UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. Plaintiffs-Appellees, v. Kelly Ayotte, Attorney General of New Hampshire, in her official capacity, Defendant-Appellant.	Civil No. 03-491-JD

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT ON CONSTITUTIONALITY OF THE ACT'S JUDICIAL BYPASS

Defendant, through counsel, the Office of the Attorney General, respectfully moves for summary judgment on the constitutionality of the Act's judicial bypass. Defendant submits a supporting Memorandum of Law concurrently herewith. In support of this motion, Defendant alleges as follows:

1. This case involves a challenge to the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act ("the Act"). N.H. RSA 132:22-28.

2. The United States Supreme Court vacated the decision of the First Circuit Court of Appeals and remanded the case for a determination of legislative intent. *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961, 969 (2006). If the Act survives on remand, the Court was to review the issue that Plaintiffs had raised on the confidentiality of the judicial bypass procedures. *Id.* The Court of Appeals remanded the case to this Court for proceedings consistent with the Supreme Court decision. On

remand, Plaintiffs improperly add a new claim, challenging judicial bypass implementation.

3. Defendant has already moved for summary judgment on the issue of legislative intent. Plaintiffs objected and filed a cross-motion for summary judgment. Defendant objects and cross-moves for summary judgment on the judicial bypass.

4. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

5. Because the Act expressly provides for confidentiality of bypass and appeal processes, as well as for alternative grounds for granting judicial bypass, it meets the applicable constitutional standards on its face, and Defendant is entitled to summary judgment as a matter of law on Plaintiffs' facial challenge.

6. In addition, Plaintiffs' challenge to the Act's judicial bypass procedure as implemented by New Hampshire courts is premature and should be dismissed. There are no disputed issues of material fact with regard to implementation of the Act's judicial bypass procedure. Defendant does not dispute the existence of written procedures and forms developed by the state's judicial branch in anticipation of the Act's implementation, *see* Pls' Mem., A-1 through A-13, and Plaintiffs do not dispute that the Act has been enjoined to date. Thus, Plaintiffs have not presented, nor could they present, any facts showing that these procedures and forms have been used in New Hampshire state courts to date. Even so, the Act controls and the courts are presumed to follow constitutional mandates.

7. Plaintiffs also have not presented facts to show that use of similar forms in other states has resulted in harm to minors seeking bypass orders. On the other hand, Defendant presents affidavit evidence demonstrating that procedures and forms implementing virtually identical bypass provisions in Minnesota have been used successfully, without challenge. See Affidavit of Judith Rehak, Esq., Exhibit B to accompanying Memorandum of Law.

8. A memorandum of law with exhibits is filed concurrently herewith in accordance with Local Rule 7.1(a)(2).

9. Assent by counsel is not required as this is a dispositive motion.

10. Defendant requests that oral argument be heard on this motion.

WHEREFORE, Defendant respectfully requests that the Court:

A. Grant Defendant's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment on Judicial Bypass;

B. Deny Plaintiffs' Cross-Motion for Summary Judgment;

C. Schedule oral argument on this and other pending motions; and

D. Grant such other and further relief as is just and necessary.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

DATE: December 29, 2006

By: \s\ Maureen D. Smith

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant's Cross-Motion for Summary Judgment was served this day upon counsel of record through the Court's ECF system.

By: \s\ Maureen D. Smith
Maureen D. Smith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. Plaintiffs-Appellees, v. Kelly Ayotte, Attorney General of New Hampshire, in her official capacity, Defendant-Appellant.	Civil No. 03-491-JD

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' OBJECTION AND CROSS-MOTION

I. Introduction

Defendant respectfully submits this Memorandum of Law in support of her Cross-Motion for Summary Judgment and her Objection to Plaintiffs' Cross-Motion for Summary Judgment, both of which have been filed contemporaneously with this Memorandum. Defendant also incorporates by reference her Motion for Partial Summary Judgment and accompanying Memorandum ("Def's Mem.").

Defendant objects to Plaintiffs' three-pronged challenge to the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act ("the Act"), N.H. RSA 132:22-28, as set forth in Plaintiffs' Memorandum of Law in Support of Their Cross Motion and Objection ("Pls' Mem."). Plaintiffs seek to have the Act invalidated and enjoined in its entirety and have alleged certain "evidence" to support their request.

However, Plaintiffs' evidence is not material to the outcome here. The Act passes constitutional muster, as a matter of law, as long as it is not enforced in certain medical emergency situations, consistent with the decision in *Ayotte v. Planned Parenthood*, __U.S. __, 126 S. Ct. 961 (2006) (hereinafter "*Ayotte*").

Plaintiffs already litigated their facial constitutional challenges in *Ayotte*, raising only the health exception and confidentiality issues. *Ayotte* provided specific instructions on remand, to which this Court must adhere, and Plaintiffs are barred from raising new theories relating to facial validity. To the extent that Plaintiffs now challenge the Act as implemented, their claim is premature and should be dismissed because the Act has been enjoined to date. Thus, the only issues properly before this Court are (1) whether issuing narrowly drawn injunctive relief to enjoin enforcement of the Act in certain medical emergencies is consistent with legislative intent and (2) if so, the validity of the Act's confidentiality provisions.

Defendant is entitled to judgment in its favor on both issues. The Supreme Court ruled that only a few applications of the Act would present a constitutional problem relating to a minor's health. It directed the lower courts to issue a declaratory judgment and an injunction prohibiting the Act's unconstitutional application in certain circumstances if they can find that a narrowly drawn injunction is consistent with the legislature's intent. As set forth in Defendant's Motion for Partial Summary Judgment, the language, purpose and structure of the Act support a finding that the legislature would have preferred a narrowly drawn injunction to no statute at all.

Defendant is also entitled to judgment as a matter of law on the validity of the Act's confidentiality provisions. The Act expressly provides for a judicial bypass process

in which court proceedings "shall be confidential." Thus, the statute expressly provides for a legal framework to guide state courts in their application of the bypass provisions and is constitutional on its face. Plaintiffs' challenge focuses entirely on court procedures and forms that do not have the force of law and that have not yet been used. The Court should dismiss Plaintiffs' as-applied claims as premature and groundless, as there is no reason to assume that state courts will act inappropriately, especially in light of existing court guidelines that restrict public access to certain court records.

Plaintiffs' third prong for alleging the Act is unconstitutional raises a new issue that was not raised on appeal, i.e., the alleged court form-based requirement that a minor choose one of two bases for seeking a bypass. To the extent that Plaintiffs seek to attack the Act on its face, they exceed the scope of this Court's review on remand and are barred from adding this claim. Even so, Defendant is entitled to summary judgment because the Act itself allows for bypass on alternative grounds and expressly meets the legal standards established by the U.S. Supreme Court. To the extent that Plaintiffs rely solely upon language used in court forms prepared in anticipation of the Act's implementation, their claim is not yet ripe for review. Plaintiffs have not, and cannot, provide any material facts to support their claim that the Act, when applied, will violate constitutional protections.

Thus, there is no basis for this Court to take any action other than to uphold the Act after issuing a narrowly drawn injunction regarding medical emergencies.

II. Undisputed Material Facts

There is no genuine dispute with regard to facts that are material to the outcome of this Court's review on remand. Fed. R. Civ. P. 56(c). Defendant does not dispute the

existence of written procedures and forms developed by the state's judicial branch in anticipation of the Act's implementation, *see* Pls' Mem., Exh. 1 at A1 through A13. However, the Act has been enjoined in its entirety since its adoption. Therefore, Plaintiffs have not presented, nor could they present, any facts showing that these procedures and forms have been used in New Hampshire state courts to date.

The only real dispute between the parties relates to applicable legal standards and the relevance of opinion evidence and other "facts" submitted by Plaintiffs. For example, Plaintiffs purport to submit evidence of legislative intent by reference to certain legislators' individual views on whether they would have passed the Act with a health exception. As a matter of law, this information is not material to legislative intent or the question of whether the legislature, as a whole, would have preferred narrowly-tailored injunctive relief to no statute at all.[1]

III. Argument

A. Defendant Is Entitled To Summary Judgment on Legislative Intent

Defendant is entitled to summary judgment on the issue of legislative intent and objects to Plaintiffs' cross-motion. As a result of Defendant's properly supported Motion for Partial Summary Judgment, Plaintiffs are required to "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it [and] if that party cannot produce such evidence, the motion must be granted." *Ayala-Gerena v. Bristol Myers-Squibb Co*., 95 F.3d 86, 94 (1st Cir. 1996). In addition, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will

[1] To the extent that this Court views any evidence referred to or submitted by Plaintiffs to be material, or even relevant, to the outcome here, Defendant respectfully requests a continuance to conduct necessary discovery under Fed. R. Civ. P. 56(f).

properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Plaintiffs have failed to produce relevant evidence to overcome the existence of language in the Act itself dictating the conclusion that the legislature would not have wanted the Act to be invalidated or enjoined in its entirety if held unconstitutional in only a small fraction of applications.

1. *This Court need only decide legislative intent on judicial remedy*

Plaintiffs attempt to persuade this Court that the appropriate legal standard on remand is whether the legislature would have wanted this Court to take on the task of crafting an appropriate health exception. *See* Pls' Mem. at 1, 3, 5-13. Plaintiffs misread *Ayotte*.

The Supreme Court found that "only a few applications of [the Act] would present a constitutional problem" and that "the lower courts need not have invalidated the law wholesale." *Ayotte* at 969. As a result, the lower courts were directed to issue declaratory and injunctive relief "prohibiting the statute's unconstitutional application" as long as it was "faithful to legislative intent." *Id.* Because there was "some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such a remedy," the Court remanded for the lower courts to determine whether the legislature would "have preferred what is left of its statute to no statute at all." *Id.* at 968.

Having already decided that crafting a narrowly drawn judicial remedy would not necessarily encroach upon the legislative domain, the Court established the relevant inquiry to be whether the legislature would have wanted no parental notification at all or whether it intended the Act to be susceptible to injunctive relief. *Ayotte* at 968-69. The

purpose and structure of the Act and the existence of the severability clause all support the latter.

2. *This Court does not need to craft legislation*

Unable to offer any relevant evidence that the legislature would have wanted no parental notification at all if it could not require it in every single instance, Plaintiffs suggest that the Court must determine "whether the legislature would have wanted the Court to supply the [emergency health] exception the legislature omitted, or whether it would have preferred for the issue to be returned to the legislative domain." Pls' Mem. at 3. Similarly, Plaintiffs argue, with the support of amicus NARAL Pro-Choice America ("NARAL"), that this Court should strike the Act in its entirety and allow the legislature to determine the terms and scope of an emergency health exception because it is not clear how the exception should be drafted. Pls' Mem. at 12, n. 12.

There is no need to determine "how the legislature would cure the statute," Pls' Mem. at 2, because the Act does not require amendment. *Ayotte* has already defined the appropriate judicial remedy and allows this Court to leave the Act unchanged. As stated in *Ayotte*, the "ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly [it] ha[s] already articulated the background constitutional rules at issue and how easily [it] can articulate the remedy." *Ayotte* at 968. Here, the rule is well articulated.

