Atty No. 46279

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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 CH 38661 In Chancery Preliminary Injunction Temporary Restraining Order

PLAINTIFFS' RESPONSE TO DEFENDANTS' COMBINED MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, TO DISMISS

As demonstrated in Plaintiffs' memoranda in support of their motion for a temporary restraining order and preliminary injunction, which Plaintiffs incorporate herein by reference, the Illinois Parental Notice of Abortion Act of 1995, 750 ILCS 70/1 *et seq.* (the "Act"), violates the Illinois constitutional guarantees to privacy, due process, equal protection and gender equality.[1] In opposing that motion, Defendants did not challenge any of the facts Plaintiffs set forth, but instead argued as a matter of law that the Illinois Constitution did not protect against the substantial harms Plaintiffs alleged

[1] Plaintiffs cite to the parties' briefs as follows: Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction ("Pls. Mem."); Plaintiffs' Reply Brief In Support of Their Motion for Temporary Restraining Order and Preliminary Injunction ("Pls. Reply"); Defendants' Response to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction ("Defs. Resp."); Defendants' Memorandum in Support of Their Combined Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss ("Defs. Mot.").

(and supported with significant evidence). Having failed to convince the Court of their arguments then, Defendants now resurrect the identical arguments in support of their motion for judgment on the pleadings or, in the alternative, to dismiss. As this Court concluded in granting the temporary restraining order, Plaintiffs have demonstrated a "fair question" as to the existence of their constitutional rights and the likelihood of success on the merits (the standard for awarding a temporary restraining order and a preliminary injunction). For the same reasons, Defendants' cannot show that Plaintiffs' claims fail as a matter of law or that Plaintiffs have failed to state a claim upon which relief can be granted.

The only new argument Defendants raise is that Plaintiffs' claims are precluded by *res judicata*. As demonstrated below, no such bar exists. When the *Zbaraz* plaintiffs filed their challenge to the Act, they could not adjudicate Illinois Constitutional claims in federal court, for the law was clear that the Eleventh Amendment to the United States Constitution was a limit on the federal court's subject matter jurisdiction. In light of this barrier to relief in the prior action, Plaintiffs are not precluded from pursing the state constitutional claims they have raised.

As Defendants have raised no basis for this Court to dismiss Plaintiffs' claims or enter judgment on the pleadings, their motion must be denied.

STATEMENT OF FACTS

A. Procedural History

The Act was signed on June 1, 1995. Plaintiffs in the action entitled *Zbaraz v. Hartigan*, 84-CV-00771 (N.D. Ill.), who had challenged the Illinois Parental Notice of Abortion Act of 1983, which was repealed by the 1995 Act, sought immediate injunctive

relief and leave to file a supplemental complaint challenging the constitutionality of the 1995 Act under the United States Constitution. *Zbaraz v. Hartigan*, No. 84-CV-00771, Verified Supplemental Complaint (attached to Defs. Mot. as Ex. A). The federal district court granted a temporary restraining order, and, shortly thereafter, the state defendants agreed to a preliminary injunction, because the Act did not contain procedural rules necessary for the Act to comply with federal constitutional requirements. *Zbaraz v. Ryan*, 84-CV-00771, Prelim. Inj. Order (N.D. Ill. June 8, 1995) (attached as Ex. A). The Act remained preliminarily enjoined until February 8, 1996, when the federal district court entered a final judgment, permanently enjoining the Act's enforcement. *Zbaraz v. Ryan*, No. 84-CV-00771, Perm. Inj. Order (N.D. Ill. Feb. 8, 1996) (Ex. B).

On March 23, 2007, the *Zbaraz* defendants filed a motion under Fed. R. Civ. P. 60 to reopen the final judgment and dissolve the permanent injunction. The district court denied the defendants' motion, *Zbaraz v. Madigan*, No. 84-CV-00771, 2008 U.S. Dist. LEXIS 15559 (N.D. Ill. Feb. 28, 2008); however, on July 14, 2009, the Seventh Circuit Court of Appeals reversed, and on August 5, 2009, issued its mandate dissolving the permanent injunction. *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009).

B. The Act's Impact on Young Women

Under Illinois law, a minor can consent to all medical care for herself, if she is pregnant, and for herself and her child once she has given birth – all without involving her parents. *See* 410 ILCS 210/1 (2009). The Act creates a single exception to this longstanding statutory framework by requiring only those pregnant minors who choose to terminate their pregnancies to notify a parent or obtain a court order. [2] Indeed, Illinois law

[2] For convenience, Plaintiffs refer to "adult family members," as defined by the Act, as "parents" except where necessary to differentiate among them.

also permits a minor to place her child for adoption without notifying a parent. *See* 750 ILCS 50/11(a) (2009). Thus, the Act singles out pregnant minors who choose abortion and imposes on them alone a requirement of parental notification as a condition of receiving medical care.

As the allegations of the Verified Complaint and the supporting affidavits demonstrate, the Act imposes significant and irreversible harms on young women. In the context of Defendants' motion, these well-pleaded allegations and all reasonable inferences therefrom must be taken as true. *Bryson v. News Am. Pubs., Inc.*, 174 Ill.2d 77, 86 (1996); *XLP Corp. v. County of Lake*, 317 Ill. App. 3d 881, 884-85 (2nd Dist. 2000).

1. The Provision of Abortions in Illinois

Legal induced abortion is one of the most frequently performed surgical procedures in the United States and one of the safest procedures in contemporary medicine. Indeed, today the risk of death from legal induced abortion is less than that from an injection of penicillin. Both in terms of mortality (death) and morbidity (serious medical complications short of death), abortion is many times safer than continuing a pregnancy to term. Compl. ¶ 23; Pls. Mem. Ex. B ¶¶ 10-12.

Pregnancy and childbirth pose serious risks for all women, even those who are generally healthy. Pregnancy effects changes in every major bodily organ. It can exacerbate a preexisting medical condition. And, even the healthiest pregnancy can quickly become life threatening. Compl. ¶ 24; Pls. Mem. Ex. B ¶¶ 13-16. Although pregnancy presents potential health risks for any woman, such risks are significantly higher for pregnant adolescents than for adult women. An adolescent carrying a pregnancy to term faces a mortality rate of more than twice that of an adult woman, and

teens under the age of 17 have a higher incidence of morbidity than do adult women, with risks being greatest for the youngest teens. Compl. ¶ 25; Pls. Mem. Ex. B ¶ 19.

Although abortion is far safer than carrying a pregnancy to term, delay in the performance of an abortion significantly increases the health risks associated with the procedure. Compl. ¶ 26; Pls. Mem. Ex. B ¶ 34. Abortions also become more expensive and are offered by fewer providers the later in pregnancy they are performed. In Illinois, this is a particular concern outside the Chicago area. For these reasons, the more delay a woman faces in getting an abortion, the less likely she will be able to obtain one. Compl. ¶ 27; Pls. Mem. Ex. B ¶ 37.

Women in Illinois, including minors, decide to terminate their pregnancies for a variety of maternal and fetal health, familial, economic and personal reasons. Young women in particular often feel that they are not yet ready to be parents, that they cannot be the kind of parent their child would deserve, or that having a child in their teens would completely change their plan for their lives and would thwart education and career goals. Compl. ¶ 29; Pls. Mem. Ex. B ¶ 22.

Most minors involve a parent in the decision to obtain an abortion. The younger the minor, the more likely she is to involve a parent. Many of those minors who do not involve a parent consult with and have the support of another adult. Compl. ¶ 30; Pls. Mem. Ex. B ¶ 26; *id.* Ex. D ¶ 16. When minors do not involve a parent in deciding whether to have an abortion, they generally have compelling reasons for not doing so, such as fear: of physical or emotional abuse by their parents if they learn of the minor's pregnancy, Compl. ¶ 31; Pls. Mem. Ex. D ¶¶ 19, 23; *id.* Ex. G ¶¶ 15-17; that their parents will force them out of the house, Compl. ¶ 31; Pls. Mem. Ex. D ¶¶ 19, 21; *id.* Ex. G

¶¶ 15-17; or that their parents will force them to carry their pregnancies to term against their will. Compl. ¶ 31; Pls. Mem. Ex. D ¶ 20; *id.* Ex. G ¶ 18. Some minors choose not to tell a parent because of other crises in the family, such as the death or serious illness of a family member or a parent's loss of a job and impending economic problems. These minors fear that news of their pregnancy will be too much for a parent already dealing with such significant problems. Compl. ¶ 32; Pls. Mem. Ex. D ¶ 26; *id.* Ex. G ¶ 14.

Other minors who do not tell a parent come from families with no real parent/child relationship because, for example, their parents are in jail, are addicted to drugs, or have abandoned them. For some of these minors, there are significant emotional reasons not to attempt to engage their parents and no advantage to doing so as they know that the parent will not offer help or support. Compl. ¶ 33; Pls. Mem. Ex. D ¶ 25.

2. The Harms of the Act

For those minors who cannot involve a parent in their decision to terminate a pregnancy, the Act's notification requirement will result in significant and irreversible harm. The Act will leave some minors little choice other than to tell a parent, contrary to their best judgment. Some of these minors will suffer: some will be beaten; some will be thrown out of their homes; and some will be forced to continue their pregnancies against their will. Compl. ¶ 34; Pls. Mem. Ex. B ¶¶ 28, 30; *id.* Ex. D ¶ 23. The Act will subject some minors to other harms as well. Some who determine they cannot notify a parent or go to court will take extreme action to avoid parental involvement, including obtaining an illegal abortion or attempting to self-induce an abortion. Compl. ¶ 34; Pls. Mem. Ex. D ¶¶ 28, 32. Others will continue to carry their unwanted pregnancy to term, and risk suffering the attendant medical harms and adverse educational, economic, and social

consequences. Regardless of the route a minor chooses – telling a parent or going to court – the Act will cause delay which increases the medical risks and costs associated with the procedure and decreases availability. Compl. ¶ 34.

