

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 RESPONSE TO PLAINTIFFS’ MOTION FOR LEAVE TO
SUPPLEMENT COMPLAINT**

I. Introduction

This case has been remanded back from the United States Supreme Court and the Court of Appeals. The Plaintiffs have filed a Motion seeking leave to file a supplemental complaint pursuant to Federal Rules of Civil Procedure 15(d), and to add additional allegations and a new claim regarding the alleged lack of confidentiality surrounding the judicial bypass process. The Defendant submits the following reply to make clear that the State does not object to the extent that the Plaintiffs are only seeking to amend or augment their claim regarding confidentiality, which has never been litigated before this Court. However, the State *does* object to any attempt by the Plaintiffs to re-litigate issues that have been ruled upon by the United States Supreme Court, or to broaden the scope of the issues which have been presented to the trial court on remand.

II. Procedural History and Background

This case involves a challenge to the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act ("the Act"). The Act provides that abortions may not be performed upon an unemancipated minor until at least 48 hours after written notice has been delivered to one of the minor's parents. RSA 132:25. In their complaint Plaintiffs alleged that the act is unconstitutional because (i) it fails to provide an exception for cases involving health emergencies; (ii) the exception in the statute allowing abortions when necessary to prevent a minor's death is too narrow; and (iii) the Act's judicial bypass provision fails to adequately protect minor's confidentiality.

The District Court held that the Act was unconstitutional on its face because it did not contain an exception when an abortion is necessary to protect the health of the minor, and because the "death exception" was too narrow. Planned Parenthood of Northern New England v. Heed, 269 F.Supp2d 59, 65 – 66 (D.N.H. 2003), *aff'd* 390 F.3d 53, *vacated and remanded sub nom.* Ayotte v. Planned Parenthood of Northern New England, 126 S.Ct. 961 (2006). The Court did not rule on the confidentiality challenge regarding the judicial bypass procedure. *Id.* at 67. The First Circuit affirmed the District Court's decision holding that the Act was facially unconstitutional because it did not have a health exception, and because the "death exception" was drawn too narrowly and "failed to safeguard the physician's good faith medical judgment that a minor's life is at risk against criminal and civil liability." 390 F.3d at 62, 64.

The Defendant appealed to the United States Supreme Court. During briefing and at oral argument the parties refined and narrowed their legal positions. Both sides agreed that the issue on appeal was whether a parental notification act is unconstitutional if it lacks an

exception to allow immediate abortions in cases involving medical emergencies. *See, e.g.* Respondent’s Brief at p. 1 (describing the “central issue” in this case as whether the state can omit a “medical emergency exception” from a parental notification statute); *see also* Transcript of Oral Arg. at p. 36 (Plaintiffs’ counsel conceded, in response to a question from Justice Ginsberg, that it would satisfy Plaintiffs’ constitutional concerns if an injunction were issued which prohibited the statute from being enforced in emergency situations where an abortion was needed to prevent an immediate danger to the minor’s health); Transcript of Oral Argument at p. 37 – 39 (Plaintiffs’ counsel conceded that it would satisfy their constitutional concerns if an order were issued that prohibited enforcement of the statute “any circumstance in which a physician certifies in good faith that he believes an immediate abortion is necessary for the health of the mother”). As a result, the Supreme Court framed the issue on appeal as follows; “If enforcing a statute that regulates access to abortions would be unconstitutional in medical emergencies what is the appropriate judicial response.” Ayotte, 126 S.Ct. at 964.

The Supreme Court vacated the Court of Appeals’ decision, and remanded the matter back to the Court of Appeals on the question of remedy. The Supreme Court noted in its decision that the statute was unconstitutional when applied in “some very small percentage of cases” where pregnant minors “need immediate abortions to avert serious and often irreversible damage to their health.” Ayotte, 121 S.Ct. at 967. However, the Court held that the lower court should not have struck down the entire statute as a result, but should have crafted a narrower remedy which prohibited application of the statute in those circumstances where a pregnant minor faces a health emergency. *Id.* at 969. The Supreme Court remanded the case back to the Court of Appeals with a blueprint for how to proceed – the Court of

Appeals was directed first to determine whether it would be possible to craft an injunction that would prohibit only the unconstitutional applications of the statute, without doing violence to the legislative intent of the General Court. *Id.* Assuming that is possible, the Supreme Court directed the Court of Appeals to then turn to the issue involving the confidentiality of the judicial bypass procedures.

