IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 84 C 771
	)	
LISA MADIGAN, Attorney General of Illinois, and RICHARD A. DEVINE, State's Attorney of Cook County,	)	Hon. David H. Coar Judge Presiding
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISSOLVE FEBRUARY 9, 1996 PERMANENT INJUNCTION ORDER

INTRODUCTION

The Illinois Parental Notice of Abortion Act, 750 ILCS 70/1 et seq., provides that a doctor may not perform an abortion upon a minor or incompetent person without giving at least 48 hours actual notice to an adult family member (defined as a parent, grandparent, step-parent living in the household, or legal guardian). 750 ILCS 70/10 (Ex. A, attached). (For simplicity, the adult family member will be referred to as a "parent" in this memorandum.) The statute creates a number of exceptions to the notice requirement. If the minor seeking the abortion is accompanied by a parent, or the physician certifies that there is a medical emergency and insufficient time to notify the parent, or the minor alleges she was the victim of sexual or physical abuse or neglect by a parent, then there is no need to notify the parent. In the case of abuse, Illinois law requires physicians to report promptly such cases to the Illinois Department of Children and Family Services. 325 ILCS 5/1 et seq. The Parental Notice statute modifies this requirement by providing that "any notification of public authorities of abuse that may be

required under other laws of this State need not be made by the person performing the abortion until after the minor receives an abortion...." 750 ILCS 70/20(4).

The final exception to notification is a waiver of notice authorized by the state court, the so-called "judicial bypass" waiver. A court will waive notification if it determines, after a confidential hearing, that the minor is sufficiently mature and well informed to make her own decision, or, for a minor who does not meet that standard of maturity, if the court finds that notification would not be in the best interests of the minor. 750 ILCS 70/25(d). The statute requires the court to appoint a guardian ad litem for the minor, advise her of her right to court-appointed counsel, and appoint counsel upon her request. 750 ILCS 70/25(b). The court must issue its decision within 48 hours of the petition's filing, unless the minor requests a longer period. 750 ILCS 70/25(c). If the court fails to rule within the 48 hour period and no extension is requested, then the petition is deemed granted and the notice requirement is waived. *Id.*

As recounted in the defendants' earlier memorandum, the statute has not taken effect since its enactment in 1995. A federal court injunction has been in place since then because the statute requested the Illinois Supreme Court to institute a rule for the conduct of bypass hearings, but that rule, Supreme Court Rule 303A, was not promulgated until September 2006. (Ex. B, attached). Rule 303A spells out the procedures for judicial bypass hearings, the appeals process for such hearings, time frames, and confidentiality requirements. With the implementation of Rule 303A, the basis for the original injunction no longer exists, and defendants have moved under Rule 60 of the Federal Rules of Civil Procedure to lift the injunction.

Plaintiffs have opposed this request, raising the following objections:

1. State court clerks may not be ready to implement the law;

2. The statute authorizes waiver of notice to the parent, but a bypass hearing does not give actual legal authorization to immature minors to have the abortion;

3. The statute does not sufficiently guarantee confidentiality by explicitly requiring a closed courtroom;

4. The statute does not adequately ensure a timely judicial decision and prompt appeal, and jeopardizes confidentiality in the time the minor is awaiting a decision and taking an appeal; and

5. The statute permits possible breaches of confidentiality for minors alleging sexual abuse and neglect if such claims are reported to DCFS or law enforcement.

None of these arguments is well founded, and none provides a basis for sustaining the injunction. Rules 60(b)(5) and (6) provide that relief from an injunction should be granted when it is no longer equitable that the injunction continue, particularly when it is a state law that is the subject of the injunction. Moreover, federalism concerns counsel that a federal court should impose no greater remedy than necessary to vindicate federal rights. Here, the original injunction was entered solely because the Illinois Supreme Court had not promulgated the rules that the Act requires. Those rules are now in place, and plaintiffs' speculation about possible future problems are of no moment in a facial challenge. Accordingly, the agreed injunction is no longer equitable, which satisfies defendants' burden under Rule 60(b) to show that the injunction should be lifted. Plaintiffs have additional constitutional challenges, but those have no bearing on the Rule 60(b) inquiry currently before the court. Rule 60(b) affords relief from the injunction because the only basis for the injunction has ceased to exist. Plaintiffs may press additional constitutional claims, but they must do so in the proper procedural context -- i.e., as grounds for the court to enjoin the statute anew, a posture in which plaintiffs would bear their proper burden before the court.

