REPRODUCTIVE RIGHTS — PARENTAL CONSENT LAWS — FIFTH CIRCUIT UPHOLDS STATE PARENTAL CONSENT LAW BLOCKING MINOR'S ABILITY TO CONFIDENTIALLY ACCESS CONTRACEPTION. — *Deanda v. Becerra*, 96 F.4th 750 (5th Cir. 2024).

Revocation of the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*[1] has raised concern that other substantive due process rights may face a similar fate.[2] Concurrently, parental rights have only expanded as advocates have increasingly attempted to assert legal control over children's education and access to medical treatment.[3] Recently, in *Deanda v. Becerra*,[4] the Fifth Circuit upheld a Texas parental consent requirement that blocks minors' ability to confidentially access contraception at Title X clinics.[5] By focusing its reasoning solely on standing and preemption doctrine, the Fifth Circuit strategically avoided the key underlying question of how to balance parents' and minors' Fourteenth Amendment rights. This avoidance has significant implications for minors' access to confidential reproductive care via mechanisms such as judicial bypass.

Enacted by Congress in 1970, Title X[6] provides low-income individuals comprehensive family planning services,[7] excluding abortion care.[8] Grantee healthcare providers are mandated to offer "services for adolescents."[9] In 1981, Congress added a requirement for grantees to "encourage family participation" "[t]o the extent practical."[10] The "longstanding guidance" of the Department of Health and Human Services (HHS) has interpreted the statute as constraining grantees from requiring parental

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1 142 S. Ct. 2228, 2283 (2022).

2 *See* Quint Forgey & Josh Gerstein, *Justice Thomas: SCOTUS "Should Reconsider" Contraception, Same-Sex Marriage Rulings*, POLITICO (June 24, 2022, 1:45 PM), https://www.politico.com/news/2022/06/24/thomas-constitutional-rights-00042256 [https://perma.cc/2MY2-SSPX] (explaining the potential implications of Justice Thomas's concurrence, which suggested that the Supreme Court "should reconsider" its past rulings on contraception access, same-sex relationships, and same-sex marriage (quoting *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring))).

3 *See* Jamelle Bouie, Opinion, *What the Republican Push for "Parents' Rights" Is Really About*, N.Y. TIMES (Mar. 28, 2023), https://www.nytimes.com/2023/03/28/opinion/parents-rights-republicans-florida.html [https://perma.cc/9X6J-QDZR] (outlining efforts by parents' rights activists to curtail educational curricula that teach "divisive concepts" and "to regulate the treatment of transgender children").

4 96 F.4th 750 (5th Cir. 2024).

5 *See id.* at 768.

6 Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, tit. X, 84 Stat. 1504 (codified at 42 U.S.C. §§ 300–300a-6, 3505a–3505b).

7 42 U.S.C. § 300.

8 *Id.* § 300a-6 ("None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.").

9 *Deanda*, 96 F.4th at 754 (quoting Act of Nov. 8, 1978, Pub. L. No. 95-613, § 1(a)(1), 92 Stat. 3093, 3093 (codified at 42 U.S.C. § 300(a))) (citing Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 652 (D.C. Cir. 1983)). This requirement was codified in 1978, reflecting the program's long-term practice. *See id.* (citing *Heckler*, 712 F.2d at 652).

10 *Id.* (alteration in original) (quoting Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 931(b)(1), 95 Stat. 357, 570 (codified at 42 U.S.C. § 300)).

consent.[11] In October 2021, HHS codified this guidance in a final rule that explicitly prohibits parental consent requirements.[12]

In 2020, prior to the promulgation of this final rule, Alexander Deanda filed suit in federal court challenging HHS's administration of Title X.[13] Deanda "alleged that he is the father of three minor daughters" whom "he is raising . . . according to his Christian beliefs."[14] As such, "he want[ed] to be informed if any of his children . . . try to access contraceptives."[15] Texas law ostensibly provides Deanda a statutory basis to require parental notification and consent, as section 151.001 of the Texas Family Code gives parents "the right to consent to the child's . . . medical and dental care."[16] Accordingly, Deanda advanced two claims.[17] First, Deanda asserted that Title X, as interpreted by HHS, did not preempt the parents' statutory right of parental consent.[18] Second, Deanda contended that Title X violated his Fourteenth Amendment constitutional right to direct his children's upbringing.[19]

