UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, et al.,	)	
Plaintiffs,	)	
v.	)	No. C-03-491-JD
KELLY AYOTTE, Attorney General of New Hampshire, in her official capacity,	)	
Defendant.	)	

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM - ORAL ARGUMENT REQUESTED

NOW COME Plaintiffs, through counsel, and petition this Court, pursuant to Fed. R. Civ. P. 56, for summary judgment enjoining enforcement of the Parental Notification Prior to Abortion Act (the "Act"), N.H. RSA 132:24-132:28, in its entirety.

As grounds for this motion, Plaintiffs allege as follows:

1. This Court held, and the First Circuit and the Supreme Court affirmed, that without a health exception, the Act is unconstitutional. Ayotte v. Planned Parenthood, ___ U.S. ___, 126 S. Ct. 961, 967 (2006); Planned Parenthood v. Heed, 390 F.3d 53, 59-62 (1st Cir. 2004); Planned Parenthood v. Heed, 296 F. Supp. 2d 59, 65-67 (D.N.H. 2003). The Supreme Court remanded the case for the sole purpose of determining whether the legislature would have wanted the law with such an exception. Ayotte, 126 S. Ct. at 968-69. The available evidence – including the legislature's deliberate omission of the required exception, the constitutional context in which it did so, the intense political controversy surrounding health exceptions, and the legislature's subsequent failure to amend the Act to include a health exception – demonstrates that it would not.

Under the governing standard, where, as here, this Court cannot be sure whether the legislature would have passed the law with a health exception, the proper course is to invalidate the Act and send the issue back to the legislature.

2. New Hampshire's parental notice law is also unconstitutional because it fails to protect the confidentiality of minors seeking a judicial bypass of the notice and delay requirements. Indeed, by requiring minors to use their names in the case caption, making no provision for sealing of the docket or the records, and instructing court employees to contact minors at home, it affirmatively exposes a minor's decision to seek a bypass to the public at large and to her parents in particular. As the Supreme Court has made clear, without a confidential bypass process, no parental involvement law can stand. See Bellotti v. Baird, 443 U.S. 622, 643-44, 647 (1979).

3. New Hampshire impermissibly requires minors to choose between seeking a bypass on the ground that they are mature enough and well-enough informed to make the decision on their own and on the ground that an abortion without parental notice is in their best interest. See Bellotti, 443 U.S. at 647-648. Unless and until this constitutional infirmity is remedied, the Act cannot be enforced.

4. Plaintiffs and their minor patients will suffer irreparable injury if the Act is not enjoined because the Act's failure to provide a health exception prevents abortion providers from performing emergency abortions necessary to protect minors' health. In addition, the state court procedures implementing the law unconstitutionally require minors to choose between seeking a bypass on the ground that they are mature enough and well-enough informed to make the decision on their own and on the ground that an abortion without parental notice is in their best interest. The law also endangers the

confidentiality of minors seeking a judicial bypass and exposes them to the risk of harm, including physical or emotional abuse from parental notification. Moreover, loss of constitutional rights is irreparable injury as a matter of law.

5. The balance of hardships favors the injunction because Defendant is not at risk of any harm.

6. Finally, the public interest is served by enjoining an unconstitutional statute and protecting the health of young women.

MEMORANDUM STATEMENT (LR 7.1(a)(2))

7. In support of this motion, Plaintiffs submit a memorandum of law and the Declaration of Jamie Sabino that has been revised to take into account the procedures that the New Hampshire Supreme Court approved for implementation of the judicial bypass.[1] For the Court's convenience, Plaintiffs have also resubmitted the Declarations of Wayne Goldner, M.D. and Rachel Atkins, P.A., M.P.H. that were originally filed with this Court in support of Plaintiff's Motion for Preliminary Injunction that was filed in November 2003.

REQUEST FOR ORAL ARGUMENT (LR 7.1(d))

8. Oral argument is requested in order to assist the court in reaching a decision on this motion.

Wherefore, Plaintiffs request that this Court set this motion for oral argument and grant this motion.

[1] The memorandum of law and the additional documents submitted also support the Plaintiff's Objection to Defendant's Motion for Partial Summary Judgment filed contemporaneously herewith.

Date: October 2, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2006, the foregoing cross-motion was served through the ECF system.

/s/ Martin P. Honigberg
Martin P. Honigberg

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO: 03-491-JD
KELLY AYOTTE, Attorney General of New Hampshire, in her official capacity,	)	
Defendant.	)	

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

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INTRODUCTION

Plaintiffs file this memorandum in support of (a) their objection to Defendant's motion for partial summary judgment and (b) their own cross-motion for summary judgment. Plaintiffs ask this Court to enjoin New Hampshire's Parental Notification Prior to Abortion Act (the "Act"), RSA 132:24-132-28, in its entirety. This case returns to this Court to consider the appropriate remedy given that its core holding – that the Act is unconstitutional because it lacks an exception to its notice and delay requirements for situations in which a minor's health is at risk – was affirmed by both the First Circuit and the Supreme Court. Ayotte v. Planned Parenthood, ___ U.S. ___, 126 S. Ct. 961, 967 (2006); Planned Parenthood v. Heed, 390 F.3d 53, 59-62 (1st Cir. 2004) ("Heed II"); Planned Parenthood v. Heed, 296 F. Supp. 2d 59, 64-66 (D.N.H. 2003) ("Heed I"). As explained fully below, the appropriate remedy is for this Court to enjoin the Act in its entirety thereby allowing New Hampshire to enact a law that comports with well-settled constitutional requirements, if it so chooses. This result is proper for three reasons.

First, under New Hampshire law – which the parties agree governs this question – this Court must strike the entire Act unless the Court can be sure that the legislature would have passed the Act with a health exception. See, e.g., Heath v. Sears, Roebuck & Co., 123 N.H. 512, 531 (1983) (holding facial invalidation is required where court is "not sure whether the legislature would have enacted" a constitutional statute). Given the legislature's deliberate omission of the required exception, the constitutional context in which it did so, the intense political controversy surrounding health exceptions, the closeness of the vote, and, perhaps most tellingly, the legislature's subsequent failure to amend the Act to include a health exception, this Court simply cannot be sure that the Act would have passed with a health exception. Indeed, the evidence suggests that it would not have. Under these circumstances, the appropriate course of

action under New Hampshire law is to invalidate the current Act and let the legislature decide for itself what it wants.

Second, New Hampshire's parental notification law fails to protect the confidentiality of minors seeking a judicial bypass. Indeed, by requiring minors to use their names in the case caption, making no provision for sealing of the docket or the records, and instructing court employees to contact minors at home, it affirmatively exposes a minor's decision to seek a bypass to the public at large and to her parents in particular. As the Supreme Court has made clear, without a confidential bypass process, no parental involvement law can stand. Bellotti v. Baird, 443 U.S. 622, 643-44 (1979).

Third, New Hampshire impermissibly requires minors to choose between seeking a bypass on the ground that they are mature enough and well-enough informed to make the decision on their own and on the ground that an abortion without parental notice is in their best interest. See Bellotti, 443 U.S. at 647-48 (holding that bypass process must allow minors to attempt to show both that they are mature and that an abortion would be in their best interest); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 512-13 (1990) (same). Unless and until this constitutional infirmity is remedied, the Act cannot be enforced.

BACKGROUND

In June of 2003, by a margin of only one vote in the Senate and six votes in the House of Representatives, the New Hampshire legislature passed the Parental Notification Prior to Abortion Act. Despite Supreme Court precedent stating that without a health exception such laws are unconstitutional, see, e.g., Ayotte, 126 S. Ct. at 967 ("[O]ur precedents hold . . . that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the life or health of the mother." (citations and internal quotation marks omitted)), the Act's

supporters deliberately chose to enact the law without such an exception. Heed II, 390 F.3d at 62 (holding that the legislature's intent to require compliance with the Act's notice and delay requirements in health threatening emergencies was clear).

Plaintiffs filed this lawsuit, challenging the Act on three grounds: (1) it lacks an exception to its notice and delay requirements for situations in which a minor needs a prompt abortion to protect her health; (2) its exception for abortions necessary to prevent a minor's death is unduly narrow; and (3) the Act's judicial bypass fails to protect minors' confidentiality. This Court agreed with Plaintiffs that the Act is unconstitutional because the legislature omitted a health exception and because the death exception the legislature drafted was impermissibly narrow. Heed I, 296 F. Supp. 2d at 64-67. Although this Court found that Plaintiffs' confidentiality claim did "raise a constitutional question," the Court declined to rule on that claim given the other fatal flaws in the Act. Id. at 67. The First Circuit affirmed in all respects. Heed II, 390 F.2d at 59-64.

The Supreme Court likewise affirmed the basic holding that without an exception to protect minors' health, the Act was unconstitutional and could not be enforced. Ayotte, 126 S. Ct. at 967. The Court remanded, however, on the question of the appropriate remedy for the constitutional violation. In so doing, the Supreme Court instructed this Court to look at legislative intent to determine whether the legislature would have wanted the Court to supply the exception the legislature omitted, or whether it would have preferred for the issue to be returned the legislative domain. Id. at 967-69. If this Court determines that crafting a health exception for the legislature is appropriate, then, per the Supreme Court's further instruction, this Court

must determine whether the law contains a constitutionally sufficient bypass process. Id. at 969.[1]

After the Supreme Court remanded the case, Plaintiffs supplemented their original complaint to take into account the procedures that the New Hampshire Supreme Court had approved for the administration of the Act's judicial bypass. Those procedures exacerbated the risks to minors' confidentiality already inherent in the Act by, among other things, including minors' names in the case caption, failing to require that bypass records or the docket be sealed and kept confidential from minors' parents, and instructing court employees, in some instances, to contact minors at home. Exhibit 1 at A5-A8.[2] In addition, the New Hampshire Supreme Court's procedures created a new infirmity. In violation of constitutional requirements, the official procedures require minors to elect between petitioning for a bypass on the ground that they are mature enough and well-enough informed to make the decision independently and on the ground that the abortion without notice is in their best interest. Compare Exhibit 1 at A8 (the court approved petition) with Bellotti, 443 U.S. at 647-48.

Plaintiffs now move for summary judgment on all three counts: the absence of a health exception; the failure to provide a confidential bypass; and the impermissibly circumscribed bypass options. Each one individually requires that the Act be enjoined in its entirety unless and until it is remedied by the appropriate branch of the New Hampshire government. Fixing the myriad problems inherent in the New Hampshire law would require this Court to trample on the

[1] With respect to the exception for abortions necessary to prevent a minor's death, the Supreme Court reasoned that, "[e]ither an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute in toto should obviate any concern about the Act's life exception." Ayotte, 126 S. Ct. at 969.

[2] Exhibit 1 contains the court procedures approved by the New Hampshire Supreme Court for the implementation of the judicial bypass. The procedures were attached to the Supplemental Complaint in this matter as Exhibit B. Their authenticity is not in dispute. See Answer to Supplemental Complaint ¶¶ 5-6.

legislature's intent and to rewrite the state court system's internal operating procedures. This the Court should not do.

ARGUMENT

I. This Court Should Not Rewrite the Act to Include an Exception the Legislature Deliberately Excluded Because This Court Cannot Be Sure That the Legislature Would Have Passed Such a Statute.

This Court should invalidate the Act in its entirety because this Court cannot be sure that the legislature would have accepted a health exception as the price of having an enforceable parental notice law. Indeed, the legislature's deliberate exclusion of the health exception, the constitutional backdrop against which the legislature chose to do so, the strong opposition to a health exception, the narrow margin by which the Act initially passed, and the lack of any effort on the part of the legislature to fix the law, all strongly point to the opposite conclusion: that the Act's supporters would have chosen to forego an enforceable parental notice law rather than compromise their principles. Where, as here, it is far from certain that the legislature would have passed the Act with a health exception, this Court should decline the Attorney General's invitation to write one in, and instead should return the issue to the legislature.

The parties agree that the decision whether to send the issue back to the legislature or to, in essence, have the Court write in the missing health exception is governed by state law. See Def's Mem. of Law in Support of Partial Mot. for Summ. J., No. C-03-491-JD (D.N.H. filed July 12, 2006) at 4 (hereinafter "Def's Mem. of Law").[3] New Hampshire law requires this Court to strike a statute in its entirety where, as here, the Court cannot be "sure whether the legislature would have enacted" the statute in the absence of the unconstitutional provisions. Heath, 123 N.H. at 531; accord Claremont Sch. Dist. v. Governor, 144 N.H. 210, 218 (1999) (holding that

[3] The parties also agree that this issue may be decided as a matter of law. See Méndez-Laboy v. Abbott Labs, Inc., 424 F.3d 35, 37 (1st Cir. 2005); Def.'s Mem. of Law at 2.

proper remedy is to strike the statute in its entirety where the court "simply cannot say whether the legislature would have enacted" a constitutional statute (citation and internal quotation marks omitted)); Carson v. Maurer, 120 N.H. 925, 946 (1980) (same).

Here, far from being sure – as New Hampshire law requires – that the legislature would have wanted the Act with the required health exception, the evidence points to the contrary.[4] As an initial matter, the Act's plain language – the starting point for determining legislative intent, see, e.g., Appeal of Cote, 144 N.H. 126, 129 (1999) – shows that the legislature deliberately omitted a health exception. Heed II, 390 F.3d at 61-62. The Act states that "[n]o abortion shall be performed upon an unemancipated minor . . . until at least 48 hours after written notice" to a parent. RSA 132:25. The legislature considered whether to make any exception to this requirement, including whether there should be exceptions for situations in which the minor's medical condition necessitates an abortion. It determined that the exception for such conditions should be limited to those circumstances where the abortion was necessary to prevent the minor's death; and it included two other unrelated exceptions (one for circumstances where a parent

[4] The State attempts to avoid any serious inquiry into the legislature's intent by arguing that the Act's severability clause is determinative and that this Court may look to other evidence of intent only if it finds the severability clause is ambiguous. Def.'s Mem. of Law at 5. These arguments are without merit. As this Court has explained, "[t]hough the inclusion of a severability clause sheds some light on the legislature's intent, it is only one factor the court must consider." Stenson v. McLaughlin, 2001 DNH 159, 15 (D.N.H. Aug. 24, 2001) (DiClerico, J.). Thus, the presence of the clause, while "probative of legislative intent, [is] not conclusive." Ackerley Commc'ns of Mass., Inc. v. City of Cambridge, 135 F.3d 210, 215 (1st Cir. 1998); see also United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."); In re Petition of N.H. Bar Ass'n, 151 N.H. 112, 119-21 (2004) (invalidating entire statutory provision despite presence of severability clause); Opinion of the Justices, 106 N.H. 202, 206 (1965) (same). Moreover, the State argued before the Supreme Court that the Act's severability clause was dispositive. Br. for Pet'r at 43-46, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 1920929. The Court rejected that argument, and instead ruled that legislative intent was an "open question" and remanded the case for a "determin[ation of] legislative intent in the first instance." Ayotte, 126 S. Ct. at 969. Finally, even if the State were correct that a severability clause must be ambiguous to inquire into legislative intent, this severability clause is ambiguous. Although the severability clause mentions unconstitutional applications of the statute three times, it declares only that the "provisions," not the applications, are severable. Compare RSA 132:28 (declaring that if "any provision of this subdivision or the application thereof to any person or circumstance is held invalid . . . the provisions of this subdivision are severable" (emphasis added), with 21 U.S.C. § 901 ("If a provision of this chapter is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable.").

certifies he or she has been notified and the other for judicial bypasses). RSA 132:26, I, II. Because the legislature included three explicit exceptions – including one that specifically deals with medical problems – under New Hampshire law it is deemed to have intended to forbid any others. See, e.g., St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996). Indeed, as the First Circuit concluded, the "New Hampshire legislature's intent that abortions not in compliance with the Act's notification provisions be prohibited in all but these three circumstances is clear." Heed II, 390 F.3d at 62 (citing St. Joseph Hosp., 141 N.H. at 11-12).