ARGUMENT

I. COURTS, INCLUDING THE U.S. SUPREME COURT, HAVE REPEATEDLY REJECTED CONSTITUTIONAL CHALLENGES TO PARENTAL NOTIFICATION LAWS

Before responding to the particular points raised by plaintiffs, it should be emphasized again that the Supreme Court has upheld laws requiring parental notice of, or even parental consent to, a minor's decision to undergo an abortion. The vast majority of States have such laws. *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961, 966 (2006). See Def. Mem. at 7-8. The state interests motivating such laws are legitimate and important. As the Supreme Court explained,

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interests of the minor. It may further determine, as a general proposition, that such consultation is particularly appropriate with respect to the abortion decision–one that for some people raises profound moral and religious concerns.

Bellotti v.Baird, 443 U.S. 622, 642 (1979).

The Court has also held that a judicial bypass proceeding must provide the minor with the opportunity to show either (1) "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her own parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-644. The Court also has required that the bypass hearing be conducted promptly and with anonymity. *Id.*

II. THE STATUTE IS NOT UNCONSTITUTIONAL ON ITS FACE.

Plaintiffs here are making a preenforcement, facial challenge to the statute, meaning that

it is their burden to show that the statute will operate unconstitutionally in a "large fraction" of the cases to which it applies[1]. In a preenforcement challenge such as this, plaintiffs cannot attack a potential "failure *in operation*," for "it is not possible to predict failure before the whole statute goes into force." *A Woman's Choice-East Side Women's Clinic*, 305 F.3d at 692 (emphasis in original). As the Supreme Court recently held, such arguments are speculative when there is a "preenforcement challenge, where no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]." *Gonzales v. Carhart*, 127 S.Ct. 1610, 1629 (2007) (internal quotation marks omitted). A federal court should not assume that Illinois courts will conduct bypass hearings without sensitivity to the concerns of the minors seeking the bypass and without attention to the important interests the statute is meant to protect. See *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 515 (1990) (State may assume its judges will follow mandated procedural requirements). Broad facial challenges, such as the one brought here, impose "a heavy burden upon the parties maintaining the suit." *Gonzales*, 127 S.Ct. at 1639. Plaintiffs cannot satisfy that burden.

Plaintiffs argue that the county clerks are not prepared to implement the law. Plaintiffs

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[1] The traditional test of facial invalidity is whether a plaintiff can show that the law is invalid in all its applications. *U.S. v. Salerno*, 481 U.S. 739 (1987). In *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), the Court in its plurality opinion appeared to say that a spousal notification law was invalid on its face if invalid "in a large fraction" of the cases to which it applied. *Id*. at 895. *Casey* did not cite *Salerno*. These different formulations have engendered confusion in the lower courts as to the plaintiff's burden in sustaining a facial challenge in an abortion-related case. The Seventh Circuit, noting the confusion, has concluded that the *Salerno* test must yield to *Casey's* "large fraction of the cases" standard. *A Woman's Choice–-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir. 2002) (upholding Indiana's informed consent statute), cert. denied sub nom., *A Woman's Choice - East Side Women's Clinic v. Brizzi*, 537 U.S. 1192 (2003); *see also Karlin v. Foust*, 188 F.3d 446, 483 (7th Cir. 1999) (rejecting facial challenge to Wisconsin informed consent statute under *Casey's* "large fraction of the cases"standard).

have submitted affidavits from the Clerk of the Circuit Court of Cook County and others working in the field of abortion rights relating phone conversations with clerk employees in other counties, suggesting the clerks are unaware of the law and not prepared to implement it. On the other hand, the Illinois Supreme Court has stated that trial courts will, as with any other new law, be prepared to implement it in good faith.

Plaintiffs' facial challenge falls short. First, it is not surprising that rank-and-file clerk's office employees may not have familiarity with a statute they have yet to implement.

Second, it is speculative to argue that in a "large fraction" of cases, a minor (possibly accompanied by a lay advocate or counselor from Planned Parenthood or a legal aid organization) will not be able to file a petition with a pseudonym or initials with a court clerk, with no filing fee, see 750 ILCS 70/25(h), and be unable to obtain an expedited hearing before a judge who would make a prompt decision whether to waive the notice requirement. There is no concrete case before this Court that demonstrates the system would malfunction systematically "in a large fraction of cases," and it would wrongly impugn the state judiciary to presume such a level of dysfunction. Nor is there any suggestion that state judges would fail to appoint guardians and counsel for minors seeking a bypass, as the law expressly requires. 750 ILCS 70/25(b). Contrary to plaintiffs' suggestion in their brief and affidavits, see Pl. Mem. at 5, and Ex. C-G, there is no need to ask the clerk to appoint counsel or "to look in the yellow pages" to obtain counsel. The judge has the obligation to advise the minor about her right to appointed counsel and to appoint counsel if requested. *Id*. A facially valid state law cannot be indefinitely enjoined based on speculation that it will be maladministered. If that were the test, few state laws would survive facial challenges.

