

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 OBJECTION TO CROSS-MOTION
FOR SUMMARY JUDGMENT**

Defendant, through counsel, the Office of the Attorney General, respectfully objects to Plaintiffs’ cross-motion for summary judgment, which seeks to “enjoin enforcement of the Parental Notification Prior to Abortion Act (the “Act”) in its entirety” and to “invalidate the Act.” In support of this objection, Defendant files the accompanying Memorandum of Law and alleges as follows:

1. On July 12, 2006, Defendant filed a Motion for Partial Summary Judgment (“Def. Motion”) seeking summary judgment on the issue of legislative intent and an injunction prohibiting application of the Act in medical emergencies. As set forth in the Memorandum accompanying that motion, this Court should issue a narrowly drawn injunction to preserve the Act because, as stated in *Ayotte v. Planned Parenthood*, ___ U.S. ___, 126 S. Ct. 961 (2006), “[s]o long as they are faithful to legislative intent, then

in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." *Id.* at 968.

2. Plaintiffs' cross-motion on the issue of legislative intent is based upon the wrong legal standard. The Court need not decide whether the legislature would have adopted the Act with a health exception. It need only decide legislative intent on the judicial remedy, i.e., whether judicial limitation on application of the Act would be preferable to no Act at all.

3. As set forth in Defendant's accompanying Memorandum of Law, the language and structure of the Act show that the legislature would prefer a limited injunction prohibiting the Act's unconstitutional application in certain medical emergencies to no Act at all. As noted in *Ayotte*, the Act contains a severability clause. The existence of bypass provisions also indicates that the legislature recognized that there might be situations in which waiver of the parental notification requirements are appropriate. Moreover, the Act contains specific factual findings that parental consultation is "usually" desirable and that parents "ordinarily" possess helpful information. RSA 132:25; 2003 N.H. Laws 173:1, II(d), III. Thus, contrary to Plaintiffs all-or-nothing approach, the legislature expressly qualified the universe of situations that would trigger parental notification and made clear in the language of the Act itself that it was willing to accept limited exceptions to the general rule.

4. Plaintiffs have presented no material facts or evidence to support their cross-motion regarding legislative intent, nor do they dispute facts raised in Defendant's Motion for Partial Summary Judgment. Political statements by individual legislators and observations on the political controversy surrounding health exceptions is not material or

even relevant to the intent of the legislature as a whole on the issue of remedy.

Legislative intent can only be gleaned from the Act itself and from its official legislative history.

5. Defendant also objects to Plaintiffs' cross-motion regarding implementation of the bypass procedures. As set forth in Defendant's Cross-Motion for Summary Judgment and accompanying Memorandum of Law, Plaintiffs present no legal or factual basis for the Court to strike down the Act as unconstitutional on its face. The Act meets all applicable legal standards and the Court should declare that it is constitutionally adequate on its face.

6. Plaintiffs' arguments are essentially that *application* of the Act might occur in an unconstitutional manner. The only fact material to their challenge is that the Act has not yet been implemented and cannot be until the Court issues an injunction against application of the Act in medical emergencies. Thus, the Court should reject Plaintiffs' claims as premature.

7. To the extent that the Court deems facts on the judicial bypass procedure, such as court forms drafted in anticipation of the Act's implementation, relevant or material to the pending motions, it should still rule in favor of Defendant because the procedures and forms are constitutionally adequate. They follow the legal framework of the Act and are subject to application by judges who are cognizant of the Act's requirements. As shown in the supporting affidavit filed by Judith Rehak, Esq. of the Minnesota's State Court Administrator's Office, Exhibit B to accompanying Memorandum of Law, Minnesota has successfully applied judicial processes and forms based upon bypass provisions that are virtually identical to New Hampshire's.

8. Defendant submits the accompanying Memorandum of Law with attached Exhibits in accordance with Local Rule 7.1(a)(2).

9. Defendant requests that oral argument be heard.

WHEREFORE, Defendant respectfully requests that the Court:

- A. Deny Plaintiffs' Cross-Motion for Summary Judgment;
- B. Grant Defendant's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment on Judicial Bypass;
- 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
Maureen D. Smith (#4857)
Senior Assistant Attorney General
Laura E. B. Lombardi (#12821)
Assistant Attorney General
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

CERTIFICATE OF SERVICE

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

By: /s/ Maureen D. Smith
Maureen D. Smith