The district court granted summary judgment to Deanda in full.[20] After finding that Deanda had Article III standing,[21] the court held that the Texas Family Code was not preempted because Title X's "to the extent practical" language definitionally set a "floor" for family

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[11] *Id.* (quoting Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144, 56166 (Oct. 7, 2021) (codified at 42 C.F.R. § 59.10)). In 1983, HHS promulgated a regulation requiring grantees to notify parents prior to distributing contraceptives and to comply with any state parental consent laws. *Id.* (citing Parental Notification Requirements Applicable to Projects for Family Planning Services, 48 Fed. Reg. 3600, 3601 (Jan. 26, 1983) (codified at 42 C.F.R. pt. 59)). However, this regulation was never implemented because it was found to invalidate "a 'primary purpose' of the program — making 'family planning services readily available to teenagers.'" *Id.* (quoting *Heckler*, 712 F.2d at 660).

[12] *Id.* (citing Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. at 56144). The added provision states that "Title X projects may not require consent of parents or guardians for the provision of services to minors." 42 C.F.R. § 59.10(b) (2023).

[13] *Deanda*, 96 F.4th at 754.

[14] *Id.*

[15] *Id.*

[16] TEX. FAM. CODE ANN. § 151.001(a)(6) (West 2024). Texas law defines "medical care" under section 266.001(5) to include "all . . . services . . . described by" section 32.003(4), *id.* § 266.001(5), which in turn "include[s] all of the health care . . . provided under federal law for needy [Texan] individuals," TEX. HUM. RES. CODE ANN. § 32.003(4) (West 2025). This law has been interpreted to include minors' access to abortion and prescription contraception. *See Teen Consent and Confidentiality: Section 2: Consent for Health Care of a Minor*, TEX. HEALTH STEPS, https://www.txhealthsteps.com/static/warehouse/1076-2011-Apr-20-n54e12wov5j3bkke32k3/section_2.html [https://perma.cc/NYM7-ERLG].

[17] *Deanda*, 96 F.4th at 755. Deanda advanced a third claim under the Religious Freedom Restoration Act of 1993, but he withdrew that claim. *Id.* at 755 & n.2.

[18] *Id.* at 755.

[19] *Id.* at 758.

[20] Deanda v. Becerra, 645 F. Supp. 3d 600, 629 (N.D. Tex. 2022).

[21] *Id.* at 614–15. Per the court's view, the deprivation of Deanda's statutorily created right to consent to his daughters' medical care, combined with the increased likelihood that his children may access contraception without his knowledge or consent, sufficed as a concrete injury traceable to the government that the court's judgment would likely redress. *Id.* at 610–11, 614–15.

involvement that could accommodate a parental consent requirement.[22] Even if Title X did preempt the Texas law, the district court held that "the right of parents to consent to the use of contraceptives" was a substantive due process right that rendered the interpretation of Title X to preempt Deanda's right of consent unconstitutional.[23] Assessing Title X in light of this constitutional holding, the district court partially vacated HHS's 2021 rule that bars parental consent requirements.[24]

The Fifth Circuit affirmed in part and reversed in part.[25] Writing for the panel, Judge Duncan[26] first agreed with the district court's determination that Deanda had Article III standing.[27] Focusing its analysis on Deanda's alleged injury, the court found that Title X's "invasion"[28] of Deanda's right to consent was more than just a "bare procedural violation."[29] It was instead a concrete harm, as courts had long honored the right of parents to direct their children's religious upbringing.[30] The court also rejected the government's additional injury-related arguments on appeal: (1) that Deanda's injury was not imminent because he had not alleged that his daughters were likely to obtain contraception, and (2) that his grievance was generalized because it applied to all parents.[31] The court found the first argument tautological because

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[22] *Id.* at 618. The government argued that mandating parental consent "would render the 'to the extent practical' language meaningless." *Id.* at 617. However, the court rejected this argument because Texas's law was not "to a large extent directly contrary to" Title X's aims. *Id.* at 619 (quoting Felder v. Casey, 487 U.S. 131, 145 (1988)).