The legislature's deliberate exclusion of a health exception is of critical importance here given that, at the time the legislature passed the Act, it was clear that without such an exception the law was unconstitutional and would be struck down in its entirety. See, e.g., Stenberg v. Carhart, 530 U.S. 914, 930-31 (2000) (striking down abortion restrictions for failure to include a health exception); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 769-71 (1986) (same); Planned Parenthood of the Rocky Mountains Servs. Corp. v. Owens, 287 F.3d 910, 915-16 (10th Cir. 2002) (striking down parental notice law for lack of a health exception).[5] By choosing nonetheless to pass the Act without an exception to protect minors' health, the legislature demonstrated its willingness to risk loss of the law itself rather than to accept a law with a health exception.

The State attempts to avoid the fact that the legislature deliberately passed the Act without a health exception despite clear constitutional commands by stating that "the New Hampshire legislature was conscious of its obligation to enact legislation that passed constitutional muster." Def.'s Mem. of Law at 6. Although Plaintiffs have no doubt that the

[5] The legislature is, of course, presumed to legislate with the knowledge of existing law. See, e.g., Cannon v. Univ. of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); Greater Worcester Cablevision, Inc. v. Carabetta Enters., 682 F. Supp. 1244, 1250 (D. Mass. 1985) ("Legislatures are presumed knowledgeable of constitutional requirements . . . .").

legislators knew they had an obligation to pass laws that comport with the Constitution, knowledge of their duty is not relevant; disregard for that duty is. Here, there can be no doubt that the legislature disregarded that duty by purposefully omitting a health exception. Indeed, bill sponsor former Representative Phyllis Woods admitted it. She explained that "one of the reasons we wrote the law the way we did" was because "we thought it would go through all the courts and it would be challenged."[6] Representative Fran Wendleboe, a vocal supporter of the Act, expressed a similar statement explaining that the legislature "'didn't mistakenly forget to put in a health exception. We purposely crafted the bill without an exception."[7] Failure to comply with the constitutional requirement was not an oversight; it was purposeful.[8]

At bottom, the State's argument boils down to its assertion that the notion that the legislature would forego the parental notice law rather than accept a health exception "strains common sense." Def.'s Mem. of Law at 9. But this argument betrays a lack of understanding

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[6] Dan Gorenstein, Court Takes Up State's Parental Notification Law, N.H. Public Radio, May 23, 2005, http://www.nhpr.org/node/8861. Plaintiffs recognize that citations to these statements by the legislators are unusual, and, in some instances, may not be probative evidence. But this is an unusual case. Here, the Court is not attempting to discern the intent of the legislature in passing certain language. Rather, the Court must decide a hypothetical question that the legislators never explicitly answered – that is, what would the legislature have done in the face of the Supreme Court's ruling. Given this difficult task, which the First Circuit has described as "devolv[ing] into an impressionistic inquiry into whether [the statute] would have been enacted" with a health exception, see Ackerley Communications, 135 F.3d at 215 (discussing Massachusetts law, which, like New Hampshire law, directs the court to strike a statute in toto when it "cannot divine with confidence" what the legislature would have done), Plaintiffs believe it is appropriate to call this Court's attention to the clearly expressed intentions of the Act's sponsors and supporters.

[7] Editorial, Abortion Law was Dangerous, Portsmouth Herald, Dec. 31, 2003, available at http://www.seacoastonline.com/2003news/12312003/opinion/68065.htm.

[8] The State strains to support its argument by pointing to the statements of some legislators that a parental notice law must contain a judicial bypass. See Def.'s Mem. of Law at 6-7. But those statements shed no light on the relevant question here: Would the legislature accept a health exception? Nor can the State use Representative Woods's invocation of Hodgson v. Minnesota, 497 U.S. 417 (1990), to argue that there was precedent for upholding the constitutionality of a parental notice law despite the absence of a health exception. See Def.'s Mem. of Law at 6-7. As the First Circuit held, "the Hodgson Court did not consider a challenge to that statute's lack of a health exception, and even if it had, the subsequent decisions in Casey and Stenberg would nevertheless require a health exception." Heed II, 390 F.3d at 60 (footnote omitted). Indeed, the State has conceded as much. See Ayotte, 126 S. Ct. at 967 (noting State's concession that some minors need immediate abortions to protect their health and that applying the Act to them would be unconstitutional).

about the politics surrounding abortion in general, and the debate about health exceptions in particular. As the Ninth Circuit recently explained in invalidating a ban on certain abortions because that ban, like the New Hampshire Act, lacked a health exception, "[p]articularly when an issue involving moral or religious values is at stake, it is far from true that the legislative body would always prefer some of a statute to none at all." Planned Parenthood Fed'n of America v. Gonzales, 435 F.3d 1163, 1187 (9th Cir. 2006), cert. granted, 126. S. Ct. 2901 (2006). As that court elaborated,

> In deciding whether to adopt legislation on highly controversial issues, elected officials must weigh various factors and make informed political judgments. When, in such cases, it is not possible to achieve the full legislative goal, the leaders of the battle may prefer to drop the legislation entirely in order to be able to wage a more dramatic and emotional campaign in the public arena. They may conclude that leaving an issue completely unaddressed will make it easier for them to achieve their ultimate goals than would a partial resolution that leaves their "base" discontented and disillusioned. Dropping the proposed legislation (or even having it defeated) may be the best way to gain adherents to the cause, inspire the faithful, raise funds, and possibly even generate support for a constitutional amendment. Conversely, the sponsors of a bill may consider a partial victory worthless from a political standpoint, as the sponsors of the . . . Act told their fellow members of Congress here, or they may just object strongly to such a solution from a moral or even a religious standpoint. . . .
>
> Abortion is an issue that causes partisans on both sides to invoke strongly held fundamental principles and beliefs. We are prepared to deal with the constitutional issues relating to that subject, but not with the question how either side would exercise its moral and other judgments with respect to tactical political decisions. Whether the congressional partisans who supported the Act would have preferred to have what they repeatedly and unequivocally deemed to be ineffective legislation or to do without the statute and preserve the status quo ante as a political and moral tool is a determination we are simply unable and unwilling to make.

Id. at 1187-88.

The same political and other factors that animated the Ninth Circuit's decision exist here. The bill's supporters repeatedly stated that including a health exception would make the bill ineffective. For example, bill sponsor Representative Woods explained that the sponsors deliberately excluded a health exception because "if we had we had written that into the bill it would have made it useless."[9] Similarly, in their brief to the Supreme Court, bill sponsor Representative Kathleen Souza together with other legislators who supported the Act characterized the exception as a "loophole," arguing that an abortion restriction with a health exception that depends on a physician exercising his or her appropriate medical judgment is no restriction at all. Br. for New Hampshire Representative and HB 763 Sponsor Kathleen Souza et al. as Amici Curiae Supporting Petitioner at 13 & n.13, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 1865477 (hereinafter Sponsor Souza's Br.).

The legislators' strong opposition to health exceptions was echoed by many other supporters of the Act. For example, the Executive Director of Citizens for Life,[10] Roger Stenson, who testified in support of the bill, stated that "any amended version" of the Act to include a health exception "would be a defeat."[11] Other supporters of the Act expressed similar sentiments in amicus briefs submitted to the Supreme Court. For example, the United States Conference of Catholic Bishops argued that "[r]equiring a health exception in this case would undermine the

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[9] Colin Manning, Activists Try to Block New N.H. Abortion Notification Law, Foster's/Citizen Online, Nov. 18, 2003, http://premium1.fosters.com/2003/news/nov%5F03/november%5F18/news/reg%5Fco%5F1118a.asp; see also Dan Tuohy, Court Blocks Parental Notice Law, Eagle Tribune (North Andover, MA), Dec. 30, 2003 (quoting Woods as dismissing the idea of modifying the legislation to include a health exception because "it makes the bill almost useless").

[10] Citizens for Life is the New Hampshire affiliate of the National Right to Life Committee. Citizens for Life, Inc., The New Hampshire Affiliate of National Right to Life Committee, www.citizensforlife.org (last visited Sept. 25, 2006). Bill Sponsor Representative Souza is a trustee of that organization and submitted an amicus brief in support of the Act on the organization's behalf when this case was before the First Circuit. Br. for Hon. Barbara J. Hagan and Hon. Katherine F. Souza, Pro Se, as Amicus Curiae Supporting Defendant-Appellant Peter Heed for Reversal at 6, Planned Parenthood v. Heed, 390 F.3d 53 (1st Cir. 2004) (No. 04-1161), 2004 WL 3421887.

[11] Dan Tuohy, Court Blocks Parental Notice Law, Eagle Tribune (North Andover, MA), Dec. 30, 2003.

whole point of the notification requirement." Br. for the United States Conference of Catholic Bishops and Roman Catholic Bishop of Manchester as Amici Curiae Supporting Petitioner at 3, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 1864092 (hereinafter Catholic Bishops Br.). Another amicus brief explained that adding a health exception would "defeat[] and cripple[] the statute." Br. for Eagle Forum Education & Legal Defense Fund as Amicus Curiae Supporting Petitioner at 13, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 1875383.

Indeed, the opposition to the health exception is so strong within the anti-abortion community that in some instances advocates and legislators would choose no restriction at all rather than to accept a restriction with a health exception. As one commentator explained, the question of whether to accept a health exception is one that "could split the [anti-abortion] movement in two" because some legislatures "might prefer principled failure to pragmatic accommodation." Jeffrey Rosen, The Day After *Roe*, Atlantic Monthly, June 2006, at 59. Thus, far from "straining common sense," the notion that the legislature would refuse to accept a parental notice law with a health exception fully comports with political realities.

Moreover, the Act's subsequent history confirms that the legislature prefers the status quo to a parental notice law with a health exception. Cf. DeBenedetto v. CLD Consulting Eng'rs, __ N.H.__, 903 A.2d 969, 980-81 (N.H. 2006) (relying on legislature's subsequent failure to amend law as evidence of legislative intent). For almost three years, the Act has been enjoined because of the lack of a health exception and yet the legislature has taken no action to add one. It did not do so after this Court permanently enjoined the Act in December 2003, nor did it do so after the First Circuit affirmed this Court's decision in November 2004. Even after

the Supreme Court's decision in January 2006 made clear that the Act could not be put into effect unless it had a health exception, the legislature declined to add the necessary exception.[12]

Indeed, the Attorney General's own brief highlights the difficulty for this Court in attempting to discern what the New Hampshire legislature would have done. On page 8 of her brief, the Attorney General argues that "[i]n the circumstance where a physician believes, in good faith, that an immediate abortion is necessary for the health of the pregnant minor, the purpose of the statute to protect the medical, emotional, and psychological well-being of the pregnant minors would not be achieved by delaying the abortion to notify a parent." Def.'s Mem. of Law at 8. But the legislature clearly thought otherwise. As the First Circuit held, the legislature intended that physicians delay providing abortions for minors with health (as opposed

[12] The legislature's failure to cure the Act is not surprising given that, as 150 New Hampshire legislators told the Supreme Court, it is unlikely that the legislature would have accepted a bill with a health exception. See Br. for N.H. State Rep. Terie Norelli and Over 100 Other State Legislators as Amici Curiae Supporting Respondents at 10-11, 12-15, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 2646476 (discussing legislative process in general and with respect to the Act, and concluding that there is reason to believe that the legislature would have voted for no law at all rather than one with a health exception).

By failing to cure the Act, the legislature has also left it to this Court to decide the terms and scope of the health exception. Although it is certainly true that counsel for Plaintiffs has indicated what would solve the constitutional problem, Tr. of Oral Argument at 38-40, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 3198019, the Attorney General has pointed to nothing that sheds any light on how the legislature would draft a health exception (assuming it would accept one at all). As detailed in the amicus brief submitted by NARAL Pro-Choice America to the Supreme Court, states around the country have adopted at least 12 different exceptions. Br. for NARAL Pro-Choice America Foundation et al. as Amici Curiae Supporting Respondents at 14-17, Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006) (No. 04-1144), 2005 WL 2598158. And, indeed, the New Hampshire legislature has in the past debated the terms and scope of quite varied health exceptions when it considered (and rejected) proposed abortion restrictions. Compare S.B. 442, 1998 Session (N.H. 1998) (bill requiring women to delay their abortions following the provision of information, with exception for health condition "which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function") with H.B. 1278, 2002 Session (N.H. 2002) (similar bill with exception for circumstances when "in the opinion of the health care practitioner, the health of the mother is endangered") with H.B. 1380, 2002 Session (N.H. 2002) (parental consent bill with exception when "in the best medical judgment of the physician based on the facts of the case before such physician, a medical emergency exists that so complicates the pregnancy as to require an immediate termination of the pregnancy"). Because there is nothing to indicate how the legislature would cure the statute (again, assuming it would do so at all), the Court should strike the statute entirely and leave "such important policy decisions . . . for the [legislature] in the first instance," Ackerley Commc'ns, 135 F.3d at 217.

to life) threatening emergencies until a parent could be notified. Heed II, 390 F.3d at 62. Bill Sponsor Representative Souza explained that it did so because of the legislators' belief that "the greater the medical emergency – short of a truly life-threatening emergency – the greater the need for parental notice." Sponsor Souza's Br. at 13; see also Catholic Bishops Br. at 17-18, 21 n. 24 (arguing that parental notice "is all the more critical when an adolescent is faced with serious health issues").[13]

Given the language of the Act, the constitutional backdrop against which it was passed, the political context, the one vote margin by which the Act passed, and the legislature's failure to remedy the Act, it is simply not possible for the Court to be sure whether the "partisans who supported the Act would have preferred to have what they repeatedly and unequivocally deemed to be ineffective legislation or to do without the statute and preserve the status quo ante as a political and moral tool." See Planned Parenthood Fed'n of America, 435 F.3d at 1187-88. Under New Hampshire law, the proper course therefore is to invalidate the Act and allow the legislature to write a constitutionally acceptable parental notice law, if it so chooses. See Claremont, 144 N.H. at 217-18; Heath, 123 N.H. at 531; Carson, 120 N.H. at 946.

II. New Hampshire's Parental Notice Law Lacks a Constitutionally Sufficient Bypass.

In Bellotti v. Baird, 443 U.S. 622 (1979), the United States Supreme Court set forth the constitutional standards that govern laws requiring parental involvement in minors' abortion

[13] The Attorney General's request for relief likewise highlights the difference between what the Attorney General seems to think is appropriate (and required by the Constitution) and what the legislature is willing to accept. The Attorney General has asked the Court to issue an injunction prohibiting enforcement 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." Def.'s Mem. of Law at 10 (emphasis added). But as Sponsor Representative Souza and other legislators told the Supreme Court, "[a] ban which depends on the 'appropriate medical judgment' of [an abortion provider] is no ban at all. . . . This, of course, is the vice of a health exception resting in the physician's judgment." Sponsor Souza's Br. at 13 n. 13 (quoting Stenberg v. Carhart, 530 U.S. 914, 972 (2000) (Kennedy, J., dissenting)). Regardless of what the Attorney General thinks, this Court's charge is to inquire into what the legislature – not the Attorney General – would accept.

decisions. Understanding that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible," id. at 642, the Court held that such laws are constitutional only if they provide a bypass process through which a minor can seek a waiver of the parental involvement requirement, id. at 643-44. In order to pass constitutional muster, such a process must, inter alia, (a) allow the minor to obtain a waiver if she is mature enough and well-enough informed to make the decision independently or if an abortion without parental notice is in her best interest and, (b) ensure the confidentiality of the minor seeking a waiver. Id. at 643-44. New Hampshire's parental involvement law violates both of these constitutional requirements.

A. The parental notice law impermissibly limits a minor's ability to seek a bypass.

As implemented by the New Hampshire Supreme Court, New Hampshire's parental involvement law violates constitutional mandates by requiring minors to elect between seeking a bypass on maturity grounds and seeking one on best interest grounds. See State of New Hampshire, Petition for Waiver of Parental Notice for Abortion Requested by a Minor.[14] As Bellotti makes clear, a state may not limit a minor's ability to seek a waiver by forcing her to select a single ground upon which to proceed. As the Court explained:

[14] The official petition approved by the New Hampshire Supreme Court for seeking a waiver of the notification requirement states: "I ask the court to allow my doctor to perform an abortion on me without notifying either of my parents or my legal guardian for one of the following reasons: (Complete section a. or b.)." Exhibit 1 at A8 (emphasis in original). Section A states that the petitioner believes she is mature and capable of giving informed consent and Section B states that the petitioner believes that it is in her best interest to have an abortion without notifying a parent. Id.

