

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

**PLANNED PARENTHOOD OF NORTHERN)
NEW ENGLAND, CONCORD FEMINIST)
HEALTH CENTER, FEMINIST HEALTH)
CENTER OF PORTSMOUTH, and)
WAYNE GOLDNER, M.D.,)**

Plaintiffs,)

v.)

PETER HEED, Attorney General of)
New Hampshire, in his official capacity,)

Defendant.)

CIVIL ACTION NO:

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION**

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**Pro hac vice* admission pending

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PRELIMINARY STATEMENT

This action challenges the constitutionality of New Hampshire's newly enacted Parental Notification Prior to Abortion Act (the Act), House Bill (HB) 763-FN, 2003 N.H. Laws ch.173 (effective December 31, 2003), to be codified at RSA 132:24-:28 (2003). (The Act is attached to the Complaint as Exhibit A.) Absent injunctive relief from this Court, the Act will take effect on December 31, 2003. RSA 173:3.¹ If allowed to take effect, the Act would prevent a minor from obtaining an abortion unless a parent is notified at least forty-eight hours in advance of the procedure or the minor seeks and obtains a judicial waiver of this requirement.

Plaintiffs – three health care facilities and an obstetrician-gynecologist – challenge the Act on behalf of themselves and their patients. Plaintiffs seek preliminary injunctive relief to prevent irreparable harm to minors' health and lives and to their constitutional rights. The Act puts the health and lives of the young women of New Hampshire at risk and violates the Constitution in at least three respects.

- First, contrary to thirty years of Supreme Court precedent, the Act lacks an exception to its requirements of parental notice and delay for circumstances where a minor needs a prompt abortion to protect her health. For this reason alone, the Act is unconstitutional and should be enjoined. Indeed, just last year, the Tenth Circuit Court of Appeals struck down a law requiring parental notice for minors' abortions for exactly this reason.
- Second, and again in violation of decades of Supreme Court case law, the Act contains only a narrow and cramped exception for even those circumstances when a minor's life is endangered by her pregnancy and her doctor determines that an immediate abortion is the most medically appropriate way to save her life.
- Finally, in contravention of constitutional mandates, the Act's judicial waiver provisions fail to protect the confidentiality of minors who – because they cannot safely turn to their parents – must go to court to seek a waiver. The Act does not tell court employees that the records must be sealed or that parents may not attend

¹ For clarity, citations are to sections of the Revised Statutes Annotated, rather than to the session law.

hearings. Without such explicit instructions, minors' confidentiality and their well-being will be compromised.

For all of these reasons, the Act is unconstitutional and should be enjoined pending a final determination on the merits.

STATUTORY FRAMEWORK

The Act prohibits performance of an abortion² upon an unemancipated minor unless the physician or his or her agent provides at least forty-eight hours advance notice of the abortion to one of the minor's parents. RSA 132:25, I. The forty-eight hour notice period begins to run from the time of delivery of the notice. Notice may be delivered in person to the parent's residence or by certified mail. If sent by certified mail, the notice is deemed delivered at noon on the next day on which regular mail delivery takes place subsequent to mailing. RSA 132:25, II & III. These requirements may be dispensed with if the parent certifies in writing that he or she has been notified. RSA 132:26, I(b).

In lieu of parental notification, a minor may petition a court of competent jurisdiction for a waiver of the notice requirement. The court must grant the waiver if it finds that the minor is mature and capable of giving informed consent to the abortion or the performance of an abortion without parental notification is in the minor's best interests. RSA 132:26, II. The Act states that the trial court must rule on the minor's petition within seven calendar days from the time the petition is filed. RSA 132:26, II(b). A minor has a right to appeal an adverse decision and the

² The Act defines "abortion" as the "use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage." RSA 132:24, I.

appellate court must rule on her petition within seven calendar days of the docketing of the appeal. RSA 132:26, II©).

The Act states that “[p]roceedings in the court under this section shall be confidential,” and a “confidential appeal” shall be available, but no specific procedures are set forth in the statute to effectuate this right of confidentiality. RSA 132:26, II(b), ©). For example, no provision is made for sealing of the record or closing the hearings.

For minors facing medical emergencies, the sole exception to notification or judicial waiver is when the attending physician can “certif[y] . . . that the abortion is necessary to prevent the minor’s death and there is insufficient time to provide the required notice.” RSA 132:26, I(a). The Act lacks any exception for medical emergencies in which an abortion is not necessary to prevent imminent death.

Violation of the Act is a misdemeanor and grounds for a civil action by a person wrongfully denied notification. RSA 132:27.

