IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS #46279
COUNTY DEPARTMENT — CHANCERY DIVISION

THE HOPE CLINIC FOR WOMEN LTD.; ALLISON COWETT, M.D., M.P.H., Plaintiffs, v. BRENT ADAMS, Acting Secretary of the Illinois Department of Financial and Professional Regulation, in his official capacity; DANIEL BLUTHARDT, Director of the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation, in his official capacity; THE ILLINOIS STATE MEDICAL DISCIPLINARY BOARD, Defendants	Case No. 09 C H 38661 In Chancery Preliminary Injunction/Temporary Restraining Order

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, The Hope Clinic for Women Ltd. ("Hope Clinic") and Dr. Allison Cowett, on behalf of themselves and their patients, request that this Court issue a Temporary Restraining Order and by a Preliminary Injunction, enjoining Defendants, the Secretary of the Illinois Department of Financial and Professional Regulation (the "Department"), the Director of its Division of Professional Regulation, and the Illinois State Medical Disciplinary Board, from enforcing the Parental Notice of Abortion Act of 1995 ("the Act"), 750 ILCS 70/1 *et seq.* (2009), attached as Exhibit A. Absent action by this Court, enforcement of a parental notice requirement will begin on November 3, 2009.[1] As the evidentiary record demonstrates, the Act violates the rights of minor women in Illinois under the Privacy, Due Process, Equal Protection, and Gender

[1] While the Act is currently in effect, the Department has granted a ninety day grace period, until November 3, 2009, for physicians to institute procedures and protocols for compliance. Ill. Dept. of Fin. & Prof'l. Reg., *Medical Professionals Offered More Time for Compliance with Parental Notification Laws*, available at http://www.idfpr.com/newsrls/08052009MedProfOfferedMoreTimeCompliance ParentalNotificationLaw.asp (last visited Oct. 12, 2009).

Equality clauses of the Illinois Constitution and subjects them to serious and irreparable harm without justification.

In particular, the Act substantially impairs the rights of pregnant minors to make the decision whether to have an abortion free from unjustifiable government interference and discriminatory regulation. Absent action by this Court, minors will suffer substantial and irreparable harm, including physical and emotional abuse, homelessness, forced childbirth, and medically risky delay in resolving their pregnancies. The judicial bypass process provided by the Act cannot ameliorate these harms, and the State cannot show that the Act furthers a compelling state interest. Furthermore, absent action by this Court, Defendants will begin to enforce the Act, though many of the state courts charged with implementing the judicial waiver process are ill-prepared to effect their charge and will therefore compound the serious risks of breach of confidentiality and medically threatening delays that plague young women subject to the Act's restrictions.

Because of the unjustified harms imposed by laws like the Act, leading professional medical organizations – including the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the Society for Adolescent Medicine, and the American Public Health Association – have emphatically and publicly opposed them. Here, the only way to protect Plaintiffs and their patients from irreparable harm is for this Court to issue an injunction that preserves the long standing status quo.

PRELIMINARY STATEMENT

The Act impermissibly restricts minors' access to abortion by requiring that they provide notice to an adult family member – defined as a parent, grandparent, step-parent living in the

home or legal guardian[2] – of an intended abortion or go to court for a waiver of the notification requirement. The Act thus fundamentally alters the way safe and appropriate medical care has been provided in Illinois for more than a third of a century.

Currently, a pregnant minor in Illinois can obtain *any* hospital, medical, or surgical care without notifying a parent. She can decide to continue her pregnancy and become a parent or place her child for adoption, or she can terminate her pregnancy, all without involving a parent. She can make all medical decisions – even those that can have serious consequences for her or her fetus – without involving a parent. And, if she has a child, she can make decisions about her child's care – including decisions as to critical and lifesaving procedures – without her parent's involvement.

Nonetheless, most minors involve their parents in their decisions relating to their pregnancies. For those who cannot, however – because, for example, a parent is abusive, critically ill, or would likely obstruct their choice – they can obtain the care they need without such involvement.

Enforcement of the Act will drastically change the status quo and will subject young women to immediate and irreparable harm. The Act will force all minors who choose abortion – but not those who choose to continue their pregnancies – to notify a parent or go to court. As a result, some young women will be prevented from obtaining abortions and forced to carry their pregnancies to term; others will be beaten or thrown out of their homes.

The judicial bypass process, intended as an alternative, will itself compromise confidentiality, exposing young women to the very harms of notification they sought to avoid. It will also delay the abortion, increasing the health risks associated with the procedure and making

[2] For convenience, Plaintiffs will refer to these adult family members as "parents" except where necessary to differentiate among them.

it more difficult, if not impossible, to obtain. Some young women, desperate to avoid notifying a parent or going to court, will resort to drastic measures such as self-induced abortions.

The Illinois Constitution does not tolerate the Act's discriminatory treatment and unjustified infringement on the fundamental rights of young women seeking abortions. The Illinois Supreme Court has declared that Illinois' explicit constitutional privacy protections – broader than and independent of the protections afforded by the federal Constitution – secure as fundamental the right to decide whether to terminate a pregnancy. The Act violates this express right to privacy as well as Illinois' constitutional protections for substantive due process, equal protection, and gender equality.

In enjoining the Act in the face of state constitutional violations, this Court will not stand alone. Indeed, no state court has upheld a parental involvement law where the state constitution – like Illinois' – provides an explicit privacy or inalienable rights clause.[3]

In support of their motion for injunctive relief, Plaintiffs offer the testimony by Affidavit of healthcare providers and leading experts from Illinois and throughout the country on the harms the Act will impose on young women:

- **Allison Cowett, M.D., M.P.H. ("Cowett"),** is Director of the Center for Reproductive Health at the University of Illinois at Chicago ("UIC") and Assistant Director of the UIC Family Planning Fellowship. (Affidavit at Exhibit B.)

- **Nancy Adler, Ph.D. ("Adler"),** is Professor of Medical Psychology and Vice-Chair of the Department of Psychiatry at the University of California at San Francisco. (Affidavit at Exhibit C.)

- **Anne Baker, M.A. ("Baker"),** is Director of Counseling at Hope Clinic for Women, in Granite City, Illinois, where she has counseled young women for the past thirty-three years. (Affidavit at Exhibit D.)

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[3] *See Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000); *No. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Wicklund v. Montana*, No. ADV 97-671, 1998 Mont. Dist. LEXIS 227 (Mont. Dist. Ct. Feb. 13, 1998).

- **Ruth Kleiman ("Kleiman")** is the Volunteer Coordinator of the Illinois Judicial Bypass Coordination Project in Chicago, Illinois. (Affidavit at Exhibit E.)

- **Judge Gerald Martin ("Martin")** is a District Court Judge for the Sixth Judicial District of Minnesota, who has presided over judicial bypass hearings in Duluth, Minnesota since 1978. (Affidavit at Exhibit F.)

- **Jamie Sabino, J.D. ("Sabino"),** has been co-chair, for more than twenty-five years, of the Massachusetts Lawyer Referral Panel, which is responsible for training and advising lawyers representing minors seeking bypasses in Massachusetts. (Affidavit at Exhibit G.)

- **Robin Stein, L.C.S.W. ("Stein"),** is a Licensed Clinical Social Worker in Illinois who has worked with abused, neglected and abandoned adolescent girls in Chicago and surrounding communities for more than two decades. (Affidavit at Exhibit H.)

- **Laurie Zabin, Ph.D. ("Zabin"),** is a Professor at Johns Hopkins University, in Baltimore, Maryland, where she holds joint appointments in the Department of Population, Family and Reproductive Health at the Bloomberg School of Public Health and the Department of Gynecology and Obstetrics at the School of Medicine. (Affidavit at Exhibit I.)

BACKGROUND

The Act

For decades, Illinois has endowed pregnant minors with "the same legal capacity . . . as has a person of legal age" to consent to medical and surgical procedures without notifying a parent. 410 ILCS 210/1 (2004). The Act upends this statutory framework by singling out pregnant minors who choose abortion and requiring them – and only them – to notify a parent before they may obtain medical care.

