UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF PARTIAL MOTION FOR SUMMARY JUDGMENT

I. Introduction

This case involves a challenge to the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act ("the Act"). N.H. RSA 132:22-28. The Act provides that abortions may not be performed upon an unemancipated minor until at least 48 hours after written notice has been delivered to one of the minor's parents. RSA 132:25. The District Court held that the Act was unconstitutional on its face because it did not contain an exception when an abortion is necessary to protect the health of the minor, and because the "death exception" was too narrow. Planned Parenthood of Northern New England v. Heed, 269 F.Supp.2d 59, 65-66 (D.N.H. 2003), *aff'd* 390 F.3d 53, *vacated and remanded sub nom.* Ayotte v. Planned Parenthood of Northern New England, 126 S.Ct. 961 (2006). The Court did not rule on the confidentiality challenge regarding the judicial bypass procedure. *Id.* at

67. The First Circuit affirmed the District Court's decision holding that the Act was facially unconstitutional because it did not have a health exception, and because the "death exception" was drawn too narrowly and "fail[ed] to safeguard the physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability." 390 F.3d at 62, 64.

The Defendant appealed to the United States Supreme Court, which framed the issue on appeal as follows: "If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response?" Ayotte, 126 S.Ct. at 964. The Supreme Court vacated the Court of Appeals' decision, and remanded the matter back to the Court of Appeals on the question of remedy. The Supreme Court noted in its decision that the statute was unconstitutional when applied in "some very small percentage of cases" where pregnant minors "need immediate abortions to avert serious and often irreversible damage to their health." Id. at 967. However, the United States Supreme Court "agree[d] with New Hampshire that the lower courts need not have invalidated the law wholesale," and held that "the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application" so long as "New Hampshire's legislature intended the statute to be susceptible to such a remedy." Id. at 969 Assuming the state legislature would prefer an injunction prohibiting the statute's application in medical emergencies to no statute at all, the Supreme Court directed the Court of Appeals to then turn to the issue involving the confidentiality of the judicial bypass procedures.

The Defendant moves for summary judgment on the issue of legislative intent on the ground that there is no genuine issue of material fact which would necessitate the need for a trial, and because the Defendant is entitled to judgment as a matter of law.

II. Standard of Review

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

In ruling on a motion for summary judgment, the court must construe the evidence in the light most favorable to the non-movant. *See* Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2001).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has properly supported its motion, the burden shifts to the nonmoving party to "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted." Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 94 (1st Cir. 1996) (*citing* Celotex, 477 U.S. at 323; Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)).

III. Argument

The question before the court is whether the New Hampshire legislature would prefer an injunction prohibiting the statute's application in medical emergencies to no parental notification statute at all. Ayotte, 126 S.Ct. at 968 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"). The answer is obviously yes. Severing the

unconstitutional applications of the Act would give effect to the legislature's intent that in as many circumstances as possible a pregnant minor's parent should be notified about the decision to have an abortion. The legislature would clearly prefer this remedy over invalidating the Act in its entirety.

Severability is a state law issue. Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (per curiam). Under New Hampshire law, a statute with unconstitutional applications is "held valid by giving it a construction compatible with the constitution, making it applicable only to those cases to which it can be constitutionally applied." Aldrich v. Wright, 53 N.H. 398, 399 (1873); *see also* Associated Press v. State, 888 A.2d 1236, 1255 (N.H. 2005) ("In determining whether the valid provisions of a statute are severable from the invalid ones, [the court is] to presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved.") (quotation omitted). Here, the New Hampshire legislature has specifically expressed its desire that the Act not be declared unconstitutional in its entirety if it can be given effect without the invalid applications. The Act contains a severability provision[1] which provides:

> If any provision of the subdivision *or the application thereof to any person or circumstance* is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

[1] A severability clause in a state statute acts as a presumption that the legislature intended to sever the unconstitutional applications from the constitutional applications. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506-07 (1985) (recognizing that Washington moral nuisance statute "should have been invalidated only insofar as the word 'lust' is to be understood as reaching protected materials."); *see also* A.A. et al. v. New Jersey, 176 F. Supp.2d 274, 309 (D. N.J. 2001) ("The incorporation of a broad severability clause is evidence of the legislature's intent and creates a presumption that the invalid sections of the statute are severable.").