The Act's abuse and neglect exception provides little, if any, aid to endangered minors. Because of the psychology of abuse, many abused and neglected minors are unwilling to reveal the abuse. Compl. ¶ 35; Pls. Mem. Ex. H ¶¶ 15, 18-20. And for minors who have not previously been subject to physical or sexual abuse, but who know with certainty (often because they have seen it happen to an older sister) that revealing their pregnancy will subject them to physical harm or ejection from the home, the exception provides no remedy. Compl. ¶ 35; Pls. Mem. Ex. H ¶¶ 7, 9.

Nor does the Act's provision for obtaining judicial waiver of notice (hereafter "judicial bypass") provide an adequate substitute for those minors who cannot involve a parent in their decision to terminate a pregnancy, as it is not a realistic alternative for many minors. For some, the prospect of going to court and revealing to a judge the intimate details of their home, personal life, and circumstances of their pregnancies is simply too daunting. Compl. ¶ 36; Pls. Mem. Ex. D ¶ 32; *id.* Ex. G ¶¶ 12, 38. For others the logistical hurdles, including phone calls, arranging transportation, and finding a time to be away from school and home without arousing suspicion, are too difficult to overcome. Compl. ¶ 36; Pls. Mem. Ex. G ¶¶ 27-30.

Minors who pursue a judicial bypass will be delayed in obtaining medical care as they overcome their fears and apprehensions about explaining their very private predicament to a stranger and authority figure; struggle to determine how to pursue a bypass; arrange transportation to court; await a time when they can travel to court

undetected by parents or school officials; and then actually progress through a bypass procedure. Compl. ¶ 36; Pls. Mem. Ex. G ¶¶ 10, 23, 33. As discussed above, delay will increase the risk and cost, and will decrease availability, of the abortion procedure, if abortion is even still an option at her advanced stage of pregnancy. *See supra* at 5.

Moreover, for some minors, the very act of pursuing a waiver of the parental notification requirement will result in a minor's parent learning of her pregnancy and planned abortion. All of the actions required to pursue a bypass, such as arranging transportation to and from the courthouse, explaining absences from home or school, and spending time at the courthouse awaiting the hearing and decision, put minors' confidentiality at risk. Compl. ¶ 36; Pls. Mem. Ex. F ¶¶ 8-9; *id.* Ex. G ¶¶ 27, 35. Furthermore, the delays, risks of disclosure, and humiliation suffered by being forced to reveal the intimate details of their lives to a judge that are inherent in the judicial bypass process will take a tremendous emotional toll on minors who pursue judicial bypass. Compl. ¶ 36; Pls. Mem. Ex. F ¶ 13; *id.* Ex. G ¶ 36.

3. Lack of Justification for the Act

The Illinois General Assembly asserted only limited justifications for the Act:

> The General Assembly finds that notification of a family member as defined in this Act 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 an abortion are not necessarily related.

750 ILCS 70/5.

Contrary to the Act's asserted findings and purpose, the Act is not necessary to prevent "serious and long-lasting" medical, emotional and psychological consequences. As already noted, abortion is one of the safest surgical procedures available, and is many times safer than continuing a pregnancy through to childbirth. *See supra* at 4. In addition, more than two decades of scientific research has consistently shown that for the vast majority of women, including adolescents, abortion poses no psychological hazard. Compl. ¶ 42; Pls. Mem. Ex. C ¶¶ 10-22. Indeed, the best scientific evidence available demonstrates that adolescents who terminated their pregnancies were just as healthy – if not healthier – psychologically than those who gave birth, and there is no reliable evidence that abortion leads to long-term mental health problems. Compl. ¶ 42; Pls. Mem. Ex. C ¶ 30; *id.* Ex. I ¶¶ 32-41.

Moreover, contrary to the Act's assumptions, the Act is not necessary to ensure that minors make an informed decision regarding abortion. Minors seeking abortion without their parents are sufficiently mature to provide informed consent and the essential medical information to health professionals prior to obtaining treatment. They are capable of understanding their options for dealing with an unintended pregnancy, the risks and benefits of each option, and the immediate and long-range consequences of their decision. Compl. ¶ 43; Pls. Mem. Ex. B ¶¶ 22-23; *id.* Ex. C ¶¶ 32-36; *id.* Ex. D ¶¶ 35-36.

The majority of minors already involve a parent in their decision to have an abortion. However, for minors who have good reasons not to involve their parents, the

Act will not create a positive family relationship and open lines of communication where none existed previously. Compl. ¶ 44; Pls. Mem. Ex. I ¶ 22.

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, oppose laws like the Act, because they impose substantial harm without justification. Compl. ¶ 44; Pls. Mem. Ex. B ¶ 32.

ARGUMENT

I. DEFENDANTS CANNOT DEMONSTRATE THAT THEY ARE ENTITLED TO DISMISSAL OR JUDGMENT ON THE PLEADINGS.

Judgment on the pleadings under section 2-615(e) is only proper if "the pleadings disclose no genuine issue of material fact and [] the movant is entitled to judgment as a matter of law." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 385 (2005). Dismissal under section 2-615(a) for failure to state a claim is appropriate only if, when interpreting allegations of the complaint "in the light most favorable to the plaintiff ... no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." *Bryson*, 174 Ill. 2d at 86-87. In evaluating both motions, a court takes as true the well-pleaded facts set forth in the complaint and the reasonable inferences to be drawn therefrom. *XLP Corp.*, 317 Ill. App. 3d at 884-85; *Bryson*, 174 Ill. 2d at 86. Similarly, a section 2-619 motion requires that the court interpret "all pleadings and supporting documents in the light most favorable to the nonmoving party," and deny the motion unless it is clear there "is no set of facts that may be proved that would support the cause of action." *Paszkowski v. Metro. Water Reclamation Dist. of Greater Chicago*, 213 Ill. 2d 1, 4 (2004). Defendants combined motion fails under these standards.

II. DEFENDANTS' RES JUDICATA AND COLLATERAL ESTOPPEL ARGUMENTS FAIL.

A. Res Judicata Does Not Bar Claims, Such as Plaintiffs', That Could Not Have Been Adjudicated in the Prior Litigation.

Defendants argue that because the *Zbaraz* plaintiffs did not pursue state constitutional claims in their prior federal action, Plaintiffs are barred by *res judicata* from raising such claims here. This novel theory is premised on two false assertions: (1) that the Eleventh Amendment did not implicate the subject matter jurisdiction of the federal court to hear the state constitutional claims, Defs. Mot. at 10; and (2) that the federal court might not have dismissed the state constitutional claims, implying that the Attorney General had the authority to waive the Eleventh Amendment in federal court to permit such claims to proceed. Defs. Mot. at 9. Since neither of these assertions was correct in 1995, when the *Zbaraz* plaintiffs filed their complaint challenging the Act under the federal constitution, or at any time prior to the entry of final judgment in February of 1996, the federal forum was not available to the *Zbaraz* plaintiffs to adjudicate state constitutional claims, and Defendants' *res judicata* argument fails.

As the Illinois Supreme Court has cautioned, *res judicata* does not bar an action where, as here, "it would be fundamentally unfair to do so." *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390 (2001). Thus, Illinois courts do not apply *res judicata* where "it would be inequitable" including, where "the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action,"[3] and where "it is clearly and convincingly shown that the policies favoring

[3] This is so because *res judicata* "is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put *no formal barriers* in the way of the litigant's" ability to adjudicate all claims in one forum. *See* Restatement (Second) of Judgments

preclusion of a second action are overcome for an extraordinary reason." *Rein*, 172 Ill. 2d at 341; *see also Airtite v. DPR Ltd. Partnership*, 265 Ill. App. 3d 214, 219 (4th Dist. 1994). Because at the time of the earlier action here, the Eleventh Amendment and Illinois law barred the federal court from adjudicating the state constitutional claims, this case falls within both of these exceptions, and Defendants' request for dismissal must be denied. Indeed, given the unique history of the litigation challenging parental notice laws in Illinois, the policy underlying *res judicata* – judicial economy – was best served by following the precise course the plaintiffs in the two actions here pursued.

1. Limitations on the Subject Matter Jurisdiction of the Federal Court Prevented Adjudication of Plaintiffs' State Constitutional Claims.

The Eleventh Amendment prohibits suits in federal courts against non-consenting states. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003). This constitutional bar "applies as well to state-law claims brought into federal court under pendent jurisdiction." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984); *see MCI Telecom. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000). And, while an exception exists when a plaintiff seeks only prospective relief for violations of *federal* law, *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *MCI Telecom. Corp.* 222 F.3d at 345 – thus, for example, permitting the federal court to adjudicate the *Zbaraz* plaintiffs' federal constitutional claims – this exception does not apply to *state* law claims, even where plaintiffs seek only prospective relief. *See Pennhurst*, 465 U.S. at 106 ("It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result

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§ 26 cmt. c (1982) (emphasis added), *adopted in Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996).

conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

In 1995, when the Act was signed into law and the *Zbaraz* plaintiffs filed their supplemental complaint in the United States District Court, it was well-established, including under then-controlling Seventh Circuit precedent, that the Eleventh Amendment was a limitation on the subject matter jurisdiction of the federal courts. *In re Estate of Porter*, 36 F.3d 684, 691 (7th Cir. 1994) ("[D]istrict courts lack original subject matter jurisdiction over claims barred by the Eleventh Amendment."), *abrogated on other grounds by Lapides v. Bd. of Regents of the University System of Georgia*, 535 U.S. 613 (2002); *Smith v. Wisc. Dep't of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134, 1140 (7th Cir. 1994) ("The now-settled law of this circuit ... holds that federal courts do not have subject-matter jurisdiction over suits against a state.") (citing *Crosetto v. State Bar of Wisc.*, 12 F.3d 1396, 1400-01 (7th Cir. 1993), *cert. denied* 511 U.S. 1129 (1994)).[4] Indeed, the Seventh Circuit continued to treat the Eleventh Amendment as a subject-matter jurisdiction bar until after the district court entered final judgment and closed the case in February of 1996. *See Gorka by Gorka v. Sullivan*, 82 F.3d 772, 774 (7th Cir. 1996) (question of whether the Eleventh Amendment "was in the nature of a common law immunity or a jurisdictional bar" was "resolved in *Crosetto*: it was a