The Act requires a "physician or his or her agent" to give "at least 48 hours actual notice to an adult family member of [a] pregnant minor . . . of his or her intention to perform the abortion." 750 ILCS 70/15. According to the Act, an "adult family member" is "a person over 21 years of age who is the parent, grandparent, step-parent living in the household, or legal guardian." *Id.* § 10. Notice is not required where the physician or his or her agent "has received a

written statement by a referring physician certifying that the referring physician or his or her agent has given at least 48 hours notice to an adult family member," *id.* § 15, or where "actual notice is not possible after a reasonable effort [and] the physician or his or her agent . . . give[s] 48 hours constructive notice," *id.*, defined as "notice by certified mail to the last known address of the person entitled to notice with delivery deemed to have occurred 48 hours after the certified notice is mailed," *id.* § 10.

Notice is also not required where the minor is "accompanied by a person entitled to notice," *id.* § 20(1); "notice is waived in writing by a person who is entitled to notice," *id.* § 20(2); "the attending physician certifies in the patient's medical record that a medical emergency exists and there is insufficient time to provide the required notice," *id.* § 20(3); or "the minor declares in writing that she is a victim of sexual abuse, neglect, or physical abuse by an adult family member as defined in [the] Act," *id.* § 20(4).

Finally, notice is not required if the minor goes to court and obtains a waiver. *Id.* § 20(5). To do so, the minor must prove by a preponderance of evidence either:

> (1) that the minor . . . is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, or
>
> (2) that notification under Section 15 of this Act would not be in the best interests of the minor . . . .

Id. § 25(d).

Under the Act, the Circuit Court must rule and "issue written findings of fact and conclusions of law within 48 hours of the time that the petition is filed," excluding weekends and holidays, *id.* § 25(c); Ill. Sup. Ct. R. 303A; the petition is deemed granted if no ruling issues within 48 hours. 750 ILCS 70/25(c); Ill. Sup. Ct. R. 303A(a). The Act provides for appeal from a

denial of the petition.[4] It also provides for court-appointed counsel and requires that proceedings be confidential, with papers impounded and sealed and minors permitted to proceed under pseudonym. 750 ILCS70/25(b), (c).

A physician who fails to give notice as required by the Act is subject to professional discipline and civil penalties under the Medical Practice Act of 1987. *Id.* § 40(a); 225 ILCS 60/22(A)(40), 22(C) (2009).

Litigation History

The Act was enacted in 1995 but was enjoined immediately because the Illinois Supreme Court had not issued rules necessary to comply with federal constitutional standards. *Zbaraz v. Ryan*, No. 84-CV-00771, 1996 WL 33293423 (N.D. Ill. Feb. 8, 1996). On September 20, 2006, the Illinois Supreme Court adopted Rule 303A, entitled, "Expedited and Confidential Proceedings Under the Parental Notification of Abortion Act." Ill. Sup. Ct. Rule 303A. The United States District Court for the Northern District of Illinois nevertheless declined to dissolve the permanent injunction, first because the Attorney General admitted that the Illinois courts were not prepared to implement the new procedures, and later, because the court concluded that a facial defect rendered the Act unconstitutional. *Zbaraz v. Madigan*, No. 84-CV-00771, 2008 WL 589028, at *3 (N.D. Ill. Feb. 28, 2008). The United States Court of Appeals for the Seventh Circuit subsequently reversed the District Court's ruling and dissolved the permanent injunction. *Zbaraz v. Madigan*, 572 F.3d 370, 376 (7th Cir. 2009). Although the Seventh Circuit's mandate

[4] The petition for appeal, along with the record and any memorandum of law, are to be filed within two days of the denial, weekends and holidays excluded. The Appellate Court must issue a written ruling within three days, excluding holidays and weekends. Ill. Sup. Ct. Rule 303A. Should the Appellate Court affirm the denial of the petition, the minor may petition the Supreme Court for leave to appeal. That petition must be filed within two days of the Appellate Court decision; should the Supreme Court grant leave, the minor must file the record within two days. *Id.*

has issued, the Department granted physicians a ninety day period to develop policies and procedures to ensure compliance with the Act and protect patients' rights. http://www.idfpr.com /newsrls /08052009MedProfOfferedMoreTimeComplianceParentalNotificationLaw.asp (last visited Oct. 12, 2009). Absent relief from this Court, enforcement of the Act will begin on November 3, 2009.

Some of the Circuit Courts have taken steps to implement the bypass process in an expeditious and confidential fashion as demanded by the United States Constitution. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (requiring an expeditious and confidential alternative to state mandated parental involvement). However, as shown below, *see infra* at 12-14, even the best run bypass process is inadequate to protect young women from the significant and irreversible harms of statutes like the Act. Moreover, as discussed below, *see infra* at 34-37, many Illinois courts are not yet prepared to implement the Act's bypass requirements, which will compound the harm for young women seeking waiver under the constitutionally and statutorily mandated process.

ARGUMENT

I. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT THE IRREPARABLE HARM OCCASIONED BY THE ACT'S INFRINGEMENT OF PLAINTIFFS' CONSTITUTIONAL RIGHTS.

A party seeking a temporary restraining order or a preliminary injunction must "demonstrate (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006); *County of DuPage v. Gavrilos*, 359 Ill. App. 3d 629, 649 (2d Dist. 2005). "Because a preliminary injunction is designed to preserve the status quo pending a decision on the merits, the plaintiff need not carry the same burden of proof that is required to support the ultimate issue." *Stenstrom Petroleum Servs. Group v. Mesch*, 375 Ill. App. 3d 1077, 1089 (2d Dist. 2007) (internal citation

and quotation marks omitted). Rather, the plaintiff need only "raise a fair question" as to the existence of the right and the likelihood of success. *Id.*

Plaintiffs readily satisfy these requirements. Absent injunctive relief, the Act will inflict irreparable harm on the young women of Illinois, and will do so in violation of clearly ascertained rights under the Privacy, Due Process, Equal Protection, and Gender Equality clauses of the Illinois Constitution. No remedy at law can compensate them for the physical and emotional harms they will suffer, including, in some instances, being forced to continue an unwanted pregnancy. Plaintiffs raise far more than a "fair question" as to the existence of their rights and their likelihood of success.

A. Absent Injunctive Relief, Illinois Minors Will Suffer Irreparable Harm.

1. Forced Parental Notification Will Subject Minors to Irreparable Harm.

The Act will force many young women in Illinois to involve a parent in their abortion decision despite their judgment that doing so would be unwise and in many cases unsafe. Even absent mandated parental involvement, the majority of minors involve a parent in their decision to undergo an abortion. Baker ¶ 16; Cowett ¶ 26; *see also* Adler ¶¶ 39-40 (summarizing research); Zabin ¶ 17.[5] Minors who choose not to involve a parent have good reasons for their choice. Martin ¶ 11; Sabino ¶ 14; Cowett ¶¶ 27, 30; Baker ¶ 18.

- One seventeen year old . . . from Missouri [a state with a parental involvement law, was] anxious to avoid suffering as her sister had. When the patient was just thirteen, her sixteen year old sister told their parents that she was pregnant and planning to obtain an abortion. The father proceeded to beat the sister and throw her and all of her clothes out of the house. He then ordered the patient (again, then thirteen) and her ten year old brother to box their sister's belongings and take them to a dumpster. Everyone in the family was then forbidden from having any contact with the older sister. Four years later, the patient and her family still knew nothing of the sister's whereabouts. Baker ¶ 19.

[5] Both experience and studies show that, the younger the minor, the more likely she is to involve a parent. Many of those teens who do not involve a parent consult another adult, be that an older sister, aunt, grandparent, or family friend. Cowett ¶ 26; Baker ¶ 16; Zabin ¶¶ 17-18.

- Another minor . . . spoke of her sister who became pregnant . . . . The sister told her parents, and they forced her to give birth and put the child up for adoption. The sister subsequently tried to commit suicide and . . . was institutionalized for depression. This minor did not want to involve her parents for fear that she, like her sister, would be forced to continue the pregnancy. *Id.* ¶ 20.

- Yet another minor patient, the youngest of four girls, told [of] how her sisters had all become pregnant as minors, and how her parents threw each sister out of the house. The patient was an excellent student, had a college scholarship, and, in general, felt that she had her life ahead of her. Understandably, given what she had seen, she feared that, if her parents found out about her pregnancy, they would throw her out of the house too. *Id.* ¶ 22.

- One minor patient chose not to tell her parents about her pregnancy and abortion because her brother was in prison, her maternal grandmother had just died, and her mother had just been diagnosed with breast cancer and put on antidepressants. This minor, who had no relationship with her father, came to [the] clinic with her eighteen year old sister. Both she and her sister believed that news of the pregnancy would devastate their mother and possibly compromise her health. *Id.* ¶ 6.