[23] *Id.* at 628. Though the district court recognized that "parental rights are not 'beyond limitation,'" *id.* at 622 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)), it found that the Supreme Court has not "disposed of [the] deeply rooted right of parents to make important life decisions for their children," *id.* at 627. The court acknowledged that both the Third and Sixth Circuits had rejected similar parental rights challenges to laws that allowed minors access to contraception without notification or consent. *Id.* at 623–25 (citing Anspach *ex rel.* Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256 (3d Cir. 2007); Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980)). However, the court noted that minors' right to contraception is in doubt per *Dobbs*, where Justice Thomas urged the Court to "reconsider" contraceptive rights. *See id.* at 623 n.12 (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring)). Moreover, the court embraced principles underlying *Troxel v. Granville*, 530 U.S. 57 (2000), where a plurality of the Supreme Court affirmed the primacy of parents' rights. *Deanda*, 645 F. Supp. 3d at 625 (citing *Troxel*, 530 U.S. at 67, 69 (plurality opinion)).

[24] *Deanda*, 96 F.4th at 753. Though HHS's finalized rule was promulgated after the parties cross-moved for summary judgment and thus was not technically at issue in the case, the district court found that partial vacatur "follow[ed] necessarily" from its substantive constitutional holding. *Id.* at 755; *see also* Deanda v. Becerra, No. 20-CV-092-Z, 2023 WL 11959385, at *3 (N.D. Tex. Jan. 4, 2023).

[25] *Deanda*, 96 F.4th at 768–69.

[26] Judge Duncan was joined by Chief Judge Richman and Judge Haynes.

[27] *Deanda*, 96 F.4th at 760.

[28] *Id.* at 756 (quoting Wendt v. 24 Hour Fitness USA, Inc., 821 F.3d 547, 552 (5th Cir. 2016)).

[29] *Id.* at 757 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

[30] *Id.* at 758 (citing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)). As the Fifth Circuit agreed that Deanda had standing because Title X undermined his right to consent, it did not evaluate the district court's determination that Deanda also had standing because Title X increased the risk that his children would obtain contraceptives. *Id.* at 760 & n.7.

[31] *Id.* at 759–60.

Title X enabled minors to seek access absent parental knowledge.[32] It additionally found the second argument unpersuasive because Deanda was asserting a harm specific to religious parents, not on behalf of all parents.[33]

The court then held that Title X did not preempt section 151.001 of the Texas Family Code, relying primarily on the premise that states' "historic police powers"[34] should not be preempted "unless that was the clear and manifest purpose of Congress."[35] First, the court held that the plain text of Texas's law did not obstruct the purpose of Title X, as the "overarching goal[s] of encouraging family participation" and "requiring parental consent" reinforced each other.[36] Thus, interpreting Title X otherwise would "distort the text"[37] — thereby flouting "the presumption against preempting state family law."[38] Next, the court held that Title X's legislative history — a failed pre-1981 congressional amendment to Title X requiring parental notification and a conference committee report indicating that grantees should refrain from directly notifying parents — did not support preemption.[39] In particular, the court found that neither piece of evidence clearly communicated Congress's intention, and thus reliance on them would effectively amend Title X's current language.[40] Third, the court rejected the persuasive authority of *Planned Parenthood Federation of America, Inc. v. Heckler*,[41] a D.C. Circuit decision invalidating 1982 HHS regulations that required Title X grantees to notify parents.[42] Judge Duncan asserted that *Heckler* answered questions related to regulatory authority, not those related to preemption.[43] The court recognized that HHS's finalized regulation could, in theory, independently preempt Texas's statute.[44] However, it declined to rule on this issue because it believed that

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[32] *Id.* at 759.