[4] The Seventh Circuit was not alone in its view that the Eleventh Amendment was a subject matter jurisdiction bar. *See, e.g., Mills v. Maine*, 118 F.3d 37, 49-50 (1st Cir. 1997); *Atlantic Health. Benefits Tr. v. Googins*, 2 F.3d 1, 4 (2nd Cir. 1993) ("Although the parties do not address the Eleventh Amendment in their briefs, we raise it *sua sponte* because it affects our subject matter jurisdiction."); *Warnock v. Pecos Cty.*, 88 F.3d 341, 344 (5th Cir. 1996) (Because Eleventh Amendment immunity deprives the court of jurisdiction, the claims barred can be dismissed only under Rule 12(b)(1)); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996); *Mascheroni v. Bd. of Regents of the Univ. of California*, 28 F.3d 1554, 1558 (10th Cir. 1994); *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1021, 1029 (11th Cir. 1994), *aff'd* 517 U.S. 44 (1996).

jurisdictional bar"). Thus, notwithstanding Defendants' citation of more recent cases, Defs. Mot. at 10, at all times relevant to this question, the *Zbaraz* plaintiffs were "unable to obtain relief" on their state law claims "because of a restriction on the subject-matter jurisdiction" of the federal court.

2. The Federal Court Would Have Dismissed the State Constitutional Claims and the Attorney General Could Not Waive the Eleventh Amendment.

Defendants' also suggest that the federal court "might" not have dismissed state constitutional claims had they been brought, implying that the State would not necessarily have asserted Eleventh Amendment immunity in *Zbaraz*. Defs. Mot. at 9. Again, however, Defendants' argument fails to take into account the law at the relevant time, which held that "the [Illinois] Attorney General [was] *not* authorized to waive Illinois' Eleventh Amendment immunity." *Estate of Porter*, 36 F.3d at 691 (citing *People v. Patrick J. Gorman Consultants, Inc.*, 111 Ill. App. 3d 729, 731 (1st Dist. 1982) ("[O]nly the General Assembly, and not the Attorney General, can determine when claims against the state will be allowed.")); *see McDonald v. Illinois*, 557 F.3d 596, 601 (7th Cir. 1977) (finding Illinois Attorney General's initial failure to raise Eleventh Amendment issue was not a waiver because he was not empowered to waive state's immunity); *see also* Civil Immunities Act, 745 ILCS 5/1 (2009) (providing that the state shall not be made a defendant or party in any court subject to limited exceptions).[5]

Clearly, this Court must base its decision on the assumption that the Attorney General would have conformed his conduct to state law. Further, even if the Attorney General had not raised the Eleventh Amendment, the federal court could have – and as a

[5] Not surprisingly, Plaintiffs are unaware of any case involving the scope of Illinois constitutional rights in which the Attorney General has explicitly waived Eleventh Amendment immunity in litigation in federal court.

practical matter would have – done so.[6] As the *Zbaraz* plaintiffs would have faced certain dismissal, there was no reason for them to have asserted state constitutional claims in their federal complaint.[7]

3. Judicial Economy Favored Filing the 1995 Complaint in Federal Court.

Moreover, given the particular history of litigation concerning the constitutionality of parental notice laws in Illinois, there was no question in 1995 that judicial economy counseled in favor of this approach. In 1984, the *Zbaraz* plaintiffs had filed a complaint challenging the Parental Notice of Abortion Act of 1983, the constitutionality of which was litigated in the Northern District of Illinois, the Seventh Circuit, and the U.S. Supreme Court. When the Illinois General Assembly repealed the 1983 Act in the 1995 Act, the same plaintiffs challenged the 1995 Act by filing an

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[6] *See, e.g., Naguib v. Ill. Dept. Prof. Reg.*, 986 F. Supp. 1082, 1092 (N.D. Ill. 1997) (dismissing claims with prejudice even though state never raised Eleventh Amendment). This principle remains, even after the Seventh Circuit decided, beginning in 1999, that the Eleventh Amendment was not a limit on subject matter jurisdiction. *See Doe v. Heck*, 327 F.3d 492, 508 n.13 (7th Cir. 2003) (raising Eleventh Amendment *sua sponte* and dismissing claims for monetary damages); *Higgins v. Mississippi*, 217 F.3d 951, 954 (7th Cir. 2000) (explaining that the U.S. Supreme Court had held "only that the federal court could ignore the immunity ... not that it must ignore it."). The Eleventh Amendment thus remains a "formal barrier" to obtaining relief in federal court for violations of state law. Indeed, notwithstanding its arguments here, the State continues to assert its Eleventh Amendment immunity as a defect in the court's subject matter jurisdiction. *See, e.g., 520 S. Michigan Ave. Assoc. v. Shannon*, 549 F.3d 1119, 1123-24 (7th Cir. 2008) (asserting Eleventh Amendment immunity in motion under Fed. R. Civ. P. 12(b)(1) to dismiss for lack of subject matter jurisdiction). And *Lapides*, 533 U.S. 613, relied on in Defs. Mot. at 10, is not to the contrary, as it was decided well after the relevant time period and involved a voluntary invocation of federal jurisdiction by the Attorney General – not the involuntary submission to federal jurisdiction in *Zbaraz*. *Id.* at 622.

[7] Indeed, the approach here is the right one for situations in which plaintiffs seek the expertise of federal courts in evaluating federal constitutional claims but face Eleventh Amendment barriers to joining state law claims. *See, e.g., Cuesnongle v. Ramos*, 835 F.2d 1486, 1497 n.8 (1st Cir. 1987) (commenting that bifurcating claims and litigating federal claims first in federal court is the only, though perhaps "less than optimal," course of action); *cf. Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75, 85 n.7 (1984) (because state court judgments have preclusive effect in subsequent federal actions, a plaintiff who wants "to litigate her federal claim in a federal forum" should "proceed first in federal court").

amended supplemental complaint in the litigation that had been initiated in 1984, in front of the same judge, and alleging nearly identical constitutional defects. Thus, although Defendants are correct that the *Zbaraz* plaintiffs could have filed their 1995 complaint in state court, under the circumstances here, doing so would have served neither the parties' nor the court's interests.[8]

Defendants' cases are simply inapposite as neither involved the kind of barrier to pursuing relief in the first action that existed here. Defs. Mot. at 8-10. In *River Park v. City of Highland Park*, the Court faulted the plaintiff for failing to include his state law claims based on the assumption that the federal court would not have exercised supplemental jurisdiction over those claims, 184 Ill. 2d 290, 318 (1998); however, unlike here, the plaintiff in *River* Park did not face a subject matter jurisdiction bar to the court providing relief on those claims. *Nowak* is similarly distinguishable. 197 Ill. 2d at 382.

Res judicata is an equitable doctrine that will not be applied "if to do so would be fundamentally unfair or would create inequitable or unjust results." *City of Chicago v. Midland Smelting*, 385 Ill. App. 3d 945, 964 (1st Dist. 2008). Here, where the plaintiffs in the first action were jurisdictionally barred from obtaining relief on state law claims in federal court, the policies favoring the application of *res judicata* do not apply to preclude a subsequent state court action. Defendants' motion thus must be denied.

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[8] Moreover, the "limitation on subject matter jurisdiction" exception to *res judicata* is no less applicable to Plaintiffs just because the *Zbaraz* plaintiffs could have filed the 1995 complaint in state court. *See* Defs. Mot. at 11. *Contrast River Park*, 184 Ill. 2d at 317-18 (court gives full consideration to whether there was truly a limitation on the claims that could be brought in the federal forum, an analysis that would have been irrelevant if the exception was inapplicable). Defendants' other cases are inapposite. *See Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1366 (7th Cir. 1988) (plaintiff chose not to allege a non-discretionary basis for federal jurisdiction); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 865-66 (7th Cir. 1996) (plaintiffs' subsequent claims were not precluded because plaintiff's first forum was both limited and exclusive).

B. Collateral Estoppel Does Not Bar Plaintiffs' Claims Under the Due Process and Equal Protection Clauses of the Illinois Constitution.

Defendants' sole basis for asserting collateral estoppel is that Illinois follows a "limited lockstep" approach to constitutional analysis and "often" follows federal precedent in analyzing its own Constitution. Defs. Mot. at 15. However, the mere existence of Illinois' limited lockstep doctrine does not mean that parties are prohibited from seeking an analysis of Illinois constitutional rights under Illinois law. *See*, *e.g.*, *infra* at 38-43. Defendants must meet a heavy burden to establish collateral estoppel – which they have not met here.

Collateral estoppel, also known as issue preclusion, "refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact *that has been actually litigated and decided in the initial action.*" *Freeman United Coal Mining Co. v. Office of Worker's Comp. Program*, 20 F.3d 289, 293 (7th Cir. 1994) (internal quotations omitted) (emphasis added). Unlike *res judicata*, collateral estoppel does not apply to issues that could have been litigated but were not. *Nowak*, 197 Ill. 2d at 390. Defendants' attempt to invoke collateral estoppel here must be denied unless they can meet the heavy burden of demonstrating with "clarity and certainty" that identical issues, actually litigated and decided in a prior action, are present in this action. *Peregrine Fin. Group Inc. v. Martinez*, 305 Ill. App. 3d 571, 581 (1st Dist. 1999). As it is plain that Plaintiffs' equal protection and due process claims under the Illinois Constitution are not the same as the claims that were raised, litigated, and determined in the federal litigation, Defendants cannot satisfy this burden.

