No. 10-1463

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE HOPE CLINIC FOR WOMEN LTD.; ALLISON COWETT, M.D., M.P.H.,	)	
Plaintiffs-Appellants,	)	
v.	)	**Appeal from Circuit Court of Cook County** **Circuit Number 09 CH 38661** **Trial Judge: Hon. Daniel A. Riley**
BRENT ADAMS, et al.,	)	
Defendants-Appellees.	)	

Consolidated with No. 10-1576

THE HOPE CLINIC FOR WOMEN LTD.; ALLISON COWETT, M.D., M.P.H.,	)	
Plaintiffs-Appellees,	)	
v.	)	**Appeal from Circuit Court of Cook County** **Circuit Number 09 CH 38661** **Trial Judge: Hon. Daniel A. Riley**
BRENT ADAMS, et al.,	)	
Defendants-Appellees,	)	
APPEAL OF: STEWART UMHOLTZ and EDWARD DETERS,	)	
Proposed Intervenors-Appellants.	)	

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BRIEF OF PLAINTIFFS-APPELLANTS IN CASE NO. 10-1463

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NATURE OF THE CASE

This action seeks relief from the Illinois Parental Notice of Abortion Act of 1995 (the "Act"), 750 ILCS 70/1-99. Plaintiffs filed a Verified Complaint alleging that the Act violates the Privacy (Article I, section 6), Due Process (Article I, section 2), Equal Protection (Article I, section 2), and Gender Equality (Article I, section 18) Clauses of the Illinois Constitution. Plaintiffs are an Illinois medical facility and a physician that provide healthcare, including abortion care, to patients, including minors. The Defendants are two state officials, sued in their official capacity, and the Illinois State Medical Disciplinary Board, all of whom are charged with imposing professional discipline on physicians who fail to comply with the Act's requirements. Plaintiffs' Verified Complaint sought a temporary restraining order, preliminary and permanent injunctive relief, a declaration that the Act is unconstitutional, and such other relief as the court deems just and proper.

The circuit court granted Plaintiffs' motion for a temporary restraining order, prohibiting Defendants from enforcing the Act. It subsequently granted Defendants judgment on the pleadings, holding that Plaintiffs' claims under the Equal Protection and Due Process Clauses were barred by collateral estoppel, and that as a matter of law, Plaintiffs could not prevail on their facial challenge to the Act under the Privacy and Gender Equality Clauses. The court also denied Plaintiffs' motion for reconsideration and to vacate the judgment.

ISSUES FOR REVIEW

(1) Whether the circuit court erred in dismissing Plaintiffs' Illinois Privacy Clause claim on the grounds that Plaintiffs could not succeed on a facial challenge to the Act even though the facts alleged demonstrate, and the court expressly recognized, that many minors would suffer infringement of their constitutional privacy rights and harm in the form of physical and emotional abuse if the Act were to go into effect.

(2) Whether the circuit court erred in holding that Plaintiffs were collaterally estopped from pursuing a claim under the Illinois Equal Protection Clause where the parties in *Zbaraz v. Madigan*, No. 84 CV 771 (N.D. Ill.), a prior federal challenge to the Act, did not litigate and the court did not decide a federal Equal Protection claim.

(3) Whether the circuit court erred in holding that Plaintiffs were collaterally estopped from pursuing a claim under the Illinois Due Process Clause because the federal court in *Zbaraz v. Madigan* decided a claim arising under the federal Due Process Clause.

(4) Whether the circuit court erred in dismissing Plaintiffs' claim under the Illinois Gender Equality Clause where the Act furthers an unconstitutional, gender-discriminatory stereotype.

JURISDICTIONAL STATEMENT

Jurisdiction over this appeal is pursuant to Illinois Supreme Court Rules 301 and 303. On October 13, 2009, Plaintiffs filed a Verified Complaint in the Circuit Court of Cook County, alleging that the Act violates various provisions of the Illinois Constitution. (A26-53.)[1] On November 12, 2009, Defendants filed a combined motion for judgment on the pleadings or, in the alternative, to dismiss. (C00710-12.) On March 29, 2010, the court granted Defendants judgment on the pleadings, a final judgment that disposed of all claims against all parties. (A8-17.) On April 26, 2010, Plaintiffs filed a timely motion for reconsideration and to vacate the judgment. (C31-35.) The court denied Plaintiffs' motion on April 28, 2010. (A25.) Plaintiffs filed a timely notice of appeal on May 27, 2010. (A292-96.)

STATUTE INVOLVED

The Parental Notice of Abortion Act of 1995, 750 ILCS 70/1-99, was signed into law on June 1, 1995, with an immediate effective date. The complete text of the Act is set forth in the Appendix of Plaintiffs-Appellants. (A1-4.)

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[1] References to the Separate Appendix of Plaintiffs-Appellants appear as "A__". References to the Record on Appeal, comprising six volumes of the common law record, one volume of records of proceedings, and two supplemental volumes, appear as "C__" for citations to the common law record and supplemental volumes, and "__" for citations to the records of proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Statutory Framework

For nearly fifty years, Illinois law has endowed pregnant minors with the same rights as "a person of legal age" to consent to medical care without involving a parent. Consent by Minors to Medical Procedures Act, 410 ILCS 210/1. Illinois likewise authorizes minors to consent to place their child for adoption without involving a parent. Adoption Act, 750 ILCS 50/11(a). Under this statutory framework, a pregnant minor can obtain *any* hospital, medical, or surgical care without notifying a parent. She can decide to continue her pregnancy and become a parent, she can place her child for adoption, or she can terminate her pregnancy, all without involving a parent. She can make all medical decisions – even those that can have serious consequences for her or her fetus – without involving a parent. And, if she has a child, she can make decisions about her own and her child's care – including decisions as to critical and lifesaving procedures – without her parents' involvement. The Act upends this statutory framework by singling out pregnant minors who choose abortion and requiring them – and only them – to notify a parent before they can obtain this medical care.

The Act requires a "physician or his or her agent" to give "at least 48 hours actual notice to an adult family member of [a] pregnant minor . . . of his or her intention to perform the abortion," 750 ILCS 70/15, and subjects physicians to professional discipline and civil penalties under the Medical Practice Act of 1987, 225 ILCS 60/22(A)(40), (C), for failure to do so. 750 ILCS 70/40(a). The Act defines "adult family member" as "a

person over 21 years of age who is the parent, grandparent, step-parent living in the household, or legal guardian." *Id.* § 10.[2]

Where "actual notice is not possible after a reasonable effort [and] the physician or his or her agent . . . give[s] 48 hours constructive notice," *id.* § 15, defined as "notice by certified mail to the last known address of the person entitled to notice with delivery deemed to have occurred 48 hours after the certified notice is mailed," *id.* § 10, the Act's notice and delay requirements are met. *Id.* § 15. These requirements are also met where a referring physician certifies in writing that that "physician or his or her agent has given 48 hours actual notice," *id.*, where the minor is "accompanied by a person entitled to notice," *id.* § 20(1), or where "notice is waived in writing" by such person, *id.* § 20(2). Notification is not required where the "attending physician certifies in the patient's medical record that a medical emergency exists and there is insufficient time to provide the required notice," *id.* § 20(3), where "the minor declares in writing that she is a victim of sexual abuse, neglect, or physical abuse by an adult family member as defined [by the] Act," *id.* § 20(4), or where the minor obtains a judicial waiver of notice, commonly referred to as a judicial bypass order. *Id.* § 20(5).

To obtain a judicial bypass order, the minor must appear before a circuit court judge and demonstrate by a preponderance of the evidence that: (1) she "is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, or (2) that notification under Section 15 of [the] Act would not be in the best interests of the minor . . . ." *Id.* § 25(d). A minor who is denied such a waiver can pursue an "expedited confidential appeal." *Id.* § 25(f). Eleven years after the Act was signed into law, the

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

Illinois Supreme Court adopted Illinois Supreme Court Rule 303A, which purports to provide the rules for such appeals.

B. Prior Challenge to the Act

On June 1, 1995, the day the Act was signed into law, plaintiffs in *Zbaraz v. Hartigan*, No. 84 CV 771 (N.D. Ill.), filed a Supplemental Verified Complaint in the United States District Court for the Northern District of Illinois, alleging that the Act violated the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. (C00759-80.)[3] The district court granted a temporary restraining order, and shortly thereafter, the *Zbaraz* defendants agreed to a preliminary injunction, on the ground that there were no "rules governing waiver of notice appeals" – a violation of the federal Due Process Clause. *Zbaraz v. Ryan*, No. 84 CV 771, Prelim. Inj. Order (N.D. Ill. June 8, 1995) (C01163-64). The Illinois Supreme Court subsequently advised the *Zbaraz* defendants that there would be no rules forthcoming, and the district court permanently enjoined the Act. *Zbaraz v. Ryan*, No. 84 CV 771, Perm. Inj. Order (N.D. Ill. Feb. 9, 1996) (C01165-66).