RSA 132:28 (emphasis added). By this plain and unambiguous language, the legislature has declared that all valid applications of the statute must be given effect. It is well settled that "[w]hen a statute's language is plain and unambiguous, [the court] need not look beyond it for further indication of legislative intent." Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005) (citations omitted).

Nevertheless, the Plaintiffs argued to the Supreme Court that the Act permits only the severance of unconstitutional provisions from the statute. Resp. Br. at 37. Should this court find that the language of the severance provision is ambiguous, which the State disputes, only then may the court turn to legislative history to aid in its analysis. *See* State v. Whittey, 149 N.H. 463, 467 (2003). When considering legislative history, the New Hampshire Supreme Court looks at the official House and Senate Journals to determine the legislative intent behind a law. *See e.g.* Caparco v. Town of Danville, 152 N.H. 722, 727 (2005) (dialogue between senators as recorded in the Senate Journal demonstrated the legislature's expectation that a planning board would determine the amount of impact fee); AIMCO Properties LLC v. Dziewisz, 152 N.H. 587, 590-92 (2005) (New Hampshire Supreme Court looked to the Senate Journals when determining the meaning of "good cause" to terminate a landlord/tenant relationship); Associated Press, 888 A.2d at 1255-56 (New Hampshire Supreme Court looked to the House Committee Report as recorded in the House Journal in determining that valid provisions of statute restricting public access to financial affidavits filed in divorce actions were severable from unconstitutional provision).

There is nothing in either the House or Senate Journal to support the Plaintiffs' assertion that the New Hampshire legislature would prefer no statute at all to a statute enjoined in medical emergencies. To the contrary, the Legislative Purpose and Findings

state, in part, that "[t]he legislature . . . finds that parental consultation is usually desirable and in the best interest of the minor." 2003 N.H. Laws § 173:1, III.[2] Thus, the state legislature has declared that in as many circumstances as possible a pregnant minor's parent should be notified about the decision to have an abortion. This state interest would be better served by a parental notification act enjoined in medical emergencies than no parental notification act at all. Cf. Brockett, 472 U.S. 491, 506-07 ("It would be frivolous to suggest, and no one does, that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute. And it is quite evident that the remainder of the statute retains its effectiveness as a regulation of obscenity."). If enjoined in the small percentage of cases where pregnant minors need immediate abortions to protect their health, the Act would retain its effectiveness as a parental notification statute.

The Plaintiffs argued to the Supreme Court that the New Hampshire legislature purposely crafted the Act without an emergency exception knowing that it would be declared unconstitutional. Resp. Br. at 39. The official legislative record directly contradicts the Plaintiffs' position and establishes that the New Hampshire legislature was conscious of its obligation to enact legislation that passed constitutional muster. *See* Report of the N.H. House Jud. Comm. on HB763-FN, *reprinted in* N.H. House Jour. 496-99 (Mar. 25, 2003) (hereinafter "House Jour.") (attached to this Memorandum as Defendant's Exhibit C); Senate Debate on HB763-FN, *reprinted in* N.H. S. Jour. 831-62 (2003) (hereinafter "S. Jour.") (attached to this Memorandum as Exhibit B). In fact, Rep. Phyllis L. Woods, one of the sponsors of the legislation speaking on behalf of the House Judiciary Committee, recognized

[2] For ease of reference, 2003 N.H. Laws 173 is attached to this memorandum as Defendant's Exhibit A.

that the United States Supreme Court upheld an identical parental notification statute. *See* House Jour. at 496. Rep. Woods also noted that the bill contained a judicial bypass provision, as required by this Court, for cases where the minor's parents are not notified. *Id.* at 497. Members of the Senate recognized that the Supreme Court has upheld the constitutionality of a parental notification statute with judicial bypass provision. *See* S. Jour. at 849-50. Thus, the legislative history supports the conclusion that the legislature wanted the statute to conform to constitutional mandates and to operate in as many applications as possible.