Plaintiffs argue that there are currently no forms or general orders available at county courthouses to help minors navigate a judicial bypass proceeding. But here again, this is not germane to a facial challenge. Plaintiffs rely on *Ohio v. Akron Center for Reproductive Health*, see Pl. Mem. at 7, but that case is inapposite. Plaintiffs in *Akron* challenged the fact that the Ohio bypass complaint forms were confusing or created a procedural trap for the minor. The Court disagreed, even assuming the forms were not as clear as they could have been: "It seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status." 497 U.S. at 517. The Court in *Akron* also noted that the pleading forms could be amended by counsel. *Id.* Illinois law is entitled to the same presumption of normality -- a handwritten petition would be enough to begin the proceeding, and the appointed guardian and counsel would assist the minor in further proceedings.

The cases cited by plaintiffs (Pl. Mem. at 7) do not support the proposition that the defendants have to meet a factual burden on a facial challenge. In *Akron*, the Court held exactly the contrary: "We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Id*. at 513. In *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 382 n. 15 (4th Cir. 1998), the Court *upheld* the Virginia bypass statute against a facial challenge, and relied on the Virginia Supreme Court's statement of administrative guidance as to how forms should be interpreted. The Court did not say the existence of forms at the trial court level was an essential prerequisite in order to survive a facial challenge. Similarly, in *Manning v. Hunt*, 119 F.3d 254, 275 (4th Cir. 1997), the Fourth Circuit upheld North Carolina's parental consent statute against a facial challenge regarding the time for the minor to appeal, noting there were state Supreme Court rules which

clarified the procedures in effect -- just as Illinois has. And in *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 297 (3rd Cir. 1984), aff'd on other grounds, 476 U.S. 747 (1986), the injunction was issued because the Pennsylvania Supreme Court had not yet enacted a rule to supplement the statute. Illinois now has a rule.

In short, the Illinois statute survives a facial challenge. The sole basis for the Court's injunction in 1995 was the absence of court rules. The Rules are now in place and plaintiffs cannot revive their facial challenge with the speculative assumption that Illinois judges and court personnel will not discharge their duties under the statute faithfully.

III. THE STATUTE PROVIDES THAT ONCE A WAIVER IS GRANTED, THE ABORTION MAY GO FORWARD IN THE ABSENCE OF PARENTAL NOTIFICATION.

As noted earlier, the statute provides that mature minors, once found by a court to be so, need not notify a parent. If a waiver is granted on that basis, the minor is free to terminate the pregnancy. If the minor is not mature, but the abortion is found to be in her best interests, then notification is waived.

Plaintiffs argue that the immature, "best interests" minors are left in some sort of legal limbo because the statute relieves them of the burden of notification but does not actually authorize the abortion, something plaintiffs claim only a parent can do. Pl. Mem. at 8-9. This is a cramped and illogical reading of the statute. A statute should be interpreted if reasonably possible in a way that avoids a nonsensical result. *AM International v. Graphic Mgmt. Associates*, 44 F.3d 572, 577 (7th Cir. 1995). Plaintiffs' reading leaves the minor with no way to obtain the abortion without telling a parent, when the court has just found that telling a parent is not in her best interests.

The U.S. Supreme Court has addressed this issue. A finding that notification would not be in the minor's best interests is tantamount to a finding that refusing an abortion would not be in the minor's best interests. As the Court put it, "a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests...." *Lambert v. Wicklund*, 520 U.S. 292, 297(1997) (emphasis in original). In *Lambert,* the Court noted that the Montana statute under review was being challenged facially and there was no state court decision suggesting the statute should be construed as improperly distinguishing between waiver of notification and authorization of the procedure. *Id.* at 298. The Illinois statute should be read the same way, rather than in a way that appears to make the bypass procedure meaningless.

IV. THE ILLINOIS STATUTE ADEQUATELY GUARANTEES CONFIDENTIALITY IN JUDICIAL BYPASS HEARINGS.

Plaintiffs argue that the statute is invalid because it does not explicitly say the courtroom should be closed; because confidentiality could be breached while awaiting the judge's decision on appeal; and because abused or neglected minors are at risk of having their confidentiality compromised. Pl. Mem. at 9-15. These points will be addressed in turn.