In general, "a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id*. at 967 (*citing Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion) (*quoting Roe v. Wade*, 410 U.S. 113, 164-65 (1973))). Further,

"the factual basis of this litigation [is that in] some very small percentage of cases, pregnant minors … need immediate abortions to avert serious and often irreversible damage to their health." *Ayotte* at 967. Therefore, crafting limited injunctive relief to allow for immediate abortions in medical emergencies, as suggested by Plaintiffs during the *Ayotte* oral argument, *Ayotte* at 969, is a "relatively simple matter," *id.* at 968 (quoting *United States v. Treasury Employees*, 513 U.S. 454, 479, n. 26 (1995)), and is exactly the remedy Defendant proposes to this Court.

3. *The Legislature intended the Act to be susceptible to partial application*

Contrary to Plaintiffs' assertion, the Court need not discern how the legislature would craft an emergency health exception but, rather, whether "the legislature intended the statute to be susceptible to [injunctive] remedy." *Ayotte* at 969. The language of the Act dictates the conclusion that it did so intend. *See Appeal of Town of Bethlehem*, No. 2004-435, slip op. at 4 (N.H. November 2, 2006) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include.").

First, the Act's severability clause makes expressly clear the legislature's desire to give effect to "provisions or applications . . . which can be given effect without the invalid provisions or applications." RSA 132:28 (2003). Second, the legislature's factual finding that "parental consultation is *usually* desirable" (emphasis added) indicates the legislature's acknowledgment that there are circumstances in which parental involvement might not be desirable. Def's Mem., Exh. A at 2 (2003 N.H. Laws § 173:1, III). Third, the Act's waiver provisions expressly allow for avoidance of notification requirements in certain circumstances. RSA 132:26, II.

In short, the legislature never had to "remedy the Act," Pls' Mem. at 11-13, because, according to its terms, the Act allows for severing invalid applications. Enjoining the Act's enforcement in medical emergencies would mean that the remainder of the Act remains unaffected, while preventing its unconstitutional application. This result is required under state law, which governs here. *See Leavitt v. Jane L.,* 518 U.S. 137, 139 (1996) (severability is a state law issue).

4. *Total invalidation would be inconsistent with state law*

Plaintiffs urge this Court to strike the entire Act unless it "can be sure that the legislature would have passed the Act with a health exception." Pls' Objection at 1; Pls' Mem. at 1, 13. However, under New Hampshire law, the legal standard is as follows:

> In determining whether the valid provisions of a statute are severable from the invalid ones, [courts] are to *presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved*. [The court] must also determine, however, whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure. (Emphasis added).

Associated Press v. State, 153 N.H. 120, 141 (2005) (*quoting Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In*), 144 N.H. 210, 217 (1999)); *see also Carson v. Maurer*, 120 N.H. 925, 945 (1980). Here, "[o]nly a few applications of [the Act] would present a constitutional problem," *Ayotte* at 969, so that an injunction prohibiting the Act's enforcement in the "very small percentage of cases," *Ayotte* at 967, where a medical emergency is present would hardly result in an entire collapse and

destruction of the Act's structure.[2] In fact, Plaintiffs do not and cannot dispute that the remainder of the Act would remain intact but for an injunction preventing its application in medical emergencies. Therefore, under state law, this Court must presume that the legislature would prefer to retain valid provisions and applications of the Act. *See Associated Press*, 153 N.H. at 141; *see also Ayotte* at 968 ("partial, rather than facial, invalidation, is the required course," such that a "statute may … be declared invalid to the extent that it reaches too far, but otherwise left intact") (*quoting Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504 (1985) (holding partial invalidation proper where legislation included severability clause)).

This case is similar to *Brockett*, where the U.S. Supreme Court reversed the 9th Circuit's facial invalidation of a moral nuisance statute, holding that the "law should have been invalidated only insofar as … [i]t reached protected materials" and that an injunction partially invalidating the statute would only be improper if "it were contrary to legislative intent in the sense that the legislature had passed an inseverable act." *Brockett*, 472 U.S. 491, 506. Noting the existence of a severability clause and the fact that the remainder of the statute retained its effectiveness after severing the invalid applications, the Supreme Court held that partial invalidation was proper. *Id.* at 507. Here, as in *Brockett*, "the issue of severability is no obstacle to partial invalidation,"

[2] Plaintiffs' reliance on *Claremont*, *supra*, *Carson, supra* and *Heath v. Sears Roebuck,* 123 N.H. 512 (1983) in support of total statutory invalidation is misplaced. Those cases involved statutes with overwhelming constitutional infirmities, unlike the limited unconstitutional applications here, that were "so integral and essential in the general structure of the act" that severability was inappropriate. *See Claremont*, 144 N.H. at 218 (where legislative record showed that the phase-in was "central to the legislature's purpose" in enacting the statewide property tax and court could not say whether the legislature would have enacted the statewide property tax without the offending provision); *Carson,* 120 N.H. at 945-46 (where legislature intended to create "an entirely new comprehensive system of recovery in the field of medical negligence," and a number of important provisions of the act were unconstitutional, the court could not be sure the remaining provisions of the act would have been enacted without the rest); *Heath v. Sears*, 123 N.H. at 531 (1983) (where all of the substantive sections of the chapter governing products liability actions were found unconstitutional, court could not be sure the legislature would have enacted a "state of the art" defense in the absence of the unconstitutional provisions).

and the Act should be left intact after issuance of a narrowly drawn injunction. *See id.*

5. *Plaintiffs present no relevant facts to support total invalidation*

Plaintiffs present no material facts to support wholesale invalidation of the Act. While they claim that the legislature "deliberately omitted a health exception" and that it has "declined to add the necessary exception," Pls' Mem. at 2, 12, they do not address the relevant inquiry, i.e., whether the legislature as a whole would prefer no statute at all to one enjoined in medical emergencies. *Ayotte* negates the need for any subsequent legislative action. If the legislature would prefer no statute at all to one with a narrowly tailored injunction, as Plaintiffs suggest, then it could have repealed the Act immediately after *Ayotte* was decided.

Unable to point to any official legislative history to support their request for wholesale invalidation, Plaintiffs rely, instead, upon individual legislators' public statements and opinions. Pls' Mem. at 8-11. However, politically motivated statements and opinions are not "facts" under Fed. R. Civ. P. 56(e), and are, at most, "conclusions, assumptions, or surmise" that are not counted. *See Perez v. Volvo Car Corp*., 247 F 3d 303, 316 (1st Cir. 2001).

On the other hand, Plaintiffs fail to address the legislature's express factual findings that "parental consultation is usually desirable and in the best interest of the minor," and that "[p]arents ordinarily possess information essential to a physician's exercise of best medical judgment concerning the child." Def's Mem., Exh. A at 2 (2003 N.H. Laws § 173:1, II(d), III). The language shows that the legislature, as a whole, preferred parental involvement in the vast majority of situations, even if they could not

require it in every single situation.[3] *See* Def's Mem., Exh. A at 2 (2003 N.H. Laws § 173:1) (legislative purpose and findings stating that the legislature's intent was to further compelling state interests of protecting minors from their own immaturity, fostering and preserving the family structure, and protecting the rights of parents to rear their children).

Plaintiffs' reliance on unofficial and unverified statements by individual legislators is not probative of legislative intent. *See Baines v. New Hampshire Senate Pres.,* 152 N.H. 124, 133 (2005) (quoting *Bezio v. Neville*, 113 N.H. 278, 280 (1973) (The journals of the House and Senate are the "conclusive evidence of the proceedings… of the legislature.").[4] The Court should disregard these "facts" as immaterial to the

[3] In support of their argument that the legislature would likely prefer no parental notification statute at all to one enjoined in medical emergencies, Plaintiffs compare this case to *Planned Parenthood Fed'n of America v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (2006), a partial birth abortion case currently on appeal to the United States Supreme Court. That case is strikingly different from New Hampshire's. In *Planned Parenthood Fed'n of America*, the Ninth Circuit found that Congress "was not only fully aware of *Stenberg*'s holding that a statute regulating "partial birth abortion" requires a health exception, but it adopted the Act in a deliberate effort to persuade the Court to reverse that part of its decision." *Id*. 435 F.3d at 1185. The Ninth Circuit cites to numerous statements in the official legislative history of the statute to support its conclusion that Congress was aware that the statute violated the Constitution as construed by the United States Supreme Court, and that Congress nevertheless passed the statute in an attempt to overturn *Stenberg*. *Id*. at 1185-86 and n. 26, 27; *see also* Br. for the Petitioner at 11, 29-30, *Gonzales v. Planned Parenthood Fed'n of America, cert. granted* 126 S. Ct. 2901) (No. 05-1382) (2006) (arguing on appeal to the Supreme Court that *Stenberg* should be overruled to the extent that it supports the conclusion that the partial birth abortion statute is facially invalid because it lacks a health exception). In contrast, the legislative history of New Hampshire's parental notification act contains nothing to support the Plaintiffs' bald accusation that the legislature knew the Act was unconstitutional and passed the Act in a deliberate attempt to challenge settled law. To the contrary, the Act was modeled after Minnesota's statute, which was upheld in *Hodgdon v. Minnesota*, 497 U.S. 417 (1990).

[4] *See also E.D. Clough & Co. v. Boston & M. R. R.*, 77 N.H. 222, 242 (1914) (Walker J., concurring) (unauthenticated reports of hearings before legislative committees that indicate what individual legislators thought is of very little weight or importance upon the question of legislative intent); *Bread Political Action Comm. v. Federal Elec. Comm.*, 455 U.S. 577, 582 n. 3 (1982) (refusing to give probative weight to after-the-fact affidavit of amendment sponsor regarding legislative intent); *B.C Foreman v. Dallas County, TX*, 193 F.3d 314, 322 (5th Cir. 1999) (holding that district court's exclusive reliance on affidavits of three Texas legislators was clearly erroneous and court should have relied on the official legislative record to determine legislative intent); *American Meat Institute v. Barnett*, 64 F. Supp. 2d 906, 915-16 (D.S.D. 1999) (after-the-fact affidavits of individual legislators not admissible on the issue of legislative intent).

Court's inquiry.[5]

Thus, the Court should issue a narrowly tailored injunction consistent with the legislature's intent, as requested in Defendants' Motion for Partial Summary Judgment.

B. Defendant is Entitled to Summary Judgment on Bypass

Plaintiffs seek summary judgment and invalidation of the Act on grounds that it lacks a constitutionally adequate judicial bypass. Defendant objects and cross-moves for summary judgment. Because the Act expressly provides for confidentiality of bypass proceedings, as well as alternative grounds for granting judicial bypass,[6] it meets applicable constitutional standards on its face. Therefore, to the extent that Plaintiffs challenge the Act itself, their motion must be denied. Moreover, to the extent Plaintiffs rely on state court procedures and forms prepared in anticipation of the Act's implementation, their claim is premature and should be dismissed.[7]

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[5] In the unlikely event that the Court deems these statements to be probative of legislative intent and material to this litigation, Defendant requests the Court to "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" or to "make such other order as is just." Fed. R. Civ. P. Rule 56(f). For example, to the extent legislative statements outside of official legislative history are deemed material, Defendant should be permitted sufficient opportunity to obtain statements from a number, if not all, of the individual legislators who voted on the Act. *See Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F. 3d 1198, 1203 (1st Cir. 1994).