More than ten years later, the Illinois Supreme Court adopted Illinois Supreme Court Rule 303A, entitled "Expedited and Confidential Proceedings Under the Parental Notification of Abortion Act." (A5-7.) On March 23, 2007, the *Zbaraz* defendants moved, pursuant to Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6), to open the case and dissolve the February 9, 1996 permanent injunction. (C01167-76.) In response, the *Zbaraz* plaintiffs argued that the Act remained unconstitutional despite the adoption

[3] *Zbaraz v. Hartigan* was initiated in 1984, challenging the Illinois Parental Notice of Abortion Act of 1983, which was repealed by the 1995 Act. Attorney General Hartigan was succeeded in office by Roland Burris, Jim Ryan and Lisa Madigan.

of Rule 303A. (C01177-92.) The district court denied defendants' motion on February 29, 2008, on the ground that even with Rule 303A in place, the Act violated the Due Process Clause of the U.S. Constitution. *Zbaraz v. Madigan*, No. 84 CV 771, 2008 U.S. Dist. LEXIS 15559 (N.D. Ill. Feb. 28, 2008). The *Zbaraz* defendants appealed that ruling to the U.S. Court of Appeals for the Seventh Circuit, which reversed the district court's ruling and dissolved the permanent injunction on July 14, 2009. *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009).

C. The Current Action

On October 13, 2009, Plaintiffs filed this action in the Circuit Court of Cook County alleging violations of the Privacy (Article I, section 6), Due Process (Article I, section 2), Equal Protection (Article I, section 2), and Gender Equality (Article I, section 18) Clauses of the Illinois Constitution. (A26-53.)[4] The allegations of Plaintiffs' Verified Complaint, and the reasonable inferences drawn therefrom, demonstrate that the Act substantially impairs the rights of pregnant minors to make the decision whether to have an abortion free from unjustifiable government interference and discriminatory regulation.[5]

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[4] Plaintiff, The Hope Clinic for Women, Ltd., is a licensed private medical clinic located in Granite City, Illinois, that provides reproductive health services, including abortions. (A28 ¶ 7.) Plaintiff Allison Cowett, M.D., M.P.H., is a physician licensed to practice medicine in Illinois. Dr. Cowett is an assistant professor at the University of Illinois at Chicago ("UIC") and Director of UIC's Center for Reproductive Health. Dr. Cowett provides a broad range of gynecologic and obstetric care, including abortions. (A28 ¶ 8.) The physicians who provide medical care at Hope Clinic and Dr. Cowett are subject to professional discipline and civil penalties for failure to comply with the Act's mandates. (A31-32 ¶ 17.)

[5] The well-pleaded allegations and their reasonable inferences are supported by extensive and uncontroverted evidence Plaintiffs submitted in support of their motion for a temporary restraining order and preliminary injunction. (A93-291.)

1. The Provision of Abortion 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, 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. (A33 ¶ 23; A105-06 ¶¶ 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. (A33 ¶ 24; A106-07 ¶¶ 13-16.) Pregnancy related health 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 seventeen have a higher incidence of morbidity than do adult women, with risks being greatest for the youngest teens. (A33-34 ¶ 25; A108-09 ¶ 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. (A34 ¶ 26; A116 ¶ 34.) Abortions also become more expensive and are offered by fewer healthcare 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 as she seeks an abortion, the less likely it is that she will be able to obtain one. (A34 ¶ 27; A117 ¶ 37.)

Women in Illinois, including minors, decide to terminate their pregnancies for a variety of maternal and fetal health, familial, economic, and other personal reasons. Young women in particular often conclude that they are not yet ready to be parents, that they cannot be the kind of parent they want to be, or that having a child in their teens would completely change their plan for their lives and would thwart education and career goals. (A34 ¶ 29; A113 ¶ 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. (A34 ¶ 30; A112 ¶ 26; A180 ¶ 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, (A35 ¶ 31; A181-82 ¶¶ 19, 23; A216-17 ¶¶ 15-17); that their parents will force them out of the house, (A35 ¶ 31; A181-82 ¶¶ 19, 21-22; A216-17 ¶¶ 15-17); or that their parents will force them to carry their pregnancies to term against their will. (A35 ¶ 31; A181 ¶ 20; A217-18 ¶ 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. (A35 ¶ 32; A183-84 ¶ 26; A216 ¶ 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. (A35 ¶ 33; A183 ¶ 25.)

2. The Harms of the Act

For those minors, 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 great harm: some will be beaten; some will be thrown out of their homes; and some will be forced to continue their pregnancies against their will. (A35-36 ¶ 34; A113-14 ¶¶ 28, 30; A182 ¶ 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. (A35-36 ¶ 34; A184-86 ¶¶ 28, 32.) Others will continue to carry their unwanted pregnancy to term, and risk suffering the attendant medical harms and adverse educational, economic, social, and life-altering consequences. Regardless of the route a minor chooses – telling a parent or going to court – the Act will cause delay that increases the medical risks and costs associated with the procedure and decreases availability. (A35-36 ¶ 34.)

The Act's abuse and neglect exception provides little, if any, aid to endangered minors. Many abused and neglected minors are unwilling to reveal their abuse. (A36 ¶ 35; A243-45 ¶¶ 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. (A36 ¶ 35; A240-41 ¶¶ 7, 9.)

Nor does the Act's provision for obtaining a judicial bypass order offer 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. (A36-37 ¶ 36; A186 ¶ 32; A215 ¶ 12; A227 ¶ 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. (A36-37 ¶ 36; A222-23 ¶¶ 27-30.)

Minors who pursue a judicial bypass order 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 the bypass process. (A36-37 ¶ 36; A214-15 ¶ 10; A219-220 ¶ 23; A224 ¶ 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 8.

Moreover, for some minors, the very act of pursuing a judicial bypass order will result in a minor's parent learning of her pregnancy and planned abortion. All of the actions required to pursue a bypass order, 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. (A36-37

¶ 36; A204-05 ¶¶ 8-9; A222 ¶ 27; A225-26 ¶ 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 such an order. (A36-37 ¶ 36; A207 ¶ 13; A226-27 ¶ 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. (A38 ¶ 40.) 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 8. 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. (A38 ¶ 42; A134-40 ¶¶ 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. (A38 ¶ 42; A142-43 ¶ 30; A263-68 ¶¶ 32-41.)

Finally, contrary to the Act's assumptions, the Act is not necessary to ensure that minors make an informed decision regarding abortion. (A38 ¶ 43.) 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. (*Id.*; A110-11 ¶¶ 22-23; A143-44 ¶¶ 32-36; A187-88 ¶¶ 35-36.)[6] Indeed, the decision to bear a child – which the State allows minors to make without involving their parents – requires at least as much consideration of "immediate and long-range consequences" as does the decision to terminate the pregnancy. (A38 ¶ 43; A187-88 ¶¶ 35-36.)

The majority of minors already involve a parent in their decision to have an abortion. However, for minors who cannot involve their parents, the Act will not create a positive family relationship and open lines of communication where none existed previously. (A39 ¶ 44; A260 ¶ 22.)

Because of the unjustified and substantial harms imposed by mandatory parental involvement laws, such laws are opposed by the leading professional medical

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[6] As the Court is aware, for the small number of patients, adult or minor, who lack the capacity to give the informed consent required by the common law, the physician cannot provide care without a legally sufficient alternative consent. However, as the well-pleaded allegations show, the vast majority of minors seeking abortion do, indeed, have the capacity to give such informed consent. *Id.*

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. (A39 ¶ 44; A114-15 ¶ 32.)

4. Circuit Court Ruling

On November 4, 2009, after briefing and argument, the circuit court granted Plaintiffs' motion for a temporary restraining order, prohibiting Defendants from enforcing the Act until further order. (C00682.) Thereafter, Defendants filed a combined motion for judgment on the pleadings or, in the alternative, to dismiss the Complaint. (C00710-12.) Defendants did not answer the Verified Complaint or contest any of Plaintiffs' factual allegations or evidentiary submissions. On March 29, 2010, the court granted Defendants judgment on the pleadings on all four claims. In issuing its opinion, the circuit court stated:

> Plaintiffs demonstrate that the law in question is a rather unfortunate piece of legislation. I find it unfortunate because it's – the evidence makes clear that it's likely to cause more harm than any good.

(A21.)

Concerning the Privacy Clause claim, the circuit court expressly recognized that:

> [T]he Act will encumber a minor's choice to terminate her pregnancy, and will lead to disclosure of confidential information about her sexual history and reproductive choices to adult members of her immediate family. Moreover, this court finds that, for many minor women, disclosure will result in worse results, including physical and emotional abuse. These are clear infringements on the constitutional rights of pregnant minors, which carry disconcerting implications.

(A15.) These conclusions are consistent with the well-pleaded allegations of the Verified Complaint and the reasonable inferences drawn therefrom. (A35-36 ¶ 34.) However, the court held that to find the law unconstitutional, "there must not be any circumstance

under which the restriction of the minor's right to abortion is reasonable." (A14.) Finding that Plaintiffs could not demonstrate that constitutional infirmity will exist in *every* circumstance, the court granted Defendants judgment on the Illinois privacy claim. (A15.)