First, no equal protection claims were actually litigated, let alone decided in the federal court; this is dispositive of Defendants' claim to collateral estoppel in connection

with Plaintiffs' state equal protection challenge. With respect to substantive due process, the only claims litigated and determined in federal court related to specific infirmities in the judicial bypass process. *See Zbaraz v. Ryan*, Perm. Inj. Order (N.D. Ill. Feb. 8, 1996) (permanently enjoining act because Illinois Supreme Court failed to promulgate rules implementing judicial bypass); *Zbaraz v. Madigan*, No. 84-CV-00771, 2008 U.S. Dist. LEXIS 15559 (N.D. Ill. Feb. 28, 2008) (declining to lift permanent injunction because judicial bypass provision lacks language permitting state court to authorize consent to abortion); *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009) (finding judicial bypass provision facially constitutional and lifting permanent injunction). By contrast, Plaintiffs here claim that the Act as a whole violated the Illinois Constitution. *See, e.g.*, Compl. ¶¶ 47-48 (Act "unlawfully intrud[es] upon a young woman's rights to bodily autonomy, to make medical decisions about her reproductive health care, and to keep medical information confidential"); *see also* Pls. Mem. at 23-24. Because it cannot reasonably be argued that the "identical" question was actually litigated and determined by the federal courts, on these grounds alone Defendants' collateral estoppel argument must fail.[9]

But even if Plaintiffs' claims were comparable in scope to those adjudicated in federal court, Defendants' underlying argument is untenable. The Illinois courts are simply not categorically bound by the federal court's application of federal law in determining a matter of first impression under the provisions of the Illinois Constitution implicated here. *See Rollins v. Ellwood*, 141 Ill. 2d 244, 275 (1990) ("While this court may . . . look for guidance and inspiration to constructions of the Federal due process

[9] Likewise, Plaintiffs are not estopped from seeking temporary relief based on the Illinois courts' lack of preparedness to enforce the judicial bypass provisions, because this request is grounded on new facts that were not before the federal courts in *Zbaraz*. *See* Pls. Mem. at 34-37.

clause by the Federal courts, the final conclusions on how the due process guarantee of the Illinois Constitution should be construed are for this court to draw."). Indeed, as even Defendants concede, Illinois courts do not always employ the same analysis as the federal courts in analyzing due process claims, nor do they always reach the identical result. *See* Defs. Mot. at 15, 19-20; *see also* Defs. Resp. at 33.[10] In *People v. Washington*, 171 Ill. 2d 475, 485-89 (1996), the Illinois Supreme Court explicitly departed from the U.S. Supreme Court's due process analysis, in large part because it reasoned that federal precedent did not adequately reflect the importance of the right at issue, and had "overlooked" an essential basis for protecting that right. *See also People v. Caballes*, 221 Ill. 2d 282, 301 (2006) (explaining that *Washington* departed from federal law because it would have been "fundamentally unfair" to deprive the defendant of the right asserted). Whether Illinois courts frequently break lockstep with federal courts is irrelevant. What is relevant, for purposes of the collateral estoppel analysis, is that the Illinois courts clearly retain the power to interpret the state Due Process Clause and are not bound by the ultimate results in federal cases analyzing the federal Constitution. Indeed, Defendants have cited no case where a party was estopped from raising a state constitutional claim *solely* because a federal court previously had adjudicated its federal analogue.[11]

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[10] As Defendants themselves explain, when "federal law provides no relief, [state courts] turn to the state constitution to determine whether [it] justifies departure from federal precedent." Defs. Mot. at 19-20.

[11] Moreover, as collateral estoppel is an equitable doctrine, even if Defendants could meet their burden, which they cannot, as a matter of fundamental fairness, Plaintiffs' state constitutional claims should not be barred. *See Nowak*, 197 Ill. 2d at 391 ("Even where the threshold elements of the doctrine are satisfied, collateral estoppel must not be applied to preclude parties from presenting their claims . . .unless it is clear that no unfairness results to the party being estopped.") In determining whether the doctrine of collateral estoppel is applicable, a court must consider "the practical realities of [the prior] litigation." *Id.* As the *Zbaraz* plaintiffs could not have pursued relief on state constitutional grounds in their federal action, *see supra* at 11-16,

Because the claims actually litigated and decided in the federal action are not the same, either in terms of scope or substance, as the claims Plaintiffs raise here, Defendants' collateral estoppel argument fails.

III. DEFENDANTS' FACIAL INVALIDATION ARGUMENTS DO NOT SUPPORT THEIR REQUEST FOR DISMISSAL OR JUDGMENT ON THE PLEADINGS.

Defendants contend that regardless of the merits of Plaintiffs' constitutional claims, this action should be dismissed because, as a matter of law, the Act could be constitutionally applied to some minors. Defendants' argument misconstrues Illinois law and fundamentally misperceives the undisputed facts before this Court, which, on this motion, must be viewed in the light most favorable to Plaintiffs.

As an initial matter, Defendants' argument depends on the remarkable proposition that not only does the Illinois Constitution lack greater protection for the right to abortion than the federal Constitution, but it actually provides *less*. *See* Defs. Mot. at 16-19 (arguing for "no set of circumstances" test despite that the federal courts have rejected its application to abortion restrictions); *see, e.g.*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (holding law requiring women to notify their husbands before having an abortion facially unconstitutional because it would operate as a substantial obstacle "in a large fraction of cases in which [it] is relevant"); *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 368 (6th Cir. 2006) (citing cases). Defendants cannot cite any support for this novel proposition.

Indeed, even outside the abortion context, Illinois courts have refused to rigidly adhere to the no set of circumstances test. *See, e.g.*, *In re H.G.*, 197 Ill. 2d 317, 333

Plaintiffs here should not be prohibited from pursuing such relief in this action because a federal court previously resolved similar issues under the federal Constitution.

(2001) (facially invalidating statute despite that it could be applied constitutionally in numerous situations); *In re Amanda D.*, 349 Ill. App. 3d 941, 954 (2nd Dist. 2004) (refusing to apply no set of circumstances test because burden would be "too high") *aff'd* 214 Ill. 2d 289 (2005); *cf. In re Branning*, 285 Ill. App. 3d 405, 416 (4th Dist. 1996) ("Nor is the statute saved by the language that a facial challenge must fail unless 'no set of circumstances exists under which the Act would be valid.' This language does not mean a statute survives a facial procedural due process challenge unless it is *impossible* for it to be applied constitutionally. . .Even facial review is not quite so deferential.") (internal citations omitted). Indeed, in many cases, Illinois courts, including the Illinois Supreme Court, apply a test comparable to the large fraction test, striking down the laws in question because they unconstitutionally infringe on the rights of "some" or "many." *See, e.g.*, *In re H.G.*, 197 Ill. 2d at 333 (invalidating statute creating presumption of unfitness if child remains in foster care for 15 months out of any 22 month period "because there will be *many* cases in which children remain in foster care for the statutory period even when their parents can properly care for them") (emphasis added); *Boynton v. Kusper*, 112 Ill. 2d 356, 370 (1986) (invalidating marriage tax because "*some* people will be forced by the tax imposed to alter their marriage plans") (emphasis added); *In re Torski C.*, 2009 Ill. App. LEXIS 1116, at * 26 (Ill. App. Ct. 4th Dist. Nov. 17, 2009) (invalidating provision of Mental Health Code authorizing involuntary confinement of mentally ill for "dangerous conduct" because "*some* types of behavior . . .may present too minimal a threat to society to justify confinement") (emphasis added).

Regardless of the test, however, facial invalidation is required here. As the U.S. Supreme Court has stated, whatever the test, "the proper focus of constitutional inquiry is

the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894 (giving example of this framework for analysis from outside abortion context). Thus, the proper focus here is *only* on the minority of minors who do not want to notify a parent of their plan to have an abortion, *see id.* at 895 (evaluating spousal notification for abortion law by focusing only on married women who do not wish to notify their husbands and do not qualify for an exception), not on the minors who would confide in an adult voluntarily, as Defendants suggest, *see* Defs. Mot. at 17.

If, as Plaintiffs believe and the law supports, the question is whether the law impermissibly infringes the rights of some, or many, or even a large fraction, in the affected group, the material facts set forth in Plaintiffs' pleadings, which the Court must accept as true and construe in the light most favorable to Plaintiffs, demonstrate that the Act does exactly that. Indeed, Defendants have not disputed *a single one* of Plaintiffs' numerous allegations detailing how the Act's notification requirement will result in significant and irreversible harm. *See, e.g.*, Comp. ¶¶ 31, 34-36; *see also* Pls. Mem. Ex. B ¶ 27 (national study of teens in states without parental involvement laws showing that 30% of those who did not involve a parent in their abortion decision had previously experienced or feared violence in the home, or feared homelessness); *id.* Ex. G ¶ 17 (quantitative study showing 18.8% of Massachusetts minors seeking judicial bypass were doing so because of fear of severe reactions such as abuse and forced homelessness).[12]

[12] Defendants characterize Plaintiffs' facts as "anecdotal" and suggest that any harms can be avoided by invoking the reported abuse exception. *See* Defs. Mot. at 17-18. But Defendants have not presented any argument as to why the very real harms that have befallen teens in other states would not occur here. As a matter of reasonable inferences, this Court must accept the reality that similarly situated families in one state are comparable to those in another when dealing with pregnant teens under similar state laws. Nor have Defendants taken issue with Plaintiffs' showing that the reported abuse exception provides little if any protection for abused teens – nor can they in the context of this motion. *See* Compl. ¶ 35; *see also* Ex. H.