ARGUMENT

In determining whether to grant a preliminary injunction, courts must consider four factors: (1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff will be irreparably harmed if the injunction is denied; (3) whether the balance of hardships tips in plaintiff’s favor; and (4) whether the court’s ruling will serve the public interest. Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996). Plaintiffs easily satisfy these standards here.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE ACT IS UNCONSTITUTIONAL.

A. The Act Is Unconstitutional Because It Lacks an Exception To Protect Minors' Health.

In an unbroken line of cases running from Roe v. Wade to Planned Parenthood v. Casey to the Supreme Court's recent decision in Stenberg v. Carhart, the Court has consistently held that laws that restrict access to abortion are unconstitutional unless they contain adequate exceptions to protect women's health and lives. Roe v. Wade, 410 U.S. 113, 164-65 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 846, 879-80 (1992); Stenberg v. Carhart, 530 U.S. 914, 931 (2000). The New Hampshire Act directly contravenes this constitutional mandate. Contrary to thirty years of Supreme Court precedent, the Act fails to include any exception to its requirements of parental notice and delay for circumstances where a prompt abortion is necessary to protect a young woman's health. For this reason alone, the Act is unconstitutional and should be enjoined.

Since the Supreme Court first decided Roe v. Wade, the Court has repeatedly held that a health exception is the *sine qua non* of validity for abortion regulations. In Roe, for example, the Court invalidated a Texas statute that proscribed all abortions except those performed "for the purpose of saving the life of the mother." 410 U.S. at 117 n.1. In addition to recognizing that the Constitution guarantees women the right to abortion prior to fetal viability, id. at 153, 163-64, the Court held that even post-viability bans must contain exceptions for abortions "necessary, in appropriate medical judgment, for the preservation of the life *or health* of the mother," id. at 164-65 (emphasis added).

Three years ago, the Supreme Court reaffirmed that, to pass constitutional muster, abortion regulations must contain an exception to protect women’s health. Stenberg, 530 U.S. at 930 (holding that because “the law requires a health exception . . . to validate even a postviability abortion regulation, it at a minimum requires the same in respect to a previability regulation”). In Stenberg, the Court held that a Nebraska law that prohibited certain methods of abortion except where necessary to save the woman’s life was unconstitutional because it “lack[ed] any exception for the preservation of the . . . health of the mother.” Id. (internal quotations and citation omitted).

Indeed, the Supreme Court has explicitly held that laws, like the New Hampshire Act, that require parental involvement in minors’ abortion decisions must contain an exception for circumstances where a minor needs a prompt abortion to protect her health. Casey, 505 U.S. at 880. In Casey, the Court addressed the constitutionality of a Pennsylvania law that required minors to obtain parental consent or a judicial waiver before getting an abortion and required all women to delay their abortions for twenty-four hours. 505 U.S. at 844. Unlike the New Hampshire Act, the Pennsylvania law included an exception for medical emergencies that was not limited to life-threatening situations. Id. at 879.³ Yet, because the law appeared not to allow

³ The Pennsylvania law defined a medical emergency as:

that 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.

Id. at 879 (citation omitted).

an immediate abortion in some situations when a woman’s health would be threatened, the plaintiffs challenged the law. *Id.* at 880. Addressing the argument that the statute’s exception was so narrow as to “foreclose[] the possibility of an immediate abortion despite some significant health risks,” the Court unequivocally held that “[i]f the contention were correct,” the law would be unconstitutional because “*the essential holding of Roe forbids a State from interfering with a woman’s choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.*” *Id.* at 880 (emphasis added). The Casey Court upheld the law only because the appellate court construed Pennsylvania’s medical emergency exception as “assur[ing] that compliance with [the] abortion regulations would not in any way pose a significant threat to the life or health of a woman.” *Id.* (internal quotations and citation omitted).⁴

Following Roe, Stenberg, and Casey, courts have consistently invalidated restrictions on abortion, including parental notice laws, that lack exceptions for circumstances when delay threatens a woman’s health. For example, just last year, the Tenth Circuit considered the constitutionality of Colorado’s parental notice for abortion law that, like the New Hampshire Act, contained an exception for circumstances where an abortion was necessary to prevent death, but no exception for circumstances where a minor needs a prompt abortion to preserve her health. Planned Parenthood v. Owens, 287 F.3d 910 (10th Cir. 2002). The Tenth Circuit held that the Colorado law was “unconstitutional because it fail[ed] to provide a health exception as required by the Constitution of the United States.” *Id.* at 927; see also, e.g., Women’s Med.