As to Plaintiffs' Illinois equal protection claim, the court explained:

> This law recognizes that there does exist a class or group of individuals within our State who are minors and who have become pregnant. The Act discriminates between those minors who elect to give birth and those minors who elect to terminate their pregnancy.
>
> Minors who elect to give birth may do so without any State interference regarding medical choices or parental notification, including consenting to an adoption. Minors who seek an abortion must notify their parents or appear before a judge.

(A21.) The circuit court was troubled by this "obvious discrimination," (A22), but dismissed Plaintiffs' Illinois equal protection claim on collateral estoppel grounds, because, although never litigated or decided, a federal equal protection claim had been included in the *Zbaraz* plaintiffs' 1995 federal complaint. (A11-12.)

The circuit court similarly ruled that Plaintiffs were collaterally estopped from pursuing their Illinois due process claim, because the *Zbaraz* court had decided a *federal* due process claim. (A11-12.) Finally, the court concluded that Plaintiffs could not pursue their gender equality claim as a matter of law. (A16.)[7]

Plaintiffs appeal from the circuit court's judgment as to each of their claims.

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[7] The court also correctly ruled that res judicata does not bar this action, because the Eleventh Amendment to the U.S. Constitution would have prevented the *Zbaraz* plaintiffs from pursuing state constitutional claims in their federal action. (A11.)

STANDARD OF REVIEW

In an appeal from a lower court's decision to grant judgment on the pleadings, this Court must accept as true all well-pleaded facts of the Verified Complaint and all reasonable inferences therefrom. *Bryson v. News Am. Publ'ns.*, 174 Ill. 2d 77, 86 (1996); *XLP Corp. v. County of Lake*, 317 Ill. App. 3d 881, 884-85 (2nd Dist. 2000). The Court reviews *de novo* a lower court's decision to grant judgment on the pleadings and a lower court's determination regarding the constitutionality of a law. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217 at *2 (2010).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' PRIVACY CLAIM BASED ON ITS MISTAKEN BELIEF THAT IT COULD NOT, AS A MATTER OF LAW, GRANT RELIEF FOR ESTABLISHED CONSTITUTIONAL WRONGS.

As the circuit court correctly held, the Privacy Clause of the Illinois Constitution secures as fundamental the right to abortion, separate from the protections afforded under the U.S. Constitution. (A13 (citing *Family Life League v. Dep't of Pub. Aid*, 112 Ill. 2d 449, 454 (1986)).) The circuit court was also correct in concluding, based on the allegations of the Verified Complaint, that the Act will impose significant harms on many young women, constituting "clear infringements on constitutional rights of pregnant minors, which carry disconcerting implications." (A15.) However, because it believed that the Act would not infringe on the constitutional rights of *every* affected minor, the court erroneously held that it was required, as a matter of law, to dismiss Plaintiffs' claim. (*Id.*) As shown below, the court's determination that the Act operates in violation of the Illinois Privacy Clause in many but not all circumstances in no way commanded

dismissal of the privacy claim. To the contrary, the court was obligated to permit the claim to proceed and to provide appropriate relief to remedy the constitutional wrongs.

The circuit court also erred in finding that the abortion right protected under the Illinois Privacy Clause "does not extend beyond the reach of its federal counterpart," (A7), apparently denying Plaintiffs the strict scrutiny review imposed under Illinois precedent when government interferes with a fundamental right. However, even if this Court determined that the Illinois Privacy Clause does not protect the right to abortion with greater force than do the penumbras in the federal Constitution, Plaintiffs' claim would still succeed. Even applying the circuit court's reasonableness analysis, Plaintiffs' verified allegations, and the reasonable inferences therefrom, demonstrate a clear violation of the Illinois Privacy Clause.

The circuit court erred in denying Plaintiffs the opportunity to pursue their privacy claim and to seek appropriate relief for established constitutional wrongs. Its judgment must thus be reversed.

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

1. The Act Is an Affront to Illinois' Core Privacy Principles, Broadly Protected Under the Express Right to Privacy.

Unlike the United States Constitution, the Illinois Constitution grants an express right of privacy: "The people shall have the right to be secure in their persons . . . against unreasonable . . . invasions of privacy . . . ." Ill. Const. art. I, § 6; *see also id.* art. I, § 12. This State's highest court has held 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*, 112 Ill. 2d at 454; *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).

This privacy right safeguards the most intimate and difficult decisions concerning pregnancy. For example, in *In re Baby Boy Doe*, this Court upheld a pregnant woman's right to refuse medical treatment – even in the face of testimony that her thirty-six week fetus would likely die absent intervention. The court emphasized that "a woman's right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy." 260 Ill. App. 3d at 401.

In addition, as the Illinois 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 medical records to opposing party and their agents and requiring plaintiffs to consent to *ex parte* communications between their doctors and opposing counsel). As the *Kunkel* Court recognized:

> The 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).

The Act requires a minor to reveal the most private medical information and facts about the most personal aspects of her life, including her sexual relationships. And, it interferes with her bodily autonomy and medical decision making, including her fundamental right to choose to have an abortion. As the well-pleaded allegations of the Verified Complaint demonstrate, 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. The Circuit Court Erred in Concluding That the Illinois Privacy Clause Does Not Protect the Rights at Issue Here Beyond the Protections Afforded Under the U.S. Constitution.

Illinois courts apply a "limited lockstep approach" to interpreting provisions of the Illinois Constitution and considering their relationship, if any, with provisions of the U.S. Constitution. *People v. Caballes*, 221 Ill. 2d 282, 289-314 (2006) (detailing Illinois' tradition of a "limited lockstep 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). Here, the circuit court was simply wrong that without "more direct actions by the drafters" it could not conclude that the Illinois Privacy Clause secures a right to abortion beyond the protections of the federal Constitution. (A7.) By all measures of the limited lockstep approach, 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 and broader than the federal right. The unique language of the Illinois Constitution, the debates and committee history of the constitutional convention, and state tradition and

laws all demonstrate that the privacy protections implicated in this case are greater than those assured under federal law.

a. The Express Right to Privacy Is Unique to the Illinois Constitution and Demands Departure From Federal Precedent.

First, the Illinois Privacy Clause is unmatched in the federal Constitution. While the federal Constitution has been interpreted to contain certain unwritten rights 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. Where a provision is "unique to the state constitution," it "must be interpreted without reference to a federal counterpart." *Id.* This alone establishes that the Illinois Privacy Clause is not limited by the federal courts' interpretation of federal privacy principles.

Adhering to this approach, the Illinois Supreme Court has repeatedly affirmed that Illinois' express privacy provisions protect with greater force and far more broadly than do the privacy rights afforded under the U.S. Constitution. *See, e.g.*, *In re Lakisha M.*, 227 Ill. 2d at 279 ("'the Illinois Constitution goes beyond Federal constitutional guarantees by expressly recognizing a zone of personal privacy'") (quoting *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381 (1992)); *Kunkel,* 179 Ill. 2d at 537 (constitutional privacy protection is "stated broadly and without restrictions"); *King v. Ryan*, 153 Ill. 2d 449, 464 (1992) ("Because the Illinois Constitution recognizes a zone of privacy, the protections afforded by the Illinois Constitution go beyond the guarantees of the Federal Constitution.").

b. The Drafters of the Illinois Constitution Made Clear Their Intent to Provide Protection for Individuals in an Evolving Society Beyond Those of the Federal Constitution.

In addition, the framers were clear that their intention in adding an express right to privacy to the 1970 Constitution was to protect the people of Illinois against invasions of privacy beyond the protections afforded under the existing Illinois and federal Constitutions. The new privacy protections were "stated broadly" and were to "expand upon," not mirror or be limited by, the rights guaranteed under those existing documents. ILCS Ann., Ill. Const. 1970, art. I, § 6, Constitutional Commentary, at 522 (Smith-Hurd 1993) (hereafter "Constitutional Commentary"); *see also* 3 Sixth Illinois Constitutional Convention, Record of Proceedings (hereafter "Proceedings") at 1525 (statement of Del. Dvorak that the Privacy Clause would be "very progressive and very thorough and very proper").

Concerned that "infringements on individual privacy will increase," the drafters concluded that "it was essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review." 6 Proceedings at 32. The concerns ran from the known – a peephole into a woman's bathroom created by an employer – to the advances yet to come – devices that could penetrate walls, revealing "bedtime intimacies and private conversations." 3 Proceedings at 1535. As Delegate Gertz stated: "All kinds of things might invade our dignity as human beings. . . . I want to stem the tide." *Id.* at 1535. The Privacy Clause thus was intended as an essential right that would not stand

fixed or frozen but would develop and mature to respond to new dangers and to preserve the integrity and inherent dignity of the people of Illinois.[8]

c. Illinois' Unique State History Demands Departure from Federal Principles Here.