As the above examples demonstrate, some young women do not involve a parent because they reasonably fear disclosure of their sexual activity and pregnancy will lead to abuse. Baker ¶¶ 19, 23; Stein ¶¶ 7, 10; Sabino ¶ 15. Others have been threatened with a variety of severe repercussions – such as being beaten, being thrown out of the house, or having all financial support cut off – if they were ever to become pregnant. Sabino ¶ 16. And many know from experience that the threats are not idle. *Id.* ¶¶ 16-17; Baker ¶¶ 19-23; Stein ¶ 10.

Still other minors fear their parents would prevent them from obtaining an abortion if they learned of the pregnancy. Baker ¶ 20; Sabino ¶ 18. For example, one young woman in Massachusetts, a state with a mandatory parental involvement law, refused to involve her parents because they had forced her to carry a previous pregnancy to term against her will, and she was determined not to let that happen again. Sabino ¶ 18; *see also* Cowett ¶ 29 (recounting story of minor, too late for an abortion, who concealed the pregnancy from her parents, for fear they would force her to keep her baby instead of placing the child for adoption).

Some teens refuse to burden parents who are already in a state of distress. Sabino ¶ 14. One affiant from Massachusetts recounts as examples a young woman whose brother had committed suicide two weeks earlier; one whose mother had recently been diagnosed with a brain tumor; another whose father had just lost his job; and another whose father had been brutally murdered a few weeks before. *Id.*

Minors' concerns about the harmful consequences of involving parents in their abortion decision are, unfortunately, often well-founded. The incidents recounted above are confirmed by research. The leading study on the issue found that, of minors whose parents learned of their pregnancy without the minor voluntarily telling them, a majority suffered adverse consequences, including being beaten or kicked out of the home. *See* Cowett ¶ 30; *see also* Baker ¶ 23.

Moreover, whether well founded or not, the fear of adverse consequences will drive some minors to take extreme and dangerous measures to avoid parental involvement in their pregnancy and abortion decision. Baker ¶¶ 28, 32; Sabino ¶ 12. Paralyzed by fear of notifying a parent, some minors will delay their abortions; others will attempt to self-induce an abortion and others may seek an illegal abortion. *See, e.g.*, Baker ¶¶ 28, 32. Health care providers in Illinois have seen teens from states with parental involvement laws who have resorted to such measures – one who picked a fight with her brother so he would punch her in the stomach, all in hope of triggering a miscarriage, and another who threw herself down the stairs in hope of disrupting the pregnancy. And, in a well publicized case from Indiana, a teen, desperate to end her pregnancy without her parents' knowledge, had an illegal abortion and died from complications. *Id.* ¶¶ 31, 40.

The Act's exception for minors who declare in writing that they have suffered abuse or neglect, 750 ILCS 20(4), will not prevent the above harms. First, the abuse and neglect exception

only applies to those minors who already have suffered abuse or neglect. It provides no relief for those who have not previously been abused but face a real threat of future harm. *See* Stein ¶¶ 7, 9, 11 (examples of teens abused once pregnancy is disclosed); Baker ¶¶ 19, 22 (examples of teens whose older siblings were abused after disclosing pregnancy). Second, the exception provides no relief to those who are subject to abuse by someone other than a parent, such as a mother's boyfriend, nor does it provide relief to those who are subject to emotional abuse. *See* Stein ¶¶ 12-13; Baker ¶ 31. Third, as one Illinois social worker attests based on decades of working with abused teens, teens will be reluctant to admit – let alone commit to writing – the abuse. They are ashamed; they fear losing the only family they have known, imperfect though it is; and they fear for other family members. Stein ¶¶ 15, 18-20.

2. The Judicial Bypass Is An Insufficient Alternative and Will Cause Further Harm.

The judicial bypass fails to provide an adequate safeguard for those minors who cannot notify a parent and will itself cause further harm. As an initial matter, some minors who desire an abortion will be too frightened by the prospect of going to court to think of it as a viable option. Baker ¶ 32; Sabino ¶¶ 12, 38. Minors who are abused – and who therefore often have the most to fear from forced notification – will be particularly reluctant to go to court to seek a bypass. Stein ¶ 6. Because of the secrecy that shrouds abuse, they will avoid going to court rather than risk revealing the abuse. As a result, some will feel they have no choice but to tell a parent about their pregnancy – which can have tragic consequences. One teen in Massachusetts, for example, who became pregnant after being raped by her mother's boyfriend, felt she could not turn to her mother. Sabino ¶ 38. However, upon learning that her only alternative was to get a court order, she decided that she simply could not face a judge and instead told her mother. *Id.* The teen's mother responded by throwing her out of the house. *Id.*

Even for those who attempt to avail themselves of the bypass process, harms will abound as they face violations of their confidentiality and medically risky delay of the abortion procedure. The bypass process inevitably delays abortions because of the difficulties minors have figuring out how the process works, arranging for transportation, and scheduling a hearing when they can get away without arousing suspicion. *Id.* ¶¶ 27-30, 32. For teens seeking a waiver of the parental involvement requirement, even a phone call can be difficult to make while preserving confidentiality. *Id.* ¶¶ 26, 34. Arranging transportation and time away to get to court without arousing a parent's suspicion can be a substantial, if not insurmountable, obstacle. Teens have to wait until their parent will be away or occupied for long enough for them to travel – and when the parents' plans change, they often have to miss the hearing and start all over. *Id.* ¶ 28. Even in states with well established systems to help young women through the process, minors often must put off their abortion for one to two weeks, and sometimes a month, in order to obtain a bypass. *Id.* ¶¶ 10, 23, 33. As explained below, this delay increases health risks and can make an abortion far more difficult if not impossible to obtain. *See infra* at 14-15.

The judicial bypass process also can compromise minors' confidentiality in myriad ways. Courts are generally open only on weekdays, when minors are required to be in school and when their absences are most likely to be noticed and reported. Sabino ¶ 27; 105 ILCS 5/26-3b; *see also* Chicago Public Schools Policy Manual, Absenteeism and Truancy § 703.1(II)(B)(2) (adopted Feb. 22, 2006) (requiring calls to parents about unexcused absences); Martin ¶ 8. In Massachusetts, for example, upon learning of one minor's intended absence from school to attend a bypass hearing, a school principal removed the student from class, drove her home, and informed her mother of both her pregnancy and her desire for an abortion. Sabino ¶ 34. Her mother forced her to carry her pregnancy to term against her wishes. *Id.*

Even those minors who get to court undetected face threats to their confidentiality. Those minors from small towns who choose to go to their local court, for example, risk being spotted at the courthouse by someone they know. Because they cannot explain their presence in the courthouse, once they are seen, their secret is exposed. Sabino ¶ 35; Martin ¶ 9. In examples from Minnesota and Massachusetts, one young woman was sitting in a court corridor when her sister's civics class came through; another saw a neighbor in the courthouse; a third encountered her godmother, who was employed as a court officer; another had to hide in the bathroom to avoid being seen by a family member who worked in the courthouse; and, in another case, a teen's parents were informed of her presence in the courthouse by a third party who identified her from a school yearbook. Sabino ¶ 35; Martin ¶ 9.

Finally, the process takes a tremendous emotional toll. Sabino ¶¶ 22, 36; Martin ¶ 13. Young women who cannot notify a parent will be compelled to appear in court and discuss the most personal of matters in front of complete strangers. Sabino ¶ 36; Martin ¶ 13. And they have to do so knowing that the very course of their life hinges on their ability to persuade the judge to issue a bypass. Martin ¶¶ 5, 13; Baker ¶ 36.

3. The Act Will Cause Irreparable Harm by Forcing Minors to Delay Their Abortions and by Compelling Some Young Women to Carry Their Pregnancies to Term.

In addition to the delays inherent in the Act's notification requirements and bypass process discussed above, it will take minors time to gather the courage to notify a parent or to work their way through the bypass system. Sabino ¶¶ 23, 25; Martin ¶ 7. All of these delays will result in irreparable harm.

Although abortion is one of the safest surgical procedures performed, and remains far safer than continuing a pregnancy through childbirth, delay in obtaining an abortion increases the

medical risk. Cowett ¶ 34; Baker ¶ 33. Moreover, the added delay imposed by the Act will make the abortion more difficult, if not impossible, for some minors to obtain. As a woman's pregnancy progresses, the cost of an abortion substantially increases and availability substantially decreases. Cowett ¶ 37, Baker ¶¶ 13-14. Delay thus adds to the challenges of raising money and managing travel, both barriers for minors. For some, the delay will put abortion completely out of their reach. Baker ¶ 37; Sabino ¶ 33.