⁴ In contrast, the New Hampshire Act has no exception for health consequences short of death that can be construed to meet constitutional standards.

Prof'l Corp. v. Voinovich, 130 F.3d 187, 203 (6th Cir. 1997) (“any abortion regulation that might delay an abortion must contain a valid medical emergency exception” that protects a woman’s health); Planned Parenthood of Delaware v. Brady, 250 F. Supp. 2d 405, 410 (D. Del. 2003) (preliminarily enjoining law mandating twenty-four hour delay before an abortion because the law contained no health exception and was therefore unconstitutional), converted into permanent injunction, No. Civ. A. 03-153-SLR, 2003 WL 21383721, at *1 (D. Del. June 9, 2003).

Applying these well-established constitutional standards, the New Hampshire Act is fatally flawed. Like the Colorado statute struck by the Tenth Circuit in Owens, the New Hampshire Act contains *no exception whatsoever* to its requirements for circumstances in which a minor is not facing imminent death but delaying her abortion will put her health at serious risk. As the Declaration of Dr. Wayne Goldner, an obstetrician and gynecologist with over twenty years of experience, makes clear, the lack of such an exception will cause minors to suffer serious and unnecessary injuries to their health. Some teenagers with preeclampsia, for example, risk harm to their kidneys, liver, and vision if an abortion must be delayed to comply with the Act’s requirements. Goldner ¶¶ 8-9. Similarly, delaying an abortion for minors with premature rupture of membranes may cause significant injuries to their health, including scarring of the reproductive organs, which can cause infertility, chronic pelvic pain, and an abdominal abscess. Id. ¶¶ 10-11; see also id. ¶¶ 7-15 (describing other conditions where a prompt abortion is needed to protect a woman’s health). Indeed, in Casey, the Supreme Court found that it was “undisputed” that delaying abortions for women with these conditions – preeclampsia and premature ruptured membranes – “could lead to an illness with substantial and irreversible

consequences.” 505 U.S. at 880; see also Owens, 287 F.3d at 920 (finding that for minors with certain medical conditions delaying an abortion to comply with the parental notice requirement could result in significant harm to the minor’s health short of imminent death); Planned Parenthood v. Owens, 107 F. Supp. 2d 1271, 1277 & n.9 (finding that when a pregnant minor presents with an urgent condition such as preeclampsia or premature rupture of membranes, delaying an abortion “in order to give notice pursuant to the Act may place the patient’s health at risk in circumstances short of imminent death”), aff’d, 287 F.3d 910. Yet, in violation of clear Supreme Court precedent, the New Hampshire Act contains no exception to its requirements to protect these teens.

Because New Hampshire’s Act prevents a minor from obtaining an immediate abortion in circumstances where delay will threaten her health, it is unconstitutional. For this reason alone, the Act should be enjoined. This Court need go no further.

B. The Act’s Exception for Abortions Necessary To Prevent a Minor’s Death Is Unconstitutionally Narrow.

In addition to failing to protect minors’ health, the Act’s exception for abortions necessary to prevent a minor’s death is wholly inadequate even to save minors’ lives. The Act permits a physician to perform a life-saving abortion without delay only if the physician can “certif[y]” that an “abortion is necessary to prevent the minor’s death and there is insufficient time to provide the required notice.” RSA 132:26, I(a). This exception is constitutionally insufficient in at least three respects; these defects pose a grave threat to the health and lives of young women and render the Act unconstitutional.

As an initial matter, the Act’s death exception permits a physician to provide a life-saving abortion to a patient only if the doctor can certify that the minor will die within the time it

takes to comply with the Act’s detailed notice requirements. But, as the declaration of Dr. Goldner explains, physicians simply cannot predict the precise number of hours or days within which a patient with a life-threatening condition will die. Goldner ¶ 17. Because medical science does not permit such mathematically precise calculations, the standard of care dictates that physicians avoid the risks of delaying life-saving care. Id. Yet, because the Act permits physicians to avoid delay only if they can certify that a minor would die within forty-eight hours if an abortion is not performed,⁵ it prevents physicians from providing even life-saving abortions. Dr. Goldner explains:

Patients do not become progressively sick according to a pattern such that I could say at a certain point in time that the patient has forty-eight hours to live. The course of these medical conditions is unpredictable: A patient might appear to be close to death but live for days. On the other hand, unfortunately, a sick patient might seem sufficiently stable to live for forty-eight hours or more, but suddenly die. Because I cannot tell in advance how quickly my patients’ condition will worsen, I will not be able to certify – as the Act requires – that she would die before I fulfilled the Act’s notice requirements. Therefore, the Act will force me to choose between following the law and letting my patient’s condition deteriorate, possibly past the point of being able to save her life at all, and