Finally, Illinois has a rich tradition of safeguarding individual privacy, particularly as it relates to nondisclosure of private, medical information and the right of pregnant women to bodily autonomy and independent medical decision making. Illinois courts long have recognized a common law right to privacy that protects pregnant women. *See, e.g.*, *Stallman v. Youngquist*, 125 Ill. 2d 267, 278 (1988) (declining to recognize cause of action by fetus against pregnant woman for unintentional prenatal injuries, reasoning that such actions would invade pregnant women's "right to privacy and bodily autonomy" by subjecting to state scrutiny "all the decisions a woman must make in attempting to carry a pregnancy to term"). In *Stallman*, the Illinois Supreme Court was explicit: "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." *Id.* at 279-80; *accord Family Life League*, 112 Ill. 2d at 454.

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[8] The clear sentiment of the delegates was that the right of personal autonomy, including abortion, was evolving in the country, and the new Constitution was not to be a barrier to government loosening of restrictions on a woman's right to choose to have an abortion. *See id.* at 1496-1523 (Bill of Rights Committee rejecting by vote a proposal to add "the unborn" to persons protected by the Due Process Clause in part because inclusion of "the unborn" would improperly prevent enforcement of laws permitting abortion, and would infringe on "the rights of all persons to act in accordance with their own religious and moral convictions"). The Illinois Supreme Court reflected this recognition in its holding in *Family Life League*, affirming that the Privacy Clause protects, as fundamental, the right to abortion. 112 Ill. 2d at 454. While Delegate Gertz stated in response to a question from Father Lawlor that the Privacy Clause "has nothing to do with the question of abortion," 3 Proceedings at 1537, nothing to this effect appears in the text of the Privacy Clause, in the Committee Reports, or in the floor statements provided by any of the other more than one hundred convention delegates.

Following the Supreme Court's lead, this Court has held that a pregnant woman has the right to make her own medical decisions, even where her choice might be fatal to the fetus. *See In re Baby Boy Doe*, 260 Ill. App. 3d at 393 (holding that pregnant woman has right to refuse caesarean section against medical advice); *see also In re Fetus Brown*, 294 Ill. App. 3d 159, 171 (1st Dist. 1997) (pregnant woman could not be compelled to accept blood transfusions). Explicit in the *Doe* holding was the recognition of the unique bodily integrity issues that attend pregnancy, including biological changes "'of the most profound type'" and possible risk to the woman's life. 260 Ill App. 3d at 400 (quoting *Stallman*, 125 Ill. 2d at 278).

Similarly, Illinois statutes have long protected reproductive decision making. For nearly 50 years, Illinois statutory protections have ensured that women – indeed, young women – have the right to make their own medical decisions during pregnancy. In 1961, Illinois passed the Consent to Medical Procedures by Minors Act, which, among other things, affords pregnant minors – by virtue of their pregnancy alone – the right to make their own medical decisions without parental or judicial involvement. 410 ILCS 210/1 (providing that pregnant minors have "the same legal capacity . . . as has a person of legal age" to consent to medical care). This recognition of the capacity of and need for pregnant minors to make independent medical decisions is consistent with a strong tradition in the state of allowing women, even at a time when they were not seen by society as independent decision makers or societal participants, to make personal decisions, including those involving their reproductive lives. *See, e.g.*, Peter Smith,

Comment, *The History and Future of the Legal Battle over Birth Control*, 49 Cornell L.Q. 275, 277 n.17 (no historical restrictions on access to contraception in Illinois).[9]

In sum, the circuit court erred in disregarding the plain text of the Illinois Constitution, the intent of its drafters to protect a zone of privacy whose breadth would evolve with a changing society, and Illinois' long history of respect for and protection of women's bodily integrity and decisional autonomy. The Illinois courts are not bound by the results of federal cases reviewing *federal* privacy principles, and therefore must subject the Act to the scrutiny dictated by *Illinois* law. Taking the allegations and reasonable inferences presented here as true, the Act indisputably fails such scrutiny.

B. The Well-Pleaded Allegations of the Verified Complaint Demonstrate That the Act Cannot Survive Strict Scrutiny, Or Even Reasonableness Review.

The circuit court correctly concluded that the Act infringes on minors' constitutional rights, including the fundamental right to abortion. Illinois laws that infringe on a fundamental right are subject to strict scrutiny and are invalid unless they "advance a compelling state interest"; are "necessary to achieve the legislation's asserted goal"; and are the "least restrictive means" of doing so. *Tully v. Edgar*, 171 Ill. 2d 297, 311 (1996); *see Estate of Hicks*, 174 Ill. 2d 433, 438 (1996); *Boynton v. Kusper*, 112 Ill.

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[9] *See also* Women Building Chicago 1790-1990: A Biographical Dictionary 999 (Rima Lunin Schultz and Adele Hast eds., 2001) (second birth control clinic in the country opened in Illinois in 1924); *id.* at 1000 (nation's first premarital and marital counseling service established in Illinois in 1932); *id.* (birth control and sex education available to minors in churches, Hull House, factories and Chicago park district field houses in 1920s and 1930s); 1859 Ill. Laws 128 (Divorce Act of 1859, permitting women to reclaim maiden name after divorce); 1861 Ill. Laws 143 (Married Women's Property Act, allowing women to own, control, transfer and contract upon separate property brought to marriage); 1869 Ill. Laws 255 (Earnings Act of 1869, permitting women to receive, use, possess, and sue for own earnings, protected against spousal interference); 1871 Ill. Laws 578 (statute protecting against gender discrimination in employment); Ill. Const. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State[.]").

2d 356, 369 (1986). Reviewed against the well-pleaded allegations and their reasonable inferences, the Act cannot survive such scrutiny. Moreover, as the circuit court found, even under a reasonableness review, the Act imposes "clear infringements on constitutional rights of pregnant minors . . . ." (A15.) Regardless of the test applied, the Act fails.

The General Assembly asserts limited justifications for the Act:

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

750 ILCS 70/5.

Defendants cannot show that the Act advances its interest in protecting minors at all, let alone that it is a necessary means of doing so. Indeed, the well-pleaded allegations here demonstrate that far from advancing the State's asserted interests, the Act undercuts them by subjecting young women who seek abortion to severe physical and emotional harms. *See supra* at 10-12. Moreover, the fact that the State permits minors to make the decision to continue their pregnancies – which indisputably carries far greater medical risks than does an abortion – and to make the decision to have a child – a decision which carries significant psychological (and other) consequences and requires greater decision making capabilities than does the abortion decision – demonstrates that the Act's

discriminatory and restrictive treatment is not necessary to protect minors. *See In re D.W.*, 214 Ill. 2d 289, 312 (2005) (statute's irrebuttable presumption that person convicted of aggravated battery or attempted murder of a child is an unfit parent fails to advance state interest in protecting the safety and welfare of children where State provides rebuttable presumption that a person who murders a child is an unfit parent); *In re H.G.*, 197 Ill. 2d 317, 330-31 (2001) (presumption of unfitness to parent based on length of child's stay in foster care not tailored to goal of identifying unfit parents because length of stay in foster care often has nothing to do with parent's ability to safely care for child). Indeed, the Act's discriminatory and restrictive treatment of minors who choose abortion lacks even a rational connection to the asserted ends.

1. The Act Frustrates Rather Than Advances the State's Asserted Interest in Protecting Minors' Physical Health.

Abortion is one of the safest medical procedures performed today, and is far safer than carrying a pregnancy to term. (A33 ¶ 23; A38 ¶ 41; A105-06 ¶¶ 10-12; A261 ¶ 25.) And, adolescents who continue their pregnancies face even greater health risks than adult women. (A33-34 ¶ 25; A108-09 ¶ 19 (pregnant teens face a mortality rate twice that of adult women in carrying a pregnancy to term and a significantly greater risk for serious complications).) Yet the State does not require medical professionals to notify a parent when a minor is planning to continue her pregnancy.[10]

[10] It is no answer that the parents of a minor who decides to continue her pregnancy will ultimately learn of her decision. By the time a parent discovers the pregnancy, it may well be too late to have any input into the decision of whether to terminate, as the passage of time will have foreclosed the abortion option. And yet, this young woman will face far greater risks of serious complications and death (as well as psychological and emotional effects) as a result of the pregnancy and childbearing than she would have from an abortion. (A38 ¶¶ 41-42; A109-110 ¶ 20.)

The irrationality of the State's scheme can be seen in the following example: A pregnant minor who relies on medication to control epilepsy, medication that may put her fetus at risk, has three choices: She may stop taking her medication, potentially putting her own health in jeopardy; she may continue taking her medication, potentially putting her fetus at risk; or she may choose to terminate her pregnancy and continue her medication. (A33 ¶ 24; A110 ¶ 21.) Under the Act, the pregnant minor can choose the first two options – putting herself or her fetus at risk – without parental involvement. It is only if she chooses the third option – to keep taking her medication and terminate her pregnancy – that the State requires parental involvement.