For these young women – as well as those who are too afraid to notify a parent or use the bypass and those whose parents, once notified, obstruct their choice – the Act will force them to bear children against their wishes. Baker ¶ 20; Stein ¶ 8. Such forced childbearing has severe consequences. Having a child changes these minors' lives in every way – their sense of self, education, job, and family. It increases the risks to the minor's life and health, and can come with adverse social and economic consequences for their children. Zabin ¶¶ 27-31, 33-41; Cowett ¶¶ 11-19.

In sum, the physical and emotional harm to these young women and the barrier to the exercise of their reproductive choice that will flow from enforcement of the Act is irreparable. The impairment of their constitutional rights alone, even for minimal periods, constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982); *C.J. v. Dep't of Human Servs.*, 331 Ill. App. 3d 871, 891 (1st Dist. 2002); *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1227 (N.D. Ill. 1985) (irreparable harm from government actions that delay abortion, thus increasing health risk or preventing the abortion altogether), *aff'd in part, vacated as moot in part*, 841 F.2d 1358 (7th Cir. 1988), *appeal dismissed*, 503 U.S. 916 (1992).

B. The Act Violates Plaintiffs' Rights Under the Illinois Constitution's Guarantees of Privacy, Due Process, Equal Protection, and Gender Equality.

The Act cannot stand in the face of the significant infringements it imposes on Illinois' constitutional guarantees of privacy, substantive due process, equal protection and gender equality. Each of these guarantees provides a separate basis for striking the Act, and as each implicates the fundamental rights of young women to decide to terminate their pregnancies, the Act can only survive if the State can justify its infringement of this fundamental right under strict scrutiny. As discussed in Section C below, *infra* at 28-34, the State cannot show that the Act's harms are necessary to advance a compelling state interest; indeed, it cannot show that this Act even meets a lesser reasonableness standard. As such, the Act must fall.

1. The Act Violates the Illinois Constitution's Express Right to Privacy.

The Act is a direct and substantial barrier to the exercise of the fundamental right of privacy afforded under the Illinois Constitution, which safeguards a woman's right to decide whether to terminate her pregnancy. This right is interpreted without reference to federal law – given the unique text of the Privacy Clause, the explicit statements of the Illinois constitutional convention delegates, and decades of Illinois common law, statutes, and tradition – and has been held to protect the rights of individuals to make their own medical decisions, to preserve their bodily autonomy, and to secure their personal information.

a. The Privacy Clause Protects As Fundamental a Woman's Right to Decide Whether to Terminate Her Pregnancy.

Unlike the United States Constitution, the Illinois Constitution grants an express right of privacy: "The people shall have the right to be secure in their persons . . . against unreasonable . . . invasions of privacy . . . ." Ill. Const. 1970, art. I, § 6. And, the Remedies Clause provides:

"Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his . . . privacy . . . ." Ill. Const. 1970, art. I, § 12.

This State's highest court has recognized that the Privacy Clause embraces as fundamental the right to make independent medical decisions, including "a woman's decision of whether to terminate her pregnancy." *Family Life League v. Dep't of Public Aid*, 112 Ill. 2d 449, 454 (1986); *accord In re Baby Boy Doe*, 260 Ill. App. 3d 392, 399 (1st Dist. 1994) ("[T]he state right of privacy protects substantive fundamental rights, such as the right to reproductive autonomy."). Minors as well as adults are afforded this privacy right. *See In re Lakisha M.*, 227 Ill. 2d 259, 279-80 (2008); *In re A Minor*, 149 Ill. 2d 247, 255-56 (1992).

The right to privacy safeguards the most intimate and difficult decisions concerning pregnancy. For example, in *In re Baby Boy Doe*, the court of appeals upheld the right of a pregnant woman to refuse medical treatment – even in the face of testimony that her fetus, then thirty-six weeks, would likely die absent intervention. The court emphasized that the woman's "right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy." 260 Ill. App. 3d at 400.

In addition, as the Supreme Court has held, the Privacy Clause provides protection from state compelled disclosure of sensitive personal information, including information about reproductive health. This is true whether the information is in written records about private medical matters, or oral statements about sensitive personal information, and even where disclosure is compelled only to a few people. *See, e.g., Kunkel v. Walton*, 179 Ill. 2d 519, 537-39 (1998) (striking statute requiring personal injury plaintiffs to release all medical records to the opposing party and their agents, and requiring plaintiffs to consent to *ex parte* communications between their doctors and opposing counsel). In so doing, the Court has recognized that:

> [t]he confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy. Physicians are privy to the most intimate details of their patients' lives, touching on diverse subjects like mental health, sexual health and *reproductive choice*. Moreover, some medical conditions are poorly understood by the public, and their disclosure may cause those afflicted to be unfairly stigmatized.

Id. at 537 (emphasis added).

b. The Illinois Privacy Clause is Broader Than the Privacy Protections Under the Federal Constitution.

By all measures, the Illinois right of privacy – including the right to decide whether to continue a pregnancy – is independent of federal precedent. The language of the Illinois Constitution, the debates and committee history of the constitutional convention, and state tradition and law all demonstrate, under Illinois' limited lockstep doctrine, that the privacy protections implicated in this case are greater than those assured under federal law. *See People v. Caballes*, 221 Ill. 2d 282, 289-304 (2006) (detailing Illinois' tradition of a "limited lock-step approach" of departing from federal law where a unique constitutional provision, the intent of the drafters, delegates and voters or a unique state history or experience justifies departure).

First, the privacy protections of the Illinois Constitution have no parallel in the federal Constitution. Indeed, just last year, the Illinois Supreme Court reiterated that "'the Illinois Constitution goes beyond Federal constitutional guarantees by expressly recognizing a zone of personal privacy.'" *Lakisha M.*, 227 Ill. 2d at 279 (quoting *May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992)); *see also King v. Ryan*, 153 Ill. 2d 449, 464 (1992) ("Because the Illinois Constitution recognizes a zone of privacy, the protections afforded by the Illinois Constitution go beyond the guarantees of the Federal Constitution.").

Second, the framers were clear that their intention in adding a right to privacy to the 1970 Constitution was to protect the people of Illinois against invasions of privacy beyond the

protection afforded under the United States Constitution. The Official Constitutional Commentary explains, for example, that the new privacy protections were "stated broadly" and were to "expand upon" the rights guaranteed under the existing Illinois and United States Constitutions. ILCS Ann., Ill. Const. 1970, art. I, § 6, Constitutional Commentary, at 522 (Smith-Hurd 1993) (hereinafter "Constitutional Commentary"); *see also* 3 Sixth Illinois Constitution Convention, Record of Proceedings (hereinafter "Proceedings"), at 1525 (statement of Del. Dvorak that the Privacy Clause would be "very progressive and very thorough and very proper"). Concerned that "infringements on individual privacy will increase," the Committee concluded "it was essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review." 6 Proceedings, at 32. The concerns ran from the known – a peephole into a woman's bathroom created by an employer – to the advances yet to come – devices that could penetrate walls, "revealing bedtime intimacies and private conversations." 3 Proceedings, at 1535. As Delegate Gertz, the Chairman of the Bill of Rights Committee, stated: "All kinds of things might invade our dignity as human beings . . . . I want to stem the tide." *Id.* at 1535.[6]

Finally, state history, law and tradition necessitate vigorous application of *state* privacy safeguards. Illinois law offers a rich fabric of privacy protections, including judge-made common

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[6] Mr. Gertz later opined, in response to a question, that the Privacy Clause "has nothing to do with the question of abortion." *Id.* at 1537. However, nothing to this effect appears in the text of the Privacy Clause, in the Committee Report regarding that clause, or in the floor statements provided by any of the other more than one hundred convention delegates. The clear sentiment of the delegate was that the right of autonomy, including abortion, was evolving in the country, and the new Constitution – intended to provide protections in a manner that evolved with societal change – was not to be a barrier to government loosening of restrictions on a woman's right to choose to have an abortion. *See id.* at 1496-1523 (Bill of Rights Committee rejecting by vote a proposal to add "the unborn" to persons protected by the Due Process Clause in part because inclusion of "the unborn" would improperly prevent enforcement of laws permitting abortion, and would infringe upon "the rights of all persons to act in accordance with their own religious and moral convictions.") The Illinois Supreme Court reflected this recognition in its ruling in *Family Life League*, 112 Ill. 2d at 454.

law, statutory protections, and other deep-seated state traditions, especially as they relate to women and pregnancy. Illinois courts have repeatedly held that the common law right of privacy protects pregnant women's rights of "bodily autonomy" and independent medical decision making. *See, e.g.*, *Stallman v. Youngquist*, 125 Ill. 2d 267, 278 (1988) (declining to recognize cause of action by fetus against pregnant woman for unintentional prenatal injuries, reasoning that such actions would invade pregnant woman's "right to privacy and bodily autonomy" by subjecting to state scrutiny "all the decisions a woman must make in attempting to carry a pregnancy to term").