[6] To the extent Plaintiffs seek to add a new facial claim by challenging the sufficiency of the grounds for bypass, they impermissibly expand the scope of review on remand. They are precluded from doing so under the doctrine of the "law of the case" and seeking to amend their complaint to add new facial challenges does nothing to change that. *See Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002) (appellate court's mandate controls all issues actually considered or necessarily inferred from disposition on appeal).

[7] When this action first commenced three years ago, Plaintiffs challenged the Act's judicial bypass provision on its face, arguing that it fails to protect minors' confidentiality as required by *Bellotti*. On remand, Plaintiffs now seek to add what appears to be a new "as-applied" claim, challenging the bypass as they allege it is being "implemented" by the New Hampshire Supreme Court. As Plaintiffs acknowledge that the Act has been enjoined since its adoption, there is no factual basis for their claim and it should be dismissed.

1. *The Act contains constitutionally sufficient bypass procedures*

In challenging the Act on its face, Plaintiffs must show that "no set of circumstances exists under which the Act would be valid."[8] *Ohio v. Akron Ctr. for Reproductive Health,* 497 U.S. 502, 514 (1990). This Court cannot invalidate the Act "based upon a worst-case analysis that may never occur." *Id.*

In deciding whether the Act's bypass provisions are constitutionally sufficient, this Court is guided by the following legal standard:

> A pregnant minor is entitled to [a bypass] proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be provided.

Bellotti v. Baird, 443 U.S. 622, 643-44 (1979). The Act contains provisions that meet all of these criteria. *See* RSA 132:26. Therefore, Defendant should prevail as a matter of law.

2. *The Act expressly meets confidentiality criterion*

The Act expressly provides that judicial bypass proceedings "shall be confidential" and that "expedited confidential appeal[s] shall be available." RSA 132:26, II(b) and (c). Although the term "confidential" is not defined in the Act, its plain meaning is "communicated or effected secretly." Webster's II New College Dictionary 236 (Riverside Ed. 1995). Thus, the Act expressly provides for secret bypass

[8] *See United States v. Salerno*, 481 U.S. 739, 745 (1987). This has long been the rule for facial challenges, including challenges in the abortion context. Because *Ayotte* did not directly address the standard of review issue and did not implicitly alter it, the *Salerno* standard continues to apply for facial challenges to abortion regulations. In fact, while not directly addressing the standard of review question in its opinion, the Supreme Court essentially applied the *Salerno* standard in *Ayotte* by limiting relief only to the Act's unconstitutional applications, so long as partial invalidation is faithful to legislative intent. *Ayotte* at 969.

proceedings, which the state judiciary is fully capable of providing under the *Bellotti* standard.

Plaintiffs' assertion that the bypass process utterly fails to protect confidentiality of minors, Pls' Mem. at 16, confuses their facial challenge to the Act, remanded in *Ayotte*, with a potential future challenge to its implementation. In a facial challenge, the proper legal standard is that notification statutes need only "provide[] the *framework* for a constitutionally sufficient means" of ensuring the confidentiality of the minor child throughout the judicial waiver proceeding. *Planned Parenthood Assoc. of Kansas City v. Ashcroft*, 462 U.S. 476, 491 n. 16 (1983) (emphasis added); *see also Manning v. Hunt*, 119 F.3d 254, 269 (4th Cir. 1997) ("State legislatures need only provide the *framework* for a proper judicial bypass which complies with *Bellotti*.") (Emphasis added). The Act provides this framework by requiring that judicial bypass proceedings and their appeals must be "confidential." RSA 132:26, II(b) and (c).

3. *Judicial compliance with legal standards must be assumed*

Contrary to Plaintiffs' suggestion, the state is not required to specify by statute, rule, or otherwise, the precise methods by which confidentiality will be achieved before a notification statute may go into effect. The cases they rely upon are inapposite.[9] Unless the "statutory program on its face exhibits some clear intent of the state to circumvent

[9] The cases Plaintiffs rely upon relate to state statutes which, unlike New Hampshire's statute, specifically authorize their state supreme courts to promulgate rules governing the bypass procedure. *See Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) (statute specifically authorized the court to promulgate rules governing bypass proceedings); *Jacksonville Clergy Consultation Service, Inc. v. Martinez*, 696 F. Supp. 1445, 1446, 1448 (M. D. Fla. 1988) (statute specifically allowed for the court to "promulgate any rules it considers necessary to ensure that [bypass] proceeding . . . are handled expeditiously and are kept confidential," but the state supreme court failed to promulgate any such rules); *Planned Parenthood v. Miller*, No. 4-96-CV-10877, slip op. at 3 (S.D. Iowa Jan. 3, 1997) (Pls' Mem., Exh. 2) (statute expressly required court to "prescribe rules to ensure that the [bypass] proceedings . . . are performed in an expeditious and confidential manner"). New Hampshire's Act does not include any such provision.

Bellotti's requirements or some clear deficiency making compliance impossible," it is improper for a federal court to presume "that state courts will not comply with the confidentiality and expedition mandates of the Supreme Court." *Manning v. Hunt*, 119 F.3d 254, 271 (4th Cir. 1997); *see also Bellotti v. Baird*, 443 U.S. at 645 n. 25 (where there was no evidence as to the actual operation of the enjoined statute's bypass procedure, it was assumed that the state courts "would be willing to eliminate any undue burdens by rule or order" if *Bellotti* criteria were not met); *Ashcroft*, 462 U.S. at 491 n. 16 (where parental consent statute was enjoined immediately after its effective date, there was no need for state supreme court to promulgate procedural rules, and no reason to believe that the state would not follow the mandates of *Bellotti)*. The Act provides the appropriate legal framework with self-implementing provisions regarding confidentiality of judicial waiver proceedings. This Court must assume that state judges will comply with the confidentiality requirements and implement the Act consistent with the mandates of the Supreme Court.[10]

[10] Plaintiffs have no real basis for their conclusion that New Hampshire's judicial waiver process threatens confidentiality of minors. Pls' Mem. at 16. The state courts are fully capable of following both state and federal law and there is no reason to believe that they would not preserve the confidentiality of minors, consistent with both the Act and constitutional mandates. *See Ashcroft*, 462 U.S. at 491 n. 16 ("There is no reason to believe that [the state] will not" follow the mandates of prior Supreme Court opinions.); *Akron Ctr. for Reproductive Health*, 497 U.S. at 515 ("Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements."); *Nova Health Systems v. Edmondson*, 460 F.3d 1295, 1301 (10th Cir. 2006) (presuming, in the absence of any evidence to the contrary, that Oklahoma courts would issue prompt bypass decisions and provide for expeditious appeals despite the fact that statute did not include specific time requirements); *Manning,* 119 F.3d at 270 ("State judges are bound, just as federal judges are, to uphold the Constitution of the United States and to follow the opinions of the United States Supreme Court. . . . [F]ederal courts should not assume lightly that a state court will not comply with Supreme Court mandates.").

4. *Plaintiffs' challenge to implementation of the Act is premature*

Plaintiffs' claim that the judicial branch's implementation of the Act does not permit minors to protect their identities, Pls' Mem. at 16, is based upon pure conjecture and should be rejected. *See Perez v. Volvo Car Corp*., 247 F.3d at 315-16 ("information and belief simply will not create a genuine issue of fact"). Plaintiffs' submission of affidavits does not assist them. *See, e.g.*, Pls' Mem., Exh. 3 (Declaration of Jamie Ann Sabino, Esq.) ("New Hampshire's bypass appears to guarantee that minors' confidentiality will be breached."). The affidavits are not based upon actual application of the Act. As Plaintiffs acknowledge that the Act has been enjoined in its application, their claims are necessarily hypothetical and premature. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (The doctrine of ripeness has as its primary rationale the "avoidance of premature adjudication."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1085 (9th Cir. 2003) (claims construed to be as-applied challenges not yet ripe for review); *cf. Delude v. Town of Amherst*, 137 N.H. 361, 364 (1993) (declaratory judgment actions are confined to judiciable controversies of sufficient immediacy and reality as to warrant court action).

Plaintiffs have not developed, and cannot develop, a factual record to support their claims, which is required for a challenge to bypass implementation. *See, e.g., Hodgson v. Minnesota*, 648 F. Supp. 756, 761-770 (D. Minn. 1986) (where Plaintiffs established in a five-week trial a detailed factual record on actual operation of Minnesota's bypass procedure over a five-year period), *rev'd in part*, 853 F.2d 1452 (8th Cir. 1988), *aff'd* 497 U.S. 417 (1990).[11]

[11] On the issue of confidentiality, the evidence presented in the *Hodgson* trial showed that those involved in bypass proceedings took practical steps to ensure confidentiality, such as (footnote cont'd)

As the subsequent history of *Bellotti* demonstrates, a challenge to the implementation of an abortion statute requires development of a factual record on the actual operation of the statute, which can only occur after the statute has gone into effect.[12] The *Bellotti* plaintiffs' challenge to the implementation of Massachusetts' bypass procedure properly focused "on the actual workings of the statute in practice as it [was] administered and applied by judges and clerks." The same rationale applies here. Plaintiffs' challenge to the implementation of the Act should be dismissed or deferred until a factual record can be established, which can only happen after the Act has gone into effect.[13]

5. *Plaintiffs fail to present any evidence of constitutional infirmity*

Even if this Court determines that the Plaintiffs' challenge to the implementation of the bypass is ripe for review, that claim fails as a matter of law. The state court forms

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(cont'd) "destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only. In addition, public defenders and courts have departed from normal routines when adhering to the routine would have threatened confidentiality." *Hodgson*, 648 F. Supp. at 763. Based on this evidence, the district court found that in implementing a statute virtually identical to New Hampshire's, "Minnesota courts have established procedures to assure the minors' anonymity." *Id.* at 777.