⁵ Absent a written certification from a parent that notice has already been received, 48 hours is the shortest amount of time that a physician would be required to delay in order to provide the required notice. In some cases, however, it will take up to 72 or even 96 hours to complete notice. The Act provides that no abortion shall be performed upon a minor “until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified.” RSA 132:25, I. Notice may be “delivered personally to the parent by the physician or an agent,” RSA 132:25, II, or it may be sent by certified mail, in which case “delivery shall be deemed to occur at 12 o’clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.” RSA 132:25, III. Because delivery does not “occur” the same day as mailing, it could take an additional 24 hours to complete notice, or even another 48 hours if the notice is mailed on a Saturday, in which case regular mail delivery will not occur until noon the following Monday. In addition, if a minor cannot notify a parent, she would be forced to attempt to obtain a judicial waiver which could take a week. RSA 132:26, II(c); see also Atkins ¶ 10.

alternatively providing appropriate medical care to my patient and risking criminal prosecution and being sued by her parents.

Id. The Constitution forbids states from forcing physicians to gamble with their patients' lives in this way. See Stenberg, 530 U.S. at 930-31; Casey, 505 U.S. at 880.

Second, under the Act, a doctor cannot provide an immediate abortion without notice unless the abortion – as opposed to some other treatment – is “necessary” to prevent the minor’s death within the next forty-eight hours. See, e.g., Colautti v. Franklin, 439 U.S. 379, 400 (1979) (finding that statute’s use of “the word ‘necessary’ suggests that a particular technique must be indispensable to the woman’s life or health – not merely desirable – before it may be adopted”). But, as the evidence shows, a patient may have a life-threatening condition for which an immediate abortion is the safest and most medically appropriate way to save her life, though it may well not be the *only* option for preventing her immediate death. Goldner ¶ 18 (“Although an abortion may be the safest and most medically appropriate way to save my patient’s life, because there often will be other treatments, such as antibiotics and blood transfusions, that will keep my patient alive for some period of time, I will not be able to certify that the abortion is ‘necessary’ to prevent her death.”). The Act, thus, forces physicians to rely on these alternative treatments even when they are less appropriate and pose serious health risks to minors facing life-threatening conditions. Id. (explaining that the alternative treatments may “pose[] far greater risks than an abortion and could result in irreversible adverse health consequences for [his] patient, such as damage to her kidneys or liver or infertility”). As the Supreme Court has repeatedly held, abortion restrictions, like this one, that force women from safer to riskier procedures are unconstitutional. See Stenberg, 530 U.S. at 931, 936-37; Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986) (invalidating

regulation of particular abortion method because it “require[d] the mother to bear an increased medical risk”); Planned Parenthood v. Danforth, 428 U.S. 52, 77-79 (1976) (holding prohibition on abortion method unconstitutional because “as a practical matter it force[d] a woman and her physician to terminate her pregnancy by methods more dangerous to her health”).⁶

Finally, the Act’s failure to clearly allow physicians to rely on their good-faith medical judgment in determining whether and when an abortion is necessary to save a minor’s life exacerbates the exception’s other flaws. Because of this failure, a physician who provides an immediate abortion to a patient based on his good-faith belief that without one she will die within the time necessary to comply with the Act may, nonetheless, be subject to criminal prosecution and civil suits if he is “later determined, in the eyes of others, using 20/20 hindsight, to have acted unreasonably.” Women’s Med. Prof’l Corp. v. Voinovich, 911 F. Supp. 1051, 1083 (S.D. Ohio 1995), aff’d, 130 F.3d 187 (6th Cir. 1997). As courts have recognized, this is a real possibility: Particularly “[i]n an area as controversial as abortion,” “[t]he determination of whether a medical emergency . . . exists . . . is fraught with uncertainty and susceptible to being subsequently disputed by others,” making it easy for the prosecution to “find a physician willing to testify that the physician did not act reasonably.” Voinovich, 130 F.3d at 205; see also Goldner ¶ 19 (noting that because abortion is controversial and medicine is not an exact science, physicians must be allowed to rely on their good faith medical judgment; otherwise they will risk criminal conviction if a jury believes that a “patient had an extra day to live or that an abortion

⁶ See also Jane L. v. Bangerter, 61 F.3d 1493, 1504-05 (10th Cir. 1995) (holding ban on abortion method unconstitutional because as a result a woman “may have to endure additional health damage and suffering”); Rhode Island Med. Soc’y v. Whitehouse, 66 F. Supp. 2d 288, 314 (D.R.I. 1999) (“If a woman could die, then she has the constitutional right to have *any and all operations* that would save her life.”) (emphasis in original), aff’d on other grounds, 239 F.3d 104 (1st Cir. 2001).