To the extent the Plaintiffs seek to rely on statements of individual legislators made outside of the official legislative record, that reliance is in error. *See* Baines v. New Hampshire Senate Pres., 152 N.H. 124, 133 (2005) (quoting Bezio v. Neville, 113 N.H. 278, 280 (1973) (The journals of the House and Senate are the "conclusive evidence of the proceedings . . . of the legislature."); *see also* E.D. Clough & Co. v. Boston & M. R. R., 77 N.H. 222, 242 (1914) (Walker J., concurring) (unauthenticated reports of hearings before legislative committees that indicate what individual legislators thought is of very little weight or importance upon the question of legislative intention); Bread Political Action Comm. v. Federal Elec. Comm., 455 U.S. 577, 582 n. 3 (1982) (refusing to give probative weight to after-the-fact affidavit of amendment sponsor regarding legislative intent); B.C Foreman v. Dallas County, TX, 193 F.3d 314, 322 (5th Cir. 1999) (holding district court's exclusive reliance on affidavits of three Texas legislators was clearly erroneous; court should have relied on the official legislative record to determine legislative intent); American Meat Institute v. Barnett, 64 F.Supp. 2d 906, 915-16 (D. S.D. 1999) (after-the-fact affidavits of individual legislators not admissible on the issue of legislative intent).

The official legislative record makes clear that the legislature intended that a pregnant minor's parent be notified about the decision to have an abortion in as many circumstances as possible, in part because "[p]arents ordinarily possess information essential to a physician's exercise of best medical judgment concerning the child." Legislative Purpose and Findings, 2003 N.H. Laws § 173:1, II (d). In 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 pregnant minors would not be achieved by delaying the abortion to notify a parent. The legislative history supports a finding that the legislature would prefer a parental notification statute enjoined in such medical emergencies over no parental notification statute at all.

Moreover, the policy considerations sought to be advanced by the Act support severance of the Act's unconstitutional applications. The goal of the judiciary "is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." State v. Whittey, 149 N.H. at 467 (quotation and brackets omitted). Where the legislative history of a statute does not reveal the intent of the legislature on a specific issue, the New Hampshire Supreme Court considers the policy sought to be advanced by the statutory scheme. *See* Hinsdale v. Town of Chesterfield, 889 A.2d 32, 35 (2005) (where review of legislative history did not assist in determining the appropriate legal standard to apply, court considered the policy sought to be advanced by the statutory scheme). New Hampshire's Parental Notification Act sets forth the legislative purpose as follows:

> It is the intent of the legislature in enacting this parental notification provision to further the important and compelling state interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household.

2003 N.H. Laws § 173:1, I. All three state interests listed would be better served by a notification act enjoined in the case of medical emergencies than no notification act at all. *Cf.* Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 466-67 (6th Cir. 1999) (holding district court abused its discretion in failing to sever objectionable portions of consent act where the state interests would be better served by a consent act less the challenged provisions than no consent act at all). Despite severance of the unconstitutional applications, the Act would still further the legislative goal of promoting parental involvement in as many circumstances as possible. Furthermore, in preserving the New Hampshire legislature's intent to promote parental involvement, enjoining the Act in the manner described by the United States Supreme Court is consistent with the severability clause included in the Act.

There are no genuine issues of material fact with regard to legislative intent. In determining legislative intent, this court's review is limited to the official legislative history and apparent purpose of the Act in light of the policy sought to be advanced by the statutory scheme. It strains common sense to conclude that the state legislature would prefer no notification act at all to a statute enjoined in the way the Supreme Court described. Because an injunction prohibiting the application of the Act in medical emergencies would better serve the legislative goals of promoting parental involvement and protecting minors than would no notification act at all, the Defendant is entitled to summary judgment on the issue of legislative intent.

IV. Conclusion

For all of the foregoing reasons, the Defendant respectfully requests that the honorable court grant her motion for summary judgment on the issue of legislative intent and issue an injunction prohibiting the application of the Act in any circumstance where a doctor, in good faith, believes that there is a medical health emergency that requires an immediate abortion.

Respectfully submitted,

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By and through her counsel,

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Certificate of Service

July 12th, 2006

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

\s\ Laura E. B. Lombardi
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