> If [a minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests.

Id. at 647-48; see also Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 516 (1990) (affirming that Bellotti requires that minors have the opportunity "to prove either maturity or best interests or both" (emphasis added)). As implemented by the New Hampshire Supreme Court, however, the parental notice law violates this mandate by allowing minors to seek a judicial waiver on the ground either that they are mature and able to give informed consent or that an abortion without notification of a parent would be in their best interests, but not both. Because New Hampshire has thereby failed to provide a constitutionally adequate alternative to parental notice, the Act must be enjoined in its entirety, unless and until the infirmity is cured.

B. New Hampshire's judicial bypass jeopardizes minors' confidentiality.

The Act must likewise remain enjoined because the judicial waiver process fails to protect minors' confidentiality. Because the "specter of public exposure" "pose[s] an unacceptable danger of deterring the exercise" of a woman's "personal, intensely private, right . . . to end a pregnancy," Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 767-68 (1986), the United States Supreme Court has recognized that it is not enough for courts simply to allow minors to seek a judicial bypass. Rather, for the right to be meaningful, minors must be able to use the bypass process without fear that their pregnancy or need for an abortion will be revealed to their parents or members of the public. See, e.g., Bellotti, 443 U.S. at 655 (Stevens, J., concurring) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny . . . ."). Thus, in order to be constitutional, a judicial bypass procedure "must assure that a resolution of the issue,

and any appeals that may follow, will be completed with anonymity." Bellotti, 443 U.S. at 644; see id. at 647 (holding that providing notice to a parent of their daughters' request for a judicial waiver was unconstitutional because "many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court"). As the Seventh Circuit has explained, for a young woman who cannot involve a parent in her abortion decision, "confidentiality during and after [the waiver] proceeding is essential to ensure that [she] will not be deterred from exercising her right to a hearing because of fear that her parents may be notified." Zbaraz v. Hartigan, 763 F.2d 1532, 1542 (7th Cir. 1985) (citations omitted), aff'd by an equally divided Court, 484 U.S. 171 (1987); see also Decl. of Jamie Sabino (hereinafter Sabino) ¶¶ 20-24 (attached as Exhibit 3 hereto) (explaining importance of confidentiality to minors seeking judicial bypasses).

The New Hampshire bypass process utterly fails to protect the confidentiality of minors seeking a judicial waiver. In fact, as the declaration of Jamie Sabino, an attorney with over twenty years of experience working with judicial bypass systems across the country makes clear, "New Hampshire's bypass appears to guarantee that minors' confidentiality will be breached." Sabino ¶ 25. As an initial matter, the judicial waiver process established by New Hampshire threatens to reveal a minor's decision to seek a bypass to anyone who happens to be in the courthouse. Nothing in the Act or the implementing procedures permits minors to protect their identities through such measures as pseudonymous filing or filing under initials. Rather, New Hampshire requires minors to provide their names for use in the case caption without providing any mechanism to protect the minors' identity from disclosure through the docket, calendar call,

or the like. See Exhibit 1 at A8 (official petition requiring teen to use her name in case caption); see also Sabino ¶ 26.

The process established by New Hampshire also threatens to notify a minor's parents directly of their daughter's decision to seek a bypass. The Court Procedure Bulletin directs court personnel, in some instances, to call the minor to advise her of her hearing date. See Exhibit 1 at A6 (instructing court personnel to, "[i]f necessary, call the petitioner to advise her of the time, place and lawyer assigned"). Minors are also required to provide their addresses, see Exhibit 1 at A8, but there is nothing to instruct court personnel that documents relating to the minor's request for a judicial bypass cannot be mailed home. As Jamie Sabino explained, "I can think of few surer ways to breach a minor's confidentiality than for her to receive a call or mail from the court about her bypass petition." Sabino ¶ 27.

In addition to these glaring threats to confidentiality, the Act and the implementing procedures fail to provide even the most basic safeguards that other courts have found necessary to protect minors' confidentiality. Although the Act states that "[p]roceedings in the court under this section shall be confidential," RSA 132:26, II(b), and the Court Procedure Bulletin states that "[a]ll documents . . . related to an appeal of a trial court decision on a petition for waiver of parental notification for abortion shall be confidential," Exhibit 1 at A7 (emphasis added), there is no parallel provision regarding the confidentiality of trial court documents. Nor is there anything that instructs court employees to seal the records.[15] Such "general pronouncements

[15] The failure to seal the records, thereby limiting access to essential court employees is particularly problematic for the many minors who come from New Hampshire's rural communities and small towns, where minors may have relatives or family friends working at the courthouse. See Decl. of Rachel Atkins (hereinafter Atkins) ¶ 9 (attached as Exhibit 4 hereto); see also Memphis Planned Parenthood, Inc. v. Sundquist, Inc., 2 F. Supp. 2d 997, 1005 (M.D. Tenn. 1997) (noting that, particularly in small rural communities, a minor may have friends or family members who work at the courthouse), rev'd on other grounds, 175 F.3d 456 (6th Cir. 1999). If the papers filed in a courthouse are not sealed, such persons could view them and report the abortion to the minor's parents. Atkins ¶ 9; see also Sabino ¶¶ 24, 30 (explaining that where minors have relatives or close family friends working in

regarding the confidentiality of proceedings . . . fall woefully short of constitutional requirements." Jacksonville Clergy Consultation Serv. v. Martinez, 696 F. Supp. 1445, 1448 (M.D. Fla. 1988).

Indeed, courts have routinely enjoined parental involvement laws containing such similarly general confidentiality statements. For instance, in Zbaraz, the Seventh Circuit enjoined the enforcement of a parental notice law stating that judicial waiver proceedings "'shall be confidential and shall ensure the anonymity of the minor or incompetent" because it failed to ensure the anonymity of judicial waiver "court documents and files, which are generally available to the public." 763 F.2d at 1543; see also Martinez, 696 F. Supp. at 1447-49 (preliminarily enjoining as woefully inadequate parental consent law that provided that minor seeking bypass would "remain anonymous" and that bypass court proceedings were "confidential") (internal citation and quotation marks omitted)), cured by court rule, 707 F. Supp. 1301, 1303 (M.D. Fla. 1989) (dissolving injunction upon issuance of court rule requiring sealing of files relating to court bypass). Similarly, the United States District Court in Iowa temporarily enjoined a parental notification law where the statute stated that the court had to "ensure that the pregnant minor's identity remain[ed] confidential," that the bypass proceedings were conducted "in a manner which protect[ed] the confidentiality of the pregnant minor," and that "[a]ll court documents pertaining to the procedure shall remain confidential," but made no provision for sealing records. Planned Parenthood v. Miller, No. 4-96-CV-10877, slip op. at 18-19 (S.D. Iowa Jan. 3, 1997) (citation and internal quotation marks omitted) (attached as Exhibit 2 hereto), prelim. inj. granted, slip op. (S.D. Iowa Jan. 22, 1997), cured by court rule, slip op. (S.D. Iowa Oct. 16, 1997). As these courts have recognized, "in order for a statute to pass constitutional

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the courthouse, knowing that those individuals would not be allowed to see the court records was critically important).

muster the provisions ensuring confidentiality . . . must be drafted with specificity and detail." Martinez, 696 F. Supp. at 1448. New Hampshire's parental notice law falls far short of this standard.

Moreover, in the absence of a provision instructing court employees that the records must be sealed or some other specific instruction, there is nothing to alert court employees that in the context of a judicial bypass proceeding, the minor's right to confidentiality operates not only against the general public, but also against her parents. The absence of such instructions is particularly problematic given that other court records categorized as "confidential" under New Hampshire law are available to interested third parties, such as parents.[16]

As Jamie Sabino explained in her declaration, detailed guidance to court personnel on what must be done to protect the confidentiality of minors in the unique context of a judicial bypass proceeding – such as ensuring that the minor's name is redacted from the docket and case titles and that all court records and materials related to the bypass are sealed and separately stored – is crucial to safeguarding the privacy rights of minors:

> In my experience, these guidelines have been essential to achieving a level of confidentiality in Massachusetts bypass cases that would otherwise have been lacking. Indeed, I have been informed by law clerks and a judge of instances in which parents, who somehow found out their daughter was seeking a bypass, called or showed up at the court demanding information. Both the clerks and the judge told me that only because of the specific confidentiality guidelines did court personnel know that the records were to remain sealed

[16] See, e.g., RSA 169-C:25, I (court records relating to child abuse and neglect proceedings "shall be withheld from public inspection but shall be open to inspection by the . . . parent"); RSA 169-B:35, I & II ("All case records . . . relative to delinquency shall be confidential and access shall be provided pursuant to RSA 170-G:8-a," which provides for access to parents among others. "Such records shall be withheld from public inspection but shall be open to inspection by" a broad spectrum of people including the minor's parent, "the relevant county, and others entrusted with the corrective treatment of the minor."); see also Miller, No. 4-96-CV-10877, slip op. at 19 (finding that parental notice law was unconstitutional because, inter alia, although juvenile records were confidential, parents were given access); Sabino ¶ 30 ("This is particularly troubling because in most other 'confidential' juvenile proceedings, although the public's right to information related to the case is circumscribed, the parent's right is not.").

> and that the parents were not entitled to access. This feedback confirms my belief that enforceable and specific instructions for bypass cases are an absolute minimum to an effective alternative to parental notification.

Sabino ¶ 29.

New Hampshire's failure to protect the confidentiality of – and, indeed, its affirmative exposure of – a minor's decision to seek a bypass puts New Hampshire's teens at real risk of serious harm. Without a confidential alternative to notifying a parent, these minors may suffer the very harms – including physical abuse, being thrown out of the house, and being made to continue the pregnancy – that compelled them to seek a bypass in the first instance. See Bellotti, 443 U.S. at 647 (noting that parents who learn of their daughters' intention to have an abortion may prevent the minor from obtaining the procedure); Sabino ¶¶ 11-17 (explaining why some minors cannot safely involve their parents in their abortion decision); Atkins ¶¶ 6-8 (same); Sabino ¶¶ 22-23 (detailing adverse consequences, including being beaten and being forced to leave home, that resulted from parents learning about a minor's pregnancy). Other minors, fearful of the consequences if their parents learn of their need for an abortion, will be deterred by the lack of confidentiality protections from going to court at all. Atkins ¶ 5; see also Sabino ¶¶ 18, 20-21. These minors may carry to term against their will, delay the procedure which increases the medical risks, or, in some instances, resort to unsafe or illegal abortions. Atkins ¶ 5.

Without a confidential alternative to the parental notice requirement, the Act cannot be enforced at all. See Bellotti, 443 U.S. at 646-48 (holding that without confidential judicial bypass option, parental involvement law was unconstitutional); Heed II, 390 F.3d at 64-65 (holding that if confidentiality protections are not adequate, it would pose an undue burden for a large fraction of minors eligible for the bypass and would therefore be facially unconstitutional);

Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127, 1136-41, 1143 (7th Cir. 1983) (enjoining entire parental notification statute that had constitutionally flawed judicial bypass because "the constitutionality of the general notification provision is dependent upon the adequacy of the waiver of notification procedures the state has established" and "[t]he state may not require any minors to notify their parents until it has enacted a statute providing for constitutionally adequate waiver procedures"); Martinez, 696 F. Supp. at 1447-49 (enjoining entire parental consent statute that failed to provide constitutionally sufficient confidentiality protections).

* * *

Because New Hampshire's parental notice law lacks a constitutionally adequate judicial bypass, the Act must be enjoined in its entirety.

CONCLUSION

For all of the foregoing reasons, the Act should be declared unconstitutional and enjoined in its entirety.

Date: October 2, 2006 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2006, the foregoing Brief was served through the ECF system.

/s/ Martin P. Honigberg
Martin P. Honigberg

The State of New Hampshire

ADMINISTRATIVE OFFICE OF THE COURTS

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Two Noble Drive
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MEMORANDUM

TO: Katherine Hanna

FROM: Donald D. Goodnow, Esq.
Director D DG.

DATE: November 18, 2005

RE: Parental Notification Procedures and Forms

Eileen Fox asked that I provide you with copies of the procedures and forms that were developed by the Judicial Branch to implement RSA 132:26, the Parental Notification Prior to Abortion Law.

I enclose copies of the following documents:

1. Information for Minors;
2. Court Procedure Bulletin;
3. Petition for Waiver of Parental Notice for Abortion;
4. Order on Petition for Waiver;
5. Guidelines for Judges;
6. Certificate of Lower Court Decision;
7. Draft Letter to the New Hampshire Medical Society.

These forms were developed by representatives of the three established trial courts. The Administrative Council recommended these materials and the Supreme Court approved them.

Please let me know if I can provide you with additional materials or information in connection with Judicial Branch efforts to prepare for implementation of the Parental Notification Legislation.

Post-it® Fax Note 7671	Date 11/18/05	# of pages ▶ 13
To Corinne S, Jem D	From M. Hanagbeg	
Co./Dept. ACLU	Co.	
Phone #	Phone # 603-223-2593	
Fax # 212-549-2652	Fax #	

The State of New Hampshire

JUDICIAL BRANCH

INFORMATION FOR MINORS
REQUEST FOR A WAIVER OF PARENTAL NOTIFICATION
TO HAVE AN ABORTION PERFORMED

A law has been passed requiring a doctor to notify at least one of your parents or a guardian before performing an abortion if you are under the age of eighteen years. You may believe that neither of your parents nor a guardian should be notified before an abortion is performed because (a) you believe you are mature and capable of giving your consent to an abortion, or (b) you believe it would not be in your best interests to notify one of your parents or a guardian prior to an abortion. In either situation, you have the right to ask a judge to let a doctor perform an abortion without notifying anyone. You also have the right to have a lawyer help you in court, free of charge. All court forms related to this request and the hearing will be confidential.

Court form needed

If you want to ask a judge to allow you to have an abortion without telling one of your parents or a guardian, you will need to fill out a form called a petition. You can get this form from any court or from the internet at www.courts.state.nh.us. Follow the link to either the Superior Court, District Court, Probate Court, or Family Division Pilot Project home pages. Then follow the link on the left side to "Forms". The name of the form is "Petition for Waiver of Parental Notice for Abortion Requested by a Minor" and the form number is AOC-340-2348.

You should fill in all the blanks on the petition as well as you are able. The more information you can provide to the judge about your circumstances, the better. This form and any court hearing will be confidential. You will have to prove to the judge, in your own words, (a) that you are mature or old enough to give your informed consent to have an abortion performed without notifying your parents or a guardian or (b) that it would be in your best interests to have an abortion without notifying either of your parents or a guardian. You will also need to show the judge some kind of identification, such as a school identification card, a driver's license, a report card from school, or a paycheck stub if you are working.

Where and when to file form

The statute says you can file your petition in "a court of competent jurisdiction." You or your lawyer must decide in which court you will file your petition. If you are not sure what courts you may consider filing in, you may consult the judicial branch web site, www.courts.state.nh.us and click on "Find Your Court." You may find it helpful to go to the bottom of that page and use the alphabetical list of towns that shows the courts that serve each town in New Hampshire.

It is best if you or your lawyer bring your petition to the trial court you have chosen between 8:30 AM and 4:00 PM on a regular court business day and ask that a hearing date be set for your case.

You may file your petition by FAX after 4:00 PM and before 8:30 AM on regular court business days or on a weekend or holiday at 271-8485. If you file your petition by FAX, you must deliver a signed paper copy of your petition to the court you have chosen on the next regular court business day. If you file your petition by FAX, you must also call your court on the next regular court business day to ask for your hearing date and to ask that a lawyer be appointed to help you, if you want a lawyer and do not already one. You will find the telephone numbers for all New Hampshire courts on the judicial branch web site at www.courts.state.nh.us; click on "Find Your Court."

Your right to have a lawyer

As mentioned earlier, if you do not yet have a lawyer, you may ask the court to appoint a lawyer to represent you. You do not have to pay for the lawyer. You can talk to your lawyer and he or she will represent you in this process. In addition, the court may appoint a Guardian ad Litem. If appointed, this person will represent your best interests to the court, not necessarily what you want.

