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.

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