Following the Supreme Court's lead, the Illinois Appellate Court has held that a pregnant woman has the right to make her own medical decisions, even where her choice might be fatal to the fetus. *In re Baby Boy Doe*, 260 Ill. App. 3d at 392 ; *see also In re Fetus Brown*, 294 Ill. App. 3d 159, 171 (1st Dist. 1997). Explicit in the *Doe* holding was the recognition of the unique bodily integrity issues – biological changes "of the most profound type," including possible risk to the woman's life – attendant with pregnancy. 260 Ill. App. 3d at 399.

Statutory law likewise supports forceful recognition of a privacy right that protects reproductive decision making. For example, Illinois statutory law has, since 1961, afforded pregnant minors – by virtue of their pregnancy alone – the right to make their own medical decisions without parental or judicial involvement. 410 ILCS 210 §§ 1, 2 (pregnant minors have "the same legal capacity . . . as has a person of legal age" to consent to medical care).[7]

[7] Illinois common and statutory law also protect informational privacy. *See Johnson v. Kmart Corp.*, 311 Ill. App. 3d 573, 579 (1st Dist. 2000) (recognizing tort of public disclosure of private facts); 5 ILCS 140/7(1)(b) (2009) (Illinois Freedom of Information Act exempts disclosure of government records that would cause "a clearly unwarranted invasion of personal privacy"); 105 ILCS 10/6 (2009) (Illinois School Student Records Act restrains the government from maintaining and disseminating various forms of information about primary and secondary school students); 820 ILCS 40 (2000) (Illinois Personnel Records Review Act restrains the government from maintaining and disseminating various forms of information about its employees).

Judicial and legislative recognition of the scope of privacy protections for pregnant women is consistent with a long tradition in Illinois of advancing the rights of women to make the personal decisions that will enable them to self-actualize as full and independent equals in our society – beginning with legislation in the 1850s and 1860s that enabled women to have autonomous lives outside the family sphere,[8] to express protections in 1872 against gender discrimination in employment. Act of Mar. 22nd 1872, 1871 Ill. Laws 578. Moreover, Illinois women have had broad access to contraception and thus the ability to control their reproductive lives. *See* Peter Smith, Comment, *The History and Future of the Legal Battle over Birth Control*, 49 Cornell L.Q. 275, 277, n.17 (no historical restrictions on access to contraception in Illinois).[9]

These factors all necessitate one conclusion: Illinois' privacy protection, safeguarding the rights of young women to decide to terminate their pregnancies, is independent of and broader than that provided under the federal Constitution. This conclusion is firmly supported by precedent in this State,[10] and is consistent with decisions of courts in other states that have similar constitutional language, case law and tradition.[11]

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[8] *See* Divorce Act of 1859, 1859 Ill. Laws 128 (permitting women to reclaim their maiden names after divorce); Married Woman's Property Act of 1861, 1861 Ill. Laws 143 (permitting married women to own separate property brought to a marriage and allowing women to control, transfer, and contract upon this property); Earnings Act of 1869, 1869 Ill. Laws 255 (permitting a married woman to receive, use and possess her own earnings and sue for the same in her own name, protected from the interference of her husband).

[9] Indeed, Illinois was at the forefront of the birth control movement; the second birth control clinic in the country opened in Illinois in 1924. *See* Women Building Chicago 1790-1990: A Biographical Dictionary 999 (Rima Lunin Schultz and Adele Hast eds., 2001). In 1932, Illinois also became the home of the nation's first premarital and marital counseling service, *id.* at 1000, and, in the 1920s and 1930s, information about birth control was extended to minors through a sex education program that operated out of churches, Hull House, factories, and Chicago park district field houses. *Id.*

[10] The Illinois Supreme Court has a long tradition of judicial independence in interpreting the Illinois Constitution. *See, e.g., People ex rel. Ring v. Board of Educ. of Dist. 24*, 245 Ill. 334 (1910) (interpreting Illinois Constitution to prohibit government led religious exercises in public schools, more than fifty years before United States Supreme Court so interpreted United States Constitution); *People v. Brocamp*, 307 Ill. 448 (1923) (interpreting Illinois Constitution to create exclusionary rule for improperly seized

c. The Act's Infringements go to the Heart of the Right to Privacy Under the Illinois Constitution.

The Illinois Supreme Court has been clear: "Judicial scrutiny into the day-to-day lives of pregnant women would involve an unprecedented intrusion into the privacy and autonomy of the citizens of this State." *Stallman*, 125 Ill. 2d at 279-80; *see also Family Life League*, 112 Ill. 2d at 454 (Illinois Privacy Clause secures a fundamental constitutional right to determine whether to terminate a pregnancy). As detailed above, the Act's barriers for minors deciding whether to terminate their pregnancies go to the heart of the rights afforded under the Privacy Clause and cannot be tolerated. *Contrast Caballes*, 221 Ill. 2d at 331 ("A dog sniff . . . does not reveal private medical information . . . A dog sniff will not reveal the contents of diaries or love letters; . . . it will not reveal sexual orientation or marital infidelity. Thus it does not infringe on the zone of personal privacy that the drafters intended to protect."). The Act substantially impairs the fundamental right to choose to terminate pregnancy and, in contrast to *Caballes*, requires a minor to reveal private medical information; requires her to reveal information as confidential as any in a diary; and requires her to reveal information about her sexual history.

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evidence, decades before United States Supreme Court applied to exclusionary rule of the United States Constitution). More recently, the Illinois Supreme Court has applied its "limited lockstep" doctrine to interpret the Illinois Constitution more broadly than the federal. *See, e.g.*, *People v. Washington*, 171 Ill. 2d 475 (1996) (state due process clause, unlike federal, requires an opportunity in post-conviction criminal proceedings to submit new evidence of actual innocence); *People v. McCauley*, 163 Ill. 2d 414 (1995) (state due process and right-to-counsel clauses, unlike federal, guarantee the right of a person being subjected to police interrogation to be informed that his counsel has arrived and would like to enter the interrogation room); *People v. Fitzpatrick*, 158 Ill. 2d 360 (1994) (state confrontation clause, unlike federal, guarantees the accused the right to face-to-face confrontation with witnesses against him); *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209 (1988) (state right-to-jury clauses, unlike federal, guarantee the criminal defendant's right to waive a jury without the prosecutor's consent); *see also People v. Krueger*, 175 Ill. 2d 60 (1996) (state exclusionary rule, unlike federal, has no good-faith exception for searches authorized by statute later held unconstitutional).

[11] As noted previously, every state with an express privacy or inalienable rights clause in its state constitution has struck its state law requiring parental involvement in teens' abortion decisions. *See supra* n. 3.

Such infringement on a fundamental right requires strict judicial scrutiny, and, as shown below, the Act cannot survive such a review. *See infra* at 28-34.

2. The Act Violates the Illinois Constitution's Substantive Due Process Guarantee.

As with privacy, Illinois' "limited lockstep" doctrine similarly dictates broader protections under the substantive components of the Illinois Due Process Clause than exist under the federal Constitution. Though the text of the Illinois Due Process Clause is similar to its federal counterpart, *see* Ill. Const. 1970, art. I, § 2 ("No person shall be deprived of life, liberty or property, without due process of law . . . ."), Illinois' due process protections are buttressed by Illinois' express right of privacy and its strong tradition, common law and statutory recognition of the importance of broad and potent privacy protections. *See supra* at 18-22.