[12] After the United States Supreme Court decision in *Bellotti*, Massachusetts amended its abortion statute and the plaintiffs in that case renewed their challenge, first challenging the facial validity of the statute, including the bypass. With regard to the bypass provisions, the First Circuit stated that "on a record undeveloped as to the *actual operation* of the judicial approval procedure, we are not prepared to hold that its effects will be so burdensome as to deny due process of law to minors seeking to use it." *Planned Parenthood League v. Bellotti*, 641 F.2d 1106, 1011 (1st Cir. 1981) (emphasis added). The plaintiffs later challenged the statute as applied after the statute went into effect. *Planned Parenthood League v. Bellotti*, 868 F.2d 459, 461 (1st Cir. 1989). In challenging the implementation of the statute, the *Bellotti* plaintiffs properly relied upon "statistical data … [proof] by transcripts, and by testimony from a lawyers' referral panel supplying counsel to the [bypass] petitioners." *Bellotti*, 868 F.2d at 462. The First Circuit noted "the success of an operational attack in this context requires proof of a 'systematic failure to provide a judicial bypass option in the most expeditious, practical manner.'" *Id.* at 469 (*quoting Hodgson v. Minnesota*, 648 F. Supp. 756, 777 (D. Minn. 1986)). The First Circuit remanded the case to allow the plaintiffs to compile a factual record showing how the statute actually worked in practice. *Id.*

[13] Should this Court determine that the Plaintiffs' claim is ripe for review, Defendant requests a continuance pursuant to Federal Rule of Civil Procedure 56(f) to conduct discovery in order to establish such matters as court clerks' internal procedures for ensuring confidentiality.

and procedures prepared in anticipation of the Act's implementation carry out the directive of the statute by expressly providing that judicial bypass proceedings are confidential. For example, court forms entitled "Information for Minors" include a statement with regard to bypass petitions that "[t]his form and any court hearing will be confidential." Pls' Mem., Exh. 1 at A2. The forms also expressly provide that: "All documents and proceedings related to the appeal will be confidential." *Id.* at A4. The petition itself refers to the "confidential hearing on this matter." *Id.* at A9.

Nevertheless, Plaintiffs argue that the forms and procedures jeopardize a minor's confidentiality in a number of ways. First, Plaintiffs attack the petition form, arguing that it is improper to require a petitioner to provide her full name and address. Pls' Mem. at 17. While the use of pseudonyms or initials is one way to assure confidentiality, *see Ashcroft*, 462 U.S. at 491 n.16, it is not constitutionally required, *see Akron,* 491 U.S. at 513 (use of pseudonym or initials on petition *not* constitutionally required; state may require petitioner to provide identifying information for administrative purposes). Because the Supreme Court has expressly stated that complete anonymity is *not* critical for a bypass procedure to pass constitutional muster, *see id*., Plaintiffs have no basis for asserting that court forms requiring adequate identification to the court violate constitutional protections. Nonetheless, there is nothing in the statute that would prevent the state courts from allowing the use of pseudonyms or initials, if they chose to do so.

Second, Plaintiffs argue that the procedures fail to ensure the confidentiality of court documents. The Plaintiffs assert that, although the Court Procedure Bulletin expressly states that documents related to an appeal shall be confidential, there is no parallel provision regarding the confidentiality of trial court documents and no provision

for sealing the records. Pls' Mem. at 17-18. However, because the Act controls, the courts will take whatever actions are necessary. The trial court Bulletin expressly states that: "These cases are confidential; hearings will be closed." Pls' Mem., Exh. 1 at A5. Also, judges are subject to court guidelines that prevent disclosure of court records deemed confidential by statute, that provide for sealing of records and that allow separate filing mechanisms to restrict access to those other than courts and clerk's staff. *See* Exh. A, ¶ II. The Act and existing court authorities and guidelines provide the state courts with sufficient tools to ensure confidentiality of court documents.

Furthermore, the New Hampshire Supreme Court Advisory Committee on Rules has proposed to recommend adoption of a new Supreme Court Rule 58 entitled "Guidelines for Public Access to Court Records," which would not allow for public access to information "that is not accessible to the public pursuant to state law, court rule or case law." *See* Exh. C at §4.60. This proposed rule, if adopted, would provide additional grounds for ensuring confidentiality of bypass records.

Third, Plaintiffs are concerned that court personnel will breach a minor's confidentiality through such actions as using the minor's name in a case caption, docket, or calendar call, calling the minor's home or mailing documents to the minor's home. Pls' Mem. at 17-19.[14] There is nothing in the judicial branch procedures or forms requiring court personnel to use the minor's name in the case caption, to speak to parents over the phone, to leave messages on answering machines, or to allow parents to access

[14] Plaintiffs' argument that there must be detailed guidance to court personnel because "other court records categorized as 'confidential' under New Hampshire law are available to interested third parties such as parents," Pls' Mem. at 19, n. 16, ignores that specific statutory provisions allowing for access by parents or others apply in those contexts. There is no statutory exception to the Act's confidentiality requirement.

confidential files. To the contrary, the forms specify that bypass proceedings are confidential and the purpose of the bypass proceeding is to seek waiver of parental notification. Plaintiffs have presented no material facts that would lead this Court to find that courts or their staff would violate the statutory requirement of confidentiality. Their claim should be dismissed and their motion denied.

6. *The Act allows for judicial waiver of notice on alternative grounds*

Plaintiffs' claim that the Act, as implemented, requires minors to elect only one ground for bypass should also be dismissed. Understandably, Plaintiffs do not cite the statute or argue that this provision conflicts with the standard enunciated by the Supreme Court. The Act expressly provides for the same alternative grounds for waiver as that required in *Bellotti*.[15] RSA 132:26, II; *Bellotti*, 443 U.S. at 643-44. Instead, Plaintiffs claim that the form petition prepared by the judicial branch improperly requires minors to elect between seeking a bypass on maturity grounds and seeking one on best interest grounds. Pls' Mem. at 14-15. Their attack on the Act based upon court forms that do not have the force of law, that can be easily modified and that have not yet been used to date, is not ripe for review. Even so, their attack fails as a matter of law because the Act controls the bypass process and even existing court forms provide alternative bases for bypass under the appropriate legal standard.

[15] To the extent that Plaintiffs attempt a facial challenge, they are barred from raising new facial challenges to the Act on remand. *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002) (an appellate court's mandate controls all issues that were necessarily inferred from the disposition on appeal); *Williamson v. Columbia Gas & Electric Corp*., 186 F. 2d 464, 470 (1st Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (whole controversy between the parties must be brought before same court in same action and new theories of recovery barred by *res judicata*).

Petitioners' concern appears to stem from a possible reading of the bypass petition that would allow a petitioner to fill out only one of two potential grounds for bypass, thereby precluding the opportunity to present all relevant evidence to the judge. Pl's Mem. at 14. However, they ignore that the Act controls and that judges presiding over bypass hearings are obligated under the Act to consider alternative grounds for granting waivers. RSA 132:26, II. In particular, the Act requires the judge to first consider whether "the pregnant minor is mature and capable of giving informed consent to the proposed abortion." *Id*. If the judge determines that the minor is not mature, then "the judge *shall* determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." *Id.* (emphasis added). Thus, even if the minor fails to complete one of the sections in her petition, the judge must ask questions of the minor at the hearing as to both grounds. *See* Pls' Mem., Exh. 1 at A2 ("After reading what you have written on the [petition] form, the judge will ask you questions. The judge will be trying to determine if (a) you are mature or old enough to give your consent to an abortion without telling either of your parents or a guardian or (b) it is in your best interests to have an abortion performed without telling either of your parents or a guardian."); Pls' Mem., Exh. 1 at A12, "Guidelines for Judges" (suggesting questions judges should ask relating to both grounds). Moreover, the form for the court's order that judges may use in bypass proceedings expressly provides for a finding based upon alternative grounds. Pls' Mem., Exh. 1 at A9-A10.

In the absence of any facts to support Plaintiffs' claim that judges will implement the judicial bypass in an unconstitutional manner, Plaintiffs' assertion that minors will be forced to elect only one ground for a bypass must fail. *See Ashcroft*, 462 U.S. at 491 n.

16 ("There is no reason to believe that [the state] will not" follow the mandates of prior Supreme Court opinions.); *Akron Ctr. for Reproductive Health*, 497 U.S. at 515 ("Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements."); *see Bellotti*, 443 U.S. at 645 n. 25 (presuming, in the absence of evidence as to the actual operation of the bypass procedure, that any constitutional problems arising in the implementation of the statute would be corrected by the state courts).

7. *Evidence from Minnesota experience contradicts Plaintiffs' claims*

Plaintiffs' submission of opinion declarations on the bypass provisions, *see* Pls' Mem., Exh. 3 (Declaration of Jamie Ann Sabino, Esq.) and Exh. 4 (Declaration of Rachel Atkins, P.A., M.P.H.), do not establish a need for either declaratory or injunctive relief. Plaintiffs pose only the hypothetical possibility of breach of confidentiality and confusion in filling out bypass petitions, with no real factual basis for their dire predictions. Pls' Mem. at 15-21.

In contrast, Defendant submits evidence that Minnesota state courts have not experienced such problems, even though Minnesota has a parental notification statute that has virtually identical bypass provisions and has used procedures and forms similar to those at issue here. *See* Exh. B (Affidavit of Judith Rehak, Esq. and Attachments). For example, even though the Minnesota bypass petition requires the name, address and birth date of the petitioner, the state courts' internal procedures ensure that the statutory confidentiality requirement is met and that only court personnel have access to the information. *See id*. at ¶ 7. Similarly, there is no evidence that New Hampshire's forms requiring petitioner identification would result in breach of confidentiality, especially

when courts can use their own internal mechanisms to ensure that the statutory confidentiality requirement is met. In addition, judicial guidelines limiting public access to court records are available to supplement the Act, as they are in Minnesota, s*ee id*. at ¶8, but are not essential to allow the courts to take whatever steps are deemed necessary to implement the Act.

Thus, evidence of Minnesota's experience contradicts Plaintiffs' claims that minors' constitutional rights will be violated and that injunctive relief is necessary at this time.

C. The Act Should Be Upheld With Narrowly Drawn Injunction

Assuming the Court finds that a narrowly drawn injunction would not violate legislative intent, it should: first, issue an injunction prohibiting the application of the Act in any circumstance where a doctor, in good faith, believes that there is a medical health emergency that requires an immediate abortion; and second, declare the Act's bypass provisions to be constitutional. Plaintiffs have presented no legal or factual basis for invalidating or enjoining the Act in its entirety before it is implemented. With a narrowly drawn injunction, the Act otherwise provides the framework for constitutionally sufficient judicial bypass.

IV. Conclusion

For these reasons, Defendant respectfully requests that the Court grant Defendant's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment, and deny Plaintiffs' Cross-Motion for Summary Judgment.

Respectfully submitted,

KELLY A. AYOTTE
Attorney General, State of New Hampshire

By and through her counsel,

Date: December 29, 2006

/s/ Maureen D. Smith
Maureen D. Smith (#4857)
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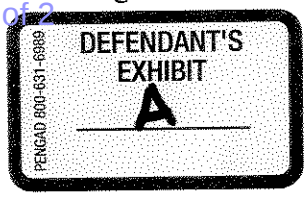
Certificate of Service

I hereby certify that the foregoing Defendant's Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Objection and Cross Motion was served upon counsel of record through the Court's ECF system.

/s/ Maureen D. Smith
Maureen D. Smith (#4857)



Guidelines for Public Access to Court Records

I. Introduction. It is the express policy of the Judicial Branch of New Hampshire to allow public access to court records. This policy is intended to recognize and effectuate the public's rights to access proceedings under the New Hampshire Constitution.

The establishment of priorities among requests for action from the clerk's and register's staff must be set in order to guarantee the efficient provision of services, and in recognition that the primary function of the Office of Clerk of Court and the Register of Probate Court is to process pending cases so as to insure every citizen the right to speedy resolution of disputes.