Court hearing

The court will schedule a hearing on your petition very soon after you file it. You must attend that hearing. The only people who will be present during your hearing will be you, a judge, your lawyer, a court security officer, a person who will record your hearing, and if appointed, a Guardian ad Litem. You may also bring your doctor, nurse, family planning counselor, or anyone else you want at the hearing. The judge will decide whether any one you bring can come into the courtroom during the hearing.

After reading what you have written on the 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. After your hearing, the judge will write an order that will tell you what the judge has decided and you will be given a copy of that order.

If the judge decides that you may have the abortion without telling one of your parents or a legal guardian, you do not have to notify your parents or guardian. You will be given two copies of a "Certificate of Lower Court Decision to Allow Abortion Provider to Perform an Abortion without Notifying a Minor's Parents or Guardian." One copy will have a court seal and should be given to your medical provider.

If the judge decides you cannot have an abortion without telling one of your parents or a legal guardian, you have the right to appeal to the New Hampshire Supreme Court. Your lawyer will also help you with this process.

Appeal to NH Supreme Court

If you decide to appeal the judge's decision that you cannot have an abortion without notifying a parent or legal guardian, you must file a Notice of Appeal with the New Hampshire Supreme Court within 30 days of the trial court clerk's notice of decision. You must send a copy of the Notice of Appeal to the clerk of the trial court.

You may deliver your Notice of Appeal to the Supreme Court during regular business hours or mail it to the New Hampshire Supreme Court, 1 Noble Drive, Concord, New Hampshire 03301. The telephone number of the clerk's office is (603) 271-2646.

If you decide to file your appeal during non-business hours, you may send it by FAX to the Supreme Court clerk's office. The Supreme Court's FAX number is (603) 271-8900. If you send your appeal by FAX, you must also call the clerk of the Supreme Court at 1-877-877-9014 to advise the clerk that an appeal has been filed by FAX. You should also contact the Supreme Court clerk's office on the next business day to confirm that it has received your appeal. If you send your notice of appeal to the Supreme Court by FAX, you must deliver or mail the original notice of appeal form to the Supreme Court by the next business day. You may file a memorandum of law and an appendix of relevant documents with your notice of appeal or within two days of filing the appeal. For more information review Supreme Court Rule 7-B.

The Supreme Court will review your notice of appeal, the recording of the trial court proceedings, and the judge' written decision. It will issue a ruling on the appeal within 7 days of docketing. All documents and proceedings related to the appeal will be confidential.

The State of New Hampshire

COURT PROCEDURE BULLETIN

RELATIVE TO: Petition for Waiver of Parental Notice for Abortion

Requested by a Minor Pursuant to RSA 132:26

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1. Petitioner will obtain the "Petition for Waiver of Parental Notice for Abortion Requested by a Minor" form from a court, her health care provider, or the internet.

2. The statute allows a minor to file a petition in "a court of competent jurisdiction," without defining that term. The petitioner, or her lawyer, must choose which court to file in.

   The Information for Minors instructs people to deliver a petition to a trial court and ask for a hearing date. In the alternative, because the statue requires that the courts provide access 24 hours per day, 7 days per week for these matters, a person may FAX a petition to the Domestic Violence Protective Order Registry (DVPOR) FAX line (271-8485) after regular court hours, on weekends, or on holidays. The DVPOR data entry person (Peg Paveglio or Pam Livingston) will forward the petition to the court designated by the petitioner as soon as she comes into work on the next regular court business day. The Information for Minors also instructs the petitioner to deliver to the trial court a paper copy of a FAXED petition on the next regular court business day.

3. There is no filing fee for this petition.

4. These cases are confidential; hearings will be closed. Cases shall be docketed in the superior court in the Equity Division with a filing type code of "WPN;" in the district courts in the Juvenile Division with a case type code of "WPN;" in the probate courts in the Confidential Division with a case type code of "WPN;" and in the family division pilot project in the Juvenile Division with a case type code of "WPN."

5. The court must schedule a hearing on a date that will allow the judge to rule within 7 calendar days from the date the petition was filed. Note that a FAXED petition is considered filed when the FAX is received at the DVPOR; the trial court may have a very short time in which to hold a hearing and issue an order.

6. If the petitioner has indicated that she wants a lawyer, assign a lawyer to the case. The court may also assign a Guardian ad Litem for the petitioner.
   a. Select an attorney from the list of attorneys available to represent minors in cases under this statute.

b. Attorney rates will be $60/hour with a $1,000 maximum.
c. Bills should be submitted to the judge for review and approval and sent to the AOC for payment.

7. Enter the hearing information on the bottom of the petition, enter the docket number on the top, and give a copy to the petitioner while she is at the court to file the petition. If necessary, call the petitioner to advise her of the time, place and lawyer assigned if she has indicated that she wants a lawyer. Copies of the petition must also be given to the attorney and the Guardian ad Litem, if either has been appointed.

8. Petitioner should provide some sort of identification at the hearing.

9. The petitioner may be accompanied by a doctor, nurse, or family planning counselor. The court will determine whether these people will be allowed to attend the court hearing.

10. All hearings conducted in these matters shall be recorded on audiotape or on digital compact disc to ensure the lower court is able to immediately deliver a copy of the recording to the Supreme Court, in the event a minor appeals an order denying her petition.

11. The court must rule on the petition within 7 calendar days from the time the petition was filed. Again, note that a FAXED petition is considered filed when the FAX is received at the DVPOR; the trial court may have a very short time in which to hear the petition and issue an order. The judge must make written specific factual findings and legal conclusions supporting the decision. The Order on Petition for Waiver of Parental Notice for Abortion Requested by a Minor should be used for this order.

    If the judge grants the minor's petition, a staff member shall prepare a "Certificate of Lower Court Decision to Allow Abortion Provider to Perform an Abortion Without Notifying a Minor's Parents or Guardian." It is a template form found in your WORD directories under FILE-NEW in the following template directories: superior court "Civil and Equity;" district court "Civil;" probate court "Probate General;" and family division pilot project "Juvenile."

    Give the minor a copy of the Certificate and the original Certificate which must bear an original signature and an original court seal; keep a copy of the Certificate for the court file. The minor will give the original Certificate to her health care provider to evidence the court's authorization to perform an abortion and to satisfy RSA 132:27.

12. If the judge denies the minor's petition, staff must give the minor a copy of the order. The petitioner may file an expedited confidential appeal to the New Hampshire Supreme Court.

    An order authorizing an abortion without notification is not subject to appeal.

Supreme Court Appeal Procedure

13. A petitioner seeking to file an appeal must file a notice of appeal form with the Supreme Court. The petitioner must send a copy of the notice of appeal to the clerk of the trial court.

    If the notice of appeal is filed during business hours, it must be delivered or mailed to the clerk's office. When a notice of appeal is delivered or mailed to the Supreme Court, the date of receipt shall be considered the docketing date for purposes of RSA 132:26, II(c).

    A petitioner may file the notice of appeal during non-business hours by sending the notice of appeal form to the clerk of the Supreme Court by FAX (271-8900), which will provide 24 hours a day, 7 days a week access to the courts. If the notice of appeal is sent to the FAX number, the petitioner must also contact the clerk of court by telephone (1-877-877-9014) to advise the clerk of the FAX transmission. When a notice of appeal is sent by FAX, the date that the documents is received in the clerk's office shall be considered the docketing date for purposes of RSA 132:26, II(c).

14. There is no filing fee for such an appeal.

15. Upon receipt of the copy of the Notice of Appeal, the clerk of the trial court shall arrange for immediate transfer of the recording of the proceedings before the trial court to the clerk of the Supreme Court and all exhibits filed and considered in the trial court.

16. All documents and proceedings related to an appeal of a trial court decision on a petition for waiver of parental notification for abortion shall be confidential.

17. A decision on the appeal must be issued within 7 calendar days of docketing of the appeal. The Supreme Court clerk's office shall send a copy of its decision by FAX to the clerk of the trial court. The Supreme Court clerk shall issue the mandate in accordance with Supreme Court Rule 24 on the same date as the decision and shall send a copy of the mandate by FAX to the clerk of the trial court.

The State of New Hampshire

Court _____ Docket Number: _____
(For Court Use)

In Re: _____
(Your Name)

Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA132:26)

1. Name of person requesting waiver _____
   Mailing address _____
   Date of birth _____
   Telephone number where you can be reached by court _____
2. Where are you living now? _____
3. Have you talked to an adult about your pregnancy? ☐ Yes ☐ No
   If yes, who? _____
4. What doctor, nurse or family planning counselor have you talked to about your pregnancy? _____
   _____
   _____
5. The following statements are true: (Check all that apply.)
   ☐ I am pregnant
   ☐ I am _____ years old.
   ☐ I wish to have an abortion to end my pregnancy.
   ☐ I do not want either one of my parents or legal guardian to be notified of my abortion.
   ☐ I understand I am entitled to have the court appoint a lawyer to represent me in this matter free of charge. ☐ I want a lawyer. ☐ I do not want a lawyer.
6. I ask the court to allow my doctor to perform an abortion on me without notifying either of my parents or my legal guardian for <u>one</u> of the following reasons: (Complete section a. or b.)

   a. I believe I am mature and capable of giving my informed consent to an abortion because _____
   _____
   _____
   _____

   b. I believe it is in my best interests to have an abortion without notifying either of my parents or a legal guardian because _____
   _____
   _____
   _____

Date: _____ _____
Petitioner signature

YOU MUST CALL THE COURT TO ASK FOR INSTRUCTIONS ON THE NEXT REGULAR BUSINESS DAY AFTER YOU FILE YOUR PETITION.

HEARING INFORMATION – TO BE COMPLETED BY THE COURT

A hearing on this matter will be held at the following time and place:
Date _____ Time _____
Court name _____ Telephone number _____
Court address _____

Your court appointed lawyer is: _____
Address _____
Telephone number _____

Guardian ad litem (optional) _____
Address _____
Telephone number _____

The State of New Hampshire

Court: _____ Docket Number: _____

In Re: _____

ORDER
ON PETITION FOR WAIVER OF PARENTAL NOTICE FOR ABORTION
REQUESTED BY A MINOR
RSA 132:26

_____ of _____
Name Address

petitioned this court for a waiver of parental notice prior to abortion. A confidential hearing on this matter was held on _____.

The petitioner ☐ was *or* ☐ was not represented by counsel.

A guardian ad litem ☐ was *or* ☐ was not appointed for petitioner.

Complete Section I *or* Section II *or* Section III

Section I

☐ The petitioner claims to be mature and the court finds the petitioner is mature and capable of giving informed consent to the proposed abortion. Specific factual findings and legal conclusions supporting this decision are as follows:

_____

_____

_____

☐ Accordingly, the petition is granted. The court authorizes an abortion provider to perform the abortion without parental notification.

Section II

☐ The court finds the petitioner lacks the necessary maturity or does not demonstrate the necessary maturity to give informed consent to the proposed abortion. The court further finds, however, that it is in the best interests of the petitioner to authorize an abortion for the petitioner without notification of he

AOC-341-2348 (12/03)

parent or guardian. Specific factual findings and legal conclusions supporting the court's decisions relative to the maturity of the petitioner and the best interests of the petitioner are as follows:

_____

_____

_____

_____

_____

_____

☐ Accordingly, the petition is granted. The court authorizes an abortion provider to perform the abortion without parental notification.

_____

Section III

☐ The court finds the petitioner lacks the necessary maturity or does not demonstrate the necessary maturity to give informed consent to the proposed abortion. The court further finds that it is not in the best interests of the petitioner to authorize an abortion for the petitioner without notification of her parent or guardian. Specific factual findings and legal conclusions supporting the court's decisions relative to the maturity of the petitioner and the best interests of the petitioner are as follows:

_____

_____

_____

_____

_____

_____

☐ Accordingly, the petition is denied. The court does not authorize an abortion provider to perform the abortion without parental notification.

_____

SO ORDERED

Date: _____ _____

Judge

AOC-341-2348 (12/03)

The State of New Hampshire

ADMINISTRATIVE OFFICE OF THE COURTS

Donald D. Goodnow, Esq.
Director

Two Noble Drive
Concord, NH 03301
(603) 271-2521
Fax: (603) 271-3977
eMail: aoc@courts.state.nh.us
TTY/TDD Relay: (800) 735-2964

Date

Palmer P. Jones
Executive Vice President
New Hampshire Medical Society
7 North State Street
Concord, NH 03301

Dear

A new law, RSA 132:26, governing the procedures for a minor to obtain an abortion without parental notice will go into effect December 31, 2003. The Judicial Branch has developed forms and procedures to comply with the portions of the new law related to court procedures. Copies of the new law and the forms and procedures are attached and are also available on our website at: www.courts.state.nh.us

Please disburse this information as you feel is appropriate to the NH medical community. If you have any questions, please contact this office.

Sincerely,

Donald D. Goodnow
Director

DDG:rc

Enclosures

The State of New Hampshire

Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA132:26)

Guidelines for Judges

Questions when Assessing Maturity

Support questions

1. Who supports you?
2. Do you go to school?
3. Do you have a job?

Independence questions

1. Whom have you talked to about your pregnancy?
2. Who is your doctor or do you go to a clinic?
3. Have you discussed this situation (pregnancy?) with the father of the baby?
4. Have you discussed pregnancy with a counselor or friend?

Personal relationships

1. Why do you want to end this pregnancy?
2. Why don't you want to tell your parents?
3. Why do you feel you are mature enough to decide to have an abortion?

Issues to consider when determining Best Interests

1. Emotional state of minor
2. Medical condition
3. Home life
4. Financial considerations
5. Negative consequences of parental involvement if they receive notice

The State of New Hampshire

Court _____

In Re: _____

Docket Number: _____

Certificate of Lower Court Decision to Allow Abortion Provider to Perform an Abortion Without Notifying a Minor's Parents or Guardian

Minor name: _____

Date of Order: _____

This document certifies that on the above date a judge of this court signed an order that allows an abortion provider to perform an abortion on the above-named minor without first notifying the minor's parents or guardian, pursuant to NH RSA 132:6. This certificate is valid only if it bears the original signature of a court official and an original seal of the court.

_____ _____

Date Title

Affix Seal

RSA 132:26 Certificate--Template (12/03)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PLANNED PARENTHOOD OF GREATER IOWA, INC., SUE HASKELL, D.O., EMMA GOLDMAN CLINIC FOR WOMEN, INC., ROBERT KRETZSCHMAR, M.D.,

Plaintiffs,

vs.

THOMAS MILLER, Attorney General of the State of Iowa, in his official capacity, and J. PATRICK WHITE, County Attorney for Johnson County, in his official capacity and as a representative of the class of all County Attorneys in Iowa,

Defendants.

CIVIL NO. 4-96-CV-10877

ORDER

The Court has before it plaintiffs' motion for temporary restraining order, filed December 17, 1996. Defendants resisted the motion December 27, 1996,[1] and plaintiffs filed a reply brief December 31, 1996. A hearing was held before the Court January 2, 1997. The motion is now considered fully submitted.

Plaintiffs also filed a motion for class certification on December 20, 1996. Defendant J. Patrick White was present during the January 2, 1997 hearing, and spoke on behalf of himself and potential class members. This motion will therefore be considered at this time.

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[1] During the hearing, defendant White, on behalf of himself and as representative of the class of county attorneys, adopted the resistance filed by defendant Miller. The Court will hereafter refer to all defendants collectively as "defendants."

I. BACKGROUND

Plaintiffs are institutional and individual providers of reproductive health services, including abortions. On behalf of themselves and their patients, plaintiffs seek injunctive and declaratory relief preventing the enforcement of Iowa Code § 135L.1 et. seq. ("the notice law"). This new law requires, among other things, that a physician notify the parent of a pregnant minor at least 48 hours prior to performing an abortion on the minor.[2] The notice law became effective January 1, 1997.