Moreover, even if the no set of circumstances test was proper here, Plaintiffs satisfy that test as well. The Act infringes the rights of *all* minors who would, in the absence of the law, seek an abortion without involving a parent: For each and every one of these minors, the Act discriminates by applying a restriction that does not apply to pregnant minors who choose to continue their pregnancies (equal protection claim). For each and every one of these minors, the Act imposes restrictions based on impermissible stereotypes about women's proper role as mothers (gender discrimination claim). And for each and every one of these minors, the Act intrudes on the right to privacy and reproductive choice – by encumbering her choice to terminate her pregnancy, by requiring her to disclose her plan to a parent against her wishes or by requiring her to disclose confidential information about her sexual history and reproductive choices to a judge (privacy and substantive due process claims). Accordingly, because the Act violates the rights of all minors subject to its restrictions, it is necessarily unconstitutional in all circumstances.

More fundamentally, however, facial invalidation is necessary here because no remedy short of facial invalidation is sufficient to protect against the unconstitutional application of the Act. *See In re Amanda D.*, 349 Ill. App. 3d at 953-54 (invalidating law on its face where law was not susceptible to as applied challenge) (citing *Beverly Bank v. Illinois Dep't of Transportation*, 144 Ill. 2d 210 (1991)). Defendants' arguments to the contrary demonstrate a callous and painfully oblivious disregard for the real-life situations of these young women. An as applied challenge to the Act would require a teen to go to court seeking a ruling that the Act is unconstitutional as applied to her: because notifying her parents would cause her harm, because she is capable of making an

informed decision on her own, and so on. She would invariably be subject to the same delay, emotional harm, and potential breaches of confidentiality that the judicial bypass process – the very process Plaintiffs challenge as harmful and insufficient here – entails. Moreover, relief from such an as applied challenge would be virtually meaningless. What would such relief look like? A ruling that the Act is unconstitutional as applied to best interest and mature minors? How would the next minor prove that she is part of the class to whom the law cannot constitutionally be applied? Presumably that teen would have to go to court and prove that she is mature or that notifying her parents is not in her best interests. In other words, requiring minors to bring as applied challenges is just another way of saying that each and every pregnant teenager seeking to challenge the Act would – at best – have to submit to the very bypass process she contends is unconstitutional.[13] Thus, regardless of the label one uses (facial vs. as applied challenge), facial invalidation is the only way this Court can provide any meaningful relief.[14]

In light of the facts presented here, whether the test is something akin to the large fraction test or whether it is the no set of circumstances test, facial invalidation of the Act is proper.

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[13] Indeed, Defendants' argument exemplifies precisely this futility. Defendants argue that in an as applied challenge "a minor may seek relief from the notice requirement whenever she fails to receive the expeditious and anonymous bypass process and the free legal counsel to which she is entitled." Defs. Mot. at 19. But what relief would the possibility of such an as applied proceeding provide to the pregnant minor who is unable to get the confidential, expeditious, attorney assisted bypass process the statute entitles her to?

[14] Defendants' citation of a few cases, where, in dicta, the court off-handedly suggests that a later as applied challenge may be possible does nothing to change the practical realities of an as applied challenge in this case. Defs. Mem. at 19. Such a challenge would unavoidably and repeatedly subject young women to the very harms Plaintiffs are seeking to prevent.

IV. DEFENDANTS ARE NOT ENTITLED TO DISMISSAL OF PLAINTIFFS' CLAIMS UNDER THE ILLINOIS CONSTITUTION.[15]

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

Unlike the United States Constitution, 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 ..." *Id.* 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 [constitutional] right of privacy protects substantive fundamental rights, such as the right to reproductive autonomy."). Minors as well as adults are protected. *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

[15] Defendants' arguments regarding privacy, due process, equal protection and gender equality in their combined motion are a nearly verbatim repetition of their arguments in their response to Plaintiffs' request for injunctive relief. Plaintiffs will not repeat all of the arguments from their initial memorandum here but instead refer the court to those papers, which, along with their reply brief, Plaintiffs have incorporated herein by reference.

her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy." 260 Ill. App. 3d at 401.

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 (1997) (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).

By all measures, the Illinois express right of privacy – including the right to decide whether to continue a pregnancy and the right not to be forced to reveal private medical information – is independent of federal precedent. The unique language of the Illinois Constitution, the debates and committee history of the constitutional convention, and state tradition and laws 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, 289-314 (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); *see also* Pls. Mem. at 18-23. The facts alleged here, which the Court must take as true, demonstrate that the Act imposes a direct and substantial barrier to the exercise of the fundamental right of privacy afforded under the Illinois Constitution. Defendants' motion thus must be denied.

1. The Illinois Supreme Court Has Held that the Privacy Clause Protects the Fundamental Right to Decide to Terminate a Pregnancy.

Defendants go to great lengths to deny that the Illinois Privacy Clause protects a woman's right to choose to terminate her pregnancy. *See, e.g.*, Defs. Mot. at 22 (Privacy Clause limited to search and seizure); 24 (limited to "invasions of one's physical person for purpose of gathering evidence" and "exposure to private records to public view"); 27-28 (limited to technological advancement and eavesdropping); 24-25 (does not protect conduct); 25 (abortion claim under Privacy Clause foreclosed). However, they have no rejoinder to the explicit holding of the Illinois Supreme Court in *Family Life League*, that the Privacy Clause of Article I, Section 6, and the "certain remedies" provision in Article I, Section 12, of the Illinois Constitution secure as fundamental a woman's right to terminate her pregnancy. 112 Ill. 2d at 454 (the "fundamental constitutional right of privacy which encompasses a woman's decision to terminate her pregnancy... is guaranteed by the penumbra of the Bill of Rights of the United States Constitution [and] was also secured by the drafters of the 1970 Constitution of the State of Illinois. Ill. Const. 1970, art. I, secs. 6, 12."). *Family Life League* is a repudiation of every argument Defendants make for excluding the applicability of the Privacy Clause to reproductive freedom. Not only is Defendants' position surprising in light of *Family Life League*'s

clear holding, it is even more so in light of the fact that it was the Illinois Attorney General who urged the Illinois Supreme Court in *Family Life League* to reach this conclusion. *See Family Life League v. Dep't of Public* Aid, No. 62137, Brief of Defendants-Appellees Ill. Dep't of Public Aid and Gregory L. Coler, Director, at 15 (Ill. Sup. Ct.) (attached to Pls. Reply as Ex. A).

Defendants attempt to dilute *Family Life League*'s impact by asserting that the case concerned nothing more than "a claimed violation of ... informational privacy." Defs. Mot. at 25, n.6 (emphasis omitted). Defendants are wrong. The Illinois Attorney General's argument for the recognition of a right to abortion under the Privacy Clause of the Illinois Constitution in *Family Life League* was an essential component of the state's defense that disclosure of identifying information about abortion providers would lead to harassment and deter physicians from offering abortion services, thus resulting in a deprivation of the fundamental right to abortion afforded under the Illinois Constitution. 112 Ill. 2d at 454-55. The Court's recognition of protections for abortion under the Privacy Clause thus cannot be limited as Defendants urge.

Defendants also argue that *Family Life League* and *Village of Oak Lawn v. Marcowitz*, 86 Ill. 2d 406 (1981), "are impossible to square" with protection for abortion under the Privacy Clause, because in those cases, the Court "dispensed with [the plaintiffs' case] without performing an independent state law analysis, as it would need to do if Illinois' privacy right provided additional protections." Defs. Mot. at 25-26. However, in both instances, the Court disposed of the federal claim after concluding that there was no evidence of any infringement. *See Family Life League*, 112 Ill. 2d at 456 (no infringement of privacy right by release of public expenditures information where record

devoid of evidence that harassment will ensue); *Village of Oak Lawn*, 86 Ill. 2d at 424 (upholding 24 hour waiting period where record devoid of evidence of burden). In the absence of any evidence, there was no reason to engage in further analysis. Here, by contrast, Plaintiffs have submitted extensive, uncontroverted evidence of the privacy infringement that will result from the Act's enforcement.[16]

In light of *Family Life League*, Defendants' numerous attempts to limit the scope of the Privacy Clause fail. First, Defendants' own cases refute their argument that the Privacy Clause is merely "part and parcel of Illinois' search and seizure provision," Defs. Mot. at 23. Rather, the Illinois Supreme Court has repeatedly linked *only* the search and seizure provisions of Article I, Section 6 with the Fourth Amendment, while consistently addressing the Privacy Clause as a separate and independent constitutional right. *See, e.g., Lakisha M.*, 227 Ill. 2d 259, 279 (2008); *People v. Caballes*, 221 Ill. 2d 282, 317 (2006). And, this is consistent with how the drafters viewed the new privacy protections. 3 Proceedings, at 1525 (statement of Delegate Gertz) (The "new" concept of privacy was included in the search and seizure provision "by accretion.").[17]

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[16] Defendants also seek to evade *Family Life League* by emphasizing Delegate Gertz's statement that the Privacy Clause "has nothing to do with the question of abortion." Defs. Mot. at 27. However, as Plaintiffs explained in their earlier briefs, Pls. Mem. at 19, n.6; Pls. Reply at 4, n.2, no other delegate seconded this sentiment, and the delegates overwhelmingly rejected a proposal to restrict abortion. In doing so, the delegates intended to allow liberalization of abortion access by both legislative and judicial action. *See, e.g.*, 3 Sixth Illinois Constitution Convention, Record of Proceedings (hereinafter "Proceedings"), at 1505 (Delegate Weisberg, opposing the proposed abortion ban because "recent court decisions" across the country had struck down abortion restraints); *id.* at 1513 (Delegate Pappas, opposing it because "the entire spectrum of the highly personal and private matters" implicated by the proposal "should be left to the legislature and the courts").