In further recognition of the diversity of caseload from court to court within the State, the establishment of priorities shall remain a matter of discretion to be determined by the Administrative Justice at each level of court, in consultation with the clerk of court or the register, hereinafter referred to as clerks.

II. Records Subject to Inspection. A presumption exists that all court records are subject to public inspection.

The public right of access to specific court records must be weighed and balanced against nondisclosure interests as established by the Federal and/or New Hampshire Constitution or by statutory provision granting or requiring confidentiality.

Unless otherwise ordered by the court, the following categories of cases shall not be open to public inspection: juvenile cases (delinquency, CHINS, abuse/neglect, termination of parental rights, adoption); pending or denied application for search or arrest warrants; grand jury records; applications for wire taps and orders thereon; and any other record to be kept confidential by statute, rule or order. Before a court record is ordered sealed, the court must determine if there is a reasonable alternative to sealing the record and must use the least restrictive means of accomplishing the purpose. Once a court record is sealed, it shall not be open to public inspection except by order of the court.

Any case records not subject to disclosure except upon order of the court shall be kept in a separate section of the court files, accessed only by the court and the clerk's staff.

III. Right To Copy. The right to public access shall generally include the right to make notes and to obtain copies at normal rates.

IV. Timing of Access. The clerk of each court, in conjunction with the court's Administrative Justice, shall set reasonable administrative regulations governing the scheduling of access to records. All such regulations shall be designed to cause the least disruption to the clerk's office and shall be balanced against the need to provide timely access. The regulations may include the requirement of requesting access in writing, the scheduling of an appointment to inspect documents during off-peak hours, etc.

V. Supervision of Access. It is the duty of the clerk to insure the integrity of each file. At no time shall any file be given to any person to be examined outside the area allocated for file review. The file review area shall be within full view of court personnel whenever possible. Supervision over file use shall be direct whenever possible. At no time shall any person be allowed to leave the court facility until the file has been returned to be refiled and court personnel has examined the completeness of the file if that is part of the court's procedure.

Administrative regulations designed to insure the integrity of all files may be established by the clerks in conjunction with the Administrative Justice. Such regulations may include, but need not be limited to, requiring the individual seeking access to provide identification and sign for all records and allowing only one file at a time to be released to each individual seeking access.

VI. Large Scale Access. Access to large numbers of records at any one time shall not be permitted. Individuals seeking such access shall be required to specifically identify by document number or case name the files to which they seek access and may be assessed a reasonable fee. Clerks are not required to allow access to more than ten files per day but may do so in the exercise of their discretion if it will not cause disruption to the clerk's primary function. No person shall be allowed direct access to the clerk's records or permitted to enter the inner office of the clerk's staff unless the court facility requires such entry and unless

specific authorization for such entry is given by the clerk in conjunction with the presiding justice.

VII. Telephone Inquiries. Telephone access to court records shall be allowed only at such times and under such conditions as the clerk may establish.

VIII. Denial of Access. The clerk, after consultation with the presiding justice and Administrative Justice, may, for good cause shown, deny access to court records to any individual. Good cause shall include, but not be limited to, previous theft, destruction, defacement or tampering of records and refusal to comply with administrative regulations established in accordance with these guidelines.

IX. Access by Litigants. Subject to paragraph II, and unless otherwise ordered by the Presiding Justice for good cause shown, parties to any litigation and their attorneys shall have complete access to their case records at all reasonable times and under the conditions set forth in these guidelines.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. Plaintiffs-Appellees, v. Kelly Ayotte, Attorney General of New Hampshire, in her official capacity, Defendant-Appellant.	Civil No. 03-491-JD

AFFIDAVIT OF JUDITH REHAK, ESQ.

I, Judith Rehak, Esquire, upon oath do hereby depose and state as follows:

1. I hold the position of Senior Legal Counsel in the Legal Counsel Division of the Minnesota State Court Administrator's Office. I have been in this position for the past 7 years, and with the State Court Administrator's Office for the past 34 years. I am familiar with the process by which forms and procedures are developed and implemented in Minnesota courts.

2. In Minnesota forms and administrative procedures used in implementation of legislation are presented to and approved by the Judicial Council (formerly the Conference of Chief Judges).

3. The judicial bypass procedures under Minnesota's parental notification statute, Minn. Stat. §144.343, are attached hereto as Attachment A.

4. I am generally familiar with Minnesota's judicial bypass procedures and the Minnesota State Court methods for ensuring confidentiality of judicial bypass proceedings, as is required by statute, and for implementing the statutory criteria for judicial bypass. See Attachment A, subd. 6.

5. By way of background, in 1991, a committee of court administrators drafted procedures and forms for implementation of the judicial bypass proceedings. The procedures and forms were presented to the Conference of Chief Judges and subsequently approved. The forms were revised for formatting consistency when they were posted on the State of Minnesota's court website in 2002. The 2002 revisions were never formally approved, but they are being used by the state courts.

6. The procedures and forms currently being used by our state courts to implement the bypass provisions include the following:

Attachment B: Procedures for Judicial Bypass of Parental Notification, Minn. State. §144.343

Attachment C: Procedures for Order for Appointment of Counsel and Form for Order for Appointment of Counsel

Attachment D: Procedures for Appointment of Guardian Ad Litem, Consent and Oath and Form for Appointment of Guardian Ad Litem, Consent and Oath

Attachment E: Petition for Physician's Authorization

Attachment F: Procedures for Report of the Guardian Ad Litem or Petitioner and Guardian Ad Litem or Petitioner Report

Attachment G: Procedures for Findings of Fact, Conclusions of Law and Order

7. The Petition for Physician's Authorization, attached as Attachment E, requires the name, address and date of birth of the petitioner. Because Minnesota's

statute requires confidentiality, the court's internal procedures ensure that only court personnel, and not members of the public, have access to this information.

8. In addition, the Minnesota Supreme Court has adopted rules entitled "Rules of Public Access to Records of the Judicial Branch," which provide that case records made inaccessible to the public under statute will also be inaccessible from the Judicial Branch. See Attachment H, Rule 4, subd. 1(f). This rule supplements the statutory authority regarding confidentiality by allowing the judicial branch to make inaccessible to the public any case records relating to petitions for judicial bypass of parental notification.

9. It is my understanding that these procedures and forms have not been problematic in the implementation and administration of statutory responsibilities and they have not been challenged in a Minnesota appellate court.

Further the affiant sayeth naught.

Judith L Rehak
Judith Rehak, Esquire

THE STATE OF MINNESOTA

On the 14th of December, 2006 before me, the undersigned officer, appeared **Judith Rehak, Esquire,** known to me to be the person whose name appears above, and she subscribed her name to the foregoing instrument and swore that the facts contained in this Affidavit are true to the best of her knowledge and belief.

Kathleen R. Zajac
Notary Public

My commission expires:_____ (Seal)

KATHLEEN R. ZAJAC
Notary Public-Minnesota
My Commission Expires Jan 31, 2010

Minnesota Statutes 2005, 144.343

Minnesota Statutes 2005, Table of Chapters

Table of contents for Chapter 144

144.343 Pregnancy, venereal disease, alcohol or drug abuse, abortion.

Subdivision 1. **Minor's consent valid.** Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. **Notification concerning abortion.** Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian has been appointed pursuant to sections 524.5-101 to 524.5-502 because of a finding of incapacity, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

Subd. 3. **Parent, abortion; definitions.** For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

For purposes of this section, "abortion" means the use of any means to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus and "fetus" means any individual human organism from fertilization until birth.

Subd. 4. **Limitations.** No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. **Penalty.** Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Subd. 6. **Substitute notification provisions.** If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her

that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Subd. 7. **Severability.** If any provision, word, phrase or clause of this section or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

HIST: 1971 c 544 s 3; 1981 c 228 s 1; 1981 c 311 s 39; 1982 c 545 s 24; 1986 c 444; 2004 c 146 art 3 s 1

B

Procedures for Judicial Bypass of Parental Notification
Minn. Stat. §144.343

The Minnesota legislature has required that an abortion operation shall not be performed on an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed pursuant to Minn. Stat. §525.54 to §525.551 until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in Minn. Stat. §144.343, subd. 6 provides a method for a pregnant woman to bypass the parental notification through a judicial procedure. The statute provides that proceedings shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. No filing fees shall be required. Access to the Court for purposes of a petition or motion, an access to the appellate courts for purposes of making an appeal from denial of the petition, shall be afforded a pregnant woman 24 hours a day, seven days a week.

1. The petition should be completed by the pregnant woman with assistance provided as needed by Court staff.

2. The Petitioner should be advised that she has the right to court appointed counsel and will be provided with such upon her request.

3. Proceedings regarding these matters shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

Approved by Conference of Chief Judges: 1/1991
Last Revised: 1/2002

C

Procedures for Order for Appointment of Counsel

1. The order should be completed if the woman is not represented by private counsel and she requests representation or the court determines that legal counsel is necessary.

2. The attorney shall give this matter precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

State of Minnesota **District Court**

County

Judicial District:	
Court File Number:	
Case Type:	Parental Notification

In the Matter of the Petition of:

_____

Order for Appointment of Counsel

Pursuant to Minn. Stat. §144.343, subd. 6(c)(ii), the undersigned court hereby appoints _____ _____ as attorney for the petitioner in the above-entitled matter.

Dated: _____

_____
Judge of District Court

D

Procedures for Appointment of Guardian Ad Litem, Consent and Oath

1. The court may appoint a Guardian Ad Litem for the pregnant woman. Each jurisdiction may have may have established a local policy mandating a Guardian Ad litem appointment for these types of proceedings.

2. The Guardian Ad Litem shall give this matter precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

State of Minnesota

County

District Court

Judicial District:	
Court File Number:	
Case Type:	Parental Notification

In the Matter of the Petition of:

_____

Appointment of Guardian Ad Litem, Consent and Oath

Pursuant to Minn. Stat. §144.343, subd. 6(c)(ii), the undersigned court hereby appoints _____ _____ , _____ as Guardian Ad Litem for the Petitioner in the above entitled action upon taking oath as Guardian Ad Litem.

Dated: _____

_____
Judge of District Court

Consent and Oath

_____ represents to the court that she/he is a responsible citizen, is 21 years of age or over, a resident of the State of Minnesota, and hereby consents to act as Guardian Ad Litem herein for the Petitioner, a minor; and for her/himself swears, "I will faithfully and justly perform all the duties of the office and trust which I now assume as Guardian Ad Litem of the minor names in the above Order in the above entitled proceedings to the best of my ability so help me God."

Dated: _____

_____
Signature of Guardian Ad Litem

Sworn/affirmed before me this
_____ day of _____, _____

_____
Notary Public/Deputy Court Administrator

E

State of Minnesota **District Court**

County	Judicial District:
	Court File Number:
	Case Type: Parental Notification

In the Matter of the Petition of:

_____
Name

_____
Address

_____

_____
Date of Birth

Petition for Physician's Authorization

Petitioner moves the court pursuant to Minn. Stat. §144.343, subd. 6(c)(i) for authorization to her physician to perform an abortion upon said petitioner without prior notification being required or given to petitioner's parent(s), guardian, or custodian.