was not absolutely necessary to save her life”). This threat of criminal prosecution will necessarily have an impermissible chilling effect on physicians seeing minors who need life-saving abortions. See Voinovich, 130 F.3d at 204-05 (striking abortion restriction as facially unconstitutional because, *inter alia*, under the medical emergency exception “physicians face liability even if they act in good faith according to their own best medical judgment”); Planned Parenthood v. Verniero, 41 F. Supp. 2d 478, 503-04 (D.N.J. 1998) (holding life exception constitutionally insufficient because it “does not protect the physician’s ability to make a judgment call as required by Roe”), aff’d on other grounds, 220 F.3d 127 (3d Cir. 2000); Goldner ¶¶ 19-20; see also City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 427 (1983) (“[B]ecause abortion is a medical procedure, . . . the full vindication of the woman’s fundamental right necessarily requires that her physician be given the room he needs to make his best medical judgment.”) (internal quotations and citations omitted), overruled in part on other grounds, Casey, 505 U.S. at 882; Colautti, 439 U.S. at 394 (finding abortion regulation that “does not afford broad discretion to the physician” and instead imposes criminal liability based on ambiguous criteria creates an impermissible “chilling effect on the exercise of constitutional rights”).⁷

⁷ Although there can be no criminal liability without a finding of some level of culpability pursuant to RSA 626:2, this fact provides little comfort to minors who need life-saving abortions or their physicians. Neither the Act nor RSA 626:2 makes clear to physicians what standard their actions will be judged against or whether they will be permitted to rely on their good faith medical judgment. As such, the Act is unconstitutionally vague. Cf. Colautti, 439 U.S. at 391-93 (holding abortion restriction unconstitutionally vague where physicians could not tell whether their conduct would be judged against a subjective or mixed subjective and objective standard); Voinovich, 130 F.3d at 205 (holding medical emergency definition, and therefore abortion regulation, unconstitutionally vague “because physicians cannot know the standard under which their conduct will ultimately be judged”).

For all of these reasons, the Act endangers minors in New Hampshire and should be enjoined.

C. The Act Is Unconstitutional Because It Fails To Protect the Confidentiality of Minors Seeking a Judicial Waiver of the Act’s Parental Notification Requirements.

The Supreme Court has made clear that laws that require parental involvement in minors’ abortion decisions are constitutional only if they provide a confidential process through which a minor may seek a waiver of the requirement. The Act fails to meet this standard. Although the Act contains a judicial waiver process, it lacks specific provisions that are necessary to ensure the confidentiality of minors who use that process. As numerous other courts have held, the lack of such provisions renders the Act unconstitutional.

In Bellotti v. Baird, 443 U.S. 622 (1979), the Supreme Court set forth the constitutional standards that govern laws requiring parental involvement in minors’ abortion 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 contain a bypass procedure through which a minor can obtain a waiver of the parental involvement requirement if she is mature enough to make the decision independently or if an abortion is in her best interest, id. at 643-44. 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, 476 U.S. at 767-68, the Court also recognized that it was not enough for courts simply to allow minors to seek a waiver. 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 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”); Bellotti, 443 U.S. at 647 (invalidating provision that would have provided notice to a parent of their daughters’ request for a judicial waiver 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”). Thus, the Court held that, in order to be constitutional, the bypass procedure “must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity.” Id. at 644. 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 Sabino ¶¶ 20-24 (explaining importance of confidentiality to minors seeking judicial bypasses).

Because confidentiality is crucial to the effectiveness of the bypass process, “[t]o pass constitutional muster,” the procedure must contain “detailed provisions assuring confidentiality” and “may not rely solely on generally stated principles of . . . confidentiality.” Thornburgh v. American College of Obstetricians & Gynecologists, 737 F.2d 283, 297 (3d Cir. 1984), aff’d on other grounds, 476 U.S. 747 (1986). Yet New Hampshire’s Act lacks the required specificity, merely providing that “[p]roceedings in the court under this section shall be confidential” and that “[a]n expedited confidential appeal shall be available.” RSA 132:26, II(b), ©). Other courts have rejected similar, non-detailed language as constitutionally insufficient. In Zbaraz, for example, the Seventh Circuit enjoined an Illinois parental notification statute that, like New

