

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

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<b>DAVID ZBARZ, M.D., et al,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>LISA MADIGAN, Attorney General of</b>	)	<b>NO. 84 C 771</b>
<b>Illinois, et al,</b>	)	<b>Hon. David H. Coar</b>
	)	<b>U.S. District Judge</b>
<b>Defendants.</b>	)	
	)	
<b>STEWART UMHOLTZ, State’s Attorney</b>	)	
<b>of Tazewell County, and EDWARD DETERS,</b>	)	
<b>State’s Attorney of Effingham County,</b>	)	
<b>Prospective Intervenors.</b>	)	

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**MOTION FOR LEAVE TO INTERVENE AS OF RIGHT,  
FOR PURPOSES OF SEEKING RECONSIDERATION OF OR  
APPEALING FROM THIS COURT’S DECISION OF 2/28/08, IN  
WHICH IT RULED THAT ILLINOIS’ PARENTAL NOTICE OF  
ABORTION ACT OF 1995 WAS FATALLY FLAWED FOR LACK  
OF A CONSENT PROVISION, AND FOR OTHER RELIEF**

Stewart Umholtz, the State’s Attorney of Tazewell County, Illinois, and Edward Deters, the State’s Attorney of Effingham County, Illinois, both of whom are members of the defendant class of State’s Attorneys herein (“the movants”), move pursuant to Fed. R. Civ. Proc. 24 that this Court grant them leave to intervene as parties herein, so that they may file a motion pursuant to Fed. R. Civ. Proc. 59, asking this Court to reconsider, alter or amend its ruling of February 28, 2008, and so that – if necessary – they may take an appeal from said ruling. A copy of said Rule 59 motion is tendered for filing with this motion. Movants also request that this Court render an expedited ruling on the motion to intervene. Failing the Court’s allowance of intervention before the time for appeal from the 2/28/08 ruling expires, the movants also request that the Court extend the time for filing a notice of appeal.

As members of the defendant class of Illinois State’s Attorneys, movants will be bound by this Court’s adverse ruling and barred from enforcing the provisions of the Illinois Parental Notice of Abortion Act of 1995 (“the Act” or “the Parental Notice Act”). On February 28<sup>th</sup>, this Court ruled that the Act will remain permanently enjoined – albeit on a different ground than was cited when the Court first entered said permanent injunction over a decade ago. The new ground, as urged by plaintiffs and upheld by this Court, is that the Parental Notice Act is unconstitutional because, although it “authorizes the court to waive parental notification when it is in the ‘best interest’ of the child,” it “does not authorize a method of consent for the abortion. Thus, under the statute, a ‘best interest’ minor who has waived parental notification is left without a mechanism to obtain consent for the abortion, and thus is in legal limbo.” Memorandum Opinion & Order, at p. 6.

With respect, movants believe that intervention is vitally required as this Court was never apprised, and therefore it misapprehended or overlooked, that such a “best interest” minor is *not* “left in limbo” and *does not require any mechanism to obtain consent*. This is because, as movants elaborate in their Rule 59 motion, the “Consent by Minors to Medical Procedures Treatment Act,” 410 ILCS 210/0.01 *et seq.*, expressly provides that “a pregnant woman who is a minor ... is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age” with respect to “consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery ....” In short, Illinois law vests *pregnant* minors of *any* age with plenary power to refuse or consent to *any* medical or surgical procedure – *including surgical abortions* – without regard to her *maturity*. There is no need, therefore, for the Parental Notice Act to include any provision for

judicial authorization or any other “mechanism to obtain consent” for the ‘best interest’ minor because, under the applicable Illinois law, any minor who is pregnant is fully empowered to render the requisite consent herself.

Movants urge that the prerequisites for intervention are amply satisfied, as follows:

1. Pursuant to Rule 24(a)(2), it is manifest that the movants have an interest in the subject of this action and that its disposition will, as a practical matter, impede or impair their ability to protect that interest. Indeed, movants’ interest in enforcing the Parental Notice Act, which they believe to be fully constitutional and enforceable, is thwarted by virtue of this Court’s declining to lift the permanent injunction against enforcement of the Act. Movants’ status as members of the defendant class of Illinois State’s Attorneys does not enable them to avert what they believe, with respect, to constitute a grave miscarriage of justice. “In order to appeal [the] disposition of a class action, a member or putative member of the class must either be a named party to the action or must seek to intervene for the purposes of appeal. The mere status of being an unnamed class member is not sufficient to permit an appeal from an adverse decision” (*Moore’s Fed’l Rules Pamphlet*, 2002, sec. 23.20, p. 260, citing *inter alia Felzen v. Andreas*, 134 F.3d 873, 874-75 (7<sup>th</sup> Cir. 1998), *aff’d sub nom. California Pub. Employees’ Retirement Sys. v. Felzen*, 525 U.S. 315 (1999)(overruling circuit precedent and holding that non-parties may not appeal from a decision of any kind in a class action). In *Felzen*, Judge Easterbrook wrote for the 7<sup>th</sup> Circuit “that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled ... there may be exceptions to this general rule, primarily ‘when the nonparty has an interest that is affected by the trial court’s judgment,’ [but] the better practice is for such a nonparty to seek intervention for purposes of