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[2] Section 135L.4 of the law, from which the bulk of plaintiffs' constitutional challenges arise, provides as follows:

1. A person shall not perform an abortion on a pregnant minor until at least forty-eight hours' prior notification is provided to a parent of the pregnant minor.
2. The person who will perform the abortion shall provide notification in person or by mailing the notification by restricted certified mail to the parent of the pregnant minor at the usual place of abode of the parent. For the purpose of delivery by restricted certified mail, the time of delivery is deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to the mailing.
3. If the pregnant minor objects to the notification of a parent prior to the performance of an abortion on the pregnant minor, the pregnant minor may petition the court to authorize waiver of the notification requirement pursuant to this section in accordance with the following procedures:
   a. The court shall ensure that the pregnant minor is provided with assistance in preparing and filing the petition for waiver of notification and shall ensure that the pregnant minor's identity remains confidential.
   b. The pregnant minor may participate in the court proceedings on the pregnant minor's own behalf. The court may appoint a guardian ad litem for the pregnant minor if the pregnant minor is not accompanied by a responsible adult or if the pregnant minor has not viewed the video as provided pursuant to section 135L.2. In appointing a guardian ad litem for the pregnant minor, the court shall consider a person licensed to practice psychology pursuant to chapter 154B, a licensed social worker pursuant to chapter 154C, a licensed marital and family therapist pursuant to chapter 154D, or a licensed mental health counselor pursuant to chapter 154D to serve in the capacity of guardian ad litem. The court shall advise the pregnant minor of the pregnant minor's right to court-appointed legal counsel, and shall, upon the pregnant minor's request, provide the pregnant minor with court-appointed legal counsel, at no cost to the pregnant minor.
   c. The court proceedings shall be conducted in a manner which protects the confidentiality of the pregnant minor and all court documents pertaining to the proceedings shall remain confidential. Only the pregnant minor, the pregnant minor's guardian ad litem, the pregnant minor's legal counsel, and persons whose presence is specifically requested by the pregnant

minor, by the pregnant minor's guardian ad litem, or by the pregnant minor's legal counsel may attend the hearing on the petition.

d. Notwithstanding any law or rule to the contrary, the court proceedings under this section shall be given precedence over other pending matters to ensure that the court reaches a decision expeditiously.

e. Upon petition and following an appropriate hearing, the court shall waive the notification requirements if the court determines either of the following:

(1) That the pregnant minor is mature and capable of providing informed consent for the performance of an abortion.

(2) That the pregnant minor is not mature, or does not claim to be mature, but that notification is not in the best interest of the pregnant minor.

f. The court shall issue specific factual findings and legal conclusions, in writing, to support the decision.

g. Upon conclusion of the hearing, the court shall immediately issue a written order which shall be provided immediately to the pregnant minor, the pregnant minor's guardian ad litem, and pregnant minor's legal counsel, or to any other person designated by the pregnant minor to receive the order.

h. An expedited, confidential appeal shall be available to a pregnant minor for whom the court denies a petition for waiver of notification. An order granting the pregnant minor's application for waiver of notification is not subject to appeal. Access to the appellate courts for the purpose of an appeal under this section shall be provided to a pregnant minor twenty-four hours a day, seven days a week.

i. A pregnant minor who chooses to utilize the waiver of notification procedures under this section shall not be required to pay a fee at any level of the proceedings. Fees charged and court costs taxed in connection with a proceeding under this section are waived.

j. If the court denies the petition for waiver of notification and if the decision is not appealed or all appeals are exhausted, the court shall advise the pregnant minor that, upon the request of the pregnant minor, the court will appoint a licensed marital and family therapist to assist the pregnant minor in addressing any intrafamilial problems. All costs of services provided by a court-appointed licensed marital and family therapist shall be paid by the court through the expenditure of funds appropriated to the judicial department.

k. Venue for proceedings under this section is in any court in the state.

l. The supreme court shall prescribe rules to ensure that the proceedings under this section are performed in an expeditious and confidential manner.

m. The requirements of this section regarding notification of a parent of a pregnant minor prior to the performance of an abortion on a pregnant minor do not apply if any of the following applies:

(1). The abortion is authorized in writing by a parent entitled to notification.

(2)(a). The pregnant minor declares, in a written statement submitted to the attending physician, a reason for not notifying a parent and a reason for notifying a grandparent or an aunt or uncle of the pregnant minor in lieu of the notification of a parent. Upon receipt of the written statement from the pregnant minor, the attending physician shall provide notification to a grandparent or an aunt or uncle of the pregnant minor, specified by the pregnant minor, in the manner in which notification is provided to a parent.

(b). The notification form shall be in duplicate and shall include both of the following:

(i). A declaration which informs the grandparent or

Plaintiffs challenge the constitutionality of the notice law on four separate grounds: 1) the law fails to provide an adequate exception for emergency abortions; 2) the law imposes strict criminal liability for performing abortions in violation of the law; 3) the law fails to provide for waiver of notification where the abortion is in the minor's best interests; and 4) the law does not provide an expeditious and confidential bypass procedure.

II. APPLICABLE LAW AND DISCUSSION

A. Law Governing Preliminary Injunctive Relief

In determining whether to grant preliminary injunctive relief, this Court must consider the following factors: 1) plaintiffs' probability of success on the merits; 2) the threat of irreparable harm to plaintiffs; 3) the balance between this harm and potential harm to others if relief is granted; and

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the aunt or uncle of the pregnant minor that the grandparent or aunt or uncle of the pregnant minor may be subject to civil action if the grandparent or aunt or uncle accepts notification.

(ii). A provision that the grandparent or aunt or uncle of the pregnant minor may refuse acceptance of notification.

(3). The pregnant minor's attending physician certifies in writing that a medical emergency exists which necessitates the immediate performance of an abortion in accordance with section 135L.6.

(4). The pregnant minor declares that the pregnant minor is a victim of child abuse pursuant to section 232.68, the person responsible for the care of the child is a parent of the child, and either the abuse has been reported pursuant to the procedures prescribed in chapter 232, division III, part 2, or a parent of the child is named in a report of founded child abuse. The department of human services shall maintain confidentiality under chapter 232 regarding the pregnant minor's pregnancy and abortion, if the abortion is obtained.

(5). The pregnant minor declares that the pregnant minor is a victim of sexual abuse as defined in chapter 709 and has reported the sexual abuse to law enforcement.

n. A person who performs an abortion in violation of this section is guilty of a serious misdemeanor.

Iowa Code § 135L.4.

4) whether an injunction serves the public interest. Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 485 (8th Cir. 1993) (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981)). The same factors are used to evaluate a request for a temporary restraining order. See S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project, 877 F.2d 707, 708 (8th Cir. 1989); Sports Design & Development, Inc. v. Schoneboom, 871 F. Supp. 1158, 1162-65 (N.D. Iowa 1995).

B. Plaintiffs' Probability of Success on the Merits

The first factor to consider is plaintiffs' probability of success on the merits. The United States Supreme Court has held that a state law restricting abortions is invalid if "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992); see also Planned Parenthood v. Miller, 63 F.3d 1452, 1457 (8th Cir. 1995) (applying Casey standard to South Dakota "notice law").[3] Such laws constitute an "undue burden" on a woman's

[3] Prior to Casey, plaintiffs challenging the constitutionality of abortion legislation were required to prove "that no set of circumstances exist[ed] under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Although the Eighth Circuit has held that this standard was replaced by Casey's more lenient approach, the Court notes that other courts, including the Supreme Court, have split on this issue. Compare Fargo Womens' Health Org. v. Schafer, 507 U.S. 1013 (1993) (O'Connor, concurring in Court's denial of application for stay and injunction) (Casey approach is correct approach), with Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011 (1992) (Scalia, dissenting from denial of petition for writ of certiorari) (Casey did not affect previous Salerno standard). See also Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (holding Casey changed standard for facial challenges to abortion laws); Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992) ("we do not interpret Casey as having overruled, sub silentio, long-standing Supreme Court precedent governing challenges to the facial constitutionality of statutes").

right to have an abortion, reaching "into the heart of the liberty protected by the Due Process Clause." Id. at 874.[4]

A law requiring parental consent or notification prior to a minor's abortion may be found constitutional if a procedure exists that allows the minor to "bypass" the notice or consent requirements by proving she is sufficiently mature, or that it is in her best interests to obtain an abortion. Bellotti v. Baird, 443 U.S. 622, 651 (1979). The statute must be sufficiently detailed to ensure a bypass may be obtained anonymously and expeditiously. Id.

1. Exception for Emergency Abortions

Plaintiffs argue that the law fails to provide an adequate exception for emergency abortions. In Casey, the Supreme Court reaffirmed the "essential" holding of Roe v. Wade, 410 U.S. 113 (1973), that a State may not interfere with a woman's decision to have an abortion "if continuing her pregnancy would constitute a threat to her health." Planned Parenthood v. Casey, 505 U.S. at 880 (citing Roe v. Wade, 410 U.S. at 164). A statute drawn too narrowly would prevent the possibility of an immediate abortion in medical emergencies, and would therefore be invalid. Id.

In the present case, plaintiffs contend the medical

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[4] Once the fetus becomes viable, the state's interest in protecting the life of the fetus outweighs the pregnant woman's liberty interests. Planned Parenthood v. Casey, 505 U. S. at 868-70. In the present case, however, there is no evidence any Iowa provider performs abortions past the point of viability. Planned Parenthood of Greater Iowa, Inc. and Sue Haskell, D.O., do not perform abortions past the sixteenth week of pregnancy. Plaintiffs Emma Goldman Clinic for Women and Robert Kratzschmar, M.D., perform abortions only to the twelfth week of pregnancy.

emergency provisions are unduly burdensome, and result in a chilling effect on a minor's ability to obtain an abortion. This Court agrees. Section 135L.6 provides that if the attending physician determines a medical emergency exists and an immediate abortion is necessary, he or she must "[c]ertify in writing" the basis for this determination, and "make the written certification available to a parent of the pregnant minor prior to the abortion, if possible." Iowa Code § 135L.6(1). Subsection (2) further provides that if it is not possible to provide the certification to a parent before performing the abortion, the physician must provide the certification to a parent within twelve hours after the abortion unless one of five exceptions apply. Id. § 135L.6(2).

Plaintiffs contend that "if possible" means that a parent must be provided with the certification if it is feasible to reach the parent prior to the abortion. The State concedes this reading of the language would render the statute unconstitutional, but contends that "a more sound construction is that making the written certification available to the parent is 'possible' only if there is opportunity for the minor to pursue bypass procedures prior to the surgery." Defendant Miller's Brief in Support of Resistance to Motion for Temporary Restraining Order and/or a Preliminary Injunction, at 6. As argued by plaintiffs, however, this reading of the statute is illogical. A "medical emergency" is defined in the statute as "a condition which, based upon a physician's judgment, necessitates

an abortion to avert the pregnant minor's death, or for which a delay will create a risk of serious impairment of a major bodily function." Iowa Code § 135L.1(7).[5] If it were medically safe to wait to perform the abortion until the pregnant minor had completed the bypass procedures, the abortion would not qualify as an emergency.

Plaintiffs also challenge the alternative language in subsection (2) that requires the physician to provide the written certification to a parent within twelve hours after performing the emergency abortion unless, among other exceptions, "[t]he pregnant minor elects not to allow notification of the pregnant minor's parent and a court authorizes waiver of the notification following completion of the proceedings prescribed under section 135L.4." Id. § 135L.6(2)(e) (emphasis added). Again, the State concedes that requiring a minor to be prepared to obtain a judicial waiver within twelve hours following the procedure would pose an undue burden, but argues the statute can be read more reasonably to require her merely to elect to obtain the waiver within twelve hours. This reading goes against the plain language of the statute. Under subsection (2)(e), the physician must provide certification within twelve hours unless the minor

---

[5] As an alternative argument, defendants argue that emergency abortions are not considered "abortions" under the meaning of Chapter 146 of the Iowa Code, which in turn serves as the definition for "abortion" under the notice law. See Iowa Code § 135L.1(1); Iowa Code 146. Under section 135L.6, however, the "medical emergency exception" to the notice law, the statute specifies that if a physician finds a "medical emergency" to exist, he or she must follow certain procedures. "Medical emergency" is defined in § 135L.1(7) to include emergency abortions. At the very least, therefore, the statute is unconstitutionally vague, and defendant's alternative argument is unpersuasive.

elects to seek a waiver and "a court authorizes" the waiver. As written, the provision subjects a physician to potential criminal liability for performing an emergency abortion in cases in which a minor elects to waive notification unless the waiver is in fact obtained within twelve hours following the procedure. This possibility certainly would have a chilling effect on the physician's willingness to perform the emergency procedure. More importantly, however, the pregnant minor might decline to undergo the emergency procedure--even if it meant placing her life at greater risk--until she was certain she could obtain the waiver.

Defendants further argue that if this Court were to find a particular provision of the statute unconstitutional, it should simply sever the offending portion. See Federal Land Bank of Omaha v. Arnold, 426 N.W.2d 153, 157 (Iowa 1988) (courts obliged to preserve as much of statute as possible without violating constitutional mandates). Specifically, defendants suggest any problems in the provisions governing emergency abortions may be cured by striking § 135L.6 in its entirety, and by striking the phrase "in accordance with 135L.6" from § 135.4(3)(m)(3). Because other problems exist with the statute, however, this would not be an appropriate solution at this juncture.

2. Lack of Mens Rea Component

Plaintiffs also claim the notice law is unconstitutionally vague due to its failure to require a mens rea component prior to imposing criminal liability. Rather, the provision at issue provides simply: "A person who performs an

abortion in violation of this section is guilty of a serious misdemeanor." Iowa Code § 135L.4(n).

In Planned Parenthood v. Miller, the Eighth Circuit struck down a similar provision under South Dakota law due to the failure to include a scienter element.[6] Planned Parenthood v. Miller, 63 F.3d at 1464-65. The United States Supreme Court has held that the lack of such a component renders a statute unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379, 395 (1979) ("Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than 'a trap for those who act in good faith.'"); see also Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051, 1087 (S.D. Ohio 1995) (striking down medical emergency provision in Ohio abortion law due to lack of scienter requirement).

This Court's task, however, is to determine how the Iowa Supreme Court would interpret such a statute. Under Iowa law, a statute is presumed constitutional unless the challenger negates "every reasonable basis for sustaining the statute." State v. Osmundson, 546 N.W.2d 907, 909 (Iowa 1996). A reviewing court must look to the legislative intent to determine a statute's true meaning. State v. Connor, 292 N.W.2d 682, 684 (Iowa 1980) (court reviewed related provisions and determined element of recklessness was inherent in involuntary manslaughter statute).

---

[6] The specific provision at issue in Miller provided: "A physician who violates [the medical emergency provision] is guilty of a Class 2 misdemeanor." Planned Parenthood v. Miller, 63 F.3d at 1455-56 n.5-6.

See also State v. Dunn, 202 Iowa 1188, 1189, 211 N.W. 850, 851 (1927) ("Whether criminal intent or guilty knowledge is an essential element of a statutory offense may be determined as a matter of construction from the language of the act in connection with its manifest purpose and design.") As noted by defendants, the Iowa Supreme Court has interpreted numerous criminal statutes as containing mens rea components even though the language of the statutes was silent on this issue. See e.g. Eggman v. Scurr, 311 N.W.2d 77, 79 (Iowa 1981) (court found general criminal content to be implied element of statute prohibiting theft by misappropriation); State v. Miller, 308 N.W.2d 4, 7 (Iowa 1981) (knowledge that accident occurred implied element of statute proscribing failure to stop at scene of personal injury accident); State v. Ramos, 260 Iowa 590, 594-95, 149 N.W.2d 862, 864-65 (1967) (court found scienter to be implied in obscenity statute).

In the present case, defendants point to the immunity provision set forth in section 135L.8(1) as evidence of legislative intent to require scienter:

> 1. With the exception of the civil liability which may apply to a grandparent or aunt or uncle of a pregnant minor who accepts notification under this chapter, a person is immune from any liability, civil or criminal, for any act, omission, or decision made in connection with a good faith effort to comply with the provisions of this chapter.

Iowa Code § 135L.8(1).

Subsection (2) further provides, however, that the section "shall not be construed to limit civil or criminal liability of a person

for any act, omission, or decision made in relation to the performance of a medical procedure on a pregnant minor." Id. § 135L.8(2). Although defendants assert that this language "simply preserves the availability of malpractice claims for medical procedures that fall below the standard of practice" it fails to provide any authority or other support for this proposition. Rather, the plain language of the statute suggests the legislature intended to excuse "good faith mistakes" for everyone other than those performing "medical procedures," and those specified in § 135L.8(1).