Hampshire’s Act, provided only that the waiver proceedings “shall be confidential and shall ensure the anonymity of the minor,” and that “an expedited confidential appeal shall be available.” 763 F.2d at 1543 (internal quotations and citations omitted). The Seventh Circuit held that the statute failed to satisfy Bellotti’s confidentiality requirement because it lacked “specific provisions to assure the minor’s anonymity at the waiver hearing,” and failed to “address particular problems concerning anonymity” existing after the hearing, including the availability of court documents and files. Id. Likewise, in Thornburgh, the Third Circuit held that a waiver procedure that, like New Hampshire’s Act, simply stated that “[c]ourt proceedings . . . shall be confidential,” provided insufficient protection for minors’ confidentiality and therefore enjoined the statute. 737 F.2d at 297, 307.

Like these other statutes, New Hampshire’s Act lacks specific guarantees of confidentiality necessary to protect minors seeking a judicial waiver of the parental notice requirement. For example, the Act fails to require that the hearings or appellate arguments “be closed or conducted in such a [manner] as to prevent the public from learning of the minor’s identity.” Memphis Planned Parenthood v. Sundquist, No. 3:89-0520, slip op. at 11 (M.D. Tenn. July 9, 1996) (enjoining parental consent law lacking such guarantees) (attached as Exhibit 1 hereto), vacated as moot in light of changes to law, 121 F.3d 708 (6th Cir. 1997). Without such specific instructions, court personnel cannot reasonably be expected to know what is required, particularly given the fact that in other areas where confidentiality is critical, New Hampshire statutes *do* specifically alert court employees that the courtroom must be closed. See, e.g., RSA 463:9, I (requiring that “[p]roceedings to determine whether a guardian shall be appointed for the proposed minor . . . shall be held in a closed court”). Nor does the Act specifically require that the records relating to judicial waivers be sealed. Zbaraz, 763 F.2d at 1543; see also Planned

Parenthood v. Miller, No. 4-96-CV-10877, slip op. at 18-19 (D. Iowa Jan. 3, 1997) (temporarily enjoining parental notification law where statute made no provision for sealing records) (attached as Exhibit 2 hereto), prelim. inj. granted, slip op. (D. Iowa Jan. 22, 1997), cured by court rule, slip op. (D. Iowa Oct. 16, 1997).⁸

As the declaration of Jamie Sabino, an attorney with over twenty years of experience working with judicial bypass systems, makes clear, without such specific provisions, court employees cannot be expected to know what is required in order to protect the confidentiality of minors seeking bypasses.

[J]udicial bypass proceedings present a set of confidentiality problems that simply do not arise in other cases. In complete

⁸ A New Hampshire court guideline regarding public access to court records does say that “[u]nless otherwise ordered by the court, the following categories of cases shall not be open to public inspection: juvenile cases (delinquency, CHINS, abuse/neglect, termination of parental rights, adoption); pending or denied application for search or arrest warrants; grand jury records; applications for wire taps and orders thereon; and any other record to be kept confidential by statute, rule, or order.” N.H. Rules of Court, Guidelines for Public Access to Court Records, Guideline 2 (Guideline 2). It is unclear whether this guideline exempts records related to judicial bypass cases from public disclosure. In any event, at most, the guideline protects records against disclosure to the general public; nothing in the guideline prevents records from being made available to interested third parties, such as parents. 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 (noting that despite the fact that juvenile court records are generally confidential, they are usually made available to parents); Sabino ¶ 27 (noting that in other types of proceedings where the records are confidential, parents are still entitled to access the hearing and case information). Moreover, nothing in this guideline requires that a court close a judicial waiver hearing or appellate argument.

contrast to the stringent confidentiality necessary for a bypass proceeding, in the vast majority of cases, it is understood that court rules require parties to use their names in pleadings, court hearings and arguments are open to the public, and court personnel are required to provide the public access to the docket and court records. Even in juvenile proceedings, which are not open to the general public, parents are summoned to attend the hearings and must be allowed access to the records. Judicial bypass cases, however, must be handled in an entirely different manner. Not only does a minor have a right of confidentiality vis-a-vis the public, but she also has the right vis-a-vis her parents. But nothing in New Hampshire's Act lets court personnel know this. Given that court personnel generally operate under the principle that hearings and records are open to the public, or, at the very least, to the parents, it is unrealistic to expect court clerks to glean this difference from the Act's statement that "[p]roceedings . . . shall be confidential."

Sabino ¶ 27.

