UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

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

I. Introduction

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

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

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

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

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

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

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

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

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

II. Undisputed Material Facts

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

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

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

III. Argument

A. Defendant Is Entitled To Summary Judgment on Legislative Intent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court's inquiry.[5]

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

B. Defendant is Entitled to Summary Judgment on Bypass

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

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

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

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

1. *The Act contains constitutionally sufficient bypass procedures*

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

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

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

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

2. *The Act expressly meets confidentiality criterion*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Act Should Be Upheld With Narrowly Drawn Injunction

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

IV. Conclusion

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

Respectfully submitted,

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By and through her counsel,

Date: December 29, 2006

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Certificate of Service

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

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