Furthermore, on at least two occasions, the Iowa Supreme Court has declined to read a mens rea component into statutes proscribing certain acts involving minors. State v. Tague, 310 N.W.2d 209 (Iowa 1981) (good faith mistake as to minor's age no defense to crime of having sex with minor); State v. Dahnke, 57 N.W.2d 553 (Iowa 1953) (bartender's good faith belief no defense to crime of serving underage drinkers). Admittedly, constitutionality of the statute was not at issue in either Tague or Dahnke. The cases support plaintiffs' argument however, that--at least with respect to certain acts involving minors--- both the legislature and the courts may decline to require specific intent.

The Court finds the uncertainty as to whether a physician will face criminal penalties even if he or she believes in good faith he or she is complying with the statute would produce "a profound chilling effect on the willingness of physicians to

perform abortions'" Planned Parenthood v. Miller, 63 F.3d at 1465 (quoting Colautti v. Franklin, 439 U.S. at 396). Without a clear scienter requirement, the statute "creates a substantial obstacle" to a pregnant minor's right to have a pre-viability abortion in Iowa. Id.[7]

3. Whether law Provides for Waiver of Notification where the Abortion is in the Minor's best Interest

Plaintiffs next contend the law is fatally flawed due to its failure to provide for a waiver of notification where the abortion is in the minor's best interest. Defendants contend, however, that United States Supreme Court precedent requires a court to determine not whether the abortion is in the minor's best interest, but whether notification is in the minor's best interest, which reflects the language of the statute presently at issue.

Specifically, the Iowa statute provides that, upon petition by the minor, the court may waive parental notification if it finds one of the following to be true:

> (1) That the pregnant minor is mature and capable of providing informed consent for the performance of an abortion. [or]
>
> (2) That the pregnant minor is not mature, or does not claim to be mature, but that notification is not in the best interest of the pregnant minor."

Iowa Code § 135L.4(3)(e) (emphasis added).

In Bellotti v. Baird, the United States Supreme Court held

[7] The Court has not ruled out the possibility of certifying this issue to the Iowa Supreme Court if appropriate at a later time.

that, to pass constitutional muster, a consent statute must provide for a waiver where the abortion is in the minor's best interests. Bellotti v. Baird, 443 U.S. at 644.[8] Subsequently, in Ohio v. Akron Center For Reproductive Health, (Akron II), the Supreme Court was called to review the constitutionality of a judicial bypass provision that allowed a waiver if the minor alleged (1) she had sufficient maturity and information to make an intelligent decision without notice to her parents; or (2) that notice was not in her best interests. Ohio v. Akron Center For Reproductive Health, (Akron II), 497 U.S. 502, 508 (1990) (emphasis added). As noted by defendants, the Akron II Court held that the Ohio statute satisfied the Bellotti language "as quoted."

Granted, the Akron II Court did not profess to overrule or disagree with Bellotti. In fact, the reason given by the Akron II Court for upholding the statute was that the provision "require[d] the juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interest." Id. It is for this reason that plaintiffs suggest in their reply brief that the relevant portion of Akron II may have been a mistake or oversight.

Although somewhat confusing, this Court cannot ignore the fact the Akron II Court upheld the constitutionality of a

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[8] The Court notes Bellotti dealt with a parental consent statute. In Planned Parenthood v. Miller, however, the Eighth Circuit held the Bellotti criteria apply equally to notice statutes. Planned Parenthood v. Miller, 63 F.3d at 1460.

judicial waiver provision setting forth a standard remarkably similar to the one at bar. Justice Stevens' concurring opinion in Akron II provides further evidence that the majority's decision was deliberate by stating:

> Thus, while a judicial bypass may not be necessary to take care of the cases in which the minor is mature or parental notice would not be in her best interests--and, indeed, may not be the preferable mechanism--the Court has held that some provision must be made for such cases.
>
> The Ohio statute, on its face, provides a sufficient procedure for those cases.

Akron II, 497 U.S. at 523 (Stevens, J., concurring). See also Planned Parenthood v. Miller, 934 F.2d 1462, 1477, n.21 (11th Cir. 1991) (in view of Akron II, fact statute allowed bypass when notification not in immature minor's best interest deemed not to be "constitutionally significant").

This Court therefore finds the judicial bypass provision in Iowa's notice law requiring that a minor show either that she is sufficiently mature to make the decision on her own, or that notification is not in her best interest, to be consistent with United States Supreme Court precedent.

4. Whether Notice Law Provides Expeditious and Confidential Bypass Procedure

Finally, Planned Parenthood argues that the law imposes an undue burden on a pregnant minor's right to obtain an abortion based on the fact it fails to ensure a bypass may be obtained expeditiously and confidentially. The United States Supreme Court set forth four general criteria a bypass procedure must satisfy in order to withstand a constitutional challenge:

1) the procedure must provide for the minor to show she is sufficiently informed and mature to make the decision to have an abortion "without regard to her parents' wishes";

2) even if unable to make the decision on her own, the procedure must allow her to bypass parental consent or notification if she can show the abortion would be in her best interest;

3) the procedure must ensure the minor's anonymity;

4) the procedure must ensure the bypass can be obtained expeditiously.

Akron II, 497 U.S. 502, 511-13 (1990) (citing Bellotti v. Baird, 443 U.S. at 643-44.

a) Whether Statute Guarantees Expedition

Neither party disputes that Iowa's notice law does not prescribe a deadline by which the juvenile court must hear a minor's petition for judicial bypass of the parental notification requirement. Such an omission ordinarily would render the statute unconstitutional under Bellotti. Contrary to defendants' argument, the Iowa statute is distinguishable from that in Akron II, based on the fact the statute in Akron II provided a hearing deadline of five business days from the day the minor filed the complaint. Akron II, 497 U.S. at 507-08. A similar distinction may be made with the Missouri statute at issue in Planned Parenthood v. Ashcroft, 462 U.S. 476, 479, n.4. (1983). As noted by plaintiffs, without a hearing deadline, the fact the Iowa statute requires the ruling to be issued "immediately" after the hearing fails to bring the statute within constitutional parameters.

During the hearing, counsel for plaintiffs conceded such a defect could be cured by properly drafted administrative or court rules. Assuming this to be true, however, the juvenile court rules promulgated by the Iowa Supreme Court and placed into temporary effect by judicial order provide that the hearing must occur within ten calendar days from the date of filing, with a decision rendered no later than the following business day. Juvenile Court Rules 5.3 and 5.7, attached as Exhibit A to Defendant Miller's Amendment to Resistance to Motion for Temporary Restraining Order and/or a Preliminary Injunction. This time delay, which feasibly could extend up to two weeks, may prove critical to a minor at the latter stages of her first trimester.

Furthermore, if the petition is denied at the juvenile court level, the appellate rules provide only that the court must "render its decision as soon as reasonably possible." Rule 501(b). Without clear deadlines for completing the appellate process, there is no assurance the bypass procedure can be completed expeditiously.[9] The Court therefore finds the statute and rules as currently written fail to provide for an expeditious bypass procedure as required under Ballotti.

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[9] Additionally, as noted by plaintiffs, neither the statute nor the rules provide a deadline for deliverance of the juvenile court transcript to the appellate court. Under Iowa law, the normal time limit for such transmission is forty days, which is clearly unacceptable under these circumstances. Iowa R. App. P. 10(b). But see Planned Parenthood v. Ashcroft, 462 U.S. at 491 n.16 (statute specifically required record on appeal to be completed within five days of filing notice of appeal).

Although an order for an expedited transcript could be entered on a case-by-case process, even obtaining such an order could lead to further delays.

b) Whether Statute Guarantees Confidentiality

With respect to confidentiality, the present statute provides that the juvenile court must "ensure that the pregnant minor's identity remains confidential," and conduct the proceedings "in a manner which protects the confidentiality of the pregnant minor." Iowa Code § 135L.4(3)(c). "All court documents pertaining to the procedure shall remain confidential." § 135L.4(3)(c). Furthermore, the statute limits attendance at the hearing to the "the pregnant minor, the pregnant minor's guardian ad litem, the pregnant minor's legal counsel, and persons whose presence is specifically requested by the pregnant minor, by the pregnant minor's guardian ad litem, or by the pregnant minor's legal counsel [.]" Id.

Despite this language, however, the Petition for Waiver of Parental Notification of Minor's Abortion, as drafted by the Iowa Supreme Court, requires the minor petitioner to provide her name, address, social security number and date of birth. See Exhibit A, attached to Defendant Miller's Amended Resistance. Counsel for the State suggested during oral argument that she "assumed," based on the detailed information contained in the petition, that the juvenile court would order the record sealed. Neither the statute nor the rules require the record to be sealed, however, nor require the juvenile court to redact identifying information from the appellate record. Cf Planned Parenthood v. Miller, 934 F.2d at 1478 (statute contained detailed confidentiality requirements at both juvenile court and appellate levels).

The Court is further troubled by the relationship between Iowa Code § 232.147, which governs confidentiality of juvenile court records generally, and the statute at issue. Section 232.147(3) provides that "[o]fficial juvenile court records in all cases except those alleging delinquency may be inspected and their contents shall be disclosed to the following without court order . . . [t]he child's parent . . . . Iowa Code § 232.147(3). If the above language applies to grant parents access to waiver petitions, the confidentiality provisions set forth in the notice law are clearly ineffective.

Defendants argue that the confidentiality provisions in § 135L override § 132.147. Again, however, the statute does not provide this assurance. The Court therefore concludes Iowa's notice law lacks an appropriately confidential bypass procedure.

5. Conclusion with Respect to Success on Merits

In conclusion, this Court finds plaintiffs have established a probability of success on the merits with respect to the majority of their constitutional challenges to Iowa's notice law. Plaintiffs have in essence shown that, "in a large fraction of the cases in which [it] is relevant, [Iowa's notice law] will operate as a substantial obstacle to a [pregnant minor's] choice to undergo an abortion." Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992). Defendants have in turn failed to convince the Court the deficiencies can be rectified short of legislative intervention, or that offending portions of the statute can be severed without rendering the statute unworkable.

This Dataphase criterion therefore weighs in favor of plaintiffs.

C. Threat of Irreparable Harm

As set forth above, the Court finds plaintiffs have shown a probability that they will succeed with their arguments that the statute poses an "undue burden" on a pregnant minor's right to have an abortion. Id. at 874. Perhaps most importantly, the Court is concerned with the chilling effect produced by the inadequate provisions governing emergency abortions. Affidavits submitted by plaintiffs demonstrate the serious physical and legal consequences plaintiffs and their patients may face if the challenged portions of the statute remain in effect. The Court therefore finds this criterion to weigh in favor of plaintiffs.

D. Whether Harm to Plaintiffs Outweigh Harm to Defendants

Defendants contend the State's interest in the welfare of its minor citizens and preservation of the family unit outweighs the potential harm to plaintiffs if an injunction were not granted. This Court disagrees. Plaintiffs risk losing both the physical health, and perhaps even the life, of certain minors for whom an emergency abortion is determined to be medically necessary. Physicians performing abortions risk criminal penalties from attempted enforcement of an unconstitutionally vague statute, and other minors near the end of their first trimester risk losing their constitutional right to obtain an abortion. The Court finds this factor weighs in favor of plaintiffs.

E. Whether Public Interest Dictates Injunction

Although this Court recognizes the State's interest in ensuring the well-being of its minors and families, it finds these interests are outweighed by the risk to plaintiffs' constitutional rights if a temporary restraining order is not granted.

III. MOTION FOR CLASS CERTIFICATION

Additionally, plaintiffs move to certify the class of all Iowa county attorneys as defendants in the present actions. Federal Rule of Civil Procedure 23(a) sets forth the requirements for class certification as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Defendant White's primary challenge to certification is that only a small number of county attorneys, presiding in those counties where abortions are in fact performed, will likely be called to prosecute alleged violations.[10] Therefore, he contends, the first criterion is not satisfied. As argued by plaintiffs, however, there is the possibility that an alleged violation will be prosecuted in any

[10] Defendant White also questioned whether, due to his caseload, he could adequately represent the class. This issue can be addressed in more detail during the January 13, 1997, hearing.

county in which a patient resides--especially in the case of an emergency abortion. The statute further provides that venue lies in all Iowa counties. Iowa Code § 135L.4(3)(k).

It is generally accepted that courts should err in favor of class certification to protect the courts from repetitive litigation. Transamerican Ref. Corp v. Dravo Corp., 130 F.R.D. 70, 76 (S.D. Tex. 1990). See also Sollenbarger v. Mountain States Tel & Tel Co., 121 F.R.D. 417, 435 (D. N.M. 1988) (at class certification stage court should err in favor of maintenance of class action because court can modify determination if later developments require); Horton v. Goose Creek Independent Sch. Dist., 690 F.2d 470, 487 (5th Cir. 1982), cert denied sub nom., 463 U.S. 1207 (1983); Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert denied, 394 U.S. 928 (1969).

Plaintiffs' motion for class certification is therefore granted.

IV. CONCLUSION

For the reasons outlined above, plaintiffs' motion for temporary restraining order is GRANTED to the extent that Iowa Code §§ 135L.4 and 135L.6 may not be enforced pending this Court's determination on plaintiffs' motion for preliminary injunction. Section 135L.7 may not be enforced except as it pertains to knowingly tendering a false original or copy of the certification form described in § 135L.2. The remaining sections of the statute may remain in effect pending further decisions by

this Court. See Federal Land Bank of Omaha v. Arnold, 426 N.W.2d at 157 (court should sever only unconstitutional portions of statute whenever possible). In particular, the Court finds section 135L.2, the mandatory-information provision, to be less intrusive than provisions upheld by the Eighth Circuit in Planned Parenthood v. Miller, 63 F.3d at 1467, and Fargo Women's Health Organization v. Schafer, 18 F.3d 526 (8th Cir. 1994).

Plaintiffs' motion for class certification is GRANTED. The Court certifies as a class all Iowa county attorneys, in their official capacities, with defendant J. Patrick White as class representative. Plaintiffs are further directed to complete notification of all members of the defendant class of the pendency of this action by mailing to them a copy of the complaint and this Court's temporary restraining order, as well as to notify them of their right to seek intervention.

A hearing shall be held before the undersigned on plaintiffs' motion for preliminary injunction on January 13, 1997, at 9:00 a.m.

IT IS SO ORDERED.

Dated this 27th day of January, 1997.

RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT

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,	)	
v.	)	CIVIL ACTION NO: 03-491-JD
KELLY AYOTTE, Attorney General of New Hampshire, in her official capacity,	)	
Defendant.	)	

DECLARATION OF JAMIE ANN SABINO, ESQ.

JAMIE ANN SABINO, ESQ., declares and states the following:

1. I am an attorney licensed to practice law in Massachusetts. I am the Chair of the Judicial Consent for Minors Lawyer Referral Panel, a panel of lawyers trained to represent minors seeking judicial waivers of Massachusetts' parental consent for abortion law (the Panel). In this role, I have been working with minors seeking judicial bypasses for over twenty-five years.

2. In addition to my work with the Panel, I have extensive experience as a family law practitioner and have represented clients in other types of civil and criminal cases. I have represented parents, including pregnant and parenting teens, and children in child protective services cases. I have worked as a court appointed investigator and have been appointed *guardian ad litem* in abuse and neglect cases. I have litigated cases in all departments of the

Massachusetts trial court system, including juvenile court, family and probate court, and the district court.

3. In November of 2003, I submitted a declaration in this case detailing the risks to minors' confidentiality posed by New Hampshire's Parental Notification Prior to Abortion Act (the Act). Since that time, I have learned that the New Hampshire Supreme Court approved court procedures and forms to implement the judicial bypass. (With the exception of this paragraph, the last section of this declaration in which I discuss the new procedures and forms, the concluding paragraph, and some updated dates and numbers, this declaration is the same as the one I submitted in 2003.) Based on my experience with parental involvement laws and judicial bypass systems in Massachusetts and in other states, I am convinced that New Hampshire's judicial bypass will breach minors' confidentiality.