The lack of specific confidentiality guarantees is particularly problematic for the many minors who come from New Hampshire's rural communities and small towns, where minors may well have relatives or family friends working at the courthouse. See Atkins ¶ 9; see also Memphis Planned Parenthood v. Sundquist, 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. Similarly, if the courtrooms are not closed, someone the minor knows could attend the hearing. Atkins ¶ 9; cf. Sabino ¶ 24 (explaining that where minors have relatives or close family friends working in the courthouse knowing that those individuals would not be allowed to come to the hearing or see the court records was critically important).

Thus, without specific provisions to protect a minor's confidentiality, some minors' parents may learn of their planned abortions. See Sabino ¶ 29 (explaining that where parents call

or show up at the court demanding information, it is only because of Massachusetts' specific confidentiality guidelines that court personnel have known that the records must remain sealed and that the parents are not entitled to see the docket). 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.

Because the Act fails to include specific provisions that courts and experts have recognized are necessary to guarantee a young woman's confidentiality and safety, it should be enjoined.

II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.

Unless the Act is enjoined, minors in New Hampshire will suffer irreparable harm. Because it lacks any exception for circumstances where delaying an abortion threatens a minor's health and only a narrow and cramped exception for life-saving abortions, the Act puts minors' health in serious jeopardy and endangers their lives. And, because it fails to guarantee their

confidentiality, those minors who cannot safely involve their parents in their abortion decision nonetheless face the risks of parental involvement or of foregoing a safe and legal abortion. Finally, because each of these infirmities renders the Act unconstitutional, the Act deprives minors of their constitutional rights, which in itself is an irreparable harm.

As an initial matter, the lack of an exception to the Act's requirements of notification and delay for circumstances where a prompt abortion is needed to prevent serious health damage will irreparably harm New Hampshire minors. Goldner ¶¶ 7-15. As the evidence shows, for minors with a host of medical complications, including preeclampsia, premature rupture of membranes, and serious infections, the best medical course may be to provide a prompt abortion to prevent the minor from suffering significant long-term health problems. *Id.*; see also *Owens*, 107 F. Supp. 2d at 1277 (describing need for immediate abortion to avoid adverse health consequences, short of imminent death, from, *inter alia*, preeclampsia and premature rupture of membranes). But because the Act lacks any exception for situations where a minor's health, but not her life, is immediately threatened, physicians will be forced to delay abortions for these young women. As the evidence demonstrates, this delay can result in grave and irreparable harm to minors' health, including damage to their kidneys and liver, vision loss, and infertility. Goldner ¶¶ 7-15.

Second, even when teenagers develop life-threatening conditions, the Act fails to adequately protect them, and indeed, puts them at risk of grave and irreparable harm, including death. Goldner ¶¶ 16-19. The course of medical complications is unpredictable, and physicians cannot predict when a minor facing a life-threatening emergency will die. *Id.* ¶ 17. Because they therefore cannot "certif[y] . . . that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice," RSA 132:26, I(a), they will not be able to invoke the Act's exception. Yet the delay required by the Act may nonetheless kill the

patient. Goldner ¶ 17 (noting that “a sick patient might seem sufficiently stable to live for forty-eight hours or more, but suddenly die”).

The Act also causes irreparable harm to minors by preventing physicians from providing life-saving abortions where other treatments, such as blood transfusions, may delay their death. But these treatments may be more risky and less medically appropriate. Id. ¶ 18. Because the Act’s exception permits life-saving abortions only where “necessary” to prevent the minor’s imminent death, however, physicians will be forced to use these other treatments even when they pose far greater risks to the patient, including the risks of damage to major organs and infertility. Id.⁹

Third, because it fails to protect their confidentiality, the Act will cause irreparable harm to minors who need to seek a judicial waiver of the parental notice requirement. Most minors involve their parents in the decision to have an abortion. Sabino ¶¶ 8, 9; Atkins ¶ 4. For a variety of reasons, however, some minors cannot inform their parents that they are pregnant and want an abortion. See generally Sabino ¶¶ 11-19, 22; Atkins ¶¶ 6-8. Some minors have previously been abused and know their parents will react violently to the news of their pregnancy. Sabino ¶¶ 12, 17; Atkins ¶ 6. Others have good reason to believe that informing their parents will lead to first-time abuse, being thrown out of the house, or being cut-off from financial or other support. Sabino ¶¶ 14, 17; Atkins ¶ 6. Still others cannot involve a parent in

⁹ The lack of a health exception and fear of parental involvement may deter minors from seeking the abortions they need to protect their health. Some may resort to the judicial bypass, causing further delay and more damage to their health. Others may delay seeking any help at all, leading to further deterioration of their condition with the possibility of permanent harm to their health. Atkins ¶ 10.

the decision to end a pregnancy because they have good reason to fear that their parents will try to force them to carry the pregnancy to term. Sabino ¶¶ 16, 17; Atkins ¶ 7.