The Act simply does not advance the State's interest in protecting minors against physical harm. Instead, as the verified allegations show, it undermines that purpose, for many pregnant minors will *suffer* physical harm as a result of the Act's restrictions. *See supra* at 10; (A15). Thus, not only does the Act fail strict scrutiny, it is not even rationally related to the State's asserted interests. *See Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 609, 636 (N.J. 2000) (given the greater risks of carrying to term, "[t]he [s]tate's differential treatment . . . is difficult to justify"); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 826 (Cal. 1997) (contention that parental involvement statute was "necessary to protect the physical and emotional health of a pregnant minor is undermined by the circumstance that California law authorizes a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that pose at least equal or greater risks to the physical, emotional, and psychological health of a minor and her child as those posed by the decision to terminate pregnancy"); *In re T.W.*, 551 So.2d 1186, 1195 (Fla. 1989) (same as to Florida law).

2. The Act Inflicts Rather Than Protects Minors from Emotional and Psychological Harm.

As an initial matter, there is no reliable evidence that abortion leads to long-term mental health problems. (A38 ¶ 42; A134 ¶ 9; A261-62 ¶ 26.) After twice convening a panel of experts to review all of the scientific literature, once in the late 1980s and more recently in 2006, the American Psychological Association concluded that for the vast majority of women, terminating an unintended pregnancy poses no psychological hazard. (A38 ¶ 42; A136-37 ¶ 14.) Indeed, former President Reagan's Surgeon General C. Everett Koop concluded after fifteen months of study that the threat of developing significant psychological problems related to abortion is "miniscule from a public health perspective." (A135-36 ¶ 12.) In contrast, the threat of psychological harm from forced parental involvement is quite real. (A39 ¶ 44; A181-82 ¶¶ 19-21; A186 ¶ 33 (recounting examples of young women who were disowned by their parents, thrown out of their homes, forced to continue their pregnancies, and otherwise emotionally abused after their parents learned of their pregnancies).)

Moreover, as with physical risks, there is no psychological basis for the State's distinction between minors who choose abortion and those who carry to term. In a direct comparison between the two categories, minors who chose abortion did as well as – and usually better than – those who had a baby in terms of psychological (and many other) effects. (A38 ¶ 42; A142-43 ¶ 30; A262-64 ¶¶ 28, 32.) As other courts have found, "[i]t is particularly difficult to reconcile defendants' contention – that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional or psychological health – with the[] statutory provision authorizing a minor who has given birth to consent, on her own, to the adoption of her child. The decision to relinquish

motherhood after giving birth would seem to have at least as great a potential to cause long-lasting sadness and regret as the decision not to bear a child in the first place." *Lungren*, 940 P.2d at 827 (citations and internal quotation marks omitted); *see also In re T.W.*, 551 So. 2d at 1195 (rejecting state's argument about psychological and emotional consequences in part because "the state's adoption act similarly contains no requirement that a minor obtain parental consent prior to placing a child up for adoption, even though this decision clearly is fraught with intense emotional and societal consequences").

3. The Stated Concern That Minors Cannot Make Fully-Informed Choices Does Not Justify the Act's Restrictions.

Similarly, the asserted inability of minors "to make fully informed choices that consider both the immediate and long-range consequences," 750 ILCS 70/5, cannot justify the infringement on minors' rights. First, minors can consider the immediate and long-range consequences of deciding to terminate their pregnancies. In fact, research specifically designed to assess competence to consent to abortion found that adolescents were as capable as adults of making informed decisions. (A38 ¶ 43; A144-45 ¶¶ 34, 37.) Indeed, the American Psychological Association's Interdivisional Committee on Adolescent Abortion concluded that "[t]here is now a substantial literature showing that adolescents do not differ from adults in their ability to understand and reason about treatment alternatives." (A143-44 ¶ 33; *see also* A144 ¶ 35 (attesting to the capacity of minor patients to make informed decisions about abortion); A268 ¶ 42 ("research demonstrates that adolescents are as capable as adults of making informed, rational decisions concerning their lives and future in general, and concerning their pregnancies in particular").)

Moreover, the fact that the State permits young women to choose to continue their pregnancy without involving their parents demonstrates that parental involvement is not necessary to assure that a minor makes a thoughtful, mature decision about abortion. Certainly the decision to bear a child requires at least as much consideration, and likely more, of the "immediate and long-range consequences," than does terminating the pregnancy. (A38 ¶ 43; A187-88 ¶¶ 35-36.)

Looking at similar evidence and similarly discriminatory schemes, other courts have concluded that restrictions like the Act's are simply not justified by the asserted interests. As the New Jersey Supreme Court held:

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

Farmer, 762 A.2d at 638; *see also id.* ("the evidence . . . leads inexorably to the conclusion that the proffered statutory reasons for requiring parental notification are not furthered by the statute"). The Supreme Courts of California and Florida have similarly concluded that the "contention that the restrictions imposed by [the parental involvement requirement] upon a minor's constitutionally protected right of privacy are necessary to protect the physical, emotional, or psychological health of the minor and to preserve the parent-child relationship [is] belied by the numerous, analogous circumstances in which [the state] authorized a pregnant minor to obtain other medical care, or to make equally significant decisions affecting herself and her child, without parental [involvement]."

Lungren, 940 P.2d at 826 (relying on *In re T.W.*, 551 So. 2d at 1195); *Wicklund v. State*, 1998 Mont. Dist. LEXIS 227 at **11-12 (1st Dist. Feb. 13, 1998) (imposing notice requirement only on minors seeking abortions does not advance compelling state interest).

Here too, the State cannot show that the Act advances its asserted interests or that it provides a necessary means of doing so. And, as the Act's restrictions are not a means to advance the State's asserted interests, there is simply no basis to suggest that the Act's "means" are the least restrictive. The Act fails to further, and in fact, undermines, its asserted purposes. As the circuit court concluded, it cannot even survive a reasonableness review. That court thus erred in dismissing Plaintiffs' claim.

C. The Circuit Court Erred in Concluding, As a Matter of Law, That It Could Not Award Relief for Established Constitutional Wrongs.

Based on the well-pleaded allegations of Plaintiffs' Verified Complaint, the circuit court correctly concluded that the Act will harm young women and impose "clear infringements on [their] constitutional rights . . . ." (A15.) The court found "that the Act will encumber a minor's choice to terminate her pregnancy, . . . [that it] will lead to disclosure of confidential information about her sexual history and reproductive choices . . . , [and that] for many minor women, [such] disclosure will result in worse results, including physical and emotional abuse." (*Id.*)

The court erred, however, in concluding that because "these are [not] the only circumstances that will arise," (*id.*), it was powerless, as a matter of law, to grant relief. Both U.S. Supreme Court and Illinois law demonstrate that the opposite is true: Once a court determines that a statute infringes on constitutional rights, it is obligated to fashion a remedy that cures the constitutional violation. It is thus clear error to dismiss a claim

based on conclusions about a particular remedy where the verified allegations demonstrate constitutional infringement. The circuit court's dismissal was not only contrary to precedent, but, more fundamentally, was an abdication of the court's obligation to remedy a constitutional wrong.

The U.S. Supreme Court affirmed the basic principle that courts must provide a remedy for a constitutional wrong in highly analogous circumstances involving a challenge to the New Hampshire parental notice of abortion law. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the plaintiffs argued that the law was unconstitutional because it lacked a proper medical emergency exception. Although the Court recognized that the Act operated unconstitutionally in only a "very small percentage of cases," it nonetheless held that *some* remedy was required. *Id.* at 328. It then remanded to the lower court to determine whether as applied relief was appropriate or whether facial invalidation was required. That the courts would dismiss the case or refuse to provide any remedy because there were only a "few applications . . . [that] would present a constitutional problem" was not an option. *Id.* at 331.

Illinois courts adhere to this bedrock principle as well. *See In re Amanda D.*, 349 Ill. App. 3d 941 (2nd Dist. 2004), *aff'd on other grounds sub nom In re D.W.*, 214 Ill. 2d 289; *see also City of Chicago v. Cuda*, 403 Ill. 381, 386 (Ill. 1949) (where "enforcement of the terms of a [law] would violate the constitution, [a] court will take jurisdiction to prevent such statute or ordinance being given an unconstitutional effect").[11] In *In re Amanda D.*, the Second District considered a facial challenge to a provision of the Illinois

[11] And, Illinois courts may award any relief merited by the pleadings and proven by the evidence. *Fritzsche v. LaPlante*, 399 Ill. App. 3d 507, 522 (2nd Dist. 2010); *Du Page County v. Henderson*, 402 Ill. 179, 191 (1949); *see also* 735 ILCS 5/2-604 ("the prayer for relief does not limit the relief obtainable").

Adoption Act that defined an unfit parent as someone convicted of aggravated battery, heinous battery, or attempted murder of any child. The court held that, even though *some* such parents are unfit, that was not the case as to *all* such parents. 349 Ill. App. 3d at 947. Because the statute violated the rights of some parents, a remedy of some type was required. *Id.* at 953-54. And, as no narrowing construction was available, facial invalidation was the only possible remedy. *Id.* at 954.

Based on these principles, the circuit court was obligated to permit this case to proceed and to fashion the appropriate remedy to cure the constitutional wrongs. The court's decision to dismiss Plaintiffs' claim at the pleading stage was thus clear error.