[33] *Id.* The court held that Deanda "easily satisfie[d] the other standing components," as his injury "flow[ed] directly from the . . . administration of Title X" and would be redressed in the absence of Title X preemption. *Id.* at 760 (citing Louisiana v. U.S. Dep't of Energy, 90 F.4th 461, 468–69 (5th Cir. 2024)).

[34] *Id.* at 761 (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008)). The court noted that there is a particularly strong presumption against preempting state family law. *Id.* at 763 (citing, inter alia, Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001)).

[35] *Id.* (quoting *Altria Grp.*, 555 U.S. at 77).

[36] *Id.* at 762.

[37] *Id.*

[38] *Id.* at 763 (citing *Egelhoff*, 532 U.S. at 151).

[39] *Id.* (citing Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 660 & n.43, 657 (D.C. Cir. 1983)).

[40] *See id.* at 764.

[41] 712 F.2d 650 (D.C. Cir. 1983).

[42] *Id.* at 652, 663.

[43] *Deanda*, 96 F.4th at 765.

[44] *Id.* at 766–67 (citing, inter alia, Butler v. Coast Elec. Power Ass'n, 926 F.3d 190, 196 (5th Cir. 2019)). The court noted that agency regulations "intended to preempt state law will be upheld unless the administrator 'has exceeded his statutory authority or acted arbitrarily.'" *Id.* at 767 (quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982)).

if it did, it would be erroneously acting as a court of "first view" rather than one of review.[45]

As the court held that Texas's law was not preempted, it declined to evaluate the district court's determination that Title X violated Deanda's constitutional right to direct his children's upbringing per the doctrine of constitutional avoidance.[46] Finally, the court held that the district court erred by partially vacating HHS's finalized rule, as Deanda had not actually challenged this rule under the Administrative Procedure Act.[47]

In *Deanda*, the Fifth Circuit strategically avoided addressing how parents' and minors' competing Fourteenth Amendment rights can be reconciled, with key implications for minors' future access to confidential reproductive care. The Supreme Court has held that individuals have a fundamental substantive due process right to access contraception.[48] Although the scope of minors' right to access contraception is less certain,[49] a majority of the Court has recognized that minors retain at least some liberty interest.[50] By declining to assess the merits of the district court's constitutional holding, the *Deanda* court allowed the district court's skepticism about minors' liberty interest in contraception to go unchallenged.[51] This has significant implications for minors' access to confidential contraceptive care via procedures such as judicial bypass.

The Supreme Court has long recognized the fundamental right to contraception, holding "[t]hat the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception."[52] In *Carey v. Population Services International*,[53] the

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[45] *Id.* at 767 (quoting Rest. L. Ctr. v. U.S. Dep't of Lab., 66 F.4th 593, 597 (5th Cir. 2023)).

[46] *Id.* at 766 n.15 ("It is a well established principle governing the prudent exercise of [federal] jurisdiction that normally [we should] not decide a constitutional question if there is some other ground on which to dispose of the case." (alterations in original) (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))).

[47] *Id.* at 767–68; 5 U.S.C. §§ 551–559, 701–706.

[48] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that married couples have a fundamental right to access contraceptives); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (extending this due process right to any "individual, married or single" (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (4–3 decision))).

[49] *Compare Carey*, 431 U.S. at 693 (opinion of Brennan, J.) (arguing that state restrictions on minors' contraception access are "valid only if they serve 'any significant state interest that is not present in the case of an adult'" (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976))), *with id.* at 707 (Powell, J., concurring in part and concurring in the judgment) (contending instead that restrictions are permissible if they "rationally serve[] valid state interests").

[50] *See id.* at 693 (opinion of Brennan, J.); *id.* at 707 (Powell, J., concurring in part and concurring in the judgment).

[51] *See* Deanda v. Becerra, 645 F. Supp. 3d 600, 623 n.12 (N.D. Tex. 2022) (stating that the "correctness of *Carey*'s holding" regarding contraception bans is "in doubt" based on *Dobbs*).

[52] *Carey*, 431 U.S. at 685 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (quoting *Eisenstadt*, 405 U.S. at 453)).