[17] For this reason, Defendants' effort to distinguish decisions striking parental involvement laws under other states' constitutions that, like Illinois', contain an express right to privacy or inalienable rights clause, also fails. Defs. Mot. at 21. *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*

Defendants also assert that the privacy language only protects against "technological developments." Defs. Mot. at 27. But when asked whether this new privacy right would "go beyond the area of an electronic device," Delegate Gertz answered affirmatively: "All kinds of things might invade our dignity as human beings...I want to stem the tide." 3 Proceedings, at 1535. Subsequent cases have embraced this broad reading of the Privacy Clause. *See, e.g.*, *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992) (Privacy Clause "goes beyond" individual liberties guaranteed by the federal Constitution); *King v. Ryan*, 153 Ill. 2d 449, 464 (1992) (same); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 451 (1997) (same). *See also* Pls. Mem. at 16-18.[18] Indeed, as Defendants concede, *see* Defs. Mot. at 24, 31, the Privacy Clause unequivocally protects against violations of *informational* privacy, as well. *See Kunkel*, 179 Ill. 2d at 537 (medical information, including information pertaining to "reproductive choice," is "without question at the core" of the Privacy Clause); *A.G. Edwards, Inc. v. Secretary of State*, 331 Ill. App. 3d 1101, 1110-12 (5th Dist. 2002) (quashing a regulatory agency's subpoena for personal financial records under the Privacy Clause).

Finally, Defendants contend that the Privacy Clause does not protect against "interference with one's *conduct*." Defs. Mot. at 24 (emphasis in original). However, as the Committee Report explained, the Privacy Clause was intended to protect a "zone of

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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).

[18] Defendants cite *Ill. State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 522 (1974), to argue that the Privacy Clause only protects against "eavesdropping devices or other means of interception." Defs. Mot. at 28. However, *Walker*, decided a mere four years after the Privacy Clause was added, states only that "[n]ot all members of the court are convinced" the clause extends beyond surveillance. *Id.* at 523. Later cases clearly indicate that this narrow view has been repudiated.

privacy" that includes both "thoughts and *highly personal behavior.*" 6 Proceedings, at 32 (emphasis added). That the Illinois Supreme Court has refused to extend constitutional protection to two specific types of conduct – the possession of child pornography, *see People v. Geever*, 122 Ill. 2d 313, 348 (1988), and the decision not to wear a seatbelt, *see People v. Kohrig*, 113 Ill. 2d 384, 395 (1986) – the only examples cited by Defendants – in no way repudiates the clear statement of the Committee, let alone overrules *Family Life League sub silentio*.

Defendants' entire argument misapplies the "limited lockstep" doctrine. First, they ignore that the Privacy Clause is unmatched in the language of the federal Constitution. While the federal Constitution has been interpreted to contain certain unwritten rights that may be similar to those guaranteed by the explicit Illinois Privacy Clause, *see, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965), the controlling question here is not whether the Illinois Constitution contains a functionally unique doctrine, but whether it contains a textually unique "provision." *Caballes*, 221 Ill. 2d at 289 ("[A] provision may be unique to the state constitution and, therefore, must be interpreted without reference to a federal counterpart.").

Second, contrary to Defendants' assertions, Defs. Mot. at 29, the limited lockstep doctrine accounts for state tradition and values as reflected in state cases and statutes, *Caballes*, 221 Ill. 2d at 314, including recent cases and enactments. *See, e.g., People v. Washington*, 171 Ill. 2d 475, 486 (1996) (in breaking lockstep, relied on recent judicial decisions); *People v. Krueger*, 175 Ill. 2d 60, 76 (1996) (same).[19] Thus, long-overturned

[19] In addition, in both *Krueger* and *Washington*, the Court relied on decisions from other states interpreting their own Constitutions in deciding whether to depart from federal law in Illinois. *Washington*, 171 Ill. 2d at 489; *Krueger*, 175 Ill. 2d at 76. Indeed, while Defendants dismiss as irrelevant the New Jersey Supreme Court's decision in *Farmer*, 762 A.2d 620, because New

abortion restraints matter far less than the unwavering support for a woman's right to reproductive autonomy repeatedly guaranteed by the Illinois courts. *See, e.g., Family Life League*, 112 Ill. 2d at 454; *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 bodily autonomy" by subjecting to state scrutiny "all the decisions a woman must make in attempting to carry a pregnancy to term"); *In re Baby Boy Doe*, 260 Ill. App. 3d at 399 ("[T]he state [constitutional] right of privacy protects substantive fundamental rights, such as the right to reproductive autonomy.")

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). Thus, contrary to Defendants' assertions, 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.

2. Defendants Cannot Show That the Act is Justified as a Matter of Law.

In pursuing this motion, Defendants apparently contend that the harm to minors set forth in Plaintiffs' complaint is justified because "the Act is a reasonable restriction on the right" to privacy, *as a matter of law*. Defs. Mot. at 30. Indeed, because this is a motion to dismiss, in order to prevail, Defendants must show that, *regardless of the facts*

Jersey "adopts a looser lockstep approach," Defs. Mot. at 21, the Illinois Supreme Court in *Krueger* relied on decisions from the New Jersey high court in departing from federal law regarding a good-faith exception to the exclusionary rule. *Krueger*, 175 Ill. 2d at 76.

Plaintiffs can prove either as to the harm or the lack of need for the Act, this Court is legally required to find that the Act is justified. This argument is beyond the pale. Plaintiffs have pled (and supported with significant evidence) that the majority of minors tell their parents about their pregnancy and planned abortion, that for those who do not, the Act will not force good family communication and indeed will put minors at risk of serious harm; that abortion is safe both from a medical and psychological perspective; and that minors are mature and capable of understanding their options and making informed decisions. *See* Compl. ¶¶ 34-36. Thus, even if Defendants were correct that Plaintiffs' privacy claim is subject to a highly deferential "reasonableness" review, Defendants could not prove that the Act is reasonable as a matter of law.[20]

Here, Defendants are not correct about the governing standard. First, laws that infringe on a fundamental right, such as the right to reproductive autonomy, 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); *Boynton*, 112 Ill. 2d at 369; *see also* Pls. Mem. at 16-23. Taking Plaintiffs' well-pleaded (and supported) allegations as true, the Act cannot survive such scrutiny. *See* Pls. Mem. at 28-34.

Furthermore, even if the Illinois Supreme Court's reasonableness test applied, it is not the highly deferential test that Defendants seek. To the contrary, the Illinois Supreme Court's reasonableness test is robust. There is "a continuum of privacy protections . . .

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[20] Defendants' citations to federal cases does not change this analysis. Defs. Mot. at 32-34. Even if the governing standards were the same, and they are not, Illinois courts do not blindly defer to federal courts' analysis of constitutional claims. *See, e.g., Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 32-40 (1996) (performing extensive independent analysis of state equal protection claim despite that the United States Supreme Court had recently upheld a similar statutory scheme under the federal equal protection clause).

depending on the degree of intrusiveness" of the government's action. *Caballes*, 221 Ill. 2d at 322. "[B]alancing the need for official intrusion against the constitutionally protected interest of the private citizen," *Will County Grand Jury*, 152 Ill. 2d at 392, Illinois courts have routinely invalidated state action that is far less invasive than the Act here. *See, e.g.*, *Kunkel*, 179 Ill. 2d at 537-40 (striking down statute requiring personal injury plaintiffs to disclose medical information to opposing party's attorneys); *King v. Ryan*, 153 Ill. 2d 449, 464-65 (1992) (striking down statute authorizing breathalyzer test of individual involved in motor vehicle accident); *A.G. Edwards*, 331 Ill. App. 3d at 1110-12 (striking down subpoena by Department of Securities for the State of Illinois for brokers' financial information).[21]

Moreover, where the Court has identified a "compelling" privacy interest under the Privacy Clause, the scrutiny applied is even more exacting. For example, in *In re a Minor*, 149 Ill. 2d 247, the Illinois Supreme Court upheld a statute allowing a court to prohibit the disclosure of the identities of minor victims of abuse against a First Amendment challenge. In so doing, the Court recognized that – *under the Privacy Clause* – minor victims had a "*compelling interest*" in protecting their identities from disclosure. *Id.* at 256 (emphasis added). After weighing the interests in favor of disclosure, the Court concluded there was "no compelling interest" that outweighed the minor's interest in privacy. *Id.* at 257.[22]

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[21] The New Jersey Supreme Court engaged in a similar balancing of rights and interests in striking New Jersey's parental notice law under the state's right to equal protection. *Farmer*, 762 A.2d at 631, 642.

[22] Contrary to Defendants' contention, Defs. Mot. at 31, n.7, the Court, without question, addressed the minors' privacy rights as compelling rights protected by the Privacy Clause of the Illinois Constitution – as opposed to some abstract notion of privacy. *See* 149 Ill. 2d at 255-57. In balancing those rights against the First Amendment rights of the press, the Court concluded that

Certainly, the privacy interest at stake here – the fundamental right to decide, without interference and free from threats, coercion and abuse, whether to continue a pregnancy, and the right to have one's private reproductive health maintained confidentially – is compelling. *See Family Life League*, 112 Ill. 2d at 454; *Baby Boy Doe*, 260 Ill. App. 3d at 399; *cf. Stallman,* 125 Ill. 2d at 279-80.