Moreover, even aside from the court's obligation to fashion a remedy for constitutional violations, it is simply not the case that Illinois courts rigidly adhere to the "no set of circumstances" test upon which the circuit court's decision was premised. While courts often invoke this language, in many instances, Illinois courts nonetheless facially invalidate statutes upon a finding that the law operates unconstitutionally in many, but not all, cases. *See, e.g.*, *In re H.G.*, 197 Ill. 2d at 333 (facial invalidation of statute creating presumption of unfitness if child remains in foster care for fifteen months out of any twenty-two month period "[b]ecause 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*, 112 Ill. 2d at 370 (facial invalidation of marriage tax because "*some* people will be forced by the tax imposed to alter their marriage plans") (emphasis added); *In re Amanda D.*, 349 Ill. App. 3d at 954 (refusing to apply no set of circumstances test because burden would be "too high"); *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 challenge unless it is *impossible* for it to be applied constitutionally. . . . Even facial review is not quite so deferential.") (citations omitted).

Indeed, were this Court to affirm the dismissal here, it would mean that Illinois courts provide *less* protection for the right to abortion than the federal courts, which apply a more appropriate "large fraction" test when evaluating facial challenges to abortion restrictions. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (facially invalidating law requiring women to notify their husbands before having an abortion, because it operated as a substantial obstacle "in a large fraction of the cases in which [it] is relevant"). But as the cases above demonstrate, even outside the context of restrictions on abortion, Illinois courts – including the Illinois Supreme Court – regularly apply a test comparable to the large fraction test, striking down laws that infringe constitutional rights, even if such infringement does not exist in every circumstance. Taking as true the verified allegations of the Complaint here, there is no question but that the Act does exactly that. As the circuit court properly found, "for *many minor women*, disclosure will result in . . . physical and emotional abuse. These are clear infringements on constitutional rights of pregnant minors . . . ." (A15 (emphasis added).)[12] In the face

[12] Plaintiffs' allegations demonstrate that the overwhelming majority of minors who are subject to the Act will suffer harm under its terms, and the Act's asserted justifications for infringement on their fundamental rights will not be served. In fact, enforcement of the Act against these minors will serve no purpose. As defined by the Act's purported justifications, *see* 750 ILCS 70/5, such minors would fall into one or both of two groups: 1) pregnant minors seeking abortions who are mature enough to make an informed decision regarding their abortion choice and 2) pregnant minors whose best interests would not be served by involving their parents. *Id.* The remaining minors – those to whom the Act might "reasonably apply" – are those who both lack maturity and would

of *many* constitutional violations, the possibility of *some* constitutional applications should not deprive Plaintiffs, as a matter of law, of the right to judicial tailoring of an appropriate remedy.

Furthermore, as the decisions in *Ayotte* and *Amanda D.* recognize, facial invalidation may be appropriate and necessary even if a law has significant constitutional applications, if as applied relief is impossible or insufficient to remedy the constitutional violation. In *Ayotte*, for example, the Court held that though limited relief is generally preferable to facial invalidation, the latter may be proper, even necessary, if limited relief is not possible – *even if "[o]nly a few applications of . . . [a statute] would present a constitutional problem.*" 546 U.S. at 331 (emphasis added). The *Ayotte* Court remanded for the lower courts to determine whether "an injunction prohibiting unconstitutional applications" (partial or as applied relief) was proper or whether "consistency with legislative intent require[d] invalidating the statute *in toto*." *Id.* at 332. Similarly, in *Amanda D.*, the court held that it was unable to narrow the statute to excise the unconstitutional applications. 349 Ill. App. 3d at 954. But, rather than letting the constitutional violation go unremedied, the court held that facial invalidation was required despite some constitutional applications. *Id.* ("[W]e deem it sufficient that respondent has demonstrated that the statute is structured so that its reach exceeds what is

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not be harmed by involving their parents in their abortion decision. This is an exceedingly small group, for as the allegations show, minors are generally capable of making informed medical decisions. *See supra* at 13. Thus, as pleaded, the Act imposes unconstitutional harms on a very large fraction of the minors for whom it is relevant.

constitutionally permissible."). As in *Amanda D*, no narrowed or limited relief is available here, and facial invalidation will thus be necessary.[13]

The circuit court concluded that because there will be some circumstances in which the Act's notification provision will be reasonable and in a minor's best interest, it could not, as a matter of law, grant relief to the many young women for whom the Act's asserted purposes are not served, and who will suffer physical and emotional harm as a result of the Act's restrictions. Under the above precedent, this was error. This court should reverse and remand to the circuit court with instructions to, upon proof of the alleged wrongs, award appropriate relief.

II. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' ILLINOIS EQUAL PROTECTION CLAIM.

Plaintiffs' equal protection claim offers a separate basis to reverse here. As discussed above, Illinois law creates two separate classes – with dramatically different legal consequences – for pregnant minors: Those who carry their pregnancy to term and those who choose abortion. This classification scheme, which implicates a fundamental

[13] Any limitation of relief here would suffer many of the same defects that defeat the Act. Limited relief – i.e., barring application of the Act only as to those minors who would otherwise suffer constitutional wrong – would require setting up a post-decree mechanism that would in essence recreate the bypass process, with all of its attendant risks and harms and with no benefit to the State. Every minor who believed she was one of the many to whom the Act applied unconstitutionally would have to demonstrate to the court that the Act's justifications did not apply to her – that she was mature enough to make her abortion decision without parental involvement or that parental notification would not be in her best interest. In light of the time sensitivity of pregnancy and abortion, as well as the medical risks associated with delay, and in light of the risks associated with breach of the minor's confidentiality, the court would have to make these determinations quickly and in a manner that assured the minor's anonymity. However, as shown above, *supra* at 11-12, even at its best, such a process would subject these young women to emotional harm, to the significant physical harms that result from delay, and to the potential for breaches of confidentiality.

right, cannot survive the strict scrutiny imposed under Illinois law. *See supra* at 24-31. Indeed, as also shown, there is not even a rational connection between the Act's discriminatory classifications and its asserted purposes.

Though troubled by the Act's "obvious discrimination" (A22), the circuit court nevertheless dismissed Plaintiffs' Illinois equal protection claim based on its erroneous belief that collateral estoppel barred the state claim. The court improperly concluded that a federal equal protection claim was "sufficiently and finally decided in the federal [*Zbaraz v. Madigan*] litigation," and that Plaintiffs were thus "precluded" from litigating a state equal protection claim in the instant action. (A12.) However, because the parties to the *Zbaraz* action did not actually litigate, and the federal courts did not decide, an equal protection claim, collateral estoppel does not bar Plaintiffs' claim. Moreover, even if a federal equal protection claim had been litigated and decided in the federal action, dismissal on collateral estoppel grounds would be improper, for Illinois' limited lockstep doctrine, though deferential to standards set in federal equal protection cases, does not mandate blind deference by the Illinois courts to federal results.

A. The Circuit Court Erred in Applying Collateral Estoppel to Bar Plaintiffs' Illinois Equal Protection Claim.

Collateral estoppel – or issue preclusion – applies where an "identical" issue of law or fact has been both "'actually litigated and decided'" in a prior action. *Freeman United Coal Mining Co. v. Office of Workers' Comp. Program*, 20 F.3d 289, 293 (7th Cir. 1994) (quoting *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900,

905 n.7 (7th Cir. 1990)).[14] Here, there is simply no basis to conclude that an equal protection claim was actually litigated or decided in *Zbaraz.*

Unlike res judicata – or claim preclusion – collateral estoppel does *not* apply to matters that *could have* been, but were not, litigated and decided. *See Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 390 (2001); *State Bldg. Venture v. O'Donnell*, 391 Ill. App. 3d 554, 560 (1st Dist. 2009).[15] Nor will a court evaluating collateral estoppel confine its examination to the complaints in the two matters; it must instead determine what was actually decided. *See Nowak*, 197 Ill. 2d at 390-91 (application of collateral estoppel must be "narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment"); *State Bldg. Venture*, 391 Ill. App. 3d at 560 ("Although there are several similarities between the verified complaints, . . . the interpretation of the statute was never actually litigated or decided by the court."). If there is any uncertainty as to what issues were actually decided, the doctrine is not applied. *United States v. Davis*, 460 F.2d 792, 799 (4th Cir. 1972); *Redfern v. Sullivan*, 111 Ill. App. 3d 372, 377 (4th Dist. 1982) (citing *Lange v. Coca-Cola Bottling Co. of Chi.*, 44 Ill. 2d 73, 75 (1969)).

The *Zbaraz* plaintiffs included a federal equal protection claim in their 1995 complaint; however, as the parties' briefs and the courts' opinions establish, nowhere was that or any other equal protection claim litigated or decided in the *Zbaraz* action. *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009); *Zbaraz v. Madigan*, No. 84 CV 771, 2008 U.S.

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[14] Illinois and federal collateral estoppel rules are "virtually identical." *King v. Burlington N. & Santa Fe Ry. Co.*, 445 F. Supp. 2d 964, 971 (N.D. Ill. 2006).