[53] 431 U.S. 678 (1977).

Court analyzed the scope of this right as applied to minors. Though the Supreme Court has held that minors presumptively enjoy constitutional protections,[54] it has acknowledged that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[55] Applying this framework,[56] the *Carey* Court enjoined enforcement of a state law criminalizing the sale of contraceptives to minors,[57] but the Justices disagreed on the proper standard of review. Writing for a four-Justice plurality, Justice Brennan argued that laws restricting access are "valid only if they serve 'any significant state interest that is not present in the case of an adult.'"[58] As such, "a blanket prohibition, or even a blanket requirement of parental consent . . . [was] foreclosed."[59] Writing separately, Justice Powell contended that laws restricting access — while not "free from judicial review"[60] — should instead be subject only to the rational basis test.[61] Thus, laws allowing parents to regulate access were likely permissible.[62] The *Carey* Court certainly fragmented on the constitutionality of parental consent laws. However, a majority agreed that minors retained at least some liberty interest in contraception access.[63] Lower courts have interpreted this fractured opinion as requiring courts to balance minor and parental due process rights when directly reviewing parental-rights challenges to laws that allow confidential contraception access.[64]

By declining to reach the merits of the district court's constitutional holding, the Fifth Circuit allowed the district court's doubt regarding minors' liberty interest in contraceptive access to go uncontested.[65] Of

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54 *See, e.g.*, *In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *see also Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

55 Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

56 *Carey*, 431 U.S. at 692 (opinion of Brennan, J.) (citing *Prince*, 321 U.S. at 170); *id.* at 705–06 (Powell, J., concurring in part and concurring in the judgment) (citing *Prince*, 321 U.S. at 170).

57 *Id.* at 681–82 (majority opinion).

58 *Id.* at 693 (opinion of Brennan, J.) (quoting *Danforth*, 428 U.S. at 75).

59 *Id.* at 694.

60 *Id.* at 705 (Powell, J., concurring in part and concurring in the judgment).

61 *Id.* at 707.

62 *Id.* at 709.

63 *See id.* at 693 (opinion of Brennan, J.); *id.* at 707 (Powell, J., concurring in part and concurring in the judgment).

64 *See, e.g.*, Doe v. Irwin, 615 F.2d 1162, 1166 (6th Cir. 1980). Upon adjudicating a parental rights challenge to a law allowing minors contraception access, *id.* at 1163–65, the *Doe* court recognized three sets of rights — "those of parents, those of children and those of the State" — in part because *Carey* recognized that minors have the "right to obtain contraceptives," *id.* at 1166. Adjudicating a similar challenge, the *Anspach* court noted that "parental interests must be balanced with the child's right to privacy, which is also protected under the Due Process Clause." Anspach *ex rel.* Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 261 (3d Cir. 2007).

65 *See* Deanda v. Becerra, 645 F. Supp. 3d 600, 623 n.12 (N.D. Tex. 2022) (stating that the "correctness of *Carey*'s holding" regarding contraception bans is "in doubt" based on *Dobbs*); *see also id.* at 627 ("For centuries, the common law held minors were incapable of giving consent to make important life decisions. No Supreme Court case has disposed of this deeply rooted right of parents to make important life decisions for their children.").

course, the *Deanda* court was not procedurally bound to review the district court's due process analysis. After all, per the doctrine of constitutional avoidance,[66] courts often decline to decide more than necessary in order to leave thorny questions to the political process.[67] However, constitutional avoidance is but one prudential factor that ought to be balanced against other strategic considerations.[68] In many cases, the federal judiciary is best positioned to define the scope of individual rights.[69] Moreover, when other circuit courts have squarely answered the constitutional question at issue,[70] federal courts ought to prioritize doing the same in the interest of clarity.[71]