Minors like these will be irreparably harmed by the Act's failure to guarantee their confidentiality. Because of the lack of provisions to protect minors' confidentiality, some parents may learn about their daughter's pregnancy and desired abortion. These minors will then be subject to the very harms that compelled them to go to court in the first instance. Sabino ¶¶ 22-23; Atkins ¶ 5; see also Bellotti, 443 U.S. at 647. Other minors who believe the bypass process will not protect their confidentiality will not participate in it at all. Sabino ¶ 20; Atkins ¶ 9. Such minors will be irreparably harmed: some will carry a pregnancy to term against their will, and others may avoid safe and licensed medical providers and attempt self-abortion or obtain an illegal abortion. Sabino ¶¶ 18, 20-21; Atkins ¶ 5.

Finally, the Act's deprivation of minors' constitutional rights alone establishes irreparable harm. Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (2d ed. 1995). Indeed, the loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (citation omitted). The injury from loss of the right of reproductive choice "is as irreparable as any that can be imagined: not only does it flow from the deprivation of constitutional rights, but it also creates a situation which is irreversible and not compensable." Pilgrim Med. Group v. New Jersey State Bd. of Med. Exam'rs, 613 F. Supp. 837, 848-49 (D.N.J. 1985); see also Pro-Choice Network of Western New York v. Schenck, 67 F.3d 377, 384 (2d Cir. 1995) (finding that without injunctive relief, abortion clinic patients will suffer "irreparable harm, including increased medical risks and the denial of constitutionally protected rights"), aff'd in part on relevant grounds, rev'd in

part, 519 U.S. 357 (1997); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989) (same); Planned Parenthood v. City of Manchester, 2001 DNH 083, 15-16 (finding defendant's action had "the potential to frustrate or delay a woman's abortion decision," a "burden [that] alone constitutes irreparable injury") (internal quotations and citations omitted).

III. THE BALANCE OF HARDSHIPS FAVORS THE INJUNCTION.

This Court should issue a preliminary injunction because the hardship to the plaintiffs and their patients from denial of interim relief far outweighs the hardship to the State. See Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991). As explained above, a decision not to enjoin the Act would result in extreme hardship to the plaintiffs because the Act contains no exception to its notice requirement for emergency abortions needed to protect a teenager's health, contains only an inadequate exception for life-saving abortions, and does not guarantee the confidentiality of minors needing to use the judicial bypass process. It thus places minors' health and lives at grave risk. See Part II, supra; see also Planned Parenthood v. Brady, 250 F. Supp. 2d 405, 410-11 (D. Del. 2003) (finding balance of hardships favored injunction where abortion restriction contained no health exception); Women's Med. Prof'l Corp. v. Taft, 114 F. Supp. 2d 664, 704-05 (S.D. Ohio 2000) (granting preliminary injunction) (same), perm. inj. granted, 162 F. Supp. 2d 929 (S.D. Ohio 2001), appeal argued, No. 01-4124 (6th Cir. Apr. 29, 2003). Enforcement of the Act, moreover, would place physicians at risk of criminal prosecution or civil lawsuits for providing medical care that is in the best interests of their patients. See RSA 132:27 (setting forth penalties for violation of the Act); Women's Med. Prof'l Corp., 114 F. Supp. 2d at 704-05 (finding balance of hardships favored issuance of the injunction where physicians would face criminal and civil liability under statute limiting abortion).

In contrast, the State is “not at risk to suffer any harm.” See Brady, 250 F. Supp. 2d at 411. Rather the State “represents the important interests of the public,” interests that cannot be served by the enforcement of an unconstitutional statute. See id. Moreover, the balance of hardships favors issuance of the preliminary injunction because it will maintain the status quo, permitting pregnant teenagers to receive abortions needed to protect their health and lives, as they have been for 30 years. See id. (finding that the balance of hardships favored the injunction in part because it would maintain the status quo); Women’s Med. Prof’l Corp., 114 F. Supp. 2d at 704-05 (same).

IV. THE INJUNCTION SERVES THE PUBLIC INTEREST.

Where, as here, plaintiffs have demonstrated a likelihood of success on the merits on their claim that the statute at issue is unconstitutional, the public interest is served by issuance of a preliminary injunction. See, e.g., Planned Parenthood v. Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding that “the public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional.”). Moreover, the public interest is served by enjoining the Act to protect the health and lives of New Hampshire minors.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that this Court grant the motion for a preliminary injunction.

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