Background

4. Since 1981, Massachusetts law has required minors to obtain the consent of their parents before they may have an abortion. (Until March 1997, the law required that the minor obtain the consent of both parents. For the last nine years, however, the law has been interpreted to require the consent of only one parent.) For minors who do not wish to involve their parents or who cannot obtain their parents' consent, Massachusetts law provides a judicial bypass procedure. This bypass procedure allows a minor to consent on her own to an abortion if she can prove to a court either that she is mature enough and capable of providing informed consent, or, if she is not sufficiently mature, that her best interests would be served by allowing her to obtain an abortion without involving her parents.

5. Before the law went into effect in 1981, Planned Parenthood League of Massachusetts and lawyers from the Women's Bar Association and the National Lawyers Guild

came together to devise a system for educating clinics and minors about the bypass process and for assisting young women with that process. The participants in those meetings developed the Judicial Consent for Minors Lawyer Referral Panel (the Panel) to recruit and train lawyers to represent young women seeking judicial bypasses. Panel lawyers, who today number over 100, have represented approximately 98 percent of the adolescents who have sought a judicial bypass.

6. I have been a member of the Panel since 1981 and co-chair or chair of the Panel since 1983. As a Panel member, I have represented approximately sixty young women in judicial bypass proceedings and been involved in almost all appeals that have occurred under this statute. As co-chair (and now chair) of the Panel, I also review the case summaries that attorneys who represent young women file with the Panel. I estimate I have reviewed over 5,600 such summaries. I also meet regularly with attorneys representing adolescents, with judges who hear bypass cases, and with clinic workers who assist pregnant adolescents. In addition, I conduct periodic trainings for attorneys on how to represent adolescents seeking a bypass. I am co-author of the training materials given to these attorneys and I periodically provide updates on the law and the implementation of the statute. By reason of these activities, I am very familiar with the workings of the Massachusetts judicial bypass system and the experiences of adolescents dealing with that system. I also consult with attorneys and reproductive health care providers in other states that have or are considering implementation of parental involvement laws, conduct trainings in other states for lawyers who will represent minors in bypass proceedings, and have reviewed literature concerning the implementation of parental involvement laws in other states.

7. The Panel has worked hard to make the bypass process function as effectively as it can, and we have had success in some areas. In fact, since the parental consent law went into

effect in 1981, about 18,000 minors have gone through the bypass system. During that twenty-five year period, there have been fewer than twenty denials.

Parental Involvement in Minors' Abortion Decisions

8. In my experience, most minors involve their parents in their decision to have an abortion. According to one nationally representative study I am familiar with, the majority of unmarried minors having abortions (61%) did so with the knowledge of one or both of their parents. Stanley K. Henshaw & Kathryn Kost, Parental Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. 196, 199-200 & table 3 (1992).

9. The younger the minor, the more likely it is that she involves at least one parent in her abortion decision. Indeed, the study found that very few of the youngest minors obtained an abortion without the knowledge of at least one parent. For example, 90 percent of minors under the age of fifteen reported that one or both parents knew about their abortion. Id. at 200 & table 3.

10. Even for those minors unable to inform their parents of their abortion, the majority (52%, according to the study) include a trusted adult in their decision. Id. at 205 & table 8.

Reasons Minors Do Not Involve Their Parents In Their Decision

11. Although most adolescents do involve a parent in their decision to have an abortion, I know from my experience that there are many reasons why some adolescents cannot.

12. Some minors fear disclosure of their sexual activity and pregnancy will cause their parents to react violently. Adolescents who previously have been abused by their parents, including being struck, beaten, and subjected to severe verbal harassment, know that stress often triggers an abusive episode and thus realistically fear that news of their pregnancy will lead to an

attack. Based on my experience, these fears are well-grounded; I have represented minors in abuse and neglect cases who have been subjected to such retribution after informing their parents of their pregnancy and intent to seek an abortion.

13. Likewise, minors whose pregnancy is the result of familial sexual abuse cannot safely share their abortion decision with their parents. Even notice to a non-abusing parent is often not a real option for a minor. For example, I remember the tragic story of one thirteen-year old girl who had been raped and impregnated by her mother's boyfriend. When the minor requested permission from her mother for an abortion, the mother called her a slut and threw her out of her home.

14. Other minors, who have not necessarily been abused before, have valid reasons to fear that discovery of their pregnancy will trigger first-time abuse. Some teens have been threatened by their parents with a variety of severe repercussions if they were to become pregnant, such as being beaten, being thrown out of the house, or having all support cut off. Many of these teens have good reason to know that these are not just idle threats. For example, one teen I worked with had recently reunited with her family after running away from home. But when her family learned of her pregnancy and desire to have an abortion, she was thrown out of the house. She ended up having to live in a group home. I know of others who have seen sisters thrown out of the house or forced into an undesired teenage marriage after parents learned of their pregnancies.

15. In other cases, minors facing a stressful family situation elect to go to court to protect the fragile family unit from a burden they know will strain it beyond its limit. Often the family is in a state of chaos, dysfunction, or stress and the adolescent fears that news of her sexual activity, pregnancy, and desired abortion will be seriously harmful to the family. For

example, Panel members have represented a teenager whose brother had committed suicide two weeks before; one whose mother had just been diagnosed with a brain tumor; another whose father had just lost his job; another whose father had just had a heart attack; and another whose father was brutally murdered two weeks before. These teens often feel that their parents are just barely coping with all the stress in their lives and that the additional impact of disclosure of their pregnancy would push their parents over the edge.

16. We see other teenagers who know that their parents would prevent them from obtaining the abortion or even going to court for a bypass if they learned of their pregnancy. These minors often have good reason to believe that their parents will act to prevent them from exercising their choice. For example, I recall one minor who sought a bypass because her parents had forced her to carry her previous pregnancy to term against her will and she was determined not to let that happen again. I knew of another minor whose mother showed up at the bypass proceeding and told the judge that her daughter should be forced to carry the pregnancy to term in order to teach her responsibility. Although this minor was ultimately able to obtain a court order in her favor, because of her mother's involvement, an already difficult process became an adversarial and agonizing experience for her.

17. The reasons I have encountered as to why minors in Massachusetts do not involve their parents are equally true of minors in New Hampshire and throughout the United States. One study of minors who did not tell one or both parents about their abortion found that 14 percent did not tell their mother and eight percent did not tell their father for fear the parent would make the minor carry to term; 18 percent did not tell their mother and 13 percent their father for fear they would make the minor leave home; six percent reported not telling their mother and seven percent their father for fear they would be beaten; 25 percent did not tell their

mother and 12 percent their father because the minor believed that the parent was under too much stress already; and at least 20 percent reported concern that telling a parent would cause problems between the minor's parents. Parental Involvement in Minors' Abortion Decisions at 202-03 & table 5.

18. At the other end of the spectrum, even some minors who have good relationships with their parents may be very strongly opposed to informing their parents of their pregnancy and decision to seek an abortion. These minors fear that their parents will be disappointed, that their parents will lose all faith and trust in them, and that their relationship with their parents will be irreparably damaged. Some of these young women have never spoken to their parents about sex and feel unable to bring it up in the context of their pregnancy and desire to have an abortion. Whether rightly or wrongly, these young women so deeply believe they cannot inform their parents that they will take drastic steps — including taking actions that endanger their life and health — to keep their decision confidential. If the law does not allow them to access confidential abortions, these minors will ensure confidentiality through risky means. As one study reveals, 23 percent of minors said that, if parental notification were required, they would forego a safe and legal abortion. Nine percent said they would attempt a self-induced abortion or would obtain an illegal abortion. Another nine percent said they would carry their pregnancies to term. Approximately two percent said they would leave home rather than notify their parents about their pregnancy and planned abortion. The remaining three percent did not know what they would do. As the authors of the study concluded, these responses indicate "that a sizable proportion of teenagers believe that the notification of their parents would put them in a desperate situation and that they would be forced to resort to desperate measures to deal with it."

Aida Torres et al., Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Fam. Plan. Persp. 284, 288 (1980).

19. What is clear, in all of these cases, is the depth of the minor's conviction that she cannot tell a parent about the abortion. Going to court to seek a waiver of a parental involvement law is a stressful and difficult step for a teen to take. Adolescents who resort to a judicial bypass procedure are so desperate to avoid their parents finding out that they are willing to contact a lawyer, reveal some of the most private details of their lives to a stranger, arrange transportation to the courthouse, repeat their personal information, and wait while another stranger decides whether they are entitled to make a decision that will have profound consequences for their life.

Minors Who Do Not Involve Their Parents Need Guarantees of Confidentiality

20. For minors who cannot involve a parent in their pregnancy and planned abortion, confidentiality is critical, and is always a paramount concern of those seeking a bypass. Most of the minors I have represented have expressed repeated concerns about the confidentiality of the process, and I have had to assure them each time that the bypass will be entirely confidential. Many of these minors clearly indicated they would not undergo the bypass process if it was not confidential. Indeed, I know of misinformed teens who thought they were required to inform their parents about the abortion procedure and therefore delayed doing anything — even going to the doctor or getting any advice about their pregnancy and abortion. In addition to these concerns about direct notification, minors fear that other people will find out about their abortion and tell their parents.

21. Consistent with my experience, numerous medical groups and researchers have found that guarantees of confidentiality are critical to ensuring that adolescents seek the reproductive health care they need. For example, a recent study in the Journal of the American

Medical Association reported that nearly half (47%) of the sexually active teenage girls surveyed at Planned Parenthood clinics throughout Wisconsin would stop using *all* sexual health care services at the clinics if parents had to be notified that they were seeking prescription contraceptives. (Ninety-nine percent of these young women, however, said they would continue having sexual intercourse.) Diane M. Reddy et al., Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services, 288 JAMA 710, 712-13 (2002). Likewise, the American Academy of Pediatrics has found that "even a perceived lack of confidentiality in health care regarding sexual issues deters [minors] from seeking services." American Academy of Pediatrics, The Adolescent's Right to Confidential Care When Considering Abortion, 97 Pediatrics 746, 749 (1996). Moreover, the American Medical Association reports that the desire to maintain confidentiality about abortion has been one of the leading reasons for illegal abortion deaths since 1973. Council on Ethical and Judicial Affairs, American Medical Association, Mandatory Parental Consent to Abortion, 269 JAMA 82, 83 (1993).

22. Minors' concern with confidentiality is well-founded. Research shows that if their confidentiality is breached, minors often suffer the harms of notification that they sought to avoid. Indeed, one study found that of those adolescents whose parents found out about their pregnancy without being voluntarily told by the daughter, a majority (58%) reported adverse consequences. Six percent reported quite serious consequences including physical abuse, being forced to leave home, or that their parents' health suffered. Ten percent said knowledge of the pregnancy caused problems between their parents. Such adverse consequences were two to four times as likely to occur when the parents discovered the pregnancy as when the daughter had

voluntarily chosen to tell them. Parental Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. at 204 & table 7.

23. Further, in my experience with minors in Massachusetts, I have found that some parents who inadvertently learn of their daughter's desire to seek an abortion will go so far as to interfere with, or obstruct, her access to a court. I know of cases in which young women failed to show up at scheduled court hearings and lost all touch with their attorneys as a direct result of parents discovering that the minors were seeking a judicial bypass. In one of these cases, I later learned, only because the minor's boyfriend contacted me, that the girl's mother was pressuring her into going through with the pregnancy.

24. Finally, I also know of several instances in which a minor seeking a judicial bypass had a relative or close family friend who worked in the courthouse. Understandably, these minors were extremely fearful that the relative or family friend would easily learn about the minor's effort to obtain a bypass and would inform the minor's parents. In these circumstances, knowing that the relative or family friend would not be allowed to enter the hearing or see the minor's court records, despite working in the courthouse, was of critical importance to these young women.

New Hampshire's Judicial Bypass Jeopardizes Minors' Confidentiality

25. I have read the New Hampshire Parental Notification Prior to Abortion Act and the implementing court procedures and forms. Based on my experiences with the judicial bypass system in Massachusetts and others around the country, I can say with certainty that the New Hampshire judicial bypass lacks the basic safeguards needed to protect minors' confidentiality. Indeed, New Hampshire's bypass appears to guarantee that minors' confidentiality will be breached.

26. For example, neither the Act nor the implementing procedures have provisions allowing a minor to file under a pseudonym or even her initials. Instead, a minor is required to supply her name for use in the case caption which, under normal court procedures, will appear on any number of public documents, including the docket, calendar, and roll call sheets for anyone to see. Thus, far from protecting a minor's confidentiality, the process instituted by New Hampshire exposes a minor's decision to seek a bypass to anyone who happens to be in the courthouse.

27. In addition to exposing a minor's decision to the general public, New Hampshire's bypass process threatens to reveal the information directly to minors' parents. New Hampshire has instructed court personnel, in some instances, to call minors to inform them of their hearing dates. And minors are required to provide their address with no instruction to court personnel that materials are not to be mailed to the minor. I can think of few surer ways to breach a minor's confidentiality than for her to receive a call or mail from the court about her bypass petition.

28. In addition to these direct breaches of confidentiality, New Hampshire's judicial bypass also lacks other basic safeguards that I have learned are critical to ensuring that the bypass is a viable alternative for minors who cannot involve a parent. The experience in Massachusetts is instructive. When our parental consent law first came into effect, it contained language similar to New Hampshire's Act, simply providing that the bypass proceedings be confidential. Because the language of the Massachusetts statute alone lacked sufficient guidance, attorneys working with the court system developed forms, a procedure, and a standing order of the court to set forth the procedures for maintaining confidentiality in a bypass proceeding. Even with the standing order, there were enough confidentiality concerns that it was necessary to petition for guidelines

from a justice of the Massachusetts Supreme Court. The standing order and guidelines specifically state, among other things, that the minors' names be redacted from the docket and the title of the case; that all court records and related materials be sealed and kept apart from other documents; and that forms be used to ensure that the name of the young woman appears in only one place — in a sealed envelope among the impounded material.

29. In my experience, these guidelines have been essential to achieving a level of confidentiality in Massachusetts bypass cases that would otherwise have been lacking. Indeed, I have been informed by law clerks and a judge of instances in which parents, who somehow found out their daughter was seeking a bypass, called or showed up at the court demanding information. Both the clerks and the judge told me that only because of the specific confidentiality guidelines did court personnel know that the records were to remain sealed and that the parents were not entitled to access. This feedback confirms my belief that enforceable and specific instructions for bypass cases are an absolute minimum to an effective alternative to parental notification.

30. I am very concerned about the lack of similar, specific instructions to guide New Hampshire court personnel. Although the Act and the implementing procedures do say that these cases are confidential, they do not say, for example, that the records must be sealed with access limited to essential court personnel. (This is particularly important for teens from smaller communities who may have a relative, neighbor, or family friend who works in the courthouse.) Nor do they otherwise alert court personnel to the fact that the records must be shielded not only from the public but also from parents who are not entitled to information about (or even confirmation of) their daughter's request for a bypass. This is particularly troubling because in

most other "confidential" juvenile proceedings, although the public's right to information related to the case is circumscribed, the parent's right is not.

31. Given the unique confidentiality concerns that surround bypass cases and their relative infrequency (compared to all other cases), specific instructions for court personnel are crucial. Based on my experiences, I know that it is simply unrealistic to expect that without such guidance, court employees will intuit what is required in order to create a confidential bypass procedure, ignore the procedures established by the court system which expose a minor's decision to seek a bypass, and come up with their own procedures to protect minors' rights.

Conclusion

32. Because it threatens to expose their request for a bypass both to their parents and the public at large, the New Hampshire bypass fails to provide a meaningful alternative for New Hampshire teens who cannot notify a parent, thereby putting their health, safety, and well-being at serious risk. The Act should therefore be enjoined.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 27, 2006.

JAMIE A. SABINO, ESQ.

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,	)	
v.	)	CIVIL ACTION NO:
PETER HEED, Attorney General of New Hampshire, in his official capacity,	)	
Defendant.	)	

DECLARATION OF RACHEL ATKINS, P.A., M.P.H.

RACHEL ATKINS, P.A., M.P.H., declares subject to the penalties of perjury:

1. I am the Vice President for Medical Services of Planned Parenthood of Northern New England (PPNNE), a plaintiff in this case. I am a physician assistant and hold a masters degree in public health. I submit this declaration in support of plaintiffs' application for a preliminary injunction against the Parental Notification Prior to Abortion Act, which is scheduled to take effect December 31, 2003 (parental notice law). It is my opinion that if the parental notice law is allowed to take effect, some of PPNNE's minor patients will suffer irreparable injury.