But whether the test is robust reasonableness or something more exacting, Plaintiffs here meet it. In response to Plaintiffs' substantial evidence demonstrating the lack of justification for the Act's requirements, *see* Pls. Mem. at 28-34, Defendants submitted not a single fact. Rather, their only attempt to show a justification is to cite "findings" from federal courts. Defs. Mot. at 32-34. This does not suffice – particularly on a motion to dismiss where Plaintiffs are entitled to the benefit of all inferences from their well-pleaded facts. Even when the governing standards are the same, and here they are not, Illinois courts do not blindly defer to federal courts' analysis of constitutional claims. *See, e.g.*, *Comm. for Educ. Rights*, 174 Ill. 2d at 32-40 (performing extensive independent analysis of state equal protection claim despite fact that the United States Supreme Court had recently upheld a similar statutory scheme under the federal equal protection clause). Rather, this Court has an obligation to conduct an examination of the facts and independently analyze the claim. *See id.* This is all the more true where, as here,

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"public disclosure [of the minors' identities] would surely invade their *right to privacy* in a most egregious manner." 149 Ill. 2d at 257 (emphasis added). In addition, contrary to Defendants' contention, the fact that the case dealt with the Privacy Clause's protection for private information as opposed to protection for private reproductive decision making in no way alters the level of protection offered by the clause and recognized by the Court.

the Plaintiffs have submitted extensive evidence in support of their claim that did not exist at the time of the federal decisions.[23]

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

As with privacy, the "limited lockstep" doctrine dictates broader protections under the substantive components of Illinois' Due Process Clause than exist under the federal Constitution. Though the text 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 privacy right and strong tradition, common law and statutory recognition of the importance of broad and potent privacy protections. *See* Pls. Mem. at 18-22.

Defendants contend that this Court cannot depart from the results in federal substantive due process cases upholding parental involvement laws. However, Defendants acknowledge, as they must, that the Illinois Supreme Court has, in appropriate situations, departed from U.S. Supreme Court analysis and results. Defs. Mot. at 38, *citing Washington*, 171 Ill. 2d at 486. In *Washington*, the Illinois Supreme Court departed from lockstep in interpreting the substantive component of the Illinois Due Process Clause, reasoning in significant part that the U.S. Supreme Court decision on

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[23] Moreover, only one of the Defendants' cases considered the *irrationality* of a legislative scheme that permits pregnant minors to consent to all medical procedures except abortion without parental notification. *H.L. v. Matheson*, 450 U.S. 398, 412-13 (1981). There, the state asserted an interest in promoting childbirth, one neither the legislature nor the Defendants have asserted here. Moreover, if justified by such an interest, the Act clearly would violate the state constitutional guarantees to privacy, substantive due process, and gender equality. The other justification in *Matheson*, that childbearing carried few if any of the "potentially grave emotional and psychological consequences" of the decision to abort, was unsupported by any record evidence of comparative safety – from a medical or psychological perspective – and is flatly contradicted by the record in this case, including comprehensive research by the American Psychological Association. *See* Compl. ¶ 44; Pls. Mem. at 31-32; *id.* Ex. C ¶¶ 11, 14; *id.* Ex. I ¶ 26.

point was insufficiently protective of the right at issue, and had "overlooked" an essential basis for protecting that right. *Id.* at 488-89; *see also Caballes*, 221 Ill. 2d at 301 (explaining that *Washington* departed from lockstep because it would have been "fundamentally unfair" to deprive defendant of the right asserted). Here, it is also appropriate for this Court to break lockstep. The Illinois Constitution expressly protects privacy, while the U.S. Constitution does not. Therefore, the privacy protection under the Illinois Constitution is stronger and more expansive than the privacy safeguards of the U.S. Constitution.

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 the right to privacy. *See Boynton*, 112 Ill. 2d 356 (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 (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).

It is not determinative, as Defendants suggest, that the debates and committee reports of the Constitutional Convention do not clearly indicate that the delegates intended the Illinois Due Process Clause to provide additional protection for abortion

than was available under federal law. In *Washington*, the Illinois Supreme Court departed from lockstep even though "the Record of Proceedings of the Constitutional Convention does not reveal anything as to what the drafters intended for the Illinois protection different from the federal counterpart." 171 Ill. 2d at 485. Here, all that is clear from the Record of Proceedings is that the Delegates resoundingly rejected due process rights for "the unborn." 3 Proceedings, at 1523.[24]

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

Defendants' entire argument in favor of dismissing Plaintiffs' equal protection claim is that because two lower federal courts rejected federal equal protection challenges to parental involvement laws, Illinois' limited lockstep doctrine deprives this Court of the right to independently analyze the well-pleaded facts in this case for compliance with the Illinois Constitution. First, however, lower federal court cases, as opposed to U.S. Supreme Court precedent, are not determinative of federal law – and Defendants' cases do not even contain persuasive analysis. Moreover, Defendants inappropriately substitute a doctrine of blind deference to federal courts for the limited lockstep doctrine. But as the Illinois Supreme Court has made clear, this Court has not only the authority but the obligation to conduct an examination of the facts and independently analyze a state constitutional claim – even when the standards governing the claim are the same as its federal counterpart. *See, e.g., Comm. for Educ. Rights*, 174 Ill. 2d at 32-40 (performing

[24] Some opponents of this "unborn" language argued that the subject of abortion should be left to the legislature. *See* 6 Proceedings, at 131, 134 (Minority Report); 3 Proceedings, at 1504, 1505, 1513, 1517 (delegate statements). However, in context, they seem to suggest only that the "unborn" language would prevent the legislature from relaxing existing abortion restrictions. Indeed, the Minority Report expressed serious concern that inclusion of "the unborn" would infringe on "the rights of all persons to act in accordance with their own religious and moral convictions." 6 Proceedings, at 135.

extensive independent analysis of state equal protection claim despite fact that the U.S. Supreme Court had recently upheld a similar statutory scheme under the federal equal protection clause). Once Defendants' equation of lockstep with blind deference is put to rest, it is clear that their motion must fail, for the well-pleaded facts and unrebutted record evidence here overwhelmingly demonstrate that there is no reasonable, let alone compelling, basis for requiring parental notification for minors who choose abortion while not requiring the same of minors who continue their pregnancies. *See supra* at 4-10; Pls. Mem. at 28-34.

"Equal protection requires that similarly situated individuals will be treated similarly unless the government can demonstrate an appropriate reason to do otherwise." *Maddux v. Blagojevich*, 233 Ill. 2d 508, 526-27 (2009). Although "when conducting an equal protection analysis, [Illinois courts] apply the same standards under both the United States Constitution and the Illinois Constitution," *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 434 (2005), if the classification affects fundamental rights, that standard is strict scrutiny. *See, e.g., In re K.L.P.*, 198 Ill. 2d 448, 467 (2002); *In re D.W.*, 214 Ill. 2d 289, 313 (2005); *Fumarolo v. Chicago Bd. of Educ.*, 142 Ill. 2d 54, 73 (1990); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Here, the Act affects fundamental rights and classifies minors based on how they exercise those rights. Thus, strict scrutiny is the appropriate standard.

None of Defendants' cases alter this conclusion. As Defendants now acknowledge, *H.L. v. Matheson* did not even involve an equal protection claim. *See* Defs. Mot. at 40; *contrast* Defs. Resp. at 34-35. The plaintiff in *Matheson* alleged only that the challenged statute "violate[d] the *right to privacy* recognized in our prior cases . . . [such

as] *Bellotti* [v. Baird, 443 U.S. 622 (1979)]." 450 U.S. 398, 408 (1981) (emphasis added).[25] *Matheson* thus says nothing about the appropriate analysis here.

That leaves only the First Circuit's decision in *Planned Parenthood v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981), as support for Defendants' remarkable assertion that federal courts have "routinely rejected equal protection claims akin to plaintiffs' . . . using a rational basis standard." Defs. Mot. at 41.[26] But there, the court chose not to employ strict scrutiny because it "consider[ed] [itself] bound by th[e] view" that under the federal Constitution, parental notice laws do not "impermissibly interfere with the exercise of a fundamental right." 641 F.2d at 1012. Here, because the Act infringes on fundamental rights protected by the *Illinois* Constitution, strict scrutiny is required.

In any event, even under lower level rationality review, the Act falls, for, among other things, the facts here show that abortion is safer than continuing a pregnancy; that minors are capable of making informed decisions; and that all of the legislature's purported justifications apply with equal or greater force to minors who decide to continue a pregnancy and have a child. *See supra* at 4-10; Pls. Mem. at 28-34; *see also People v. McCabe*, 49 Ill. 2d 338, 348 (1971) (holding that reason proffered for distinction between marijuana and other drugs – that marijuana use was likely to lead to use of other and harder drugs – was not sufficient to satisfy even rational basis equal protection review where the same effect could be attributed to other drugs); *cf. Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 325 (1996) (finding that distinction could not

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[25] Indeed, in *Bellotti v. Baird*, the Supreme Court declined to rule on the equal protection claim because it had held the statute unconstitutional on other grounds. 443 U.S. at 650 n.30.

[26] Defendants' other lower court case, *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 296 (3rd Cir. 1984), addresses equal protection in only the most cursory fashion and, indeed, incorrectly relies on *Matheson* as rejecting an equal protection challenge to a parental notice statute. *Id.*

survive even rational basis review under the equal protection clause because the state interest "would be equally well served by" applying the restriction to both classes of individuals). Indeed, given the undisputed harms of parental involvement, the Act is "directly at odds with the stated purpose" of the Act, and therefore must be struck down. *Jacobson*, 171 Ill. 2d at 328.

Defendants' counter to this evidence is limited to the "implict[] assum[ption] that a state may rationally conclude that the decision to have an abortion poses risks to the physical, mental health, or emotional well-being of a minor which are greater than the risks posed by the decision to bear a child." *Bellotti*, 641 F.2d at 1012; Defs. Mot. at 41. However, constitutional rights cannot be violated based on assumptions and intuition, and such assumptions most assuredly cannot support a motion to dismiss – particularly in the face of the facts presented here.

Defendants' reliance on the interests and assumptions in *Matheson* is similarly flawed. Defs. Mot. at 40. The statute in *Matheson* was supported by an interest in promoting childbirth, one neither the legislature nor the Defendants have asserted here. (Indeed, if the state did assert an interest in making it more difficult for teens to get an abortion so that they instead carried to term, the Act would clearly violate the state constitutional guarantees to privacy, substantive due process, and gender equality.) The only other justification asserted by the *Matheson* Court, that the restriction was necessary because childbearing carried few if any of the "potentially grave emotional and psychological consequences" of the decision to abort, was unsupported by any record evidence of comparative safety – from a medical or psychological perspective. 450 U.S. at 411 and n. 20, 412.