A. THE STATUTE REQUIRES CONFIDENTIALITY AND NEED NOT EXPLICITLY REQUIRE A CLOSED COURTROOM.

The statute and rule are not unconstitutional merely because they do not spell out the fact that courtroom proceedings will not be open to the public. The statute explicitly provides:

> Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent person. All court proceedings under this Section shall be sealed. The minor or incompetent person shall have the right to file her petition in the

> circuit court using a pseudonym or using solely her initials. All documents related to this petition shall be confidential and shall not be made available to the public.

750 ILCS 70/25(a). Supreme Court Rule 303A(f) repeats the same requirements and notes that all documents shall be sealed and impounded. It is difficult to see how this procedure facially violates any constitutional requirement of confidentiality. State judges will conduct hearings in chambers or take whatever steps are necessary to insure confidentiality, just as the rule requires. There is no reason to speculate that judges will ignore the law's express, repeated efforts to maintain the confidentiality of the proceedings.

B. NOTHING ON THE FACE OF THE STATUTE OR THE RULE THREATENS THE MINOR'S CONFIDENTIALITY IN THE CIRCUIT COURT OR ON APPEAL.

The statute and Rule 303A require trial courts to issue written findings of fact and conclusions of law within 48 hours of the time the petition is filed, except if the minor requests a longer period. S.Ct. Rule 303A(a). The court must attempt to rule at the conclusion of any hearing on the petition, but if the decision is not rendered immediately following a hearing, then the petitioner shall be responsible for contacting the clerk of the court for notification of the decision. *Id.* If the court fails to rule within the 48-hour period and an extension is not requested, then the petition shall be deemed to have been granted. 750 ILCS 70/25(c); S. Ct. Rule 303A(a).

Plaintiffs contend that the requirement of written findings means the court cannot rule at the end of the hearing, while the minor is present in court, necessitating further calls or trips to the courthouse that threaten her confidentiality. Pl. Mem. at 11-12. This concern is hypothetical, speculative, and unfounded. The minor will have a guardian, 750 ILCS 70/25(b), and likely

counsel as well, *id*., when a decision is rendered. If a decision is not rendered immediately, the judge's law clerk or staff assistant could call the guardian or lawyer when the decision is ready. There is no grave constitutional threat to confidentiality in this process. There is no need for the minor herself to make repeated trips to the courthouse or repeated phone calls, and nothing to suggest that communication by the judge or judge's staff would expose the minor.

The alleged problems with the Rule's appeal process are overblown as well. The Rule provides that an appeal must be taken within two days after the judge denies relief (which plaintiffs contend may not be enough time), except the Rule also provides that the two-day period may be extended at the request of the minor, who will, of course, be represented by a guardian and probably appointed counsel who will be doing the work of putting together the short record and filing the appeal. S. Ct. Rule 303A(c).[2] On appeal, appointed counsel is also available. S. Ct. Rule 303A(d). The expedited time frames at both the trial and appellate level protect the pregnant minor's interests, not detract from them, and pose no constitutional problem.

C. ABUSED AND NEGLECTED MINORS

The Illinois Abused and Neglected Child Reporting Act ("ANCRA") provides that if a physician, teacher, or other specified persons believe a minor has been physically or sexually abused, they are mandated to report the suspected abuse to the Illinois Department of Children and Family Services. 325 ILCS 5/4. The ANCRA requires that the report be made "immediately." *Id.*

The Parental Notice Act modifies this requirement. If the minor seeking a waiver of

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[2] This flexibility in the appeal deadline distinguishes the Illinois law from the rigid two-day appeal period in the Idaho statute discussed in *Planned Parenthood v. Lance*, No. 00-0353, rev'd on other grounds, 375 F.3d 908 (9th Cir. 2004) (see Pl. Mem. Ex. I, slip. op. at 16).

notices declares in writing that she is a victim of sexual abuse, neglect or physical abuse by an adult family member, the attending physician must certify that in writing on her medical record. 750 ILCS 70/20(4). The statute then provides that "any notification of public authorities of abuse that may be required under other laws of this state need not be made by the person performing the abortion until after the minor receives an abortion that otherwise complies with the requirements of this Act." *Id*.