Petitioner bases her motion on one of the following alternative grounds:

1. She is mature and capable of giving informed consent to the proposed abortion.

2. It is in her best interests for the physician to perform the proposed abortion upon petitioner without prior notification of parent(s), guardian, or conservator.

Wherefore, Petitioner requests an order authorizing her physician to perform an abortion upon her at her request and without prior notification being required or given to her parent(s), guardian, or custodian.

Dated: _____

_____
Attorney for Petitioner

_____
Address

_____

_____, petitioner, being first duly sworn on oath, states that she has read the foregoing petition subscribed by her, that she knows the contents thereof, and that the same is true to her best information and belief.

Dated: _____

_____
Signature *(Sign only in front of notary public or court administrator.)*

Sworn/affirmed before me this

_____ day of _____, _____.

_____
Notary Public \ Deputy Court Administrator

It is Therefore Ordered

In compliance with Minn. Stat. §144.343, subd. 6(c)(i), the court hereby authorizes Petitioner's physician to perform the proposed abortion on Petitioner as requested by her without prior notification to Petitioner's parent(s), guardian or conservator.

Dated: _____

By the Court:

_____
Judge of District Court

F

Procedures for Report of the Guardian Ad Litem or Petitioner

1. The form should be forwarded to the Guardian Ad Litem immediately upon appointment or completed by the Petitioner if a Guardian Ad Litem is not appointed.

2. The Guardian Ad Litem or Petitioner should complete the report and forward it to the Court as soon as possible before the scheduled hearing on the Petition.

3. The information provided on this form is provided to assist the court, and will not, by itself, be a determination of this matter.

4. The Guardian Ad Litem is not obligated to ask and the Petition is not obligated to answer any or all questions on this form, the questions are merely suggestive of the types of questions the Guardian Ad Litem may find helpful in assisting the Court to determine whether the petition should be granted or denied, and the guardian Ad Litem is not limited to asking only those questions appearing on the form.

State of Minnesota | **District Court**

County	Judicial District:
	Court File Number:
	Case Type: Parental Notification

In the Matter of the Petition of:

_____

Report of the Guardian Ad Litem or Petitioner

Date of Birth: _____

I. MEDICAL INFORMATION

1. Has the Petitioner been examined by a physician? ☐ Yes ☐ No

   Date: _____

2. Have the abortion procedures and the medical risks been explained? ☐ Yes ☐ No

3. Have the aftercare procedures been explained and understood? ☐ Yes ☐ No

4. Has the Petitioner been informed and does Petitioner understand what to do if medical complications occur? ☐ Yes ☐ No

5. Has the Petitioner given a true statement of her medical history to the physician? ☐ Yes ☐ No

6. Did Petitioner's physician advise her of any additional risks to her health as a result of her medical history? ☐ Yes ☐ No

7. Has the Petitioner given informed consent to the abortion? ☐ Yes ☐ No

II. COUNSELING INFORMATION

1. Has Petitioner received counseling regarding having an abortion? ☐ Yes ☐ No

   If yes, name and agency of counselor;

   _____

   _____

   _____

2. Has Petitioner received counseling as to pregnancy alternatives?

   a. abortion ☐ Yes ☐ No

b. adoption ☐ Yes ☐ No

c. marriage ☐ Yes ☐ No

d. single parenthood ☐ Yes ☐ No

3. Does Petitoner feel she needs more counseling as to her decision to
a. have an abortion? ☐ Yes ☐ No

4. Has Petitioner been counseled as to possible emotional and psychological
a. Problems she may experience after the abortion? ☐ Yes ☐ No

5. Has Petitioner been counseled as to the methods of contraception that
a. are available? ☐ Yes ☐ No

III. PERSONAL INFORMATION

1. Does Petitioner wish to have an abortion? ☐ Yes ☐ No

2. Has Petitioner been coerced by any other party as to this decision? ☐ Yes ☐ No

3. Petitioner elects not to notify her parent(s) because:

_____

_____

_____

_____

4. Does Petitioner live with her parents? ☐ Yes ☐ No

5. What is Petitioner's source of financial income?

_____

_____

6. Is Petitioner attending school? Grade _____ ☐ Yes ☐ No

7. What is the highest school grade level Petitioner has completed? _____

8. Is Petitioner employed? ☐ Yes ☐ No

9. Place of employment:

_____
Address

Job title: _____

10. What are Petitioner's plans for the future (schooling, employment, etc.)?

_____

_____

_____

_____

_____

11. State any additional information Petitioner wishes to bring to the court's attention relative to the proposed abortion:

_____

_____

_____

_____

_____

Dated: _____

_____
Guardian Ad Litem on behalf of Petition or Petitioner

_____
Relationship to Minor

IV. RECOMMENDATION OF THE GUARDIAN AD LITEM

A. Authorization to the physician without parental notification is recommended because:

_____

_____

_____

_____

B. The minor is mature and capable of giving an informed consent, as evidenced by:

_____

_____

_____

_____

C. The minor is not mature, but the proposed waiver of parental notification is in her best interests because:

_____

_____

_____

_____

D. It is not recommended that authorization be granted because:

_____

_____

_____

_____

Dated: _____

_____
Guardian Ad Litem

G

PROCEDURES FOR FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Findings of Fact, Conclusions of Law, and Order

1. The written Findings of Fact, Conclusions of Law and order shall be completed by a judge of the court who conducts the proceeding.

2. Included in this form are two second pages: one if the court finds the Petitioner entitled to an order authorizing the physician to perform the abortion and one if the Petitioner is not entitled to an order authorizing the physician to perform the abortion. The judge should complete the fist page and complete and sign the appropriate second page.

Procedure Upon Appeal

1. Pursuant to Supreme Court Order dated June 14, 1984, an order denying the petition shall be appealable on the record to one judge of the district court in Hennepin and Ramsey Counties or two district court judges in unified districts.

2. If there is a division between the two judges, the order denying the petition shall stand.

3. No filing fee shall be required of the pregnant woman at the appellate level.

4. An expedited confidential appeal shall be available to the pregnant woman for whom the court denies an order authorizing an abortion without notification.

State of Minnesota

County

District Court

Judicial District:	
Court File Number:	
Case Type:	Parental Notification

In the Matter of the Petition of:

_____

Findings of Fact, Conclusions of Law and Order

The above entitled matter came on for hearing before the court on _____, _____, pursuant to the Petition for Physician's Authorization to proceed with an abortion without prior parental notification.

Petitioner was personally present and was represented by her attorney _____ _____. Also present and serving as Guardian Ad Litem for Petitioner was _____ _____.

Upon evidence presented at the hearing and upon the files and records herein, pursuant to Minn. Stat. §144.343, subd. 6(c)(i), the court now makes the following:

Findings of Fact

(Finding of Fact No. 1 is that which is initialed below.)

_____ Petitioner is a mature minor and is capable of giving informed consent to the proposed abortion.

OR

_____ It is in the best interests of the minor for the physician to perform the proposed abortion upon Petitioner without prior notification to her parent(s), guardian, or conservator.

OR

_____ Petitioner is not a mature minor, is not capable of giving informed consent to the proposed abortion, and it is not in the best interests of the minor for the physician to perform the proposed abortion upon Petitioner without prior notification to her parent(s), guardian, or conservator.

Conclusions of Law

Petitioner is entitled to an Order of the court pursuant to Minn. Stat. §144.343, subd. 6(c)(i) authorizing her physician to perform her requested abortion.

H

Rule 4. Accessibility to Case Records.

Subd. 1. Accessibility. All case records are accessible to the public except the following:

(a) *Domestic Abuse Records.* Records maintained by a court administrator in accordance with the domestic abuse act, MINN. STAT. § 518B.01, until a court order as authorized by subdivision 5 or 7 of section 518B.01 is executed or served upon the record subject who is the respondent to the action;

(b) *Court Services Records.* Records on individuals maintained by a court, other than records that have been admitted into evidence, that are gathered at the request of a court to:

(1) determine an individual's need for counseling, rehabilitation, treatment or assistance with personal conflicts,

(2) assist in assigning an appropriate sentence or other disposition in a case,

(3) provide the court with a recommendation regarding the custody of minor children, or

(4) provide the court with a psychological evaluation of an individual.

Provided, however, that the following information on adult individuals is accessible to the public: name, age, sex, occupation, and the fact that an individual is a parolee, probationer, or participant in a diversion program, and if so, at what location; the offense for which the individual was placed under supervision; the dates supervision began and ended and the duration of supervision; information which was public in a court or other agency which originated the data; arrest and detention orders; orders for parole, probation or participation in a diversion program and the extent to which those conditions have been or are being met; identities of agencies, units within agencies and individuals providing supervision; and the legal basis for any change in supervision and the date, time and locations associated with the change.

(c) *Judicial Work Product and Drafts.* All notes and memoranda or drafts thereof prepared by a judge or by a court employed attorney, law clerk, legal assistant or secretary and used in the process of preparing a final decision or order, except the official minutes prepared in accordance with MINN. STAT. §§ 546.24-.25.

(d) *Juvenile Appeal Cases.* Case records arising from an appeal from juvenile court proceedings that are not open to the public, except the appellate court's written opinion or unless otherwise provided by rule or order of the appellate court.

(e) *Race Records.* The contents of completed race census forms obtained from participants in criminal, traffic, juvenile and other matters, and the contents of race data fields in any judicial branch computerized information system, except that the records may be disclosed in bulk format if the recipient of the records:

(1) executes a nondisclosure agreement in a form approved by the state court administrator in which the recipient of the records agrees not to disclose to any third party any information in the records from which either the identity of any participant or other characteristic that could uniquely identify any participant is ascertainable; and

(2) obtains an order from the supreme court authorizing the disclosure.

Nothing in this section (e) shall prevent public access to source documents such as complaints or petitions that are otherwise accessible to the public.

(f) *Other.* Case records that are made inaccessible to the public under:

(1) state statutes, other than Minnesota Statutes, chapter 13;

(2) court rules or orders; or

(3) other applicable law.

The state court administrator shall maintain, publish and periodically update a partial list of case records that are not accessible to the public.

NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

PUBLIC HEARING NOTICE

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 1:00 p.m. on Wednesday, December 13, 2006, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before December 12, 2006, or may be submitted at the hearing on December 13, 2006. Comments may be e-mailed to the Committee on or before December 12, 2006, at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

The Committee anticipates that there may be many people who wish to speak at the December 13 public hearing. If so, a time limit may be imposed upon each speaker. Because each speaker's time may be limited, the Committee encourages each speaker to submit written comments,

either prior to or at the hearing, to ensure that all of the speaker's comments are provided to the Committee.

Included among the suggested rule changes are amendments to the Rules of Professional Conduct, which were the subject of an earlier public comment period that ended on September 1, 2006. All comments filed during that public comment period will be considered by the Committee, and need not be filed a second time.