By contrast, here, the extensive, uncontroverted, and well-pleaded facts demonstrate that "abortion is one of the safest surgical procedures available, and is many times safer than continuing a pregnancy through to childbirth." Compl. ¶ 41; *see also* Compl. ¶¶ 23-28; Pls. Mem. Ex. B. In addition, Plaintiffs' facts thoroughly discredit the notion that abortion leads to grave psychological consequences for minors, particularly relative to childbirth. Compl. ¶ 42 ("more than two decades of scientific research has consistently shown that for the vast majority of women, including adolescents, abortion poses no psychological hazard"); *see also* Pls. Mem. Ex. C. Moreover, "the best scientific evidence available demonstrates that adolescents who terminated their pregnancies were just as healthy – if not healthier psycholiogically – than those who gave birth." Compl. ¶ 42; *see also* Pls. Mem. Ex. C ¶ 30.

As the Illinois Supreme Court has made clear, *even under rational basis review*, the determination of whether a classification is justified "require[s] an assessment of the relevant scientific, medical and social data found, including the voluminous materials assembled by the parties here, which are pertinent to support and to defeat the classification." *McCabe*, 49 Ill. 2d at 341-42; *see generally id.* at 341-50 (striking drug classification scheme after closely reviewing detailed evidence about the differences between various illegal drugs and finding that the data did not provide any reasonable basis for the differential classifications). Where, as here, "the data presently available" demonstrates that there is no sufficient "basis for the described classification," the court must strike it down. *See id.* at 348 (refusing to rely on justification where evidence supporting rationale for distinction "once broadly entertained, has recently encountered serious challenge"); *see also Maddux*, 233 Ill. 2d at 528 (noting that even under rational

basis review, the court has "long acknowledged its duty to interpret the law and to protect the rights of individuals against acts beyond the scope of the legislative power" and "[i]f a statute is unconstitutional, courts are obligated to declare it invalid") (quotations omitted).

D. The Act Violates Illinois' Prohibition Against Gender Discrimination.

By furthering long standing stereotypes about women's role in society, the Act violates Illinois' explicit constitutional prohibition 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.'" *People 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)).

Defendants acknowledge that the Act imposes unequal burdens on a category of young women – those who seek abortion care – but assert that this unequal treatment is not "gender-based," Defs. Mot. at 42, and thus does not comprise discrimination "on account of sex" in violation of the Gender Equality Clause. To the contrary, a gender-based stereotype is the sole basis for the Act's classification scheme, and such stereotype-based schemes plainly comprise discrimination "on account of sex."

To be sure, a statute that explicitly treats men and women differently discriminates "on account of sex" and violates article I, section 18. *See, e.g., In re Estate*

of Hicks, 174 Ill. 2d 433, 439 (1996). But even in the absence of such explicit differentiation, a plaintiff can demonstrate gender discrimination as long as the disability imposed on one group is on account of gender.

Indeed, even federal law, which Illinois' Gender Equality Clause "was intended to supplement and expand," *Ellis*, 57 Ill. 2d at 133, has recognized that barriers imposed on an individual because of that individual's failure to conform with prevailing gender stereotypes, is discrimination "on account of sex." For example, the U.S. Supreme Court recognized in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), that denying a woman a promotion to partnership on the basis that her behavior and appearance did not conform to gender stereotypes was discriminatory treatment "because of ... sex," actionable under Title VII of the Civil Rights Act of 1964. *See id.* at 235 (holding unlawful the denial to a female employee of a promotion because she was too "macho" and should "dress more femininely"). Federal courts have appropriately extended this principle to the Equal Protection Clause of the U.S. Constitution. *See, e.g.*, *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 577 (6th Cir. 2004) (holding that Equal Protection and Title VII claims stated where male employee was suspended after he began exhibiting feminine appearance and mannerisms); *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 120 (2nd Cir. 2004) (denying summary judgment on Equal Protection claim where female employee was denied tenure because she supposedly could not both "'be a good mother' and have a job that requires long hours"). To suggest, as Defendants do, that Illinois' broader protection for gender equality should be viewed more narrowly than the protection offered by federal law is untenable.

Here, the Act similarly discriminates against young women seeking abortion care because their choice to terminate their pregnancies is inconsistent with the prevailing (and improper) gender-based stereotype that women should bear children and become mothers. The Act asserts that abortion has "serious and long-lasting" "medical, emotional, and psychological consequences," 750 ILCS 70/5, and apparently presumes that these consequences are absent when a pregnant minor carries an unwanted pregnancy to term. This perpetuates the stereotype that for women, childbirth is natural and unremarkable, while choosing *not* to bear a child is unnatural and improper. Those young women who deviate from that stereotype – by choosing to terminate their pregnancies – suffer a deprivation of rights which is imposed "on account of sex."

The Act, which deprives young women of the ability to make the most fundamental decisions over their lives, undermines the guarantee of true equality promised by the Illinois Constitution. *See Casey*, 505 U.S. at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *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 *Stallman* Court explained, legal duties cannot be founded on "prejudicial and stereotypical beliefs about the reproductive abilities of women." *Id.* at 278.

Because Defendants' argument that a gender discrimination claim must be based on a differential classification between men and women is flatly incorrect and forms the sole basis of their request to dismiss this claim, that request must be denied.

CONCLUSION

For the reasons stated herein and in Plaintiffs' Memorandum of Law in Support of Their Motion For a Temporary Restraining Order and Preliminary Injunction and Reply Brief in Support of Their Motion For Temporary Restraining Order and Preliminary Injunction, Plaintiffs respectfully request that this Court deny Defendants' Combined Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss.

Dated: December 18, 2009

Respectfully submitted,

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EXHIBIT A

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

DAVID ZBARAZ, M.D., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 84 C 771
	)	
JIM RYAN, et al.,	)	Hon. Hubert L. Will
	)	Judge Presiding
Defendants.	)	

AGREED PRELIMINARY INJUNCTION ORDER

This cause coming to be heard on Plaintiffs' Motion for a Preliminary Injunction enjoining the enforcement of the Parental Notice of Abortion Act of 1995 ("the 1995 Act"); and, the Court having considered said Motion and Plaintiffs' Memorandum in Support Thereof, the Declarations submitted by Plaintiffs, Plaintiffs' Verified Supplemental Complaint, Defendant Attorney General Ryan's Response to Plaintiffs' Motion for a Preliminary Injunction and the arguments of counsel,

IT IS HEREBY AGREED AND ORDERED:

1. Section 25 of the 1995 Act creates a procedure for judicial waiver of the parental notice of abortion. Pursuant to Section 25(g), the "Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and competent manner."

2. The Supreme Court of Illinois has not been afforded an opportunity to promulgate rules in accordance with Section 25(g) of the 1995 Act.

3. The 1995 Act is incomplete and cannot be adjudicated until the Supreme Court of Illinois promulgates rules governing waiver of notice appeals.

4. The 1995 Act cannot be implemented or adjudicated at this time.

5. This court defers any adjudication as to the constitutionality of the Parental Notice of Abortion Act of 1995 until the Supreme Court of Illinois promulgates rules pursuant to Section 25(g) governing appeals from denials of waiver of parental notice.

6. Defendants are enjoined from enforcing the 1995 Act until further order of the Court.

7. The posting of security by plaintiffs pursuant to Rule 65(c) of the Federal Rules of Civil Procedure is not required.

HUBERT L. WILL
United States District Court Judge

Dated: June 8, 1995

EXHIBIT B

Not Reported in F.Supp., 1996 WL 33293423 (N.D.Ill.)
(Cite as: 1996 WL 33293423 (N.D.Ill.))

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois.
David ZBARAZ, M.D., et al., Plaintiffs,
v.
Jim RYAN, et al., Defendants.
No. 84CV771.

Feb. 8, 1996.

PERMANENT INJUNCTION ORDER

PLUNKETT, District Court J.

*1 This cause coming to be heard on plaintiffs' Motion for Permanent Injunction and the Court being fully advised,

THE COURT FINDS AS FOLLOWS:

1. Section 25 of the Parental Notice of Abortion Act of 1995 [the 1995 Act] creates a procedure for judicial waiver of the parental notice of abortion. Pursuant to Section 25(g), the "Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and competent manner."

2. On June 8, 1995 the Honorable Hubert L. Will found:

(a) That the Supreme Court of Illinois had not been afforded an opportunity to promulgate rules in accordance with Section 25(g) of the 1995 Act;

(b) That the 1995 Act was incomplete and could not be adjudicated until the Supreme Court of Illinois promulgated rules governing waiver of notice appeals; and,

(c) That the 1995 Act could not be implemented or adjudicated at that time.

3. On June 8, 1995, Judge Will entered a Preliminary Injunction Order in which:

(a) The court deferred any adjudication as to the constitutionality of the Parental Notice of Abortion Act of 1995 until the Supreme Court of Illinois promulgated rules pursuant to Section 25(g) governing appeals from denials of waiver of parental notice; and,

(b) Defendants were enjoined from enforcing the 1995 Act until further order of the Court.

4. The Supreme Court of Illinois has advised that no additional rules will be promulgated under the 1995 Act.

5. The 1995 Act, therefore, remains incomplete and cannot be implemented.

IT IS HEREBY ORDERED:

Defendants are permanently enjoined from enforcing the 1995 Act.

N.D.Ill.,1996.
Sbaraz v. Ryan
Not Reported in F.Supp., 1996 WL 33293423 (N.D.Ill.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2009, I caused true and correct copies of the foregoing **Plaintiffs' Response to Defendants' Combined Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss,** to be served electronically by email and by first class mail, postage prepaid, upon:

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