As the Act implicates the fundamental rights of young women to choose to terminate their pregnancies, this Court must subject the Act to strict scrutiny under the substantive components of the Illinois Due Process Clause. Applying this level of scrutiny under the Illinois Due Process Clause, the Illinois Supreme Court has struck numerous laws that infringe on fundamental rights, including those protected by the right to privacy. *See Boynton v. Kusper*, 112 Ill. 2d 356 (1986) (invalidating statute imposing $10 tax on marriage, to be spent by the state to promote the general welfare); *Wicham v. Byrne*, 199 Ill. 2d 309 (2002) (invalidating statute providing for grandparent visitation over objections of single parent); *In re H.G.*, 197 Ill. 2d 317 (2001) (invalidating statute creating presumption of parental unfitness if child was in foster care for fifteen of previous twenty-two months); *see also Lulay v. Lulay*, 193 Ill. 2d 455 (2000) (invalidating application of statute providing for grandparent visitation over objections of both parents).

As shown below, the Act's infringement on a young woman's ability to exercise her fundamental right to terminate her pregnancy and to do so without forced disclosure of the most intimate details of her life will not survive such scrutiny and thus is invalid. *See infra* at 28-34.

3. The Act Violates the Illinois Equal Protection Clause by Impermissibly Classifying Young Women Based On How They Exercise a Fundamental Right.

Illinois law creates separate classes for pregnant minors. The class that chooses abortion is subject to restrictive, and for many, entirely obstructive requirements of parental or judicial involvement. Any other pregnant minor can, without parental notification or judicial involvement: make the decision to continue the pregnancy and bear a child, even if doing so poses a significant risk to her health; continue the pregnancy and place her child for adoption; choose to undergo or forego pregnancy related medical care that could harm her or her fetus; and consent to or refuse all other medical care, including major surgery and life altering drug therapies. 410 ILCS 210 §§ 1, 2; 750 ILCS 50/11(a).

A discriminatory classification scheme, which as here implicates a fundamental right, violates the Illinois Equal Protection Clause unless the State can show that the classification is necessary to advance a compelling state interest. *See Fumarolo v. Chicago Bd. of Educ.*, 142 Ill.2d 54, 73 (1990) ("When the means used by a legislature to achieve a legislative goal impinges upon a fundamental right, . . . a court will examine a claim that there was a violation of the constitutional right to equal protection under a standard of strict scrutiny."); *see also In re D.W.*, 214 Ill. 2d 289, 313 (2005) (classification implicating fundamental right to parent by creating unjustifiable presumptions regarding parental fitness failed strict scrutiny); *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 469 (2002) (classification implicating fundamental right to parent by distinguishing between parents who were entitled to appointed counsel under one act

but not another failed strict scrutiny); *see also Vill. of Oak Lawn v. Marcowitz*, 86 Ill. 2d 406, 416-17 (1981) (engaging in equal protection analysis of restrictions on abortion under strict scrutiny standard).

As shown below, the State's asserted purposes are not served by the Act's crude means and simply do not justify its discriminatory classifications. *See infra* at 28-34.

4. The Act Impermissibly Discriminates Based on Gender.

The Act, by furthering long standing stereotypes about women's role in society, also violates the Illinois Constitution's explicit provision against sex discrimination: "The equal protection of the laws shall not be denied or abridged on account of sex by the State[.]" Ill. Const. 1970, art. I, § 18. This provision has no parallel in the federal Constitution, and by its very language, grants broader protections than the equal protection clause, common to the state and federal constitutions. As this State's high court has held, "'[W]e find inescapable the conclusion that [section 18] was intended to supplement and expand the guarantees of the equal protection provision of the Bill of Rights.'" *Illinois v. Ellis*, 57 Ill. 2d 127, 133 (1974) (quoting *Oak Park Fed. Savs. and Loan Ass'n v. Vill. of Oak Park*, 54 Ill. 2d 200 (1973)).

This State's Supreme Court has regularly struck down laws that discriminate on the basis of sex,[12] and has required more exacting scrutiny than under federal law: "a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'" *Estate of Hicks*, 174 Ill. 2d 433, 436 (1996) (internal citations and quotations omitted), *compare with Nguyen v. INS*, 533 U.S. 53, 61 (2001) (federal sex discrimination claims

[12] *Estate of Hicks*, 174 Ill. 2d 433, 436 (1996) (overturning statute that allowed mother, but not father, to inherit from a child born out of wedlock); *Phelps v. Bing*, 58 Ill. 2d 32, 35 (1974) (finding unconstitutional statute that restricted the right to consent to marry at different ages based on gender); *Ellis*, 57 Ill. 2d at 133 (finding unconstitutional statute that set the age of majority for criminal acts at seventeen for boys and eighteen for girls).

are subject to intermediate scrutiny, requiring only that the legislation serve "important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives").

Consistent with the State's strong gender equality protections, the Supreme Court has rejected state laws that rest on stereotypes about the roles women play, and in particular roles related to pregnancy and mothering. For example, in *Hicks*, the Court rejected the argument that a law favoring mothers of illegitimate children who died intestate was justified on the ground that such children "typically have a much closer relationship with their mothers," with pregnancy and women's disproportionate role in raising children offered to support the premise. 174 Ill. 2d at 339-40. *See also Stallman*, 125 Ill. 2d at 276 ("[I]t is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant. . . such is not and cannot be the law of this State."). As the Court in *Stallman* explained, legal duties cannot be founded on "prejudicial and stereotypical beliefs about the reproductive abilities of women." *Id.* at 278.[13]

The Act violates these guarantees of equal rights so staunchly protected in this State's Constitution. Young women are free under the Act to continue a pregnancy unburdened by the State; the burden is on the teen who chooses not to have a child. Thus, the Act imposes a

[13] Illinois' prohibition against laws based on gender stereotypes comports with cases that implicate federal equal protection. *See, e.g., Back v. Hastings on Hudson Union Free Sch.*, 365 F.3d 107, 119 (2d Cir. 2004) (plaintiff's evidence of government employer's comments about working mother's lack of commitment to her job could be the basis of gender discrimination claim after plaintiff was denied tenure); *Knussman v. Maryland*, 272 F.3d 625, 635-36 (4th Cir. 2001) (verdict against state official who imposed irrebuttable presumption on father of newborn that he was not the "primary" caregiver and therefore not entitled to extended "nurturing leave" affirmed); *cf. Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 733-35 (2003) (pregnancy leave policies providing leave to women exceeding medically recommended pregnancy disability leave period used as examples of unconstitutional gender-based stereotypes about parenting roles which gave Congress the authority to respond with the Family Medical Leave Act – remedial and prophylactic legislation passed under section 5 of the Fourteenth Amendment).

deprivation only on those young women who choose to deviate from antiquated stereotypes about women. The decision to become a mother is seen as natural, one a woman of any age can make without assistance; the decision to end a pregnancy is unnatural and thus requires intervention. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (the "sacrifices [of motherhood which] have from the beginning of the human race . . . enoble[d] [women] in the eyes of others" cannot justify restrictions on abortion).

This stereotype has long roots in society and was once reinforced in laws that discriminated against women in the name of motherhood. Indeed, in a case coming out of this State, the United States Supreme Court upheld the decision to deny a married woman admission to the bar. The statements of Justice Bradley, in a concurring opinion, speak to the stereotypes that underlay laws limiting women's ability to direct the course of their lives. Justice Bradley stated, "The paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother. . . . And the rules of civil society must be adapted to the general constitution of things . . . ." *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141-42 (1873); *see also Doe v. Maher*, 515 A.2d 134, 159-60 (Conn. Super. Ct. 1986) (collecting cases). As shown above, Illinois long ago rejected these notions, *see* Act of Mar. 22nd 1872, 1871 Ill. Laws 578, and, in 1970, added protection against restrictions based on such stereotypes to the Illinois Constitution.

Laws like the Act limit the ability of young women to make the most fundamental decisions over their lives. As the evidence demonstrates, the Act will force some teens to continue pregnancies, with countless consequences, including their visions for themselves, their families, their hopes, their health, education, occupation and economic promise. As Justice Ginsburg has aptly stated, in the balance with reproductive rights is "a woman's autonomous

charge of her full life's course . . . her ability to stand in relation to a man, society, and the state as an independent, self-sustaining, equal citizen." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 383 (1985) (footnotes omitted).

For these reasons, other state courts, looking to their independent constitutional protections for gender equality, have struck provisions that single out abortion for unique and burdensome regulation. *See, e.g., New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Doe v. Maher*, 515 A.2d 134.

As shown below, the Act cannot survive the strict level of scrutiny imposed on Illinois laws that discriminate based on gender.