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301 (Tel. 271-2646). In addition, the changes being considered are available on the Internet at:

http://www.courts.state.nh.us/committees/adviscommrules/index.htm

The changes being considered concern the following rules:

I. Rules Relating to Public Access to Court Records

The following proposal arose out of the Report of the New Hampshire Supreme Court Task Force on Public Access to Court Records:

1. Repeal the current Guidelines for Public Access to Court Records that took effect on December 9, 1992, and adopt new Supreme Court Rule 58 (Appendix A).

II. Rules of Professional Conduct

The following proposals arose out of the report of the New Hampshire Bar Association Ethics Committee on Revisions to the Rules of Professional Conduct, and a recommendation of the Pro Bono Referral Program to revise Rule 6.1 of the Rules of Professional Conduct.

1. Repeal and replace all of the Professional Conduct Rules (Appendix B).

2. Repeal and replace Professional Conduct Rule 6.1 regarding pro bono service (Appendix C).

III. Joinder and Severance Rules – Criminal Cases

These proposals would adopt new standards for joinder and severance of criminal cases in the trial courts.

1. Superior Court Rule 97-A re joinder and severance (Appendix D).

2. District Court Rule 2.9-A re joinder and serverance (Appendix E).

IV. Attorney Discipline System

These proposals amend provisions dealing with monetary sanctions in attorney discipline proceedings.

1. Supreme Court Rule 37 re attorney discipline system (Appendix F).

2. Supreme Court Rule 37A re rules and procedures of the attorney discipline system (Appendix G).

V. Judicial Conduct Rules

These proposals would adopt on a permanent basis temporary rules now in effect relating to the composition and procedures of the Judicial Conduct Committee, and would amend the Code of Judicial Conduct relative to the ability of retired judges to engage in alternative dispute resolution for compensation in the private sector.

1. Supreme Court Rule 38, Application section, re retired judges (Appendix H).

2. Supreme Court Rule 39 re judicial conduct committee (Appendix I).

VI. Domestic Relations Rules

These proposals would adopt on a permanent basis temporary domestic relations rules now in effect relating to forms, parenting plans, divorce decrees, etc. These rules are modeled upon similar Family Division Rules currently in effect.

1. Superior Court Rules 201 to 202-E re domestic relations (Appendix J).

VII. Public Protection Fund Rules

This proposal would amend the appeal procedure for appeals from decisions by the committee administering the Public Protection Fund.

1. Supreme Court Rule 55(5) re public protection fund (Appendix K).

VIII. Supreme Court Procedural Rules

This proposal is to adopt on a permanent basis the current rule allowing parties to obtain automatic extensions of time to file briefs in the supreme court.

1. Supreme Court Rule 21(6-A) re automatic extensions of time (Appendix L).

New Hampshire Supreme Court
Advisory Committee on Rules

By: Linda S. Dalianis, Chairperson
and David S. Peck, Secretary

October 31, 2006

APPENDIX A

Repeal the current Guidelines for Public Access to Court Records that took effect on December 9, 1992, and adopt the following new Supreme Court Rule 58:

RULE 58. GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS

PREAMBLE

In October 2002, the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) published model guidelines for public access to court records, entitled, Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts (CCJ/COSCA Guidelines). This rule uses the organization of the CCJ/COSCA Guidelines as a guide, and is divided into the following subsections:

-- Purpose (Section1.00)

-- Access by Whom (Section 2.00)

-- Access to What (Sections 3.00 & 4.00)

-- When Accessible (Section 5.00)

-- Fees (Section 6.00)

-- Obligation of vendors (Section 7.00)

-- Obligation to inform and educate (Section 8.00)

In June 2004, the New Hampshire Supreme Court established the Task Force on Public Access to Court Records (Task Force) and charged it with reviewing and recommending new rules of public access to court records. This rule is the result of that review. The relevant CJJ/COSCA commentary, which is incorporated by reference, is reprinted at the end of this rule. To the extent that the Task Force departed from the CCJ/COSCA template or to the extent that the Task Force believed that additional New Hampshire emphasis or commentary was appropriate, it has provided that commentary as set forth in this rule.

(I) **Section 1.00 – Purpose of these Guidelines**

(a) The purpose of these Guidelines is to provide a comprehensive framework for a policy on public access to court records. These Guidelines provide for access in a manner that:

(1) Maximizes accessibility to court records when available resources make it feasible for the judicial branch to do so;

(2) Supports the role of the judiciary;

(3) Promotes governmental accountability;

(4) Contributes to public safety;

(5) Minimizes the risk of injury to individuals;

(6) Makes most effective use of court and clerk of court staff;

(7) Provides excellent service to information users; and

(8) Does not unduly burden the ongoing business of the judiciary.

(b) These Guidelines are intended to provide guidance to: (1) litigants; (2) those seeking access or limitation of access to court records; and (3) judges and court and clerk of court personnel responding to requests for access or requests to limit access.

Task Force Commentary

The Task Force adopted Section 1.00 of the CCJ/COSCA Guidelines with only minor revisions. Although the COSCA Guidelines refer to providing "excellent customer service," the Committee believed that the word "customer" was inappropriate as it implied that courts serve only paying "customers." The purpose of this subsection is to make clear that an access policy should provide opportunities for easier, more convenient, less costly access to anyone interested in the information and should also provide a clear and understandable process for those seeking to limit access to particular court records. In addition, an access policy should require court personnel to treat all who seek access to court records with respect.

(II) **Section 2.00 – Who Has Access Under These Guidelines**

(a) Every member of the public will have the same access to court records as provided in these Guidelines, except as provided in section 4.30(b) and 4.40(b).

(b) "Public" includes:

(1) any person and any business or non-profit entity, organization or association; and

(2) any governmental agency for which there is no existing policy defining the agency's access to court records.

(c) "Public" does not include:

(1) court or clerk of court employees;

(2) people or entities, private or governmental, who assist the court in providing court services;

(3) public agencies whose access to court records is defined in another statute, rule, order or policy; and

(4) the parties to a case or their lawyers regarding access to the court record in their case.

Task Force Commentary

The Task Force adopted Section 2.00 with only minor revisions. The CCJ/COSCA Guidelines specifically define "Public" to include media organizations and commercial information providers. The Task Force believed it unnecessary to define "Public" to include these types of organizations. The point of this section is to make explicit that all members of the public have the same right of access to court records, including, without limitation, individuals, members of the media, and the information industry.

(III) **Section 3.00 – Definitions**

(A) **Section 3.10** – Definition of Court Record

For the purposes of these Guidelines:

(a) "Court record" includes:

(1) Any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;

(2) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree,

judgment, and any information in a case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding; and

(3) The following information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court office and not associated with any particular case.

[List to be added prior to enactment]

(b) "Court record" does not include:

(1) Other records maintained by the public official who also serves as clerk of court.

(2) Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in section 3.10(a)(1).

(B) **Section 3.20** – Definition of Public Access

"Public access" means that the public may inspect and obtain a copy of the information in a court record.

(C) **Section 3.30** – Definition of Remote Access

"Remote access" means the ability electronically to search, inspect, or copy information in a court record without the need to visit physically the court facility where the court record is maintained.

(D) **Section 3.40** – Definition of "In Electronic Form"

Information in a court record "in electronic form" includes information that exists as:

(a) electronic representations of text or graphic documents;

(b) an electronic image, including a video image, of a document, exhibit or other thing;

(c) data in the fields of files of an electronic database; or

(d) an audio or video recording, analog or digital, of an event or notes in electronic form from which a transcript of an event can be prepared.

(IV) **Section 4.00 – Applicability of Rule**

Except where noted, these Guidelines apply to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.

(A) **Section 4.10** – General Access Rule

(a) Information in the court record is accessible to the public except as prohibited by section 4.60 or section 4.70(a).

(b) There shall be a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication shall not disclose the nature of the information protected.

(B) **Section 4.20** – Court Records In Electronic Form Presumptively Subject to Remote Access by the Public

When available resources make it feasible for the judicial branch to do so, the following information in court records should be made remotely accessible to the public if it exists in electronic form, unless public access is restricted pursuant to sections 4.50, 4.60 or 4.70(a):

(a) Litigant/party indexes to cases filed with the court;

(b) Listings of new case filings, including the names of the parties;

(c) Register of actions showing what documents have been filed in a case;

(d) Calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing;

(e) Judgments, orders, or decrees in a case and liens affecting title to real property.

(C) **Section 4.30** – Access to Bulk Downloads of and Compiled Information from Filtered Database

(a) Definitions

(1) "Bulk Download" is a distribution of all case management system records, as is and without modification or compilation.

(2) "Compiled Information" is information derived from manipulating the case management system in some way, either through filtering so that only particular records are included, or through editing or redaction.

(3) "Filtered Database" is a database of case management system records in which fields containing "personal identifiers" have been encrypted.

(4) "Unfiltered Database" is a database of case management system records in which fields containing "personal identifiers" have not been encrypted.

(5) "Personal Identifiers" include, but are not limited to: name, street address, telephone number, e-mail address, employer's name and street address, month and day of birth, driver's license number, personal identification number, FBI number, State identification number, and social security number.

(6) "Affected Person" is a person whose personally identifying information the court has been requested to disclose.

(b) When available resources make it feasible for the judicial branch to do so, Bulk Downloads and Compiled Information will be available to the public as follows:

(1) The court will post on the Internet and periodically update the Filtered Database. Members of the public may download data from the filtered database without restriction.

(2) Through individual queries, members of the public may compile information from the filtered database as desired.

(3) Except as set forth in section 4.40(f), any member of the public who would like a bulk download of or compiled information from a database of case management system records in which one or more of the fields containing personal identifiers is not encrypted may file a request for this information with the Supreme Court, or its designee, as set forth in section 4.40.

Task Force Commentary

The Task Force significantly redrafted Section 4.30 of the CCJ/COSCA Guidelines because of its concerns about permitting public access to data downloaded in bulk that contains personally identifying information. While the

Task Force appreciates that data downloaded in bulk may have substantial value to legitimate researchers, the Task Force believes it imperative to protect the privacy of individuals about whom the court has collected data. After much debate, a majority of the Task Force recommends that the court make a case management system database available to the public that contains only very limited personally identifying information about individuals.

One area of debate was whether personal identifiers should be redacted or encrypted. Redacted information would be of no use to legitimate researchers. Encrypted information would provide some privacy protection, but allow researchers to match records based on the consistency of the encryption. The Task Force majority believed that an individual's privacy interest would not be unduly compromised by encrypting the data. The majority also recognized the benefit of the information to enhance accountability and foster research. The proposed rule therefore states that personal identifiers will be encrypted rather than redacted.

A minority of the Task Force members believe that this recommendation does not achieve the right balance between allowing public access to public court records and protecting the legitimate privacy interests of those involved in the legal system. These Task Force members disagree that individuals have a legitimate privacy interest in protecting against the disclosure of personal information, such as their names, addresses and telephone numbers. These Task Force members believe also that without case docket number information, information from the Filtered Database is of limited utility. Without case docket numbers, individuals who download information from the Filtered Database are unable to correlate that information with individual cases. These Task Force members believe that the ability to link information to individual cases allows members of the public to use the information to ensure judicial accountability.