[15] The purpose of collateral estoppel, as contrasted with res judicata, is "only to avoid the burdens and potentially disruptive consequences of permitting a second and possibly inconsistent determination of matters that have been once decided." Wright & Miller, *Federal Practice and Procedure* § 4420 (2d ed. 2010). Where an issue has been neither litigated nor decided in a prior action, there is no risk that litigation of that issue in a subsequent action will result in an inconsistent determination.

Dist. LEXIS 15559 (N.D. Ill. Feb. 28, 2008); (C01167-1371).[16] The federal district court preliminarily enjoined the Act in 1995, on the sole basis that there were no "rules governing waiver of notice appeals" – a violation of the federal Due Process Clause. *Zbaraz v. Ryan*, No. 84 CV 771, Prelim. Inj. Order (N.D. Ill. June 8, 1995) (C01163-64); *see Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (to comport with federal due process, the bypass "proceeding . . . must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition . . . .").[17] The district court later issued a permanent injunction on the same grounds. *Zbaraz v. Ryan*, No. 84 CV 771, Perm. Inj. Order (N.D. Ill. Feb. 9, 1996) (C01165-66).

In 2007, after the Supreme Court issued rules and the State moved to dissolve the injunction, the *Zbaraz* plaintiffs defended the continued need for the injunction again on the grounds that the bypass process violated federal substantive due process principles by denying abortions to minors found to lack maturity but whose best interests would not be served by parental notification, and by failing to ensure expedition and anonymity as outlined in *Bellotti*. (C01177-93); *see also Zbaraz*, 2008 U.S. Dist. LEXIS 15559 at *9. No party raised, and the district court did not decide, whether the Act violated federal equal protection rights. The district court ruled in favor of the *Zbaraz* plaintiffs, holding that the Act's bypass process failed to include a mechanism for authorizing "immature, best interest" minors to have abortions. *Id.* at **9-12.

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[16] Indeed, in *Zbaraz*, no party argued and no court decided any claim that even addressed the Act's differential treatment of minors who continue their pregnancies compared to those who choose abortion.

[17] *Bellotti* was decided solely on federal substantive due process grounds. Having struck the law on due process grounds, the Court specifically reserved decision on the statute's consistency with the federal Equal Protection Clause. *Bellotti*, 443 U.S. at 650 n.30.

On appeal, defendants argued that the district court's conclusion regarding "immature, best interest" minors was incorrect. (C01246-62.) They also submitted extensive briefing in support of the district court's conclusions rejecting plaintiffs' other grounds for continuing the injunction – all under the Due Process Clause. (C01262-68.) No party even discussed the Act's consistency with federal equal protection. (*See* C01211-1371.) The Seventh Circuit issued a lengthy opinion, holding that the Act did not deny abortions to "immature, best interest" minors and therefore was constitutional on its face. *Zbaraz*, 572 F.3d at 383. Not surprisingly, the words "equal protection" appear nowhere in that opinion, for an equal protection claim was never litigated.

As the circuit court so clearly erred in applying collateral estoppel when no equal protection claim was litigated or decided in *Zbaraz*, its judgment for Defendants must be reversed.[18]

B. The Act's Discriminatory Classifications Violate Illinois' Equal Protection Clause.

"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, 525-26 (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

[18] Moreover, as shown below, under the limited lockstep doctrine, Illinois courts evaluating an Illinois equal protection claim must determine whether to depart from the results of federal cases resolving a federal equal protection claim. *Infra* at 44. Thus, the issue before an Illinois court resolving an Illinois equal protection claim is not the "same" or "identical" issue as one resolved in a prior federal equal protection action and cannot be subject to collateral estoppel. *See infra* at 45-46.

rights, that standard is strict scrutiny. *See, e.g.*, *In re D.W.*, 214 Ill. 2d at 313; *In re K.L.P.*, 198 Ill. 2d 448, 467 (2002); *Fumarolo v. Chi. Bd. of Educ.*, 142 Ill. 2d 54, 73 (1990); *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Here, the Act affects fundamental rights and classifies minors based on how they exercise those rights; strict scrutiny thus applies.

As discussed at length above, the Act cannot pass such scrutiny, or, indeed, even lower level rational basis review. *See supra* at 24-31. The well-pleaded facts here demonstrate that abortion is safer than continuing a pregnancy, (A38 ¶ 41); that minors are capable of making informed decisions, (*id.* ¶ 43); and that the legislature's purported justifications, even if they were supportable, which they are not, would apply with equal or greater force to minors who decide to continue a pregnancy and have a child. *See supra* at 12-13. The Act's discriminatory classifications thus do not even bear a rational relationship to the asserted purposes, let alone further them in a manner that is narrowly tailored to meet such ends. *See In re D.W.*, 214 Ill. 2d at 313 (striking down provision of Adoption Act under strict scrutiny after finding "no logic to the statutory scheme," much less a narrowly tailored means to achieve the state's goal); *see People v. McCabe*, 49 Ill. 2d 338 (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 Pub. Aid*, 171 Ill. 2d 314, 325 (1996) (finding that distinction could not 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).

Where, as here, the Act is "directly at odds with the stated purpose" it cannot survive an equal protection challenge. *Jacobson*, 171 Ill. 2d at 328.[19]

C. Application of the Limited Lockstep Interpretive Approach Would Not Require Dismissal of Plaintiffs' Equal Protection Claim.

Because of the circuit court's improper application of collateral estoppel, it did not reach Defendants' alternative argument for judgment on the pleadings on Plaintiffs' equal protection claim – that the limited lockstep approach deprives Illinois courts of the right to independently analyze the well-pleaded facts in this case for compliance with the Illinois Constitution. However, this argument is of no effect, for Defendants misapplied Illinois' limited lockstep doctrine. First, as the U.S. Supreme Court has never rejected a federal equal protection challenge to a mandatory parental involvement law, there is no federal precedent to apply under the limited lockstep analysis. In any event, even if relevant U.S. Supreme Court precedent existed, the limited lockstep interpretative approach does not deprive the Illinois courts of the right, or obligation, to independently examine the evidence presented in support of the particular state constitutional claim.

The U.S. Supreme Court has never ruled on the validity of a mandatory parental notice or consent statute under the federal Equal Protection Clause. As the Illinois Supreme Court has explained, under the limited lockstep approach of interpreting the

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[19] Equal protection claims, by definition, allege that every member of an improperly burdened class is suffering a constitutional infringement by virtue of the burden imposed on the class. As such, the "no set of circumstances" test, which questions whether the alleged infringement occurs in every circumstance, has no place in an equal protection challenge (or, alternatively, is satisfied every time an equal protection violation is shown). *See, e.g.*, *Maddux*, 233 Ill. 2d at 525-26 (no discussion of "no set of circumstances" test for facial challenge under Equal Protection Clause); *In re D.W.*, 214 Ill. 2d at 313-17 (same); *see also Rothe Dev. Corp. v. Dep't of Defense*, 413 F.3d 1327, 1337-38 (Fed. Cir. 2005) (explaining that no set of circumstances test has no function in equal protection challenge). Therefore, once the court determines the burden imposed on the class is unconstitutional, the statute must fall.

Illinois Constitution, a state court will consider "whether factors unique to the state weigh in favor of departing from the *Supreme Court's* interpretation of the same constitutional language" in the U.S. Constitution. *Caballes*, 221 Ill. 2d at 308 (emphasis added); *see also People v. Tisler*, 103 Ill. 2d 226, 243 (1984) ("[T]his court has, in the past, in construing provisions of our constitution, elected to follow the decisions of the *Supreme Court* rendered in construing similar provisions of the Federal Constitution.") (emphasis added). Lower federal decisions do not have the same effect. Indeed, it has long been clear that "lower federal court decisions are not [even] binding on Illinois courts" when interpreting *federal* constitutional provisions. *People ex rel. Ryan v. World Church of the Creator*, 198 Ill. 2d 115, 127 (2001) (citing *People v. Stansberry*, 47 Ill. 2d 541, 545 (1971)). It is thus hardly surprising that they would not bind Illinois courts interpreting their own Constitution.[20] Thus, federal law does not direct the result, or even the analysis, of Plaintiffs' Illinois Equal Protection Clause claim.[21]

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[20] Only two lower federal courts have decided equal protection challenges to, as opposed to due process claims against, mandatory parental involvement laws. Plagued by a dearth of analysis, neither has any persuasive value. *See Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984) (addressing equal protection claim in only one paragraph, failing to assess comparative risks of abortion and childbirth, and improperly relying on *H.L. v. Matheson*, 450 U.S. 398 (1981), as rejecting an equal protection claim); *Planned Parenthood v. Bellotti*, 641 F.2d 1006, 1012 (1st Cir. 1981) (30-year-old decision upholding Massachusetts parental consent law based on an "implicit assum[ption]" that a state may rationally conclude that the decision to have an abortion poses physical, mental and emotional risks to the well-being of a minor greater than the risks posed by the decision to bear a child).