appeal; denials of such motions are, of course, appealable”), and *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 458 (7<sup>th</sup> Cir. 1997)(overruling circuit precedent and holding that unnamed plaintiff class member may not appeal from summary judgment for defendant). More recently, the U.S. Supreme Court has ordained a more liberalized practice with respect to class action settlements, holding that an unnamed non-party class member who timely objects to a class action settlement may appeal without first intervening in the class action. The Court reasoned that as a class member the objector would be bound by the judgment and should thus be deemed a party even if he didn’t intervene (*Devlin v. Scardelletti*, 536 U.S. 1, 12-15 (2002)). But here, there has been no settlement but rather a ruling on the merits, which afforded the movants no prior opportunity to make a timely objection to this Court’s ruling. Thus to assure their right to be heard on the merits, the movants must intervene and become parties in this case so that they will be able to register their objection to this Court’s ruling by filing their Rule 59 motion. Failing either intervention or a grant of their Rule 59 motion, the movants intend to press an appeal.

2. Intervention is the proper route that an unnamed nonparty class member must pursue when he cannot otherwise protect his legitimate interests. In *Business & Commercial Litigation in the Federal Courts* (2d ed. 2005 - ABA Section on Litigation), vol. 2, Haig, ed., sec. 16:66, p. 409, the authors state: “An absent class member may have the right to participate directly in the [class action] litigation. Intervention in a class action law suit has been treated as being governed by the general rule on intervention. As provided in Fed. R. Civ. P. 24, the court may be obligated to grant intervention as a matter of right, or intervention may be granted as a permissive matter.” In *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456,

457-58 (7<sup>th</sup> Cir. 1997), Judge Posner wrote that, “If the certified class representation does not adequately represent the interests of some of the class members, those class members ... can intervene of right and become named [defendants] themselves....” Moreover, as Georgetown Law Professor Robert Klonoff states in *Class Actions and Other Multi-Party Litigation* (West, 1999), sec. 14.16, “Inadequacy of Existing Representation,” p. 324, “This [inadequacy] element is generally not difficult to satisfy. The application [for intervention] meets its burden by showing that the existing representation may be inadequate. If the proposed intervenor would offer arguments and theories that the existing parties would not, then this standard is typically satisfied.” In this case, as is detailed in movants’ Rule 59 motion, the prospective intervenors offer arguments and theories that were not clearly articulated – indeed, they were either unmentioned or distorted – when this Court upheld the permanent injunction against the Parental Notice Act. With respect, the upshot is that the Court was led into clear error.

3. Movants’ counsel unsuccessfully sought assurances from both the office of the class representative for defendant State’s Attorneys and from the Attorney General’s office that they would seek reconsideration from this Court’s ruling on the grounds set forth in movants’ Rule 59 motion or on any other ground. The Cook County State’s Attorney’s office has advised that it defers on matters of statewide concern to the office of the Attorney General. Counsel’s telephoned and emailed requests to the office of the Attorney General have gone unanswered. Thus the movants’ existing representation may be inadequate and their Rule 59 motion should be heard and decided on its merits.

4. Movants’ effort to intervene is timely, given the exigent circumstances at bar. Movants learned of this Court’s decision several days after it was entered. Movants’ counsel –

who had advocated issuance of new procedural rule for confidential and expedited bypass hearings before the Illinois Supreme Court, on behalf of a consortium of Illinois *amici curiae*, shortly before promulgation of SCR 303A – also learned of the decision only several days after it was handed down. Thereafter, efforts were made to contact, meet and consult with the Attorney General’s office which proved unavailing.

5. Finally, movants ask that the Court expedite its consideration and ruling on this motion to intervene, as that motion itself – as apart from the Rule 59 motion tendered for filing herewith – will not toll the time for filing an appeal herein. At the same time, movants ask that the Court extend the time for filing an appeal to avoid the sort of “procedural morass” that Judge Ripple criticized in *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7<sup>th</sup> Cir. 1990)(“if the motion to intervene has not been acted upon within the time to appeal, the putative class member should nonetheless file a timely notice of appeal” because “[a]lthough the filing of the notice would deprive the district court of power to act on the motion to intervene, ‘the cause may be remanded for that purpose,’” citing 9 *Moore’s Federal Practice*, Par.203.06 at 3-24 n.10 (2d ed. 1990)). Accordingly, movants should be permitted to present and argue their Rule 59 motion and, if necessary, to take an appeal.

WHEREFORE, movants, Stewart Umholtz and Edward Deters, State’s Attorneys for their respective Illinois counties, pray that the Court grant them the right to intervene as parties herein; that it entertain and rule on the merits of their Rule 59 motion; that it expedite consideration and ruling on the motion to intervene and, if need be, extend the time for filing an appeal herein; and that it grant any and all other relief as may be warranted upon the premises in

accordance with law.

s/ Thomas Brejcha

s/ Peter Breen

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