(D) **Section 4.40** – Access to Bulk Downloads of and Compiled Information from Unfiltered Database

(a) A request for a bulk download of or compiled information from a database of case management system records in which one or more of the fields containing personal identifiers is not encrypted must be in writing and must contain the following information:

(1) name, address, telephone number, fax number, e-mail address, organizational affiliation and professional qualifications of the person requesting information;

(2) the specific information sought;

(3) the purpose for which the information is sought;

(4) a description of how the release of the information sought will promote or contribute to one or more of the following public interests:

(i) governmental accountability;

(ii) the role of the judiciary;

(iii) public knowledge of the judicial system;

(iv) effectiveness of the judicial system;

(v) public safety.

(5) the procedures that will be followed to maintain the security of the data provided such as using physical locks, computer passwords or encryption;

(6) the names and qualifications of additional research staff, if any, who will have access to the data; and

(7) the names and addresses of any other individuals or organizations who will have access to the data.

(b) The Supreme Court, or its designee, may grant the request filed pursuant to section 4.40(a) if it determines that:

(1) the release of the requested information will serve one or more of the public interests set forth in section 4.40(a)(4)(i) through (v);

(2) the risk of injury to individual privacy rights will be minimized;

(3) the request does not unduly burden the ongoing business of the judiciary;

(4) the request makes effective use of court and clerk staff; and

(5) the resources are available to comply with the request.

(c) If the court, or its designee, grants a request, the requester will be required to sign a declaration, under penalty of perjury, that:

(1) The data will not be sold to third parties;

(2) The data will not be used by or disclosed to any person or organization other than as described in the application;

(3) The information will not be used directly or indirectly to sell a product or service to an individual or the general public;

(4) There will be no copying or duplication of the information provided other than for the stated purpose for which the requester will use the information.

(d) Before releasing the requested information, the court shall notify affected persons as follows:

(1) The requester must provide the court with a draft order that notifies affected persons of the bulk download/compiled information request and its purpose and that describes how the requester intends to use requested information.

(2) The court shall review the draft order and, if appropriate, adopt it as an order of the court and send it to all persons affected by the release of the requested information and will inform them that if they object to the release of the information, they must notify the court within a specified time. If the order is returned as undeliverable or an affected person objects to the release of the requested information, personal identifying information about that person shall not be released.

(3) The court shall require the requester to pay a fee to cover the cost of mailing and processing.

(e) If the court, or its designee, grants a request made under section 4.40(a), it may make such additional orders as may be necessary to recover costs or protect the information provided, which may include requiring the requester to post a bond.

(f) Section 4.40(a) does not apply to for-profit data consolidators and re-sellers. For-profit data consolidators and re-sellers shall not, under any circumstances, obtain a bulk download of or compiled information from case management system records that are not publicly accessible on the Internet.

Task Force Commentary

This is a significant rewrite of Section 4.40 of the CCJ/COSCA Guidelines. A majority of the Task Force recommends that the court implement the stringent process established in this rule governing the process by which researchers and other members of the public may request and

possibly obtain access to data downloaded in bulk that contains personal identifying information about individuals. The proposed rule reflects the outcome of extensive discussions as to what should be the default position when an individual fails to respond to the notice that his or her "personal identifiers" have been requested to be disclosed. Some Task Force members believed that if an individual failed to respond to the notice, information about that individual should not be disclosed, while other Task Force members believed that the failure to respond operated as a waiver of any objections to the disclosure. Ultimately, the majority agreed that privacy would not be unduly compromised if an individual is given appropriate notice and an opportunity to "opt out."

A minority of the Task Force believes that the process Section 4.40 describes is overly cumbersome and unnecessarily protective of individual privacy rights. Some members of the Task Force minority had additional concerns.

Several Task Force members questioned whether the Supreme Court should be the entity that decides whether to permit access to data from the Unfiltered Database. One Task Force member posited that to avoid any appearance of bias or impropriety, this task should be undertaken by an entity that is outside the judicial system. Another Task Force member suggested that the Supreme Court be available to decide disputes involving access to data from the Unfiltered Database, but that the initial decision about access should be made by an entity other than the Supreme Court.

One Task Force member suggested that the notification process set forth in Section 4.40(d) should not apply if a researcher requests only the names of individual litigants and does not request that these names be correlated with any other private information. With the names, the researcher will then be able to conduct individual queries using the case management system database on the Internet or at the courthouse. This observer reasoned that when litigant name is correlated only with publicly available information, such as the case management system data on the Internet, the individual does not have a legitimate privacy interest in protecting against disclosure of his or her name.

Several Task Force members expressed concern that the Supreme Court lacks the resources to keep track of who responded or did not respond to notice.

(E) **Section 4.50** – Court Records That Are Only Publicly Accessible At a Court Facility

(a) The following information in a court record will be publicly accessible, consistent with the ongoing business of the court, only at a court facility in the jurisdiction, unless access is prohibited pursuant to sections 4.60 or 4.70:

(1) All pleading, other filing and data entries made within ten (10) days of filing or entry to allow parties or other affected persons a ten (10) day opportunity to request sealing or other public access treatment;

(2) Names of jurors;

(3) Exhibits;

(4) Pre-trial statements in civil proceedings and witness lists in all proceedings;

(5) Documents containing the name, address, telephone number, and place of employment of any non-party in a criminal or civil case, including victims in criminal cases, non-party witnesses, and informants, but not including expert witnesses; and

(6) All pleadings not otherwise addressed in these rules in all cases until the court system has the means to redact certain information or exclude certain documents in some automated fashion.

Task Force Commentary

The Task Force recognizes that paper pleadings are, for the most part, already public and does not intend these rules to provide for any additional restrictions. A majority of the Task Force favors maintaining the "practical obscurity" inherent in paper records by ensuring that the information and documents described in Section 4.50 are available only at the courthouse, and not on the Internet. A strong minority of the Task Force favors recommending that pleadings and, in particular, court orders and opinions, be made available on the Internet as soon as the technology is available to do so with appropriate redactions for private or confidential information.

(F) **Section 4.60** – Court Records Excluded from Public Access

(1) The following information in a court record is not accessible to the public:

(a) Information that is not to be accessible to the public pursuant to federal law;

(b) Information that is not to be accessible to the public pursuant to state law, court rule or case law, including but not limited to the following:

(i) records pertaining to juvenile delinquency and abuse neglect proceedings;

(ii) financial affidavits in divorce proceedings;

(iii) pre-sentence investigation reports;

(iv) records pertaining to termination of parental rights proceedings;

(v) records pertaining to adopting proceedings; and

(vi) records pertaining to guardianship proceedings; records pertaining to mental health proceedings; and

(c) Other information as follows:

(i) records sealed by the court;

(ii) social security numbers;

(iii) juror questionnaires;

(iv) Case Management System fields, if any, depicting street address, telephone number, social security number, State identification number, driver's license number, fingerprint number, financial account number, and place of employment of any party or non-party in a criminal or civil case, including victims in criminal cases, nonparty witnesses, and informants;

(v) internal court documents, such as law clerk memoranda;

(vi) Case Management System fields, if any, depicting the name of any non-party; and

(vii) Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, or Personal Identification Numbers (PINs) of individuals.

(2) A member of the public may request the court to allow access to information excluded under this provision as provided for in section 4.40(a).

Task Force Commentary

Most of the Task Force agreed that the information described in Section 4.60 should not be available to the public. A few Task Force members believe that non-party witness names, addresses and telephone numbers should be publicly available, preferably on the Internet. These Task Force members disagree that non-party witnesses have a legitimate privacy interest in protecting against disclosure of their names, addresses and telephone numbers.

(G) **Section 4.70** – Requests To Prohibit Public Access to Information In Court Records Or To Obtain Access to Restricted Information

(a) A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. The court must decide whether there are sufficiently compelling reasons to prohibit access according to applicable constitutional, statutory and common law. In deciding this, the court should consider at least the following factors:

(1) The availability of reasonable alternatives to nondisclosure;

(2) Risk of injury to individuals;

(3) Individual privacy rights and interests;

(4) Proprietary business information; and

(5) Public safety.

In restricting access the court will use the least restrictive means that will achieve the purposes of the access policy and the needs of the requestor.

(b) A request to obtain access to information in a court record to which access is prohibited under section 4.60 or 4.70(a) of these Guidelines may be made by any member of the public or on the court's own motion upon notice as provided in subsection 4.70(c). The court must decide whether there are sufficiently compelling reasons to continue to prohibit access according to applicable constitutional, statutory and common law. In deciding this, the court should consider at least the following factors:

(1) The public's right of access to court records;

(2) The availability of reasonable alternatives to nondisclosure;

(3) Individual privacy rights and interests;

(4) Proprietary business information;

(5) Risk of injury to individuals; and

(6) Public safety.

(c) The request shall be made by a written motion to the court. The requestor will give notice to all parties in the case except as prohibited by law. The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under section 4.70(a), the court will provide notice to the individual or entity that requested that access be prohibited either itself or by directing a party to give the notice.

(V) **Section 5.00 – When Court Records May Be Accessed**

(a) Court records will be available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.

(b) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time, consistent with the ongoing business of the court.

(VI) **Section 6.00 – Fees for Access**

[Reserved]

(VII) **Section 7.00 – Obligations Of Vendors Providing Information Technology Support To A Court To Maintain Court Records**

[Reserved]

(VIII) **Section 8.00 – Information and Education Regarding Access Policy**

(A) **Section 8.10** – Dissemination of Information to Litigants About Access To Information In Court Records

The court will make information available to litigants and the public that information in the court record about them is accessible to the public,

including remotely and how to request to restrict the manner of access or to prohibit public access.

Task Force Commentary

The Task Force firmly believes that before the court implements any rule changes with respect to public access to court information, it must thoroughly educate litigants and the public about what court record information is public and how it may be accessed or protected both remotely and at individual courthouses. Members of the bar should also be educated about these issues through the New Hampshire Bar Association.

(B) **Section 8.20** – Dissemination of Information To The Public About Accessing Court Records

The Court will develop and make information available to the public about how to obtain access to court records pursuant to this rule.

(C) **Section 8.30** – Education of Judges and Court Personnel About Access Policy

The Court and clerk of court will educate and train their personnel to comply with the access policy established in this rule so that the Court and clerk of court offices respond to requests for access to information in the court record in a manner consistent with this policy. The Presiding Judge shall insure that all judges are informed about the access policy.

(D) **Section 8.40** – Education About Process To Change Inaccurate Information in A Court Record

The Court will have a policy and will inform the public of the policy by which the court will correct inaccurate information in a court record.

CCJ/COSCA RECOMMENDATIONS AND COMMENTARY

Purpose

Section 1.00 - Purpose of the *CCJ/COSCA Guidelines*

(a) The purpose of these *CCJ/COSCA Guidelines* is to provide a comprehensive framework for a policy on public access to court records. The *CCJ/COSCA Guidelines* provide for access in a manner that:

(1) Maximizes accessibility to court records,