Justified or not, the *Deanda* court's invocation of constitutional avoidance enabled it to hide behind the cloak of judicial minimalism while still signaling that it would overturn *Carey* if directly presented with the issue. Some have described this phenomenon as "anticipatory overruling" — a practice in which lower courts "disregard Supreme Court decisions when they are reasonably sure that the Supreme Court would overrule them given the opportunity."[72] The district court explicitly embraced this framework by asserting that the "correctness of *Carey*'s holding" regarding contraception bans was "in doubt" based on *Dobbs*.[73] Even if not overtly, the Fifth Circuit adopted this view by valorizing parental authority throughout its opinion. Indeed, the court emphasized that "parental rights" fall within "enduring American tradition"[74] — thus indicating that it believed that the Supreme Court would prioritize this interest as it has other historical practices.[75] To be sure,

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[66] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[67] *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 309 (1998) (contending that judicial minimalism is a way for courts to "open a dialogue with other governmental actors").

[68] *See* ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 12 & n.107 (2014).

[69] *See* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1522 (2000) (arguing that there is little justification for "substantive minimalism," the practice in which a court "avoid[s] decision of the constitutional issue" because it downplays the institutional competence of the judiciary to protect individual rights).

[70] Such is the case here, as both the Third and Sixth Circuits have rejected parental rights challenges to laws allowing minors to access contraceptive care without parental notification or consent on constitutional grounds. *See supra* note 64 and accompanying text.

[71] Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1173 (2012) (contending that "variation is a recipe for public disillusionment over the authoritativeness of national institutions").

[72] C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 41 (1990) (footnote omitted).

[73] Deanda v. Becerra, 645 F. Supp. 3d 600, 623 n.12 (N.D. Tex. 2022).

[74] *Deanda*, 96 F.4th at 758 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).

[75] *See* Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59, 63 (2023) (explaining how the Supreme Court has increasingly relied on history and tradition).

the Supreme Court has categorically rejected the practice of anticipatory overruling.[76] Yet, lower courts have sometimes engaged in the practice anyway,[77] increasing the risk that the Fifth Circuit could do the same.

Recognizing an unqualified right of parents to regulate minors' contraception access would have significant implications for minors' access to confidential reproductive care via mechanisms such as judicial bypass. In the context of abortion access, the Supreme Court has held that minors must be allowed the option of petitioning a court to waive parental consent requirements.[78] Recognizing that this mandate may be on shaky footing post-*Dobbs*, some scholars have noted that the common law right to bodily integrity[79] may alternatively provide minors a way to overcome statutory parental consent requirements in certain cases — thus requiring states with these laws to allow judicial bypass.[80] This common law right ought to extend to minors' access to contraception as well. After all, confidential access to contraception, at least via judicial bypass, is consistent with this doctrine's recognition of minors' right to autonomy.[81] Yet, an unqualified constitutional right of parents to direct their children's medical care would trump even this last-resort failsafe.

Deanda v. Becerra should be viewed as part of a concerning trend of chipping away at constitutional rights simply by omission. Especially in an era when the Supreme Court is reconsidering many of its precedents,[82] lower courts' signaling that they would be willing to anticipate changes in jurisprudence breeds uncertainty. By declining to engage with the district court's proposition that minors retain little to no liberty interest in contraceptive care, the Fifth Circuit indicated that the right to contraception, codified in jurisprudence for decades, may indeed already be on the chopping block.

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[76] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case . . . the [court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[77] *See* Christine Scherer, *A* Whole Woman's *Mess: How the* Marks *Rule, Anticipatory Overrulings, and One Concurring Opinion Have Confused Lower Courts Ruling on Abortion Restrictions*, 47 U. DAYTON L. REV. 43, 50–52 (2022).

[78] *See* Bellotti v. Baird, 443 U.S. 622, 643 (1979) (plurality opinion). A majority of the Court concluded that the state cannot "give a third party an absolute . . . veto" over a minor's fundamental right to access an abortion and thus must provide an alternate way for a minor to receive services if parental consent is required. *Id.* (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).

[79] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred . . . by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

[80] *See* Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After* Dobbs, 132 YALE L.J. 1908, 1954 (2023).

[81] *Id.*

[82] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning longstanding precedent stating that courts should defer to agency statutory interpretations in cases of ambiguity).