The record further reflects that Doe gave reasoned answers in response to questions about her options. When asked if she had thought about keeping the child, Doe explained that it would be very difficult for her considering her age and desire to further her education. She expressed her desire to go to college and have a career, and stated that she would like to be married and settled

down before having a child. Doe testified that she did not believe herself ready for parenthood. She understood that the law requires the father to pay child support, but concluded that she and the father would not be able to support the child. She testified that the two teenagers who kept their babies, at least one of whom had married, led very hard lives and wished they could take it back.

As we have said, the courts' fundamental inquiry is whether the minor has thoughtfully considered her alternatives. This inquiry must focus not on whether the minor has recited a generally recognized list of benefits or consequences in order to justify her decision. Instead, the inquiry must take into account whether the minor has considered and weighed her alternatives in light of her particular circumstances. When a minor has established that she has engaged in a rational and informed decision-making process and concluded that realistic concerns foreclose her alternatives, she cannot be denied the statutory bypass for failing to list general benefits that others might see. It must be remembered that "it is not the court's responsibility to superimpose its judgment or its moral convictions on the minor in regard to what course of action she should take with reference to her own body." *Ex parte Anonymous*, 618 So.2d 722, 725 (Ala. 1993). The question is not whether she is making a decision that we would approve of or agree with, but whether she is sufficiently informed to make the decision on her own. *See id.*

Doe also conclusively established that "she is . . . aware of the emotional and psychological aspects of undergoing an abortion." *In re Jane Doe 1(I)*, \_\_ S.W.3d at \_\_. Doe spoke to an older relative and another minor about their abortion decisions and how they felt about them. After this, Doe discussed the emotional effects of abortion with the organization's counselor, who also gave Doe written materials about the emotional consequences of abortion. Doe read these materials several times. Although she did not discuss the emotional consequences of abortion with anyone

opposed to abortion, she was not required to do so. *See id.* at \_\_\_.

Doe testified that, after consulting these sources, she understood that many women experience guilt after an abortion and some women experience depression, but that abortion also provided many women with a feeling of relief. Doe did not merely consider these emotional consequences in the abstract; she carefully considered how each of these alternatives would affect her emotionally. She reasoned that all of her choices would involve guilt, but that she felt most comfortable with the decision to have an abortion.

Doe also indicated that she understood the gravity of her decision. She considered how abortion would affect her emotionally in light of its serious consequences. Doe asked to see the fetus on the ultrasound video, testifying that she considered it her responsibility to do so. Doe also testified that she understood and considered the fetus's development. Doe understood that her decision to terminate her pregnancy was irrevocable, and consequently recognized the seriousness of her decision. She also considered an abortion's effects on her spiritual well-being and concluded, based on her personal spiritual beliefs, that it would not have an adverse effect.

Doe also considered how her decision to have an abortion would affect her family relations. *See id.* at \_\_\_. She testified that it would likely cause problems within the family if her parents found out about her decision, and could possibly even lead her parents to abandon her. Doe based this conclusion on her parents' reaction to abortions by a relative and one of Doe's friends, as well as her parents' reactions to other events in Doe's past. Nevertheless, Doe believed that in the future she would be able to tell her parents about the abortion.

After considering all of these factors, Doe concluded that she felt comfortable with her decision and that she would not be burdened with guilt. While we might disagree with her

conclusion, Doe conclusively established that it was “thoughtful and well informed.” *Id.* at \_\_\_.

In his dissent, JUSTICE HECHT cites the following evidence to support the trial court’s finding that Doe was not sufficiently well informed: (1) “Doe admitted that she is young and inexperienced;” (2) “Doe has never had to make a decision approaching the seriousness of having an abortion;” and (3) Doe did not want to confront her parents about her decision because they would disapprove. But these considerations have no bearing on whether Doe was sufficiently well informed. While they might be relevant to Doe’s maturity, the trial court’s decision was not based upon maturity. Moreover, JUSTICE HECHT’s focus on the minor’s experience is misplaced. As the Alabama Supreme Court explains, “[i]n every case where a minor female is involved, we would not find the experience to be expected of an adult female. . . . [N]o minor female would be able to pass the experience test if adult-level experience were a criterion.” *Ex parte Anonymous*, 618 So.2d at 725.

### III

#### Conclusion

For the foregoing reasons, we hold that Doe conclusively established the statutory requirements to obtain a judicial bypass. We therefore reverse the court of appeals’ judgment and

render judgment granting Doe’s application for a judicial bypass.

Harriet O'Neill  
Justice

OPINION DELIVERED: June 22, 2000.