[21] Defendants attempted to rely on the Supreme Court's decision in *H.L. v. Matheson*, 450 U.S. 398, in the circuit court; however, *Matheson* did not involve an equal protection claim. It was a challenge to Utah's parental notification law as "violat[ing] the *right to privacy*," under the federal Due Process Clause. *Id.* at 407-08 (emphasis added). As there was no equal protection claim presented, the Court did not evaluate whether a parental notice requirement survived scrutiny under federal equal protection principles and is thus of no avail in scrutinizing Illinois' discriminatory classifications.

In any event, even if the U.S. Supreme Court had rejected a federal equal protection claim – which it has not – that decision would not be outcome determinative, for Illinois precedent makes clear that state courts must still assess the claim under the Illinois Equal Protection Clause and determine whether it is appropriate to depart from that federal holding to reach a different outcome. For example, in *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 32 (1996), the plaintiffs alleged that the system for funding Illinois schools, which created disparities in education funding because of variations in local property wealth, violated the Illinois Equal Protection Clause. Although the U.S. Supreme Court had already rejected a federal Equal Protection Clause challenge to a similar school funding scheme in Texas, *see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Illinois Supreme Court nevertheless performed an extensive independent analysis of the Illinois Equal Protection Clause claim. 174 Ill. 2d at 33-40; *see id.* at 33-34 (acknowledging holding of *Rodriguez*). That analysis would have been entirely unnecessary if the U.S. Supreme Court decision was outcome determinative under the limited lockstep doctrine.

In evaluating Plaintiffs' Illinois Equal Protection claim, taking Plaintiffs' verified allegations as true, this Court can only conclude, as the circuit court did, that "the Act discriminates between those minors who elect to give birth and those who elect to terminate their pregnancy" and that this is "obvious discrimination between members of the same class, i.e., pregnant minors." (A21-22.) As the circuit court erred in its conclusion that the doctrine of collateral estoppel barred Plaintiffs' Illinois Equal Protection claim, this Court is left with no option but to reverse the circuit court's ruling.

III. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' ILLINOIS DUE PROCESS CLAUSE CLAIM.

A. The Circuit Court Erred in Applying Collateral Estoppel to Bar Plaintiffs' Illinois Due Process Clause Claim.

The circuit court applied collateral estoppel to bar Plaintiffs' Illinois due process claim, based on its erroneous conclusion that because of Illinois' limited lockstep doctrine, the *federal* due process issue litigated and decided in *Zbaraz* was the same as the Illinois due process issue here. (A11-12.) As explained above, collateral estoppel is not applied when the issue in a prior action was not the same as that currently before the court, *see supra* at 37-38, and the lockstep doctrine does not render the issues identical.

Although courts evaluating Illinois due process claims *often* "follow federal precedent in 'lockstep' in defining Illinois' due process protection," they are not *constrained* to do so. *People v. Washington*, 171 Ill. 2d 475, 485 (1996); *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 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."). For example, in *Washington*, the Court acknowledged it was bound by the U.S. Supreme Court's interpretation of the *federal* Due Process Clause, but recognized the possibility "that [the defendant's] claim may [nevertheless] be cognizable under the Illinois Constitution's due process protection." *Washington*, 171 Ill. 2d at 485. The *Washington* Court went on to hold that the federal due process decision did not adequately reflect the importance of the right at issue under the Illinois Constitution and thus departed from the federal result. *Id.* at 485-89.

As Illinois courts retain the authority to interpret Illinois due process claims separately from previously decided federal claims, the two issues are not the same for purposes of collateral estoppel. Indeed, under the circuit court's mistaken analysis, had Mr. Washington been the same defendant who had litigated and lost in the U.S. Supreme Court, collateral estoppel would have barred the Illinois Supreme Court from evaluating its own Constitution and determining that it provided greater protection than did the federal. Because the Illinois courts must, at the very least, decide whether to depart from federal results, the issue before them cannot be the "same issue" as is required for collateral estoppel. The circuit court's decision dismissing this claim on collateral estoppel grounds is thus simply wrong and must be reversed.

B. The Act Violates Illinois' Substantive Due Process Guarantees.

As with the Privacy Clause, the limited lockstep doctrine dictates broader protections under the substantive components of Illinois' Due Process Clause here than exist under the federal Constitution. Though the text is similar to its federal counterpart, *see* Ill. Const. art. I, § 2, Illinois' due process protections are buttressed by Illinois' express privacy right and strong tradition, common law, and statutory recognition of safeguarding individual privacy, particularly as it relates to nondisclosure of private, medical information and the right of women to bodily autonomy and independent medical decision making. *See supra* at 19-24. The circuit court thus erred in holding that there was no basis on which it could depart from federal due process precedent here. (A12.) As shown above, each of these criteria supports departure from federal precedent and, thus, application of Illinois' strict scrutiny to the Act's restrictions on the fundamental right to abortion. *See supra* at 19-24.

Furthermore, departure from federal precedent is warranted here to avoid a "fundamentally unfair" result for young women who are otherwise permitted to consent to all other health care, including procedures far riskier than abortion. *Washington*, 171 Ill. 2d at 487-88 (finding that to ignore the constitutional claim, as federal precedent did, would be fundamentally unfair and would lead to results that would shock the conscience). (*See* A27 ¶ 3; A109-110 ¶ 20.) The well-pleaded allegations in Plaintiffs' Verified Complaint demonstrate that the Act will impose significant and unjustified harms on young women seeking abortion, (A27 ¶ 4; A 35-36 ¶ 34; *see also* A15), which will not be ameliorated by the bypass process. (A36-37 ¶ 36; A224-26 ¶¶ 33-36 (demonstrating that for some young women, the bypass process itself will cause significant harm).) Application of the Act to such minors in lockstep with federal cases would thus be fundamentally unfair.

As the Act implicates the fundamental rights of young women to choose to terminate their pregnancies, the Act is subject 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, e.g., Wickham v. Byrne*, 199 Ill. 2d 309 (2002); *In re H.G.*, 197 Ill. 2d 317; *Boynton*, 112 Ill. 2d 356; *see also Lulay v. Lulay*, 193 Ill. 2d 455 (2000).

As shown above, *supra* at 24-31, a review of the well-pleaded allegations here leads to but one conclusion – that the Act cannot survive such scrutiny.

IV. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFFS' GENDER EQUALITY CLAIM.

Finally, by furthering long standing stereotypes about women's role in society, the Act violates Illinois' explicit constitutional prohibition against sex discrimination. Specifically, the Act discriminates on the basis of sex by permitting teens who conform to the view that women should put childbearing and motherhood above all else to act without parental involvement, while requiring those who, by having an abortion, challenge this version of women's duties, to additional burdensome barriers.

Illinois broadly and proudly protects the rights of individuals to be free from discrimination on the basis of sex, including the right to be treated equally whether or not one conforms to gender stereotypes. "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. *People v. Ellis*, 57 Ill. 2d 127, 133 (1974) ("[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."); *see also supra* at 24, n.9.

While it is true that the Act does not purport to treat boys in one manner and girls in another, courts have long recognized that statutes that are based on and perpetuate gender stereotypes violate the guarantee of equal protection even without explicit differential treatment. For example, 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, are discrimination "on account of sex." *See 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 on basis that she could not both "'be a good mother' and have a job that requires long hours"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 577 (6th Cir. 2004) (holding that male employee suspended after he began exhibiting feminine appearance and mannerisms stated Equal Protection and Title VII claims); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (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).

The Act here similarly discriminates against girls who do not conform to stereotypes about how women and girls are supposed to behave. The Act states 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. And, for those young women who choose abortion – and don't conform to this stereotype – the Act erects the substantial and harmful barriers discussed above. These young women suffer a deprivation of rights which is imposed "on account of sex."

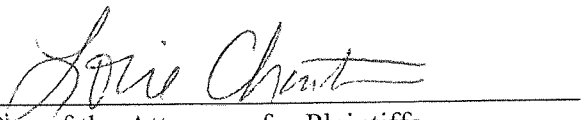
Consequently, the circuit court erred in concluding that Illinois' special and broad constitutional protection for gender equality does not reach the kind of gender stereotype the Act advances, and its decision must be reversed.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask this Court to reverse the circuit court's grant of judgment on the pleadings to Defendants and remand this case to that court for further proceedings.

Dated: October 14, 2010

Respectfully submitted,



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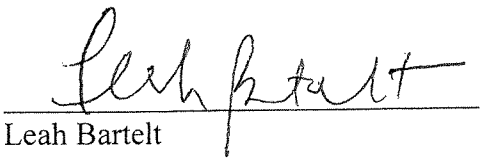
CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341(c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statements of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.



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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2010, I caused true and correct copies of the foregoing **Brief of Plaintiffs-Appellants in No. 10-1463** and two volumes of **Separate Appendix** to be served by the following methods upon:

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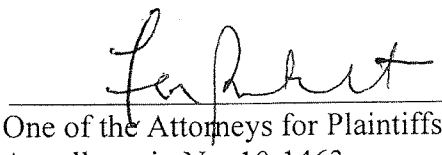

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