2. PPNNE is a Vermont not-for-profit charitable organization registered to do business in New Hampshire. PPNNE operates 27 health centers in New Hampshire, Maine and

Vermont, with 8 of those centers in New Hampshire. PPNNE offers its patients a full range of reproductive health services, including family planning counseling and medical services, testing and treatment of sexually transmitted infections, HIV/AIDS testing and counseling, breast and cervical cancer screening, pregnancy testing and options counseling, abortions and prenatal care. In 2002, PPNNE served 19,028 patients in New Hampshire. PPNNE offers abortions in New Hampshire at its West Lebanon health center.

3. I have had extensive experience in abortion care, both as a provider of abortion services to adult women and teens, and as an administrator, managing the provision of abortion services. I began in 1978 as a health educator and abortion counselor and then trained as a physician assistant in women's health. As a physician assistant, I provided out-patient gynecological services, including first trimester abortions, for 15 years, from 1981 to 1995. During that time, I counseled hundreds of pregnant women, including numerous teenagers, regarding their pregnancies and their decisions to continue their pregnancies or to have an abortion. In addition, since 1987, I have supervised the provision of medical services, including abortion care. From 1987 to 2000, I was Executive Director of the Vermont Women's Health Center, a private non-profit medical practice that provided comprehensive obstetrical and gynecological health care, including abortions. In 2000, I took the position of Assistant Director of Medical Services at PPNNE and, in 2003 was promoted to Vice President for Medical Services. In my present position, I supervise the provision of all medical services including abortion services at PPNNE's medical centers in Maine, Vermont and New Hampshire. I conduct these activities in cooperation with PPNNE's medical director, a physician.

4. The vast majority of minors who obtain abortions from PPNNE in New Hampshire involve a parent in their decision. The younger the minor is, the more likely she is to come to a health center with a parent. If a minor has not already talked to a parent, PPNNE staff explores with the minor her reasons for not involving a parent and encourages her to do so, unless parental involvement would be against her best interests. Often, after this counseling, minors agree to involve a parent. Of those who do not, nearly all involve a trusted adult, such as a relative or school nurse.

5. I have read the parental notice law and am aware that it does not have specific provisions to maintain the confidentiality of minors who attempt to obtain a judicial bypass. I believe that this lack of protection, especially in a rural state like New Hampshire, will have a deterrent effect on minors' willingness to use the bypass. Without guarantees that the bypass will be confidential, minors who fear notifying a parent, will be deterred from obtaining legal abortion services. Such minors may carry to term in circumstances that are against their best interests, delay the procedure, which can increase the risk of complications or, in some instances, resort to unsafe illegal or self-induced abortion. In addition, I fear that those minors who use the bypass and experience a breach of confidentiality in which their parents learn of their abortion, could experience harm in the form of being forced to carry a pregnancy to term against their will, being forced out of their homes, or being physically or emotionally abused or maltreated.

6. The small number of our patients unwilling to involve a parent in their abortion decisions often have serious reasons for not doing so. These reasons include fear of serious emotional or physical abuse, being thrown out of the home, and being cut off from parental support, including financial support and college tuition. These fears often are based on a parent's

past specific threat of untoward consequences if the minor were ever to become pregnant. Minors often have good reason to believe a parent will carry out such threats. For example, parents may have maltreated them in the past in similar stressful situations or an older sibling may already have been thrown out of the home or beaten when a parent learned of a pregnancy. Among our patients have been young women from other countries and cultures who feared ostracism, even death, if an out-of-wedlock pregnancy were revealed to their families.

7. Sometimes the minor's parents are deeply ideologically opposed to abortion, and are even active in the local anti-abortion movement. Such minors fear an emotional rift if such parents find out about their decision or that the parent will try to block them from obtaining the abortion by confining them to the home or monitoring their activities. Recently, a parent active in the local anti-abortion movement repeatedly called our center, posing as her daughter, and attempted to cancel her daughter's appointment for an abortion. On the day of the daughter's appointment, she showed up at the health center, in an attempt to prevent her daughter from obtaining an abortion.

8. Often minors fear disturbing a family already in a stressful situation. A member of the minor's family, such as a grandparent, may recently have died; a minor's parents may be dealing with a sibling who is in trouble because of criminal activity. One of our patients did not want to burden her mother, a widow who had recently been diagnosed with cancer. A minor may fear that news of her pregnancy and planned abortion will be more than a parent in these circumstances can handle.

9. I believe that minors' drive to maintain their confidentiality would deter many from using the judicial bypass if confidentiality were not assured. The possibility of a breach of

confidentiality that could lead to a minor's parent finding out about her abortion is very real in communities where our patients reside. We draw our patients almost exclusively from the rural areas and small towns of New Hampshire. In these areas, the minor may have a relative or family acquaintance working at the courthouse. If the papers filed in a courthouse are not kept confidential, such persons could view them and report the abortion to the minor's parents. Similarly, if the courtrooms are not closed, there is a very real possibility that someone the minor knows could encounter her in the courtroom.

10. I also understand that the parental notice law does not make an exception for circumstances when delaying the abortion to comply with the notice requirements or to get a judicial bypass would seriously threaten a young woman's health. I understand that the only time a provider can go ahead with an immediate abortion is when the provider certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to comply with the law's notice requirements. I fear that, without a proper health exception, minors who fear notifying their parents of their abortion decision will be deterred from seeking and obtaining abortions they need in urgent medical circumstances. Such minors may well seek a judicial bypass, further delaying the procedure while their condition worsens. Others may simply delay seeking any help at all, leading to further deterioration of their condition with the possibility of permanent harm to their health. For these reasons, I believe the law must allow an immediate abortion where a minor's health would be endangered by delay.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 15, 2003

Rachel Atkins P.A. MPH.

Rachel Atkins, P.A., M.P.H

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DECLARATION OF WAYNE GOLDNER, M.D.

Wayne Goldner, M.D., declares and states the following:

1. I am an obstetrician and gynecologist in private practice in Manchester. I am board certified by the American Board of Obstetricians and Gynecologists, licensed to practice medicine by the State of New Hampshire, and a fellow in the American College of Obstetricians and Gynecologists. I graduated from the University of Pennsylvania School of Medicine in 1978 and completed a residency in obstetrics and gynecology at Baystate Medical Center in 1982. From 1989-1991, I was the chair of the Department of Obstetrics and Gynecology at Elliot Hospital, where I continue to provide hospital-based care. I am one of the plaintiffs in this action.

2. I have practiced obstetrics and gynecology since 1982. I provide my patients with a full range of services, including pregnancy testing and options counseling; prenatal care; delivery of newborns; prevention and screening of gynecological and breast cancers; evaluation and treatment for infertility; care for symptoms of menopause; screening and treatment for sexually transmitted infections; counseling and testing for HIV/AIDS; and abortions.

3. Abortion is an extremely safe medical procedure. Indeed, it is among the safest surgical procedures that doctors perform. Both in terms of mortality (death) and morbidity (serious complications short of death) abortion is many times safer than continuing pregnancy through to childbirth. Although abortion remains safe throughout pregnancy, the risks associated with the procedure increase as the pregnancy progresses.

4. My patients include both adult women and teenagers. The majority of my teenage patients who seek abortions (approximately 60 to 70 percent) bring a parent with them to the appointment. Most teens who do not bring a parent bring another significant adult, such as a grandmother.

5. I have read the New Hampshire Parental Notification Prior to Abortion Act (the Act). As I understand it, the Act requires that, unless a minor's parent certifies in writing that he or she has been notified of the minor's abortion, I will have to notify the minor's parent, then wait at least forty-eight hours before performing the abortion. If the teenager cannot notify her parent, she may opt instead to go to court seeking authorization for the abortion. While the young woman figures out the court process, applies for the judicial waiver, and awaits a decision from the court, the abortion may be delayed for a week, two weeks, and possibly longer. If I do not comply with the Act, I risk criminal prosecution and civil lawsuits.

6. As I understand it, the Act contains no exception for circumstances where my patient needs a prompt abortion to protect her health and only a limited exception for circumstances where the abortion is needed to protect her life. I submit this declaration in support of plaintiffs' motion for a preliminary injunction because it is my professional opinion that the Act's failure to include a health exception and a sufficient life exception will put young women at grave risk.

The Lack of a Health Exception Puts My Patients at Risk

7. For teens facing medical emergencies, the Act permits me to perform an immediate abortion only when I can certify that the abortion is "necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26,I(a). It does not allow me to proceed immediately if the delay required by the Act threatens my patient's health, but an immediate abortion is not necessary to prevent her death. Thus, unless I can get a written certification from a parent, the Act will force me to subject a teen patient to a delay of at least forty-eight hours even if the teen needs an immediate abortion to prevent serious harm to her health. Unfortunately, there are many such conditions. I detail some of them below.

8. For example, a pregnant teenager can develop preeclampsia, a form of pregnancy-induced hypertension characterized by excessively high blood pressure. Preeclampsia puts a woman at risk for liver and kidney dysfunction or failure; severe bleeding; vision loss; and fluid in the lungs. If not treated, preeclampsia may also progress to eclampsia, which can cause seizures, coma, and even death. Both preeclampsia and eclampsia occur most frequently in young women pregnant for the first time. The only cure for preeclampsia is termination of the pregnancy.

9. A patient who presents with preeclampsia probably will not die within forty-eight hours, and therefore I generally won't be able to certify that an "abortion is necessary to prevent her death and there is insufficient time to provide the required notice." Yet, because delay may well cause substantial harm to the patient's liver, kidneys, or vision, the best medical course will often be to end the pregnancy immediately. But because the Act contains no exception for circumstances where delay will cause serious harm to a patient's health, the Act would force doctors to jeopardize their patients' health by delaying the abortion.

10. A pregnant teen may also experience premature rupture of the membranes, a condition where the membranes that surround a fetus and that contain amniotic fluid rupture prior to fetal viability. Women with premature rupture of membranes are at risk of developing a serious infection of the placental lining, called chorioamnionitis. When a woman with premature rupture of membranes develops this type of infection, she is at serious risk of severe and permanent harm to her health, including scarring of the reproductive organs which can cause total infertility, chronic pelvic pain, and an abdominal abscess. If not treated appropriately, chorioamnionitis can lead to systemic sepsis (an infection that spreads throughout the body) and even cause death.

11. The course of chorioamnionitis is unpredictable and it can spread quickly. Because every minute the woman remains infected, she is at risk of serious damage to her health, the best medical course is often to provide an immediate abortion. But because a woman in the early stages of the infection probably won't die within forty-eight hours, the Act will force me to delay the procedure. While I wait, my patient is at risk of serious and permanent harm to her health: without a prompt abortion she may lose the ability ever to become pregnant again and may be subject to serious pain for the rest of her life.

12. Other women develop what is known as spontaneous chorioamnionitis, not associated with premature rupture of membranes. This condition may start with a simple urinary tract infection or a sexually transmitted infection, such as chlamydia, which is extremely prevalent among sexually active teenagers. For pregnant women with spontaneous chorioamnionitis, the infection may travel from the pelvic organs throughout the body. To prevent patients from suffering serious, chronic pain, losing their future fertility, or damaging major organ systems, such as their kidneys or liver, the best medical course is to perform a prompt abortion. But the Act prevents me from providing medically appropriate care. Unless I am able to certify that an "abortion is necessary to prevent her death and there is insufficient time to provide the required notice," something I am unlikely to be able to do, I will have to delay the abortion for forty-eight hours or more and expose my patient to the real risk of a lifetime of pain, infertility, and permanent, significant health problems.

13. Pregnant patients may also develop a host of other pelvic infections that may require an immediate abortion. These infections can be triggered by a number of causes, such as an IUD that has remained in place in the uterus, or a sexually transmitted infection. As with chorioamnionitis, delaying an abortion for a pregnant patient with a pelvic infection puts the patient at risk of permanent damage to her health, including infertility and chronic pain. But because in most circumstances I am unlikely to be able to certify that a patient with such an infection will die within forty-eight hours without an abortion, the Act requires that I delay treatment, and put my patient's long-term health at risk.

14. An immediate abortion may also be needed when a woman experiences heavy bleeding from the uterus. This condition may well arise at an early stage of pregnancy. Severe bleeding places the teenager at risk of dangerously low blood pressure, permanent kidney and

liver damage, and infertility. Such patients are also often at risk for infection, with all the dangers that entails. If the patient loses a lot of blood, she will require blood transfusions, which carry their own risks.

15. When a patient experiences this significant bleeding the best medical course may be to provide an immediate abortion. Unless the bleeding is quite severe though, she probably will not die within the time it takes to comply with the Act's notice requirements, and therefore I will have to delay providing the abortion for forty-eight hours or more. But if I delay, my patient will be at risk of kidney and liver damage, as well as the complications from infection and blood transfusions that I detailed above.

The Act's Narrow Death Exception Endangers My Patients' Health and Lives

16. I am also concerned that the Act will prevent me from providing appropriate care even when my patient's life is at risk. As I understand it, for minors facing even life-threatening emergencies, the only exception to the parental notice requirements comes when I can "certif[y]" that "the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26,I(a) (emphasis added). In many ways, however, this death exception does not reflect medical reality and is insufficient to protect my patients.

17. For women facing certain life-threatening conditions, the best medical course is often to provide an immediate abortion. Yet, as I understand it, the Act allows me to proceed immediately only when I can certify that my patient will die within the time it takes to comply with the Act's notice requirement. But that just is not the way medicine works: Whether and when a patient will die cannot be predicted with such accuracy. Patients do not become progressively sick according to a pattern such that I could say at a certain point in time that they patient has forty-eight hours to live. The course of these medical conditions is unpredictable: A

patient might appear to be close to death but live for days. On the other hand, unfortunately, a sick patient might seem sufficiently stable to live for forty-eight hours or more, but suddenly die. Because I cannot tell in advance how quickly my patients' condition will worsen, I will not be able to certify – as the Act requires – that she would die before I fulfilled the Act's notice requirements. Therefore, the Act will force me to choose between following the law and letting my patient's condition deteriorate, possibly past the point of being able to save her life at all, and alternatively providing appropriate medical care to my patient and risking criminal prosecution and being sued by her parents. The law should not put patients and their doctors in this untenable position.

18. The Act also ties doctors' hands and threatens patients by preventing physicians from performing life-saving abortions unless they can certify that the abortion is "necessary" to prevent the minor's death. But again, this ignores medical realities and puts my patients at risk. Although an abortion may be the safest and most medically appropriate way to save my patient's life, because there often will be other treatments, such as antibiotics and blood transfusions, that will keep my patient alive for some period of time, I will not be able to certify that the abortion is "necessary" to prevent her death. Under the Act, then, I would be required to provide this other treatment even where it poses far greater risks than an abortion and could result in irreversible adverse health consequences for my patient, such as damage to her kidneys or liver or infertility. The combination of the Act's cramped death exception and the absence of any exception to protect my patients' health forces physicians to act contrary to their patients' best medical interests and thereby jeopardize our patients' health.

19. All of this is made worse, because, as I understand it, the Act also does not entrust to the physician's good faith medical judgment the decision of whether an immediate abortion is

necessary to prevent the minor's death within a given time. This makes me very nervous. It goes without saying that abortion is extremely controversial. On top of that, as I have said, medicine is not an exact science. Unless I am allowed to rely on my good faith medical judgment, I could be convicted if the prosecution convinced a jury that my patient had an extra day to live or that an abortion was not absolutely necessary to save her life. In this way, the Act forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives.

Conclusion

20. In sum, because the Act will prevent me from caring for my patients according to accepted medical practice and my best medical judgment, I fear enforcement of the Act for my patients' sake as well as my own. The Act will cause grave harm because it does not allow for immediate abortions to protect a teenager's health and includes a "death exception" that is inadequate to protect my patients. The Act thus places me in fear of prosecution for fulfilling my duty as a physician, which is to proceed with my patient's safety as my paramount concern.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 11, 2003

Wayne Goldner, M.D.