C. The Act Cannot Pass Strict Scrutiny.

Laws that infringe on a fundamental constitutional right are subject to strict scrutiny and are invalid unless they "advance a compelling state interest;" are "necessary to achieve the legislation's asserted goal;" and are the "least restrictive means" of doing so. *Tully v. Edgar*, 171 Ill. 2d 297, 311 (1996); *Estate of Hicks*, 174 Ill. 2d at 438; *Boynton*, 112 Ill. 2d at 369. As the evidence discussed below demonstrates, the State cannot meet this burden.

The General Assembly asserts limited justifications for the Act:

> The General Assembly finds that notification of a family member...is in the best interest of an unemancipated minor, and the General Assembly's purpose in enacting this parental notice law is to further and protect the best interests of an unemancipated minor. The medical, emotional, and psychological consequences of abortion are sometimes serious and long-lasting and immature minors often lack the ability to make fully informed choices that consider both the immediate and long-range consequences. Parental consultation is usually in the best interest of the minor and is desirable since the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related.

750 ILCS 70/5.

The State cannot show that the Act advances its interest in protecting minors at all, let alone that it is a necessary means of doing so. Indeed, the evidence here demonstrates that far from advancing the State's asserted interests, the Act undercuts them by subjecting young women to severe physical and emotional harms. *See supra* at 9-15. Abortion is safe from a physical and psychological perspective. Moreover, the fact that the State permits minors to continue their pregnancies to term – which indisputably carries far greater medical risks than does an abortion – and to make the decision to parent or place the child for adoption – which carries significant psychological consequences and requires greater decision making capabilities than does the abortion decision – demonstrates that the Act's discriminatory and restrictive treatment is not necessary to protect minors. *See In re D.W.*, 214 Ill. 2d at 311 (statute's *irrebuttable* presumption that person convicted of aggravated battery or attempted murder of a child is an unfit parent fails to advance state interest in protecting the safety and welfare of children where State provides a *rebuttable* presumption that a person who murders a child is an unfit parent); *In re H.G.*, 197 Ill. 2d at 330-31 (presumption of unfitness to parent based on length of child's stay in foster care not tailored to goal of identifying unfit parents because length of stay in foster care often has nothing to do with parent's ability to safely care for a child).

First, the Act does not serve the State's asserted interest in protecting minors against physical harms. Abortion is one of the safest medical procedures performed today – particularly in the first trimester of pregnancy, when eighty-nine percent of abortions occur. Cowett ¶ 10. The only other option for a pregnant teen – continuing the pregnancy – carries far greater risks. For example, the mortality rate for abortions is 0.6 per 100,000 procedures, while for women who carry a pregnancy to term, it is 7.1 per 100,000 births. *Id.* ¶ 11. Abortion similarly carries far fewer risks of major complications than does carrying to term and giving birth. *Id.* ¶ 12. And,

adolescents who continue their pregnancies face even greater risks than adult women: the mortality rate associated with an adolescent carrying a pregnancy to term is more than twice that of an adult woman. *Id.* ¶ 19. Yet the State does not require medical professionals to notify a parent when a minor is planning to continue her pregnancy.[14] Thus, it simply cannot be said that the Act is necessary to advance the State's interest in protecting minors against physical harm.

Indeed, to the contrary, the State imposes an irrational scheme. Take for example, a pregnant minor who relies on medication to control her epilepsy, medication which may put her fetus at risk. This young woman has three choices: She may stop taking her medication, potentially putting her own health in jeopardy; she may keep taking her medication, potentially putting her fetus at risk; or she may choose to terminate her pregnancy and continue her medication. Cowett ¶ 21. Under the Act, the pregnant minor can choose the first two options – putting herself or her fetus at risk – without parental involvement. It is only if she chooses the third option – to keep taking her medication and terminate the pregnancy – that the State requires parental involvement.

Thus, not only does the Act fail under strict scrutiny, it is not even rationally related to the State's asserted interests. *See Farmer*, 762 A.2d at 636 (given the greater risks of carrying to term, "[t]he state's differential treatment is . . . difficult to justify"); *Lungren*, 940 P.2d at 826 (holding that contention that parental involvement statute was "necessary to protect the physical and emotional health of a pregnant minor is undermined by the circumstance that California law

[14] It is no answer that the parents of a minor who decides to continue her pregnancy will ultimately learn of her decision. By the time a parent discovers the pregnancy, it may well be too late for the parent to have any input into the decision of whether to terminate or continue the pregnancy, as the passage of time will have foreclosed the abortion option. And yet, this young woman will face far higher risks of serious complications and death (as well as psychological and emotional effects) as a result of the pregnancy and childbearing than she would have from an abortion. Cowett ¶¶ 11-19; *see also* Zabin ¶¶ 30, 32, 38-39; Adler ¶ 30.

authorizes a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that pose at least equal or greater risks to the physical, emotional, and psychological health of a minor and her child as those posed by the decision to terminate pregnancy"); *In re T.W.*, 551 So.2d at 1195 (same as to Florida law).

Second, the evidence demonstrates that the Act fails to advance the State's goal of protecting minors from emotional and psychological harm. As an initial matter, there is *no* reliable evidence that abortion leads to long-term mental health problems. Adler ¶¶ 21-22. After twice convening a panel of experts to review all of the scientific literature, once in the late 1980s and more recently in 2006, the American Psychological Association concluded that for the vast majority of women, terminating an unintended pregnancy poses *no* psychological hazard. *See generally id.* ¶¶ 10-20. Indeed, former President Reagan's Surgeon General C. Everett Koop concluded after fifteen months of study, that the threat of developing significant psychological problems related to abortion is "miniscule from a public health perspective." *Id.* ¶ 12. In contrast, as the evidence in the case demonstrates, the threat of psychological harm from forced parental involvement is quite real. *See, e.g.*, Baker ¶¶ 19-24, 31 (recounting examples of young women who were disowned by their parents, thrown out of their homes, forced to continue their pregnancies, and otherwise emotionally abused after their parents learned of their pregnancies); Sabino ¶¶ 16, 18, 38 (same).

Moreover, as is the case with physical medical risks, there is no psychological basis for the State's distinction between teens who choose abortion and those who carry to term. As a direct comparison between adolescents who chose to terminate their pregnancies with those who carried to term revealed, minors who chose abortion did as well as – and usually better than – those who had a baby in terms of psychological (and many other) effects. Zabin ¶¶ 32, 35-41; *see*

also Adler ¶ 30. And, as other courts have found, "[i]t is particularly difficult to reconcile defendants' contention – that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional or psychological health – with the[] statutory provisions authorizing a minor who has given birth to consent, on her own, to the adoption of her child. The decision to relinquish motherhood after giving birth would seem to have at least as great a potential to cause long-lasting sadness and regret as the decision not to bear a child in the first place." *Lungren*, 940 P.2d at 827 (citations and quotation marks omitted); *see also In re T.W.*, 551 So.2d at 1195 (rejecting state's argument about psychological and emotional consequences in part because "the state's adoption act similarly contains no requirement that a minor obtain parental consent prior to placing a child for adoption, even though this decision is clearly fraught with intense emotional and societal consequences").

Finally, the asserted inability of minors to "make fully informed choices that consider both the immediate and long-range consequences," 750 ILCS 70/5, cannot conceivably justify the infringement on minors' rights. First, the evidence demonstrates that minors *can* consider the immediate and long range consequences of deciding to terminate their pregnancies. In fact, research specifically designed to assess competence to consent to abortion found that adolescents were as capable as adults of making informed decisions. Adler ¶¶ 32-36. Indeed, the American Psychological Association's Interdivisional Committee on Adolescent Abortion concluded that "[t]here is now a substantial literature showing that adolescents do not differ from adults in their ability to understand and reason about treatment alternatives." *Id.* ¶ 33; *see also* Cowett ¶¶ 22-23 (attesting to the capacity of her minor patients to make informed decisions about abortion); Baker ¶¶ 35-36 (same); Zabin ¶¶ 42-43 (same). This conclusion is buttressed by the record of judicial bypass proceedings in Massachusetts. Out of approximately 20,000 bypass cases, all but

two have been granted and almost all of them have been granted on the ground that the young women were mature enough to make the decision for themselves. Sabino ¶ 9; *see also* Martin ¶¶ 11-12 (explaining that, of the hundreds of bypass petitions he has heard in Minnesota, in all but one case the minor demonstrated that she was mature enough to make the decision independently; the minor who was not sufficiently mature appeared with her mother seeking a waiver of the state's requirement that she also notify her long absent father).