III. Argument

Neither the District Court nor the Court of Appeals has yet to examine whether the judicial bypass provisions contained in the Act are unconstitutional because they fail to adequately protect a minor's confidentiality. That is still an open question, and the Supreme Court thus remanded the case back to the lower court, in part, to decide that issue. Therefore, the Plaintiffs may seek to supplement their complaint pursuant to FRCP 15(d) to reflect the changed factual circumstances regarding the judicial bypass procedure and the methods for protecting the confidentiality of applicants. However, this should not be a general opportunity for the Plaintiffs to seek to expand the scope of the District Court's mandate on remand, or to revisit issues regarding whether a "health exception" is necessary.

1. "Law of the Case" Doctrine Prevents the District Court From Expanding the Scope of the Inquiry on Remand from the Supreme Court

The Supreme Court has now ruled on Plaintiffs' challenge to the emergency health exception and the so-called death exception – in effect holding that while the statute may have unconstitutional applications in some rare circumstances involving health emergencies, that the proper remedy is to craft an injunction that limits the reach of the statute to those situations where there is no likelihood of such potential consequences. That ruling is binding on the lower courts, and cannot be reexamined on remand.

The doctrine of the “law of the case” provides that “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” Nat’l Labor Relations Board v. Goodless Brothers Elec. Co., 285 F.3d 102, 107 (1st Cir. 2002). One branch of the law of the case doctrine, the so-called “mandate rule” forbids a lower court from “relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case.” Ellis v. United States, 313 F.3 636, 646 (1st Cir. 2002).

“When an appellate opinion clearly addresses a disputed issue, it instructs an inferior tribunal to comply with this decision on remand. . . . An appellate court’s mandate controls all issues that were actually considered and decided by the appellate court, or as were necessarily inferred from the disposition on appeal.”

NLRB v. Goodless Bros. Elec. Co., 285 F.3d at 107 (internal cites and quotes omitted).

In this case, the Supreme Court has effectively ruled upon the Plaintiff’s challenge regarding the health exception and the death exception. It can be inferred from the Supreme Court’s decision that both of these constitutional issues can be resolved, and the statute as a whole can be saved, if an injunction can be issued which limits the Act’s applications. The lower court is not permitted to revisit this issue on remand, and should not allow the Plaintiffs to supplement their complaint in a manner that would lead to such a result.

The first issue before the District Court is whether an injunction can be crafted which prohibits application of the statute in cases involving medical emergency, and which does not do violence to the legislature’s intent. The Court should limit its inquiry to that narrow issue, and only after deciding that question, should the Court go on to examine whether the judicial bypass provisions adequately protect minors’ confidentiality.

III. Conclusion

For all of the foregoing reasons, the Defendant respectfully requests that the Court issue an order which makes clear that the Court is only allowing Plaintiffs to file a supplemental complaint to the extent that they are seeking to augment their claim regarding the confidentiality of the judicial bypass, and that the Court is not allowing the Plaintiffs to revisit any of the issues which have been decided before the Supreme Court.

The Defendant has not submitted a separate memorandum of law in support of this reply under Local Rule 7.1, as the relevant facts and authorities are cited herein.

Respectfully submitted,

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By and through her counsel,

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Certificate of Service

June 23rd, 2006

I hereby certify that a copy of the served this date, via the ECF system on Dara Klassel, Esq., counsel for Planned Parenthood Federation of America; Martin P. Honigberg, Esq., counsel for Planned Parenthood of Northern New England; Lawrence A. Vogelmann, counsel for Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.

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