Plaintiffs contend that the reporting of sexual abuse *after* the abortion could compromise the minor's confidentiality, stating that the physician's report to DCFS "sets into motion a series of events that can result in parents, and/or public authorities outside DCFS, learning of the minor's abortion." Pl. Mem. at 13. It appears plaintiffs are arguing that the perpetrator of a criminal act should never be investigated or charged because eventually he might learn of the minor's abortion. The only absolute protection of the minor's confidentiality would be total immunity for the offender, thus permitting him to repeat the same behavior with the same minor or with other minors in the household. Plaintiffs cannot cite a single authority for the proposition that such immunity is a constitutional imperative.

By delaying notification until after the abortion, the statute avoids the possibility that the minor would have to notify an abusive parent before the fact, opening the possibility of coercion or worse. See *Planned Parenthood of the Blue Ridge*, 155 F.3d at 377 (notice given after the abortion attenuates risk of obstruction of the minor's decision). But permanently barring DCFS or law enforcement from knowing about the allegation of abuse would severely impact other vital state interests: "Beyond any question it is reasonable for the State to require that physicians report declarations of abuse to ensure that mistreatment is known to authorities responsible for

the protection of minors." *Hodgson v. Minnesota,* 497 U.S. 417, 493-94 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part).

In any event, there is nothing in ANCRA to suggest that DCFS would publicly or privately reveal the fact of the abortion to the alleged perpetrator of sexual abuse, even if that person were the parent of the victim. DCFS would certainly need to investigate whether other children in the house were at risk and needed to be removed from the house, but that would not require disclosure of the abortion. Records must be kept confidential under ANCRA. 325 ILCS 5/11. Records may be released to the parents of an abuse victim, but nothing in the statute suggests that a parent in the category of an alleged perpetrator could even see the file. Moreover, the statute provides that any disclosure has to be "in furtherance of purposes directly connected with the administration of this Act...." 325 ILCS 5/11.1(a). The likelihood of a minor's abortion being revealed has not been shown on this record and cannot reasonably be inferred from ANCRA.[3]

Even if conceivable that a parent could possibly suspect from a DCFS investigation that one's daughter was the source of the complaint, that the daughter might have become pregnant, and that the daughter might have had an abortion, it would impose too great a social cost on the State's legitimate needs to protect children and to investigate and prosecute criminal activity to

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[3] The cases cited by plaintiffs regarding the abuse and neglect exception are distinguishable. In *Lance*, the case previously discussed (Pl. Mem., Ex. I), the Idaho statute essentially required the judge conducting the bypass hearing to call law enforcement in *every* bypass case. (Slip Opinion, p. 22). The Illinois law only requires reporting of "sexual abuse, neglect, or physical abuse by an adult family member," a much narrower category. 750 ILCS 70/20(4). Similarly, in *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995), the Court found that the South Dakota law, which permitted only a "physician bypass" but not a judicial bypass, provided avenues for the parent to obtain medical records on the parent's daughter; the Court also noted that a report from the one doctor in South Dakota who performed abortions would automatically reveal that the minor had an abortion. *Id.* at 1461.

hold that the minor's need for confidentiality outweighs everything else. The parental notice statute makes the sensible choice of deferring the required call to DCFS until after the abortion is complete. That procedure protects the minor in making her decision without frustrating in perpetuity the State's unquestioned need to investigate child abuse allegations in order to protect children. See *Womencare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1309, 1327 (N.D. Fla. 2006) (conceivable breach of confidentiality in abuse case insufficient as a matter of law to invalidate parental notification statute). And the possibility of a breach of confidentiality after the fact is not enough to say the statute will inevitably have that effect in a "large fraction" of the cases to which it applies, and thus not nearly enough to facially invalidate the statutes.

V. THERE IS NO NEED FOR DISCOVERY

Plaintiffs have suggested that they should be permitted discovery before this motion can be decided, but discovery is clearly unwarranted in the current posture of this case. The statute has never been put into effect, so there is no claim that the statute is unconstitutional as applied, thus no need for discovery as to the manner in which it is being applied. This Rule 60 motion poses a purely legal question–whether the promulgation of Supreme Court Rule 303A eliminates the sole original basis for the injunction. Resolution of that question is a matter of law that requires no discovery.

CONCLUSION

It would be inequitable to continue the injunction now that the sole ground for entering the injunction has been eliminated with the promulgation of Supreme Court Rule 303A. Plaintiffs may wish to assert other grounds for the law's unconstitutionality, but those claims should be litigated *after* the injunction -- which was predicated solely on the absence of a court

rule -- has been lifted. The defendants' motion under Rule 60 should be granted.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

By: s/Thomas A. Ioppolo
THOMAS A. IOPPOLO
Assistant Attorney General
General Law Bureau
100 W. Randolph Street, 13th Fl.
Chicago, Illinois 60601
(312) 814-7198