Moreover, the fact that the State permits young women to choose to continue their pregnancy without involving their parents demonstrates that parental involvement is not necessary to assure that a minor makes a thoughtful, mature decision about abortion. Certainly the decision to bear a child requires at least as much consideration, and likely more, of the "immediate and long-range consequences," than does terminating the pregnancy. *See* Zabin ¶¶ 27-41.

Looking to similar evidence and similarly discriminatory schemes, other courts have not hesitated to conclude that these restrictions are not necessary to advance the State's asserted interests. As the New Jersey Supreme Court held:

> The State has failed to demonstrate a substantial need for the Parental Notification for Abortion Act, or even that the asserted need is capable of realization through enforcement of the Act's provisions. Nor does the State offer adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care relating to their pregnancies. To the contrary, plaintiffs present compelling evidence that neither the interests of parents nor the interests of minors are advanced by the Notification Act, and further that there is no principled basis for imposing special burdens only on that class of minors seeking an abortion.

Farmer, 762 A.2d at 638; *see also id.* (finding that "the evidence . . . leads inexorably to the conclusion that the proferred statutory reasons for requiring parental notification are not furthered by the statute"). The Supreme Courts of California and Florida have similarly

concluded that the "contention that the restrictions imposed by [the parental involvement requirement] upon the minor's constitutionally protected right of privacy are necessary in order to protect the physical, emotional, and psychological health of the minor and to preserve the parent-child relationship is belied by the numerous analogous circumstances in which [the state] authorized a pregnant minor to obtain medical care, or to make equally significant decisions affecting herself and her child without parental [involvement]." *Lungren*, 940 P.2d at 826; *see In re T.W.*, 551 So.2d at 1195; *Wicklund*, 1998 Mont. Dist. LEXIS 227 at **11-12 (imposing notice requirement only on minors seeking abortions does not advance compelling state interest).

Here too, the State cannot show that the Act advances its asserted interests or that the Act provides a necessary means of doing so.[15] The State cannot demonstrate any qualitative difference between the decision to end, and the decision to continue, a pregnancy that could justify this differential treatment and thus survive strict scrutiny review. Indeed, there is simply no reasonable or rational basis for the restrictive and discriminatory treatment. Because the State cannot satisfy its burden to justify the infringement of minors' constitutional rights, the Act should be enjoined.

II. ILLINOIS CIRCUIT COURTS REMAIN UNPREPARED TO CONDUCT JUDICIAL BYPASS PROCEEDINGS IN A MANNER THAT PROTECTS MINORS' CONSTITUTIONAL RIGHTS.

Even if the Act did not fail under the independent protections of the Illinois Constitution, this Court should enjoin its enforcement until such time as the State can show that the courts throughout Illinois can implement the judicial bypass process in a manner that accords with federal constitutional requirements for such proceedings. Consistent with the federal Constitution, a parental involvement law must have a bypass procedure that provides "an

[15] Moreover, as the Act's restrictions are not a means to advance the State's asserted interests, there is simply no place in this analysis to assess whether the Act's "means" are the least restrictive.

effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 643-44. That means that the State must be ready to implement the Act, including, consistent with the Act's mandates – ensuring that the courts charged with adjudicating these bypass petitions are prepared to protect the confidentiality of minors, ensure expedition in the process, and ensure counsel to guide the minor. *Id.* This they are not ready to do. Rather, as recent calls to Circuit Clerks' offices reveal, the judicial bypass procedure is effectively non-existent in some Illinois courts.[16]

In some cases, the Clerks' offices are a complete barrier to a young woman's ability to seek relief mandated by the Act and the Constitution. Indeed, in nine of the fifteen offices contacted since September 9, 2009, the personnel – including the Clerks – had never heard of the Act or could not answer even the most basic questions about it. Kleiman ¶¶ 5, 7-10. Indeed, in two offices, when asked for information, the personnel said they would need to call back. After a month, they had not done so. *Id.* ¶ 9. In another county, the court personnel did not know about the Act, did not think anyone in her office would know, suggested the State's Attorney might know, and transferred the call to that office. However, the person who received the transferred call at State's Attorney's office had "no idea" and suggested that the caller "get on-line and find the Illinois Statutory Code, or the law library at the courthouse . . . ." *Id.* ¶ 7.

In two counties, the court personnel described a procedure that would wholly thwart the confidentiality guarantee demanded by the Act and the Constitution. For example, the Deputy Clerk in one county said, "when a minor comes in, we want a parent or guardian present." *Id.* ¶ 6. In another county, the Deputy Clerk, said, "if they file that petition, don't they have to give

[16] Some courts, like the Circuit Court of Cook County, have put extensive procedures in place to endeavor to protect the rights of minors seeking waiver in their courts. *Id.* ¶ 14. However, the Act permits minors to seek waiver in any Circuit Court. They therefore must all be ready.

notice? So that would give notice of the abortion." *Id.* ¶ 8. These courts threaten the confidentiality of minors seeking judicial waiver in direct contravention of the Act's mandates.

There was also confusion – or misinformation – about the expedition demanded under the Act. The Act requires that a decision issue within forty-eight hours of the petition being filed (weekends and holidays excluded). 750 ILCS 70/25(c). Yet the Deputy Clerk for one county reported that the hearing would "probably" take place in "ten days to two weeks." Kleiman ¶ 5.

In addition, while minors have a statutory and constitutional right to court-appointed counsel and are to be informed of that right, several Clerks said the court would not appoint such counsel for bypass proceedings because it is a "civil case," or it is not a "criminal case." *Id.* ¶¶ 6, 8, 11.[17]

Consistent with the Constitution, minors cannot be left to fend with such insufficiencies – insufficiencies that deprive them of an opportunity for confidentiality, expedition, legal assistance to navigate the system, and even the most basic information about the proceedings required by the Act. Rather, the Circuit Courts must be in a position to shepherd young women through a process that respects and safeguards their constitutional right to decide to terminate pregnancy. As one court recognized, "any delays occasioned by court clerks' total unfamiliarity with the required procedures could have very serious consequences for the young woman seeking to utilize the judicial bypass procedure." *Eubanks v. Wilkinson*, No. C82-0360-L(A), 1989 WL 109507, at * 1 (W.D. Ky. Feb. 22, 1989).

For these reasons, other courts, finding similar infirmities in the judicial bypass process, have enjoined their laws until such time as the courts where able to implement them. *See Memphis Planned Parenthood Ass'n v. Sundquist*, No. 3-89-0520, Agreed Temporary

[17] In both of these cases, the Clerks nevertheless insisted, contrary to the Act's requirements, that the minor would have to have a lawyer in order to participate in her bypass hearing. *Id.*

Restraining Order (M.D. Tenn. Sept. 3, 1999) (Attached as Ex. J) (barring enforcement of Tennessee parental consent law until "bypass procedure demanded by the Act, the Constitution, and the Sixth Circuit opinion is in place"); *Eubanks*, at * 1 (granting temporary stay of enforcement of Kentucky parental consent law in order to "provide court clerks time to become familiar with the procedures involved in the judicial bypass procedure"). In the federal case challenging the Act, *Zbaraz v. Madigan*, 84-CV-00771, 2008 WL 589028 (N.D. Ill. Feb. 28, 2008), plaintiffs argued to the United States District Court for the Northern District of Illinois in May of 2007 that the Illinois courts were unprepared to implement a constitutional bypass process. The federal court declined to find the courts' lack of adequate protocols and training a constitutional violation before the Act went into effect. *Id.* Relying on a letter from the Illinois Supreme Court stating that that Court "presume[d], and therefore assert[ed] that, as with the enactment of any new law, our state courts are prepared to proceed to apply the law as enacted," the District Court "declined to speculate that the state courts cannot adequately implement the law, before it has had a chance to carry out the procedures." *Id.* at * 6.

Here, Plaintiffs' argument cannot be described as speculative. The Act is in effect and the courts have had three months since the Seventh Circuits' decision dissolving the federal injunction to establish procedures and train staff. They have not done so. The Act thus must be enjoined until the State can demonstrate that its courts are prepared to conduct bypass proceedings in a manner consistent with their statutory and constitutional obligations to young women.

CONCLUSION

For the reasons stated above and in the attached exhibits, Plaintiffs request that this Court enter an order enjoining Defendants and those acting in concert with them from enforcing the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2009, I caused true and correct copies of the foregoing **Plaintiffs' Memorandum of Law in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction** and to be served by hand delivery upon:

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